

**STATE BOARD OF EQUALIZATION**

1020 N STREET, SACRAMENTO, CALIFORNIA  
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October 10, 1975

Mr. J. M--- P---  
Controller  
N--- D---, Inc.  
--- and --- Roads  
---, Illinois XXXXX

Dear Mr. P---:

SR -- XX XXXXXX

This is in response to your letter of September 2, 1975, which was addressed to Mr. H. L. Cohen. Your letter was referred to the undersigned for reply. You raise further questions with respect to your claim for additional interest of July 23, 1975. Mr. Cohen responded to your letter on August 26, 1975.

Reviewing the transactions at issue, it appears that N--- D--- entered into sales agreements with W--- B--- Radiology in July 1974 and with M--- L--- Hospital and G--- Hospital in August 1974. You undertook to furnish certain tangible personal property to these customers and in fact delivered the items to the customers in the third quarter of 1974. You reported these transactions on your third quarter return as sales, and you paid tax measured by the gross receipts from the sales. These customers are all located in California.

With respect to W--- B---, the merchandise was returned in November 1974, and you issued a credit memorandum to the customer.

With respect to the transactions involving the two hospitals, the merchandise was delivered and installed at M--- L--- Hospital and E--- G--- Hospital, and the hospitals were billed for the merchandise plus tax reimbursement. During the fourth quarter, the two hospitals requested that the sales be rebilled to leasing companies who issued resale certificates to you. You canceled your billings to the hospitals and rebilled the leasing companies.

You then applied for a refund of the tax remitted on these three sales.

It is your view, as stated in your letter of July 23, 1975, that all these transactions were improperly reported by you as sales occurring the third quarter of 1974.

You have sought and received a refund of the tax paid with respect to these transactions. You have also received interest with respect to the refunds, computed from February 1, 1975. You have sought additional interest for the period November 1, 1974, through January 31, 1975, in the amount of \$154.52.

With respect to the W--- B--- transaction, it appears that the property was shipped on or about August 30, 1974. You state in your letter of January 20, 1975, that "11-01-74 Customer dissatisfied with system – sale was cancelled and all inventory removed from his premises and returned here." In your letter of July 23 you state that "In the case of W--- B---, it should have never been reported as a sale. It was shipped on evaluation and proper treatment would result in no sale being reported in the third quarter regardless of whether it was accepted later or not."

You are of course correct that the fact of invoicing is not conclusive as to the issue as to when the sale of the property occurred. However, from the information previously furnished by you we think that there was insufficient basis for our concluding that the sale (passage of title) took place after physical delivery of the goods. Based on the information which accompanied your letter of September 2, 1975, it would appear that the sale transaction was a "sale on approval" under which the purchaser had a 60-day period in which to return the goods.

Under Commercial Code Section 2401, title to goods passes at the time explicitly agreed to by the parties. Title cannot pass under a contract for sale prior to identification of the goods to the contract. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest.

The Commercial Code further provides that, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is a "sale on approval" if the goods are delivered primarily for use. Under a sale on approval, unless otherwise agreed, although the goods are identified to the contract, the title does not pass to the buyer until acceptance.

It would thus appear that title to the goods never passed to W--- B---. Accordingly, interest should have been computed from November 1, 1974.

With respect to the M--- L--- Hospital and G--- Hospital transactions, Mr. Cohen has concluded that no refund was in order. The items in question were delivered in the third quarter of 1974. Title to the property passed no later than the date of delivery.

Upon further examination it would appear that the refund was proper. Although the property was not physically returned to N--- D---, it would appear that the transactions may be regarded as returned merchandise transactions. Our Regulation 1655, "Returns, Defects and Replacements," provides that:

"The amount upon which tax is computed does not include the amount charged for merchandise returned by customers if, (1) the full sale price, including that

portion designated as 'sales tax', is refunded either in cash or credit and (2) the customer, in order to obtain the refund or credit is not required to purchase other property at a price greater than the amount charged for the property that is returned."

In the two cases before us the requirements of Regulation 1655 were met. It would follow then that interest should be paid on the amount previously refunded, for the period November 1, 1974, through January 31, 1975. Our recommendation to that effect has been transmitted to the Board for its consideration.

Very truly yours,

Gary J. Jugum  
Tax Counsel