STATE BOARD OF EQUALIZATION

(916) 445-6450

October 19, 1976

Dear

This is to inform you of the conclusions we have reached following our meeting on September 29, 1976 to further discuss my Decision and Recommendation of June 8, 1976 on --- petition for redetermination. Our conclusions take into account the changes of fact and argumentation which you submitted in your memo on September-, 1975.

As to those situations in which the names and addresses are transferred to --- by means of a magnetic tape, we remain of the opinion that this constitutes a lease of the, tape to --- We do not agree that Regulation 1504(a) (4) applies only to situations in which the transferred tape is directly used to produce the mailing list in its final form. The regulation must be construed consistently with the Board's Capitol Records decision which is, in effect, an interpretation applying to all transfers of tapes. The Board simply does not agree that the transfer of a tape involves only a transfer of intangible information

Two copies of the list owner's tape are made by --- and than the original tape is returned to the owner. This use of the original tape to make copies is an exercise of dominion and control over the tape by --- and is well within the court's opinion in, the Culligan case.

We do not see Regulation 1502(d) (5) as having any relevance to the questions before us. --- is not processing information for the list owner. No output resulting from the processing is transferred to the list owner in human readable form, or in any other form.

As to the names and addresses transferred to --- by warranty registration cards or coupons (hard copy), we cannot escape the conclusion that the Board in enacting Regulation 1504(4) (1) intended to include such situations by stating that a mailing list may be in the form of "…index cards, or other similar means of communication". As between --- and the list owner, such hard copy is obviously "intended for use in circulating material by mail", regardless of what the list owner's original intention was in gathering the hard copy. To restrict "mailing list" to hard copy in the precise form necessary for final mailing purposes would be to completely emasculate Regulation 1504, given the demographic and postal service requirements for such mailings.

As to both tapes and hard copy, we do not see the “one time only” restriction as applicable here. This restriction is contained only in the contract between --- and its customer, not between --- and the list owner. The fact that --- agrees with the list owner to restrict --- customer to a one time use only does not restrict --- to a one time use. The fact that --- must get the list owner s approval of each mailing is not a numerical restriction but goes to the list owner not wanting to undercut his own purposes by allowing mailings by potential competitors.

Lastly, as I stated at our meeting, the implied distinction drawn in my Decision and Recommendation between “agents” and “independent contractors” is misleading. The correct distinction is between “employees” and “independent contractors” as stated in Automatic Canteen Co. v. State Board of Equalization, 238 Cal. App. 2d 372, 385. if with in each such distinctions --- was in any sense an agent, it was an independent contractor/agent, with its action being for, but not by, the list owner. --- was clearly not an “employee” of the list owner.

Given the above, we regret that we find no basis for adjusting our Decision and Recommendation. If --- desires a Board hearing in this matter, please request such hearing in writing to --- of this office within 10 days of the date of this letter. If --- does not receive such request within 10 days, our Decision and Recommendation will be presented to the Board for its consideration and action.

Very truly yours,

Donald J. Hennessy
Tax Counsel

DJH:rt