STATE BOARD OF EQUALIZATION
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December 20, 1990

Mr. [M]
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[N]
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--- ---, Suite ---
--- ---, CA XXXXX

Re: [D]
S- -- XX-XXXXXX

Dear [M]:

As you know, your October 5, 1990 letter to Assistant Chief Counsel Gary J. Jugum regarding the application of use tax to leases of videotapes has been referred to me for reply.

We understand that you represent [D], which is in the business of selling and renting educational films and videotapes. The Board's audit staff recently determined that rentals of videotapes by [D] are subject to use tax pursuant to Revenue and Taxation Code sections 6006 and 6010 which respectively include within the meanings of "sales" and "purchase," rentals or leases of videocassettes, videotapes, and videodiscs for private use under which the lessee or renter does not obtain or acquire the right to license, broadcast, exhibit, or reproduce the videocassette, videotape, or video disc. (Rev. & Tax. Code §§ 6006, subd. (g)(7) and 6010, subd. (e)(7).)

We understand that [D] leases videotapes to individuals for private viewing and to libraries, churches, schools and businesses to exhibit to their respective patrons, congregations, students and customers. [D]'s standard licensing agreement grants a "non-exclusive, limited license to exhibit the motion pictures…for non-commercial, private, nonpaying exhibitions at the premises of the licensee." The Board's audit staff, relying on a January 31, 1986 memorandum I wrote, concluded that tax applies to [D]'s leases of the videotapes, because no admission fee was charged by the lessees to the persons to whom the videotapes were exhibited.

You do not believe that the Legislature intended to make the charging of admission the test for imposition of the use tax. You believe the legislative intent would be accomplished by determining taxability based on whether a license for a public performance of the work were part of the lease agreement.

We agree that the charging of admission should not be the test for determining the application of use tax to the rentals. The lease of a videotape should qualify for exclusion from "sale" and "purchase" if the lease contract allows the lessee to publicly exhibit the videotape.

A performance may be characterized as public under the Copyright Act, 17 United States Code sections 101-702, through application of two clauses which define the term "perform or display a work 'publicly'." (Columbia Pictures v. Professional Real Estate Inv., 866 f.2d 278.) Under clause (1), the applicable one here, a performance is public if it occurs "at a place open to the public or at any place where a substantial number or persons outside of a normal circle of family and its social acquaintances is gathered." (17 U.S.C. § 101.) The House Commentary on the 1976 version of the Copyright Act attempted to clarify the meaning of "perform the copyrighted work publicly":

> "…One of the principal purposes of the definition was to make clear that, contrary to the decision in Metro-Goldwyn-Mayer Dist. Corp v. Wyatt, 21 C.O. Bull. 203 (d.Md.1932), performances in 'semi-public' places such as clubs, lodges, factories, summer camps and schools are 'public performances' subject to copyright control. The term 'a family' in this context wold include an individual living alone, so that a gathering confined to the individual's social acquaintances would normally be regarded as private. Routine meetings of businesses and governmental personnel would be excluded because they do not represent the gathering of a 'substantial number of persons.'" (H.R.Rep. No. 1476, 64, 94th Cong., 2d Sess., reprinted in 1976 U.S. Code Cong. & Admin.News 5659, 5677-78.)

Following that interpretation of the definition, the court in the Columbia Pictures case (supra) held that a hotel's providing in-room videodisc players and renting videodiscs to its customers did not result in a public performance. On the other hand, we believe that, when a business such as [D] leases videotapes to libraries, churches, schools, and businesses which lease the videotapes specifically to exhibit to the public, the performance is necessarily "public" under 17 U.S.C. § 101, and the lease qualifies for exclusion from the definitions of "sale" and "purchase". In such case, the lessor is the consumer of, and tax applies to the sale of the videotapes to, the lessor. By this letter, I am reversing my previous opinion to the extent that it can be construed that the taxability of leases of videotapes is based on whether or not the lessee of the videotape charges an admission fee to the persons to whom the motion picture is exhibited, and I am reversing the opinion specifically where it states that tax necessarily applies to leases of videotapes to clubs, churches, etc., which rent the videotape to show to members of the organization.

If you have any further questions regarding this, feel free to contact me directly

Very truly yours,

Ronald L. Dick
Senior Tax Counsel

RLD:sr