

**STATE BOARD OF EQUALIZATION**

1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 445-6450

December 19, 1990

Mr. M--- S. A---
Corporate Tax Manager
The B--- of N--- A---, Inc.
XXXX --- ---, Northwest
Washington, D.C. 20037

Dear Mr. A---:

Your October 19, 1990 and October 22, 1990 letters to the California State Board of Equalization have been referred to the legal staff for reply.

In your October 19 letter, you ask whether this Board agrees that the application of California sales tax results in the same conclusion as reached by the Massachusetts Tax Board decision in F. W. Faxon Company, Inc. v. Commissioner of Revenue. You note that the fact situation on which you are requesting an opinion is exactly the same as the facts in the F. W. Faxon Company case. In that case, the Massachusetts Board made a finding that the appellant company (Faxon) furnished a service to its library clients rather than sold tangible personal property under the following facts reviewed by the Board:

“In its business of providing a subscription service for libraries, public, corporate and academic, the appellant obtains listings of periodicals published by various publishers with their prices. Using these listings, an annual catalogue is prepared by the appellant entitled ‘Faxon Librarian’s Guide to Periodicals’. The guide offers a choice of over 100,000 periodicals, newspapers, annuals, etc. published in the United States and overseas by over 50,000 publishers together with a price list. Copies of the guide are distributed by the appellant to potential customers. Using this guide the customers submit to the appellant orders for specified periodicals; these orders also include publications not listed in the guide. The appellant then processes the list through its computer and places orders for the listed periodicals with the various publishers. On the order forms the appellant requests that the periodicals be sent directly to the library clients and that the appellant be billed. The appellant never has possession of the periodicals. The

appellant bills the libraries for the standard cost of each subscription plus a service charge. If the publisher grants the appellant a discount on an order, the discount is applied to reduce the total service charge paid by the library to the appellant. If the publishers add a sales tax to the order, then the appellant includes it on the invoice and it is passed on to the libraries. Publishers most often contact the libraries directly for renewals rather than the appellant.”

This Board would not reach the same conclusion based on the California Sales and Use Tax Law. Rather, we believe that acquisitions of tangible personal property are regarded as purchases on the purchaser’s own behalf for resale or use unless the purchaser clearly establishes with respect to an acquisition that it is acting as an agent in making the purchase for a client.

To establish that a particular acquisition was made as agent for its client (i) the agency must clearly disclose to the supplier the name of the client for whom the agency is acting as agent, (ii) the agency must obtain, prior to the acquisition, and retain written evidence of agent status with the client, and (iii) the price billed to the client, exclusive of any agency fee, must be the same as the amount paid to the supplier. The agency purchasing tangible personal property as agent on behalf of its client may not issue a resale certificate to the supplier. This Board would presume that an agency which issued a resale certificate to its supplier thereby purchased the tangible personal property on its own behalf for resale rather than as an agent on behalf of a client. See Sales and Use Tax Regulation 1540, Advertising Agencies, Commercial Artists and Designers, at subdivision (a)(2)(A). Although Regulation 1540 pertains generally to transactions involving advertising agencies, we believe that the same result obtains as to the purchases made by the subscription agency.

In your October 22 letter, you asked what form of documentation, other than a copy of the original authorization letter or direct pay permit, a vendor may accept from a company with a direct pay permit.

Enclosed is a copy of Sales and Use Tax Regulation 1699.5, Direct Pay Permits. Subdivision (h) of the regulation provides the form of the exemption certificate which the seller should require the purchaser to submit in order for the seller to consider the sale as being nontaxable. You provided the following alternative documentation that direct pay permit holders generally submit to their vendors:

- “1. State issued exemption certificates with their direct pay permit number filled in on the certificate.
- “2. Facsimiles of the State’s exemption certificate form with their direct pay permit number filled in on the certificate.
- “3. Documents that substantially have the required language of the State’s exemption certificate form with their direct pay permit number filled in on the certificate.

- “4. Documents that simply list the direct pay permit account number and a statement that tax will be paid directly to the state.
- “5. Purchase orders that list the direct pay permit account number and a statement that tax will be paid directly to the state.”

You asked for our opinion whether any of the above forms of documentation can be accepted by the vendor. We believe that the vendor may accept an exemption certificate or a facsimile of the exemption certificate signed by the purchaser or the purchaser's agent. Any other documentation must be in substantially the same form as the exemption certificate as provided in subdivision (h) of Regulation 1699.5. Without further information, we believe that items 4 and 5, listed above, would not qualify.

We hope this answers your questions; however, if you need further information, feel free to write directly to me.

Very truly yours,

Ronald L. Dick
Senior Tax Counsel

RLD:sr

Enc.