

**STATE BOARD OF EQUALIZATION**

1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 445-2705

April 21, 1989

Mr. R--- W. S---
[P---] Company
XX --- Street
--- ---, CA XXXXX

Dear Mr. S---:

You requested advice on a particular problem your company is experiencing in handling sales and use tax on transportation charges related to mail order energy conservation merchandise shipped prepaid to your customers. Briefly stated, the issue is as follows:

Orders and payment are received from the customer before merchandise is shipped. A separately stated flat \$3.00 charge is made for "shipping" on each order. Orders are shipped via United Parcel Service (UPS), but actual shipping costs are not calculated until the orders are assembled and shipped. The customer has already paid tax on the sales price plus the \$3.00 shipping charge. The customer dissatisfaction arises when the tax is applied to the \$3.00 fee.

California Revenue and Taxation Code section 6012(c)(7) provides that gross receipts do not include "separately stated charges for transportation from the retailer's place of business or other point from which shipment is made directly to the purchaser, but the exclusion shall not exceed a reasonable charge for transportation by facilities of the retailer or the cost to the retailer of transportation by other than facilities of the retailer....(Emphasis added.)

Regulation 1628(a), copy enclosed, states "...tax does not apply to 'separately stated' charges for transportation of property from the retailer's place of business or other point from which shipment is made 'directly to the purchaser' provided the transportation is by other than facilities of the retailer, i.e., by United States mail, independent contract or common carrier....The amount of transportation charges excluded from the measure of tax shall not exceed the cost of the transportation to the retailer." (Emphasis added.)

Since at the time the orders are received with the payment you do not know the actual cost of the transportation charges, you cannot determine if the \$3.00 charge is going to be more or less than the actual cost.

An average cost cannot be used to calculate the exclusion for transportation charges. Each of your customers that paid tax where the charge exceeded the actual cost would be entitled to a refund of excess tax reimbursement. Averaging the costs would violate the integrity of the application of the sales tax, and such a calculation cannot be used to exclude transportation charges from the tax. (See Decorative Carpets, Inc. v. State Board of Equalization, 58 Cal.2d 252, 23 Cal.Rptr 589 (1962). The court stated very strongly that the Board has a vital interest in the integrity of the sales tax and may insist, as a condition for refunding overpayments, that the retailer repay its customers the amounts erroneously collected to as to avoid a misuse of the sales tax by a retailer for private gain.

As we discussed on the telephone, there are alternatives to the procedures the company is currently using; such as utilizing a weight and distance chart so that the customer can figure shipping charges when sending in the order or billing the customer at the time of shipment. Changes such as these are policy decisions and could be very costly compared to the present system. Of course, the ultimate in customer goodwill is to charge tax on the sale item and not on the transportation charges, although tax to the state would be due on the entire amount; sales price plus the \$3.00 fee.

I wish I could give you a more positive response, but there does not appear, given the present circumstances, any way to eliminate the tax on the flat fee transportation charges unless the actual transportation costs can be stated.

Very truly yours,

Gordon P. Adelman
Tax Counsel

GPA:sr

Enc.