



STATE BOARD OF EQUALIZATION

July 7, 1971

Mr. R--- R---
XXXXX --- ---
--- ---, California XXXXX

SR -- XX XXXXXXX

Dear Mr. R---:

Your undated letter addressed to our Pasadena office has been referred to us for direct reply.

It is our understanding that R--- P--- was formed with the intention of selling a four-volume set of recordings entitled "I--- R---". During a trial advertising campaign, you realized the lack of response and decided to offer the recordings on a "free-will" offering basis. Since these recordings are now offered under a free-will program, you ask whether your transactions will be subject to sales tax. We understand that you have paid tax on the materials and services that went into producing the four-volume set of recordings.

In addition, we understand that you enclose a letter with the recording that you send out on a trial basis, a portion of which is quoted below:

"If you find a kinship with the words and the way they were produced, you may send for the three other volumes. We are very much aware of today's marketing ways to 'get the dollar', so we are leaving the free will offering up to you. There is a cost to produce and mail these recordings to the few that are receptive, so if you can afford the cost printed on the back of the jackets we would appreciate the assistance in helping us produce more material to companion with in our moments of quiet.

"If you cannot afford to offer anything at this time, but feel the need of these recordings to companion with, don't hesitate to write and ask for them."

We regard the foregoing statement as an offer. When the customer accepts the offer by agreeing to pay the amount requested or by the act of sending money, an enforceable contract of sale is created. The transaction is contractual in nature because a valuable consideration (the price) is bargained for and received in exchange for the promise to deliver the merchandise (California Civil Code Sections 1549 and 1605). The fact that some persons receive the recordings without agreeing to pay the price does not warrant a finding that no sale occurs in instances where a customer agrees to pay a certain amount for the merchandise. In this situation, the recipient receives the merchandise pursuant to the alternative promise to make him a gift of the merchandise if he is unable to pay the price. Such transactions are legally distinguishable because no valuable consideration is given in exchange for the promise that allows him to retain the merchandise. Since there is no legal duty to perform there is no contract and no sale at which the tax can be applied.

Summarily, in those cases where the recipient agrees to pay you a stated amount for the recordings, sales tax is due measured by that amount. However, you can take a tax-paid-purchase-resold deduction on your return for those recordings since you paid tax reimbursement on the materials that went into making them. (See Copy of Regulation 1701, copy enclosed). In those instances when you give the recordings away you are regarded as the consumer thereof and have properly paid tax reimbursement to your vendors.

If you have any further questions regarding the foregoing, please do not hesitate to contact us. Our district office nearest you is located at 485 East Rowland Ave., Covina, California 91722, phone 331-6401.

Very truly yours,

Glenn L. Rigby
Tax Counsel

GLR:lb
Enclosures