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November 16, 1999

Mr. P--- W. M---
C---, W--- & C---
XXX --- Street, --- Floor
--- ---, California XXXXX

Re: U--- - T---
SR -- XX-XXXXXX

Dear Mr. M---:

This is in response to your letter dated October 19, 1999 regarding the application of tax to transportation charges imposed by the U--- - T--- for newspaper deliveries.

You state:

“The newspapers in question are manufactured at production plants operated by the U--- -T---. From those plants the newspapers are shipped by facilities of the U--- - T--- to locations where the newspapers are received by independent contractors who use their own facilities, not facilities of the U--- - T---, to transport the newspapers directly to residences of individual subscribers.

“The U--- - T--- contemplates presenting subscription and transportation renewal notices to customers based on the following hypothetical model:

“U--- - T---, daily and Sunday, \$x.xx [per month]

* * *

“Includes applicable sales tax computed to the nearest mill. Per title 18, California Code of Regulations, section 1628, \$x.xx of your monthly charges is attributable to transportation.’

“It is the intention of the U--- - T--- to exclude from the measure of tax transportation charges in an amount that does not exceed the actual cost to the U--- - T--- of the transportation itself.

“The U--- - T--- enters into discrete agreements with independent contractors for the transportation of newspapers within distinct service areas. The actual cost of transporting individual newspapers necessarily varies among those areas, depending on the type of dwelling (single versus multi-unit), density of subscribers, terrain, as well as a number of other factors. The U--- - T--- intends to state separately on renewal notices a charge which is no greater than the lowest actual cost of transportation to subscribers in a particular geographic area. That is, the U--- - T--- would separately state on all renewal notices for a geographic area the lowest cost to transport newspapers to subscribers in that particular territory. Those costs would be based on actual (not ‘averaged’) transportation fees paid to independent contractors.

“We recognize that associated transportation charges are subject to sales tax if a newspaper is delivered to a subscriber by U--- - T--- employees or by use of U--- - T--- facilities.”

You ask whether the transportation charges described above may be excluded from the U--- - T---’s taxable gross receipts from the sale of its newspapers.

Discussion

Title 18, California Code of Regulations (hereafter “Regulation”), section 1628 provides, in part:

“(a) . . . [T]ax 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 place where the sale occurs . . . is immaterial, except when the property is sold for a delivered price or the transportation is by facilities of the retailer, as explained in (b) below. The amount of transportation charges excluded from the measure of tax shall not exceed the cost of the transportation to the retailer.”

“

“(b)(1) . . . ‘Delivered Price.’ Property is sold for a delivered price when the price agreed upon in the contract for sale includes whatever cost or charge may be made for transportation of the property directly to the purchaser. A sale for a ‘guaranteed price’ including a separately stated amount for transportation is a sale for a ‘delivered price.’ Property is not sold for a delivered price when the price is agreed upon and to this price is added a separately stated amount representing the cost or charge for transportation of the property directly to the purchaser and any

increase or decrease in the actual cost of transportation is borne by or credited to the purchaser.”

The *U--- - T---*’s proposed invoice indicates that it is selling newspapers for an agreed price regardless of the amount of the sales price that is allocated to the delivery of the newspaper. We further understand that the *U--- - T---* does not alter the subscription price of its newspapers to its customers based on the charges that the *U--- - T---* incurs for delivery. Under these facts, we agree with your conclusion that the *U--- - T---* is selling its newspapers at a “delivered price.”

Regulation 1628(b)(2) specifies how tax applies to the sale of property sold at a delivered price. Under this provision, tax applies to charges for transportation unless: 1) the transportation charges are separately stated; 2) the transportation charges are for transportation from the retailer’s place of business or other point from which shipment is made directly to the purchaser; and 3) the transportation occurs after the sale of the property is made to the purchaser. The amount that may be excluded from a retailer’s gross receipts for transportation under this provision cannot exceed the actual cost of the transportation incurred by that retailer. (*Id.*) This amount must also be calculated on a transaction by transaction basis. (See BTLG Annots. 557.0005 (7/24/91); 557.0690 (4/21/89).) That is, the amount of excludable transportation charges may not be calculated by averaging the total cost of transportation imposed on the retailer for deliveries to multiple customers for like goods. Instead, the amount that may be excluded from the retailer’s gross receipts for transportation costs cannot exceed the lesser of the actual cost of delivery imposed on that retailer for the particular transaction, or the amount of the separately stated charges for that delivery.

Regulation 1628(b)(2) only allows the charges for delivery directly to the customer to be excluded from a retailer’s gross receipts and not the cost of delivery to an intermediate location such as a warehouse. In that regard, we understand that the *U--- - T---* *only* seeks to exclude from its taxable gross receipts the transportation costs associated with the delivery of its newspapers from locations where the newspapers are received by the independent contractors and not the cost of transporting its newspapers from its plants to these locations. As such, the remaining issues are: 1) whether the *U--- - T---* separately sets forth an amount attributable to transportation; 2) whether the *U--- - T---*’s charges exceed the cost of transportation by its independent contractors; and, 3) whether the transportation in question occurs after the sale of the newspapers to its customers.

Separate Statement of Transportation Costs

In pertinent part, Regulation 1628(a) provides:

“Transportation charges will be regarded as ‘separately stated’ only if they are separately set forth in the contract for sale or in a document reflecting that contract, issued contemporaneously with the sale, such as the retailer’s invoice. The fact that the transportation charges can be computed from the information

contained on the face of the invoice or other document will not suffice as a separate statement. . . .” (Emphasis added.)

We understand that the *U--- - T---* wishes to designate a monthly amount for transportation charges on its invoices to its customers based on a calendar month of 4.3 weeks. That is, rather than designate the charges specific to each particular calendar month, the *U--- - T---* plans on using the average number of weeks per month based on each calendar year. The net result is that some monthly charges will be for an amount either less than, or in excess of the actual charges for that particular month calculated on an actual per-month basis. As noted above, Regulation 1628 requires the *U--- - T---* to separately state its actual charges for transportation on a customer’s invoice in order to exclude these charges from its taxable gross receipts. We interpret this to mean that the *U--- - T---* must separately state the *actual* amount for transportation for each invoice period. This means that the *U--- - T---* must either separately itemize the charges for each actual monthly billing period (i.e., a billing period not based on an average of 4.3 weeks per month), or actually invoice its customers for 4.3 week subscription intervals. Where either of these conditions is met, it appears that the *U--- - T---* meets the provisions of Regulation 1628(a). You may wish to contact Mr. Vic Anderson ((916) 324-2894) to obtain further guidance with regard to this requirement.

The *U--- - T---* is also required to notify its credit card customers of its transportation charges in order to meet the requirements of Regulation 1628. Again, Regulation 1628 requires a retailer to separately set forth its transportation charges in a document issued contemporaneously with the sale. This means that the *U--- - T---* must provide its credit card customers with some type of statement separately stating its transportation charges. This statement should be provided to the *U--- - T---*’s customers each time the customer provides a payment to the *U--- - T---* for newspaper delivery for a specified time period. Again, Mr. Anderson can provide you with further guidance regarding this requirement.

You also ask whether the *U--- - T---* makes a separate statement of its transportation charges on its “carrier collect” accounts. These accounts consist of subscribers who actually make payments directly to the carrier on behalf of the *U--- - T---* and not directly to the *U--- - T---* via the mail. We assume that carrier collect customers are provided with an invoice by the carrier that is identical to the invoice provided to customers who make payments directly to the *U--- - T---* via the mail. Under these facts, we regard the *U--- - T---* as the retailer of the newspapers. (See Rev. & Tax. Code § 6015(c).) We also regard the separate statement for transportation charges on the invoices provided to carrier collect customers to be sufficient provided they meet the requirements set forth above. This means that the *U--- - T---* must either separately itemize the charges for each actual monthly billing period (i.e., a billing period not based on an average of 4.3 weeks per month), or actually invoice its customers for 4.3 week subscription intervals. Where either of these conditions is met, it appears that the *U--- - T---* meets the provisions of Regulation 1628(a) with respect to its carrier collect accounts. Again, you may wish to contact Mr. Vic Anderson ((916) 324-2894) to obtain further guidance with regard to this requirement.

Cost of Transportation

Since the actual cost of transporting the newspapers varies among each distinct service area, the U--- - T--- wishes to separately state on customer invoices a charge that is no greater than the actual cost of transportation to an individual subscriber in a particular geographic area. We understand this to mean that the U--- - T--- will separately state a charge to all its customers in a particular geographic area equal to the *lowest cost* of transportation to any of its customers in that area or route. This "lowest amount" will be separately stated on *all* the customers' invoices for the particular geographic area regardless of whether the U--- - T---'s actual transportation charges for the entire geographic area may exceed the product of the separately stated charge for transportation and the number of customers in that geographic area. Since such charges would never exceed the U--- - T---'s actual cost of delivery to the customers for any of its sales, the U--- - T--- may deduct such separately stated charges provided the sale of its newspapers occurs prior to delivery and provided the U--- - T--- separately states its charges for transportation as outlined above.

Time of the Sale

Regulation 1628(b)(3)(D) states:

"Unless explicitly agreed that title is to pass at a prior time, the sale occurs at the time and place at which the retailer completes his performance with reference to the physical delivery of the property, even though a document of title is to be delivered at a different time or place. If the contract requires or authorizes the retailer to send the property to the purchaser but does not require him to deliver it at destination, the retailer completes his performance with reference to the physical delivery of the property at the time and place of shipment, e.g., delivery of the property to a carrier for delivery by the carrier to the purchaser; but if the contract expressly requires delivery at destination, including cases where one of the terms of the contract is F.O.B. place of destination, the retailer completes his performance with reference to the physical delivery of the property on tender to the purchaser there. When delivery of the property is by facilities of the retailer, title passes when the property is delivered to the purchaser at the destination unless there is an explicit written agreement executed prior to the delivery that title is to pass at some other time."

You state that the U--- - T--- contracts with several different independent contractors for the delivery of its newspapers throughout various different geographic areas. We understand that these persons are in fact independent contractors and not employees of the U--- - T---. (We further assume that the Employment Development Department regards these persons as independent contractors and not employees of the U--- - T---. If our assumption is incorrect, our opinion would be different.) Under these facts, the transportation of newspapers from the location where the newspapers are received by the independent contractors to the end customer is by facilities other than that of the U--- - T--- provided each independent carrier actually uses

its own (and not the *U--- - T---*'s) resources to deliver the newspapers. The remaining issue is when the sale of a newspaper to a customer takes place.

We understand that the documentation between the *U--- - T---* and its subscribers does not contain any language as to when title to the newspapers transfers. This means that title to the newspapers passes (and a sale occurs) at the time and place when the *U--- - T---* completes its performance with reference to physical delivery of the property. We further note that the invoice (and we assume any other documentation between the *U--- - T---* and its subscribers) does not contain express language (e.g., F.O.B. destination) requiring the *U--- - T---* to deliver the newspapers to a specific destination. We therefore conclude that the *U--- - T---* completes its responsibilities with respect to physical delivery of the newspapers when it transfers them to its independent carriers for delivery to its customers. Title passes to the customer at that time. The transportation by the independent carriers therefore occurs after the *U--- - T---*'s sale of the newspaper to its customer. Subject to the restrictions under the heading "Separate Statement of Transportation Costs" above, the *U--- - T---*'s separately stated charge for transportation on each customer's invoice for delivery by the independent carriers may therefore be excluded from its taxable gross receipts from the sale of newspapers as a separately stated charge for transportation not exceeding the cost of transportation to each respective customer. (See Rev. & Tax. Code §§ 6011(c)(7), 6012(c)(7).) Tax does, however, apply to the *U--- - T---*'s charges for transportation where the newspapers are delivered to the homes of subscribers by employees and/or facilities of your client.

Finally, you state that the *U--- - T---* will implement procedures for quantifying actual transportation costs so as to avoid unintended audit exposure. In that regard, you or the *U--- - T---* should contact Mr. Vic Anderson ((916) 324-2894) to discuss the particulars of those procedures prior to implementing the *U--- - T---*'s proposed program. This will reduce the risk of future disagreements between the *U--- - T---* and this Agency regarding the *U--- - T---*'s calculation of deductible delivery charges.

If you have any further questions, please write again.

Sincerely,

Warren L. Astleford
Senior Tax Counsel

WLA/cmm

cc: Mr. Vic Anderson (MIC:40)
--- District Administrator (--)