

**STATE BOARD OF EQUALIZATION**

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January 4, 1996

BURTON W. OLIVER
Executive Director

Mr. D--- M. H---
W--- S--- G--- & R---
XXX --- --- Road
--- ---, CA XXXXX-XXXX

Re: D--- G--- S---, Inc.
No Seller's Permit

Dear Mr. Horii:

This responds to your letter dated October 12, 1995 to Assistant Chief Counsel Gary J. Jugum concerning D--- G--- S---, Inc. (DGS).

You write that DGS, whose principal office is located in --- ---, California, is "engaged in a delivery service business that distributes radio commercials from advertising agencies (and their recording studios) directly to radio stations through a multimedia communications network established by DGS." This multimedia communications network is comprised of Record Send Terminals (RSTs) located at various recording studios, and Receive Playback Terminals (RPTs) located at radio stations, which communicate with the DGS Network Operations Center located in --- --- through standard telephone lines.

You state that the RSTs and RPTs are essentially customized multimedia computers (equipped with modems) that are either purchased or leased by DGS, with DGS paying sales or use tax resulting from the purchase or lease. You further state that the DGS Network Operations Center functions essentially like a switchboard, receiving radio commercials from an RST located at a recording studio and routing the radio commercial to the appropriate RPT at the radio station.

DGS' charges to an advertising agency are based on the number of commercials distributed at one time to a radio station and the time frame within which the distribution is made, e.g., "express" distribution guarantees distribution to radio stations via the DGS multimedia communications network within four hours for a charge of \$35 to distribute one commercial to a radio station, and an added charge of \$6 for each additional commercial sent at

the same time to the same radio station. In cases where a radio station is not part of the DGS multimedia communications network, i.e., the radio station does not have an RPT on-site, DGS will transfer the radio commercial onto audio tape at its --- facility and have the tape delivered by courier or overnight delivery service to the radio station. In those instances, DGS pays sales tax on its purchase price of the blank tapes.

You describe the operation of the system, which we summarize below. An RST (owned or leased by DGS) is provided by DGS free of charge to major recording studios in each market accessed by the DGS multimedia communications network. You state that DGS retains title, control and reasonable access to the RST, and pays for any repairs or maintenance. The recording studio pays electricity and telephone line charges. After the recording studio has recorded a radio commercial using copy supplied by the advertising agency, the radio commercial is transmitted by the recording studio to the DGS Network Operations Center.

In the event that the advertising agency produces commercials at a recording studio which does not have an RST, the agency can deliver an audio tape of the commercial to an RST equipped studio which will transmit the commercial to the DGS Network Operations Center. Recording studios which do this are separately compensated by DGS on a per transmission basis.

To transmit the commercial from a recording studio to the DGS Network Operations Center, you write, “[a]t the completion of a recording session, or upon receipt of an audio tape from an advertising agency, the recording studio loads the radio commercial into the RST by keying in the advertising agency code number (pre-assigned by DGS) along with the radio commercial’s name and identification number. Once the RST signals the completion of the loading cycle, the operator pushes the ‘send’ button which causes the unit to auto-dial the DGS Network Operations Center and transmit the radio commercial. Thus, the RST automatically addresses the commercial to the DGS Network Operations Center, identifies the sender of the commercial, and delivers the commercial to the DGS Network Operations Center for the next step of the delivery process.”

You write that the DGS Network Operations Center automatically receives and stores the commercial. The DGS Network Operations Center reviews the commercial to assure it was transmitted properly, and prepares the commercial for transmission to the various radio stations according to instructions from the advertising agency, including any “traffic instructions” (the play rotation and any special instructions to the radio station) by the advertising agency. We understand, from your letter, that the instructions from the advertising agency to the DGS Network Operations Center are sent either verbally, by fax, or by data file. For purposes of this opinion we assume that any data file transferred to the DGS Network Operations Center is transferred electronically, and not via computer disk or other tangible personal property.

You write that, “The DGS Network Operations Center automatically matches the distribution priorities for the commercials received with the appropriate radio stations and auto-

dials the RPT at these radio stations. The radio commercial and its traffic instructions are then each transmitted to the radio station's RPT and fax machine respectively." In the case of radio stations which do not have an RPT, the radio commercials are transmitted from the DGS Network Operations Center to a DGS facility in ---, ---. The --- facility transfers the commercial to audio tape and sends the audio tape and traffic instructions to the radio station via courier or overnight delivery service.

You state that radio stations which do substantial business with the advertising agency clients of DGS are provided an RPT at no charge. You do not state whether or not RPTs are available to other stations for a charge. This opinion letter applies only to distributions of radio commercials to stations which are provided an RPT by DGS at no charge.

You also state that installation of the RPT is fairly simple, requiring an AC power source outlet and a dedicated phone line to receive the transmissions. You state that the electricity and telephone line are paid for by the radio station, and that DGS holds title to the RPT as the owner (or right to possession and control as the lessee), retains control and reasonable access to the RPT, and is responsible for its maintenance.

You state that when the RPT receives a transmission from the DGS Network Operations Center, a list of the various commercials is displayed on the RPT screen. From the RPT, the radio station operator may select a radio commercial, listen to it for content approval, and play the file into a tape cartridge dubbing machine or directly onto the air. The station plays the commercial according to the traffic instructions faxed (or otherwise delivered) by DGS.

You assert that neither the charges made by DGS to the advertising agencies for the radio commercial distribution using the DGS multimedia communications network, nor the charges made by DGS to advertising agencies for the distribution of audio tapes are subject to sales or use tax. You ask that we confirm this.

Discussion

Sales of tangible personal property made at retail in California are subject to sales tax unless excluded or exempted by statute. (Rev. & Tax. Code § 6051.) A sale at retail means a sale for any purpose other than resale in the regular course of business. (Rev. & Tax. Code § 6007.) A sale includes any transfer of title or possession of tangible personal property for a consideration. (Rev. & Tax. Code § 6006(a).) An audio tape, for example, is tangible personal property, and, therefore, a transfer of an audio tape for consideration is a taxable sale unless an exemption or exclusion applies. On the other hand, a transfer made electronically by remote telecommunication, such as by modem, is not a transfer of tangible personal property, and, therefore, is not subject to tax.

Sale also includes the reproducing, fabricating, processing, printing, or imprinting of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used. (Rev. & Tax. Code § 6006(b).) It also includes a transfer for consideration of the title or possession of tangible personal property which has been produced, fabricated, or printed to the special order of a customer. (Rev. & Tax. Code § 6006(f).) Making copies of audio tapes is an example of the producing, fabricating, and processing of tangible personal property. (Cf. BTLG Annot. 435.1745 (10/16/78).)

Where the sales tax does not apply (e.g., the sale occurs outside of California), use of the property in this state is subject to use tax if the property was purchased from a retailer for use in California. (Rev. & Tax. Code §§ 6201, 6401.) Although the use tax is owed by the purchaser, in order to aid in the collection of the use tax, any retailer who is engaged in business in California must collect the applicable use tax and pay it to the Board of Equalization. (Rev. & Tax. Code § 6203.) Such a retailer is required to register with the Board of Equalization (Rev. & Tax. Code § 6226; Reg. 1684.)

If a retailer has a business location in this state, such as DGS' principal office in --- ---, it is a retailer engaged in business in California within the meaning of the California Sales and Use Tax Law. (Rev. & Tax. Code § 6203(a).) Thus, even if a sale of tangible personal property is made by DGS outside of California, DGS must collect and remit use tax on the transaction if the property is purchased for use in this state.

Under the unique facts you present, we agree that DGS is regarded as itself using the RSTs and RPTs, rather than leasing them. The charges made by DGS are not for the RSTs and RPTs, but for the transmission of the recordings. The taxability of those charges depends upon whether that transmission constitutes a sale of tangible personal property. Since it is the sale or use of tangible personal property which is subject to tax, if what is transferred by DGS is not tangible personal property, there can be no taxable sale or use. Thus, the transfer electronically of the radio commercials from the recording studios to the radio stations through the DGS multimedia communications network is not a transfer of tangible personal property and, therefore, is not a taxable transaction under the California Sales and Use Tax Law.

On the other hand, when the DGS facility in --- copies a radio commercial onto audio tape, and then sends the audio tape and to a radio station in California, there is a transfer of tangible personal property: the audio tape. Charges for such a transfer of tangible personal property for consumption in California are subject to use tax. Since DGS is a retailer engaged in business in California under Revenue and Taxation Code section 6203(a), the transfer of the audio tape for a measurable monetary consideration to a radio station in California is a taxable transaction. The measure of tax, for the transfer of the audio tape, is the sale price of the unprocessed recording media (the blank audio tape). (Reg. 1527(a)(1).)

If DGS has paid a retail sales or use tax imposed by another jurisdiction, such as the state of ---, on its sale of the audio tape, a credit for those taxes is allowed against, but shall not exceed, any use tax imposed by California on the storage, use or consumption of the tape in California. (Rev. & Tax. Code § 6406.)

In summary, we conclude that the only portion of DGS' charges described in your letter which are subject to tax are those attributable to the transfer of audio tapes from DGS' --- facility to radio stations in California. If DGS is making such transfers of tangible personal property, it must register with, and obtain a seller's permit from, the Board of Equalization. The address of the Board's San Francisco District office is 50 Fremont Street, Suite 1400, San Francisco.

I hope this information is of assistance. Please write again if you have any further questions.

Sincerely,

Sharon Jarvis
Staff Counsel

SJ:rz

cc: Mr. Ronald L. Dick
San Francisco District Administrator - BH
Out-of-State District Administrator - OH