

**STATE BOARD OF EQUALIZATION**

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Executive Director

January 3, 1995

Mr. A--- -. F---
P--- W--- ---
XXX --- XXXXX-XXXX

Re: Unidentified Taxpayer

Dear Mr. F---:

This is in response to your letter dated October 7, 1994 in which you request a ruling regarding the application of tax to certain sales of printed advertising material. I note that the only basis for the Board to relieve a person of otherwise properly due taxes is pursuant to the provisions of Revenue and Taxation Code section 6596. To come within the provisions of that section, the taxpayer must have reasonably relied on the Board's written advice which was in response to a written request for advice that disclosed all relevant facts, including the identity of the taxpayer. Since your client is not identified, this opinion does not come within the provisions of section 6596.

You state that your client, Company A, is a direct marketer located in California that advertises its products and services by means of printed material sent through the mail. You ask us to assume for purposes of this opinion that the printed material does not qualify for the exemption for printed sales messages provided in Revenue and Taxation Code section 6379.5 as explained in Sales and Use Tax Regulation 1541.5.

You explain that Company B, a corporation related to Company A, is also located in California. The ownership of the two corporations is identical, but they are "separate entities with different officers, bank accounts, employees, books, and records." You anticipate that in the future, Company A will purchase advertising material solely from Company B, and that a typical transaction will be as follows:

"Forms (blank stock with certain artwork such as colored borders and reproduced photographs of previous contest winners) will be ordered by Company B from a California supplier. The vendor will be directed by Company B to drop ship the forms to an unrelated printer located in California.

"Company B will contract to have the forms personalized by the printer, including adding the body and text of the product or service that is being promoted. At Company B's direction, the printed material will be drop shipped by the printer to a California mailing house.

"Another vendor will provide mailing envelopes which will be sold to Company B and drop shipped by the vendor to the same mailing house pursuant to Company B's instructions.

"Company B will sell the finished printed material and envelopes to Company A at a price which includes a small mark up. Company B will direct the mailing house to mail the property to recipients located in California as well as in other states as provided in mailing instructions received by Company B from Company A pursuant to the contract of sale between the related companies."

Retail sales of tangible personal property in California are subject to sales tax, which is measured by gross receipts, unless specifically exempt by statute. (Rev. & Tax. Code § 6051.) A retail sale is a sale for any purpose other than resale in the regular course of business. (Rev. & Tax. Code § 6007.)

A sale is a transfer of title or possession of tangible personal property for consideration from one person to another. (Rev. & Tax. Code § 6006(a).) For purposes of the Sales and Use Tax Law, two separate corporations would generally be regarded as separate persons; therefore, a transfer between two separate corporations for consideration would generally constitute a sale.

However, certain transfers between related parties are disregarded for sales and use tax purposes if not as if at arms length. On the other hand, a transfer between related parties is treated the same as a transfer between unrelated parties when the sale price includes all of the transferor's costs, including the costs of the property and any overhead expenses reasonably allocable to the cost and sale of that property. You indicate that B's transfers of property to A include cost and a small mark up. For purposes of this opinion, we assume this means that all of B's costs of the property, including overhead expenses allocable to the purchase and sale of the property, are covered by the selling price. Based on this assumption, the transfer from B to A will be treated as a sale for sales and use tax purposes.

Regulation 1541, a copy of which is enclosed, explains the application of tax to printing. The printer's sales of the advertising material to B for resale to A are nontaxable sales for resale. However, since A does not resell the material, B's sales to A are subject to sales tax unless the

sales are exempt from tax by statute.

B owes sales tax with respect to its sales to A of the printed matter mailed to California consumers, measured by the marked-up sale price to A. B's sales to A of property shipped out-of-state may be exempt under Revenue and Taxation Code section 6396, which provides an exemption for sales in interstate commerce. This exemption is explained in subdivision (a)(3)(B) of Sales and Use Tax Regulation 1620:

"Shipments Outside the State--When Sales Tax Does Not Apply. Sales tax does not apply when the property pursuant to a contract of sale, is required to be shipped and is shipped to a point outside this state by the retailer, by means of:

"1. Facilities operated by the retailer or

"2. Delivery by the retailer to a carrier, customs broker or forwarding agent whether hired by the purchaser or not, for shipment to such out-of-state point. As used herein the term 'carrier' means a person or firm regularly engaged in the business of transporting for compensation tangible personal property owned by other persons, and includes both common and contract carriers. The term 'forwarding agent' means a person or firm regularly engaged in the business of preparing property for shipment or arranging for its shipment. An individual or firm not otherwise so engaged does not become a 'carrier' or 'forwarding agent' within the meaning of this regulation simply by being designated by a purchaser to receive and ship goods to a point outside this state...."

Thus, if the contract of sale requires B to ship the property outside California by common carrier, and B in fact does so without A or any agent of A taking possession of the property, that sale is an exempt sale in interstate commerce.

If you have further questions, please feel free to write again.

Sincerely,

Kelly W. Ching
Staff Counsel

KWC:cl

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Enclosure

Mr. A--- -. F---

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January 3, 1995
495.0736.800

cc: Santa Ana District Administrator