STATE BOARD OF EQUALIZATION

October 11, 1963

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Gentlemen

This letter is in regard to the petition for Redetermination of sales and use taxes of the above-named taxpayer. Please refer to your letter of September 6.

You have indicated your client is willing to accept the determination with respect to the item which we designated as protested item 3 insofar as it applies to the year 1961. You object to the inclusion of this item in a percentage factor used to compute additional use tax for other years on the basis that the particular item was a nonrecurring type of error.

The above item was included in the test year 1951 to compute an additional measure of use tax for a classification of expense items described as "advertising material, supplies, etc., purchased ex tax for resale or from out-of-state vendors". The specific purchase consists of newspaper mats. In examining the auditor's working paper detail for the test period, we find no other newspaper mats included in the test. However, we note that his listing of expenses tested includes many other similar types of merchandise, such as dies and samples, press plates and dies, production plates, etc. We wish to point out to you that the underlying theory of the test is not necessarily calculated to produce the same error in other years. Rather, the determination for the other years is made on the premise that, because of the consistency of errors in the test year, there will be other similar errors in other years aggregating those in the test year. Accordingly, unless you are able to show that the total amount determined for this class of merchandise for other years is incorrect, we are unable to recommend any further adjustment to this item.

You have also indicated that your client disagrees with our conclusions and intended recommendations or those items which we have identified as protested items 2, 5, 7, and 8. As we have indicated to you in our previous letter, the legal issue is whether or not in each instance there has been a taxable use of the property in California.

We believe that as to each of these items there is present all of the elements of a valid gift inter vivos. There was (1) intent to make a gift, (2) actual or symbolic delivery such as to relinquish all control by the donor, and (3) acceptance by the donee. Where delivery is made by a third person not subject to the donor's control, "delivery" is effected by delivery of the property to that person.

(See Jean v. Jean, 207 Cal. 115.) Here delivery was effected by delivery of the merchandise to a common carrier. Since acceptance of a beneficial gift is presumed to take place at the time of delivery the gifts were completed upon delivery to the carrier. Therefore, it is our opinion that your client's act of delivering the property to the carrier constituted such an exercise of right or power over the property so as to result in a taxable use of the property in California.

Where the donor divests himself of control over the property in California and makes no subsequent use of the property outside this state, we regard the gift as being a taxable use of the property. In like manner, we do not attempt to assert use tax on a completed gift made outside this state even though the donee may subsequently use the property in California.

In view of what is set forth above, we shall recommend that no further adjustments be made to the amount originally determined.

WEB:spg