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STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 324-3828

April 9, 1991

Mr. REDACTED TEXT

RE: REDACTED TEXT

Dear Mr. REDACTED TEXT:

I am writing this in response to your letter of February 5, 1991. You have requested a ruling that COMPANY A's donation of REDACTED TEXT computer products to schools under its own "REDACTED TEXT" program is exempt from use tax.

We note that the Board staff cannot issue tax rulings; only the Board itself may do that. However, we can give you our opinion regarding the correct application of tax to a given set of facts.

I. FACTUAL BACKGROUND

You set forth the factual background of your problem as follows:

"COMPANY A, Inc., a grocery retailer, currently donates tangible personal property in the form of REDACTED TEXT computers and software programs to organizations located in California and described in Section 170(b)(1)(A) of the Internal Revenue Code (26 U.S.C.; hereinafter, generally, "I.R.C.").

"The procedure for the donation is as follows:

- "1. COMPANY A's customers accumulate their receipts for purchases of products that are unrelated to the property to be donated.
- "2. These receipts are turned over to local schools or other exempt organizations participating in the program.
- "3. The schools accumulate their receipts in a Deposit Bank managed by a third party servicing vendor who issues periodic statements of account balance (accumulated tape value) to the schools.
- "4. The schools, based on their 'bank balance', can order any item they choose by delivering a completed form to their local COMPANY A Store.

- “5. COMPANY A reviews and then places these purchase orders with the out-of-state third party vendor who COMPANY A relieves of the sales tax liability, in accordance with Section 6421.
- “6. The out-of-state vendor ships the property directly to the schools and invoices COMPANY A.”

You indicate further on that the schools are not obligated to promote shopping at COMPANY A as a condition of receiving the computers. They promote the program by asking their students and P.T.A. members to collect the sales slips from their COMPANY A purchases and turn them over to the school for use in the program rather than throw them away. As you do not indicate that the school owes COMPANY A a fee when it places its order, I assume that none is charged.

II. OPINION

A. Sales and Use Tax Generally

In California, except where specifically exempted by statute, Revenue and Taxation Code Section 6051 imposes an excise tax, computed as a percentage of gross receipts, upon all retailers for the privilege of selling tangible personal property at retail in this state. (Unless otherwise stated, all statutory references are to the Revenue and Taxation Code.) “[I]t shall be presumed that all gross receipts are subject to tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale ...” (§ 6091.) “Exemptions from taxation must be found in the statute.” (Market St. Ry. Co. v. Cal. St. Bd. of Equal. (1953) 137 Cal.App.2d 87, 96 (290 P.2d 201).) “The taxpayer has the burden of showing that he clearly comes within the exemption.” Standard Oil Co. v. State Bd. of Equalization (1974) 39 Cal.App.3d 765, 769 [114 Cal.Rptr. 571].)

Likewise, Section 6201 imposes a use tax on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer for storage, use, or other consumption in this state unless otherwise exempted from taxation by statute. The use tax is supplemental to the sales tax, and as such, is intended to supplement the latter by imposing upon those subject to it a tax burden equivalent to the sales tax in order that tangible personal property sold or utilized in this state would be taxable once for the support of the state government. (Bank of America v. State Board of Equalization (1962) 209 Cal.App.2d 780, 792 [26 Cal.Rptr. 348].)

The sales tax applies only to sales made within the borders of the State of California. (§ 6017.) The sale is “within this state” if the property being purchased is located here when the purchase takes place. Tangible personal property sold by any person for delivery in California is presumed to be sold for use, storage or other consumption in California. (§ 6241.)

B. Retailer’s Donations of Tangible Personal Property

Section 6403 provides that the storage, use, or any other consumption in this state of property donated by any seller to any organization described in I.R.C. Section 170(b)(1)(A) and located in California is exempt from use tax.

C. Tax Consequences to COMPANY A

1. Applicability of Use Tax

Presumably, because the third-party supplier is located out of state, the computers are also located there and are shipped into the state after the schools order them. This transaction is not subject to sales tax because the computers are not in California when the sale takes place. (Title 18, Cal. Code Regs., Reg. 1620(a)(1). Sales and Use Tax Regulations are Board promulgations which have the force and effect of law.)

For the same reason, this donation is not subject to use tax. To be taxable, the use of tangible personal property must occur while the property is located within the borders of the State of California. (§§ 6010.5, 6017.) COMPANY A makes a use of the computers when it donates them to the schools. We are of the opinion that the donation occurs when the equipment supplier ships a particular piece of equipment to the school. (Cal. U. Comm. Code § 2401(1).) At that time, the computer equipment being ordered is out of state. Therefore, title to the equipment is transferred to the school out of state, and no taxable use occurs within California.

Because there is no use of the computer equipment within California to which use tax applies, we conclude that Section 6403 is not applicable to this situation. Therefore, we do not need to discuss the issue of the status of a public school as an I.R.C. 170(b)(1)(A) institution.

2. Is the “donee” School Actually a Customer of COMPANY A?

Although the transaction as you describe it appears to be an otherwise straightforward Section 6403 donation, there is a scenario in which it might be determined to be taxable. Regulation 1671 considers the possibility of trading stamps and related promotional schemes. Such schemes are subject to tax because the premium which the customer receives upon submission of the required indicia of eligibility is considered as purchased by the customer and so not a gift. (Food & Grocery Bureau v. Garfield (1942) 20 Cal.2d 388, 232 [125 P.2d 3].) If the school is considered to be a customer of COMPANY A for the purpose of this transaction, it would be liable for use tax.

Regulation 1671 describes three schemes considered to be taxable transactions under which a retailer gives its customers premiums apparently gratis. The pattern which comes closest to the instant transaction is set forth in Regulation 1671(b)(3). There, the customer receives the indicia of eligibility – usually cash register receipts – from the retailer and submits them to the third-party supplier. The supplier delivers the premium to the customer in exchange for the required quantity of indicia. The retailer then pays the third party on an agreed basis related to premium merchandise delivered to the customer by the third party.

We are of the opinion that the instant transaction is distinguishable from that discussed above on several points. Here, the customer may not redeem the cash register receipts for a computer, nor may the computer be shipped to the customer. The customer, then, has no right to receive either title to or possession of the premium.

Additionally, the school, which does receive the premium, neither owes nor furnishes any legal consideration to COMPANY A or to the supplier in order to receive it. The school is not

required to ante up any of its own money at the time it places its order with COMPANY A. (Compare, II Bus. Tax. L. Guide, Annot. 280.0220, "Cereal Manufacturers," where a cereal company was deemed to be selling premiums to its customers because, not only did the cereal company not identify the premium retailer but they also advertised the premium as being available for an agreed price plus proofs of purchase. (Annotations are excerpts from previous Board Staff opinion letters and serve as a guide to Staff positions.) The school is not obligated to promote shopping at COMPANY A in order to obtain the computers. We are of the opinion that the fact a school's request that its students and their parents participate in the program may result in increased patronage at the local COMPANY A is distinguishable from promoting shopping there as part of an agreement whereby COMPANY A would donate the computer in return for the promotion. We do not believe that the fact that the orders are placed through COMPANY A, is by itself, evidence that COMPANY A receives any consideration from the school in return for the premium.

For the above reasons, we conclude that COMPANY A's "REDACTED TEXT" plan is not a promotional plan involving a premium related to trading stamps, nor can the receiving school be termed a customer of COMPANY A for this purpose. The result would be different if the school were to receive a computer in return for doing its own shopping at COMPANY A.

Section 6421 exempts transactions from the sales tax only. The applicable tax here is the use tax. An exemption certificate under Section 6421 might not be adequate to demonstrate the use tax does not apply to this transaction. For advice on the proper documentation which COMPANY A should maintain in its records, you should contact the Audit Staff at the following field office:

Oakland District
1800 Harrison Street, Suite 940
P.O. Box 27
Oakland, CA 94604-0027
(415) 464-0347

For your information, I have enclosed a copy of Regulations 1620 and 1671. I hope the above discussion has answered your question. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid
Tax Counsel

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Encs.: Regs. 1620 & 1671