

**M e m o r a n d u m****295.0035.200**

To: San Francisco – Audit (JES)

April 28, 1986

From: Teresa Armstrong

Subject: SR -- XX XXXXXXX  
M--- & J--- S---  
dba The B--- L---

This memorandum is in response to your memo of March 7, 1986, requesting a legal opinion as to the application of sales or use tax to the business activities engaged in by the above referenced taxpayers. The facts, as provided in your memorandum, are as follows:

“Customers who order costume deliveries are seeking a novel way to celebrate a birthday, anniversary, or other special event. Taxpayer sends a person dressed in some type of costume, who delivers the balloons and sings ‘Happy Birthday’ or some other requested song.

“Work orders generally show lump-sum amounts for balloons of each type; it is often not possible to determine how many balloons were used. Some jobs involve only one type of balloon and show only one lump-sum amount, while others use two types of balloons and show two amounts. In some cases, additional amounts are added for delivery, writing, or weekend jobs. In all cases, however, customer is quoted a lump-sum amount.

“While the costume and singing could be considered a service in connection with the sale of the balloons, we cannot envision a customer ordering balloons alone in the same way one might order flowers. Clearly, the object of the transaction in the customer’s mind is the clown singing ‘Happy Birthday’ - - the balloons would appear to be secondary.

“Taxpayer has reported an amount equal to roughly one-third of the total costume delivery charges as taxable; this would approximate a reasonable marked-up selling price for the balloons, alone.”

You also stated in our telephone conversation that the taxpayer's invoices indicate that at least six balloons are given with each performance or costume delivery and that the charge to the customer is directly affected by the quantity and type of balloons delivered.

Typically, services that are rendered as part of a sale or purchase are included in the gross receipts or sales price of the tangible personal property (see Rev. & Tax. Code §§6012(b)(1) and (6011(b)(1)). However, as pointed out in your memorandum, when the true object of the contract is a service, charges for such activities are not subject to either sales or use tax (see Regulation 1501).

The Board has taken the position in the past that where a single business transaction is comprised of both a sale or purchase of tangible personal property and the providing of a service, only the charges for the sale of the tangible personal property will be subject to tax (see Business Taxes Law Guide Annotation 330.2310). The business activities engaged in by this particular taxpayer appear to comprise a hybrid of both a nontaxable service and a taxable sale of tangible personal property, as explained below.

Tax is imposed upon retail sales of tangible personal property when such property is more than merely incidental to the rendering of the service (Reg. 1501). The quantity of balloons delivered by the taxpayer indicates that the balloons are not merely incidental to the performance of the service. The quantity and type of balloons delivered dictating the price charged the customer strongly indicates that one of the primary purposes of the transaction with the B--- L--- is the sale of the balloons. Accordingly, tax will apply to the sale of the balloons.

On the other hand, the singing of a song or other theatrical performance does not involve the transfer of title or possession of tangible personal property, and therefore, is a service which is not subject to tax. The service of performing a song or dance routine is so unique as to not be considered a service which is rendered as simply a part of the sale of the balloons. It is conceivable that a customer could obtain the services of the taxpayer to simply perform a song for a special occasion. This clearly would be a service which would not be subject to tax. Hence, we conclude that the charges for the costume delivery and performance are not subject to tax.

Where a business transaction comprises both a nontaxable service and a taxable sale of tangible personal property, a separate allocation of the charges is appropriate (see Business Taxes Law Guide Annotation 330.2310). Where the taxpayer and their customers have agreed upon a reasonable allocation of the charges between the taxable sale of balloons and the nontaxable service, the measure of tax upon the sale of balloons will be based upon such allocation (see Hawley v. Johnson (1943) 58 Cal.App.2d 232). However, where the contract between the taxpayer and her customers does not separately state charges for the service and the sale of the balloons, the Board may make the proper allocation in order to apply tax to the portion of the charges which represent the sale of the balloons. In this particular instance, the taxpayer has reported approximately one-third of the total charges as gross receipts subject to

tax. You state in your mmeo that this amount appears to be a reasonable marked-up price for the balloons. Accordingly, the appropriate measure of tax in this particular case is one-third of the total charges.

If you have any questions regarding the enclosed information, please contact us again.

TA:ba