

M e m o r a n d u m**385.1040**

To: Out-of-State - Auditing (FLZ)

Date: March 7, 1967

From: Tax Counsel (EHS:GLR)

Subject:

This is in reply to your memo of January 17, 1967 regarding the taxability of the reference books issued by "B"

It is our understanding that "B" is engaged in the business of gathering, compiling, and evaluating various credit data on business throughout the United States and Canada. Anyone interested in receiving this information may subscribe to "B"'s service. The Basic Service Contract provides that the subscriber is entitled to receive a minimum number of narrative and financial reports and the "loan" of four to six "reference books." The "reference books" are not loaned separately and must be returned to "B" prior to receipt of a later revised and updated issue. These issues are published every two months and are available for distribution at this time.

"B" has been reporting its tax liability based upon its cost of the "reference books" it furnishes its subscribers under the theory it is merely lending the books and not selling them.

You ask our opinion as to the taxable status of the "reference books" "B" supplies its California customers under contracts entered into or renewed after August 1, 1965.

The essential question is whether or not "B" is making sales of tangible personal property to its customers. In this regard, it is immaterial whether or not it is basically a service organization. "As to tangible personal property that it sells, it is a retailer." *Market Street Railway Co. v. California State Board of Equalization*, 137 Cal. App. 2d 87, 96.

Although the contract between "B" and its subscribers refers to the "reference books" as merely being "loaned", we are of the opinion that these books are leased within the meaning of Section 6006.3 of the Sales and Use Tax Law since a charge of \$75 and \$100 per "reference book" is made by "B". Since a sale is defined in Section 6006(g) as including "Any lease of tangible personal property in any manner or by any means whatsoever for consideration..." it is

clear that the “loan” of the “reference books” for a consideration constitutes a sale within the meaning of Section 6006.

Although the Board recognized that a so-called service enterprise which makes an incidental use of tangible personal property should be regarded as receiving consideration for its services only and has embodied this interpretation in Ruling 1, the theory is not applicable to the facts of this case since a lessor who leases tangible personal property on or after August 1, 1965, is considered selling the property instead of using it.

As already indicated, an organization which is primarily engaged in rendering nontaxable services is nevertheless the retailer of tangible personal property which it sells to customers. The fact that its retail activity is “incidental” to its principal activities is unimportant. In any event, the publication and distribution of the “reference books” could hardly be considered an incidental activity of "B". We believe it is evident, too, that the printed materials are not incidental to the information services; they are the very means by which the desired information is obtained.

Notwithstanding our conclusion that the “reference books” are sold, we are of the opinion that the “reference books” qualify as exempt periodicals under Ruling 50; they are revised and published six times per year, they contain information of interest to a particular group, and each issue bears a relationship to prior and subsequent issues in representing its similarity of subject matter. Under these circumstances, “B” is exempt from collecting and/or remitting tax on the publication to the state.

It is noted that “B” will loan to its subscribers, for an additional fee of \$100 per issue, the “Reference Book of Manufacturer's.” I contacted the local “B” office and was informed that this book was of the same general format of the "reference books", except it concerned itself more specifically with credit information on manufacturing firms and was only revised and published twice a year. It, therefore, does not come within the exemption of Ruling 50 because of the period requirement. The rental receipts are accordingly subject to sales tax. It appears from the contract that the rental is \$100 per copy.

GLR:lt [lb]