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March 8, 1996

Mr. D--- L---
L---, G---, S--- & Co.
XXXXX --- Road, Suite XXXX
---, CA XXXXX

Re: Sales & Use Tax Regulation 1541.5

Dear Mr. L---:

This is in response to your January 19, 1996 letter, regarding the application of Sales and Use Tax Regulation 1541.5 to your client's activities. In your letter you state:

“Our client, a corporation to be formed in California, will be a marketing consultant. Most of the revenue will be generated by charging a fee for our client's opinion on various campaigns that consumer companies will solicit for help in determining whether television or print or other advertising media would be most beneficial.

“It is contemplated that various consumer companies would select the media of printed material inserted in monthly billing statements sent to customers. Our client might possibly then act as a print broker, obtaining the camera ready item to be printed from the consumer company and arranging to have it printed. The print company (unrelated as to ownership or control to our client or the consumer company) would deliver the printed flyers to a mail house. The mail house would merge the flyers and the consumer company's billing into an envelope, affix postage and deliver to the U.S. Post Office for mailing.

“My query concerns the interpretation of Regulation 154[1].5--Printed Sales Messages. Section B, Application of Tax, states that sales tax does not apply if:

- “Printed to the special order of the purchaser
- “Mailed by the seller's agent through the US Post Office
- “Received by recipient at no cost who then owns it

“Our client’s customer may not know exactly how many billing statements are to be mailed out when the order for the printed material is placed; new customers are added daily. To accommodate all anticipated envelopes, however, when the order is placed an extra 3% will be requested to be printed and delivered to the mail house. Those that remain will be destroyed by the mail house.

“For example, assume that consumer company A has 175,325 customers in their data base with credit cards. Of those, an average of 151,000 receive billings each month, but the 151,000 are different customers since only those who charge are sent billings. The average of 151,000 has increased each month by a factor of 3%. Consumer company A orders the printed material inserts in October for December billing inserts, and to be certain that sufficient are available 165,000 are ordered. The mail house stuffs and delivers 160,000 and has 5,000 left over when completed. They destroy the 5,000 since the flyers are time date sensitive and not to be used again. Although these 5,000 do not meet the criteria of the second and third requirements listed on page one of the letter, I believe the entire billing to consumer company A is not subject to sales tax.

“It is impossible for the consumer company A to know exactly how many customers to print flyers for, and an insufficient number of flyers would not serve them well.

“It is anticipated that the billing to consumer company A for the 165,000 flyers will be done pursuant to Regulation 154[1].5 and not be subject to sales tax. Am I correct in my interpretation of the Regulation? If not, why not and how can the sales transaction by client be changed to make the sale not subject to sales tax?”

Section 6051 of the Revenue and Taxation Code imposes sales tax on retailers’ retail sales of tangible personal property in this state unless the sale is specifically exempt from tax by statute or is a sale for resale in the regular course of business. The measure of tax is the gross receipts from the retail sales in this state of tangible personal property. When sales tax does not apply, use tax applies to the use in California of tangible personal property purchased from a retailer for use in California, unless the use is specifically exempt from tax by statute. (Rev. & Tax Code §§ 6201, 6401.)

As you noted above, the sale and use of certain printed sales messages printed to the special order of the purchaser are exempt from sales and use tax when the printed sales message are delivered by the seller, the seller’s agent, or a mailing house, acting as the agent for the purchaser, through the United States Postal Service or by common carrier to any other person at no cost to that person who becomes the owner thereof. (Rev. & Tax. Code § 6379.5.)

Sales and Use Tax Regulation 1541.5(a)(1) defines “printed sales messages” as catalogs, letters, circulars, brochures, and pamphlets which are printed for the principal purpose of advertising or promoting the sale of goods services.

You describe the printing as “flyers” which are inserted in monthly billing statements. Without having a copy of the “flyer” to which you refer, we cannot determine whether it qualifies as a “printed sales message.” However, we shall assume the “flyers” are printed for the principal purpose of advertising or promoting the sale of goods or services and qualify as “printed sales messages.” The remainder of this discussion will be based on that assumption.

You mention that your client may act as a “print broker”. We understand you mean that your client will contract with a printer for the printed material and then sell that printed material to your client’s customer. We assume your client, when acting as a printing broker, will purchase the printed material for resale. In which case, sales tax will not apply to the sale of that printed material to your client. However, when your client is acting as a printing broker, its sales of the printed material are retail sales subject to sales unless the sale is exempt. Since the printed matter is a printed sales message printed to the special order of your client’s customer, is mailed through the United States Post Office by a mailing house to a recipient who becomes the owner at no cost, the exemption provided for the sale of printed sales messages applies. Hence, your client would not incur any sales tax liability on such a sale.

A purchaser does not incur tax liability for material which was purchased for resale but has become unsalable and is discarded. (Bus. Taxes L. Guide Annot. 280.0660, 11/28/66.) Similarly, sales for incorporation into a finished product are sales for resale even with respect to the sale of that portion lost or wasted in the manufacturing process, and no tax is due as a result of the disposal of that waste. (Bus. Taxes L. Guide Annot. 440.1880, 5/26/52.) We believe the application of tax is the same as to the disposal of the waste generated by overprinting the “flyers”. That is, under the specific facts set forth above, the sale of the printed materials is exempt from tax including that material which becomes waste.

We have made several assumptions in order to respond to your question. If those assumptions are incorrect, then our answer to your question may also be incorrect. If you have any further questions in regard to this matter, please do not hesitate to write again.

Yours very truly,

Anthony I. Picciano
Staff Counsel

AIP:cl

cc: Van Nuys District Administrator