STATE BOARD OF EQUALIZATION
1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)

April 11, 1969

A--- & P---
XXXX --- Street, N.W.
---, --- XXXXX

Attention: Mr. J--- F. F---

SC --- XX XXXXXX
A--- P---

Gentlemen:

Thank you for the thorough discussion of the issues and precedents in your letter of February 4, 1969.

In my view the basic question that must be answered initially is whether the Association is "engaged in business" in California within the meaning of section 6203 by virtue of the acceptance of orders taken by independent subscription agencies in this state. If it is not "engaged in business," there is no duty to collect the tax, and the controversy ends there without the necessity of considering the other issues raised.

Section 6203 provides that:

> "'Retailer engaged in business in this state'… means and includes any of the following:
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> * * *
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> "(b) Any retailer having any representative, agent, salesman, canvasser or solicitor operating in this state under the authority of the retailer…for the purpose of selling, delivering, or the taking of orders for any tangible personal property."

Basically, section 6203 is intended to allow California to go as far as is constitutionally permissible in requiring out-of-state concerns to collect use tax on merchandise sold to California consumers. Assuming for the moment that California courts would find under the code that the subscription agencies are operating under the authority of the Association for the purpose of taking orders, we must look to the decisions of the United States Supreme Court to determine whether such an interpretation would allow us to constitutionally impose the collection duty - in the words that have become the accepted standard, whether this is "some definite link, some minimum connection" between

our state and the person property or transaction we seek to tax. Miller Bros. Co. v. Maryland (1954) 347 U.S. 340, 344-345; 98 L.Ed. 744, 748; 74 S.Ct. 535.

The court has found the definite link or minimum connection missing where a Missouri based company conducted its Illinois business entirely on a mail-order basis and had no place of business, agents, or salesmen in Illinois to sell or take orders, to deliver merchandise, to accept payments, or to service merchandise, did not own any tangible property in Illinois, had no telephone listing and did not advertise in newspapers, on bill boards, or by radio or television, though they did send catalogues and advertising circulars to Illinois customers. National Bellas Hess v. Illinois (1967) 386 U.S. 753; 18 L.Ed. 505; 87 S. Ct. 1389.

They likewise found the link or connection missing when Maryland attempted to require a Delaware retailer to collect its use tax on sales which took place when Maryland residents went to the Delaware store and purchased merchandise, with no mail or telephone orders being accepted. The Delaware retailer incidentally reached Maryland residents with advertising in Delaware papers and on Delaware radio stations; it mailed occasional sales circulars to former customers in Maryland; it delivered some purchases to Maryland by common carrier and by its own truck. Miller Bros. Co. v. Maryland, supra.

On the other side of the coin, the court has found the link or connection to be present where the out-of-state retailer sent its salesmen into Iowa for the purpose of soliciting orders, even though the company had never qualified to do business there nor did it maintain any branch, office, or warehouse in Iowa and all orders were subject to approval in Minnesota. General Trading Co. v. State Tax Commission (1944) 322 U.S. 335; 88 L.Ed. 1309; 64 S.Ct. 1028

In Scripto v. Carson (1960) 362 U.S. 207; 4 L.Ed.2d 660; 80 S.Ct 619, the link or connection was found to be present where the only contact was that orders for Scripto's products were solicited by brokers or wholesalers or jobbers of advertising materials who were residents of Florida and who were under contract with Scripto.

Our present situation is somewhere between Scripto and National Bellas Hess, but in my opinion is closer to the Scripto case. All that is missing is a formal written contract between the subscription agency and the Association. Perhaps such a distinction is "without constitutional significance." (Scripto, supra, 322 U.S. at 211; 4 L.Ed.2d at 664.) I assume the agency makes a profit on its business and that the library will not pay a premium over that which could be paid by direct order, so there is some implied agreement between the Association and the agency in accepting their orders. Assuming that the periodicals are not purchased without viewing a sample or descriptive advertising materials, I assume the agencies have such items to display to the customer. Thus, in my opinion, the use of the orders and solicitation by these agencies in selling periodicals provides the minimum contact necessary to constitutionally impose the duty of collecting the use tax, other things being equal.

As pointed out above, section 6203 is intended to allow California to go to the constitutional limits in imposing the use tax collection duty. There are no cases directly facing the issue, but it is my opinion that our courts would have no difficulty in finding that your use of these agencies constituted engaging in business in this state within the meaning of the statute. What the agencies are doing can be construed as acting "under the authority of the Association." If they were not, you could refuse to accept the orders as

you no do with orders for the directory. Note that under the facts of the General Trading Co. case, supra, the Iowa court had found the company to be a "retailer maintaining a place of business in this state" (322 U.S. 337; 88 L.Ed. 1311), which is stretching a definition considerably further than we propose here.

What seems to be the more troublesome issue, and the one on which you place greater emphasis, is whether the fact that you are engaged in a business, the receipts of which are exempt under our Sales and Use Tax Law, can be used to require you to collect use tax on taxable property when you could not be so required if you were not engaged in the exempt business.

Despite what implications you might draw from the analysis preceding the code sections in the pamphlet issue of the Sales and Use Tax Law, it has long been our position that business activities are not divisible in the manner you propose. Either you are engaged in business or you are not -- whether the receipts from your principal business are exempt or not is irrelevant. All of your business activities fall under the same umbrella. Note that the statute says "for the purpose of selling, delivering, or the taking of orders for any tangible personal property…" (emphasis added). This phrase is not qualified by the phrase "the storage, use, or other consumption of which is subject to tax." "Any" implies whether or not subject to tax.

From a constitutional standpoint, Nelson v. Sears Roebuck & Co. (1941) 312 U.S. 359; 85 L.Ed. 888; 61 S.Ct. 586, seems to have laid to rest the question of the duty of a mail-order seller to collect the use tax on direct mail orders in which his local retail outlets are not involved. His business is not divisible once he is engaged in business in the state. You correctly state part of the rationale underlying the imposition of the duty to be the benefits flowing from the state to the businessman. You, however, see a requirement that the benefit be directly related to the property which is the subject of the particular sale. I see no such requirement. Rather, the requirement is merely that the business receives benefits. The fact that most benefits accrue to an exempt business is, in my opinion, irrelevant. In Nelson v. Sears, Roebuck & Co., supra, the court said in regard to mail-order sales having no connection whatsoever with Sears' retail outlets, "Since Iowa has extended to it that privilege [doing business], Iowa can exact this burden as a price of enjoying the full benefits flowing from its Iowa business." 312 U.S. 364; 85 L.Ed. 892.

As you and I both know, quoting language that is essentially dicta is inconclusive. The quotation from National Bellas Hess at the bottom of page 4 of your letter does seem to require that the commerce taxed must be commerce enjoying protection. Remember, however, that there were no contacts whatsoever in that case. Further, the standard phrase quoted at the top of your page 5 is, "Here, too, the Constitution requires 'some definite link, some minimum connection, between a State and the person, property or transaction it seeks to tax.'" Note that it is person, property or transaction -- three choices. We have the connection with the person and the property.

In my opinion, the cases you cite in support of your divisibility theory, Norton Co. v. Illinois, (1951) 340 U.S. 534 and American Oil Co. v. Neill (1965) 380 U.S. 451, which hold that a tax cannot be imposed directly on the receipts of the vendor on interstate sales, even if there are definite links or minimum contacts, are not precedent for the proposition that a state cannot require a retailer to collect a use tax imposed on the consumer. The imposition of a tax and the imposition of a collection duty are separate issues. In fact, the court so states in the Norton case, see 340 U.S. at 537. See also the discussion

in American Oil, 380 U.S. at 455-457, in regard to the duty of collecting the tax from the purchaser or user.

The tax that we require you to collect on your directories (or other nonperiodicals) is a use tax imposed on the consumer. Aside from the issue of whether you have to collect the tax, the nonperiodicals purchased in interstate commerce are subject to the use tax; and the purchaser, user or consumer is liable for the tax thereon. This is the second requirement of section 6203 and part (3) of your analysis on page 10 of your letter. Thus, it is our position that you are: (1) engaged in business in this state and (2) making sales of tangible personal property for storage, use or other consumption in this state (3) that the property sold is subject to the use tax (or is not exempt under chapters 3.5 or 4). Accordingly, you are required to register with us (which you have already done), collect the use tax on sales of nonexempt property, and regularly file returns and remit any tax due.

Very truly yours,

Lawrence A. Augusta
Assistant Counsel

LAA:ph

bc: --- – District Administrator
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