

Memorandum**440.0165****To :** Mr. Bradon Bresnahan
Senior Tax Auditor**Date:** June 29, 1995**From :** David H. Levine
Supervising Staff Counsel**Telephone:** (916) 445-5550
CalNet 485-5550**Subject:** H--- M--- and S---
S- -- XX-XXXXXX

You sent us a copy of your January 10, 1995 letter to H--- M--- and S--- regarding the application of tax to sales of shipping materials. It is not clear whether you intended us to respond directly to the taxpayer or to you. Your letter included a note to us stating that Regulation 1630 appears to conflict with Regulation 1620 regarding sales of packing materials in interstate commerce. You attached certain documentation which explains the interpretation we have given provision in Regulation 1630 in question. You ask: “[d]oes the Board staff still wish to follow this?” The taxpayer, however, is asking about what it takes for us to accept that title passes to the customer prior to use in light of a recent audit. It appears from the taxpayer's letter that the auditor did not accept that title passed prior to use based on a separate statement of charges.

The documentation you provided us from Principal Tax Auditor Don Brady and from Assistant Chief Counsel Tom Putnam resolves your question. That documentation explains that by the late 70s, we had followed the interpretation stated therein for over thirty years. I have confirmed with the Sales and Use Tax Department that we have continued to follow that interpretation. That is, our interpretation of Regulation 1630 has always been as stated in the Putnam and Brady correspondence. Any change in interpretation would require an amendment to the regulation. Thus, since the taxpayer does not raise this question but rather bases its questions on an apparent understanding of the interpretation of Regulation 1630 we have always followed, it is not necessary to address this in your response to the taxpayer.

With respect to the title passage question, it is not clear what the problem is. The taxpayer has apparently been audited under a rule that would say that unless the charge for containers is separately stated, title to the containers does not pass before use. It is not clear whether the auditor would have accepted title as having passed prior to use when separately stated even if there had been no early title passage clause in the contract. It is only the latter factor which is relevant here. There are no special rules in this context which would say that title passes prior to use based solely on a separate statement of charges. Title would always pass

prior to use if the parties explicitly contract for it to do so. The question in this context is whether the parties have contracted to pass title prior to use.

The taxpayer has provided a contract with the notation: "Customer agrees that title to all packing material passes to customer before any use of such material is made." There is then a signature line for the customer to execute. When a customer signs this provision, we conclude that title passes prior to any use, without regard to the manner of billing. It is not clear whether this same form was used during the audit period. I therefore am unable to reach a conclusion as to whether the audit reached a correct conclusion.

We apologize for delay in response. Nevertheless, despite our taking over five months to respond, I ask that you quickly respond to the taxpayer. The taxpayer has contacted the Taxpayer's Rights Advocate's office, who interpreted a message I left as meaning that the taxpayer would receive a response within two weeks. That information was then relayed to the taxpayer. Thus, notwithstanding the delay here, I hope that you can respond to the taxpayer in accordance with the information it was provided from the Advocate's office.

DHL:cl

cc: Mr. William D. Dunn
Mr. John L. Waid