M e m o r a n d u m

220.0161

To: All District and Subdistrict Administrators

Date: November 19, 1976

From: Principal Tax Auditor

Subject: Mail Order Merchandise

As you know, there are a number of merchandising programs which involve major oil companies, major airlines, and others who enter into agreements with direct mail order firms for the sale of merchandise to customers of the oil companies, etc. Under these programs, brochures and other sales literature promoting various products is mailed to the customers of the oil company in an envelope with the customer's periodic credit card statement. Purchases of the advertised prodducts can usually be charged to the customer's oil company credit card. The merchandise is generally shipped to the purchaser by the mail order firm. The oil company receives compensation based on the volume of sales generated.

In the past, we may not have always been consistent as to who should be treated as the retailer of the goods sold under such arrangements. For the most part, we have held the direct mail order firm as the retailer responsible for the sales tax or the collection of the use tax. In some cases, this has resulted in problems when the mail order firm was located out of state and resisted our registration efforts.

This matter has been reviewed by the legal staff and it has been concluded that the oil company, airline, etc., should be held as the retailer provided that all of the literature and order forms lead the customer to believe that this is the party with whom he is contracting. If the literature identifies the mail order firm as the seller, that party must be held as the retailer.

In this latter situation, the oil company, etc., will be considered the agent or solicitor of the mail order firm if the solicitation is from a California location, and the mail order firm will be considered to be engaged in business in California. On the other hand, if the solicitation by the oil company, etc., is from a location outside of California, there will be insufficient participation within this State, and the mail order firm will not be considered as engaged in business in California. The fact that the solicitor or agent may be engaged in business in this State on its

own behalf is insufficient participation. Additionally, when a mail order firm contracts with two or more oil companies, etc., and it is disclosed as the seller, it can be held liable for collection of the tax on all of its sales in California notwithstanding the fact that the sole solicitation in this State relates to only one of the parties with whom the mail order firm has contracted.

The above guidelines will be followed in the future. It will be applied prospectively in those cases in which we have previously advised the firms involved to the contrary.

Attached is a list of mail order firms and their related clients which we understand are engaged in mail order activities. Earlier this year, S--- O--- C--- of C---, M--- O--- Corp., P--- P---, T--- W--- A---, F--- W--- I---, Inc., and M--- C--- were advised of our future policy. In order to encourage consistent compliance and minimize future problems, the Audit Evaluation and Planning Unit has recently written to the remainder of the mail order firms and their related clients appearing on the list. Copies of these letters have been sent to the districts of account. Should your district become aware of any additional mail order firms or clients engaged in such activities, you should write to the firms involved in your district explaining our future policy. A suggested form for such letters is attached. Copies of such future correspondence should be sent to the Audit Evaluation and Planning Unit and other districts which may be involved.

R. Nunes

RN:iw
Attach.

cc: Mr. Leslie Clark
Mr. J. D. Dotson
Mr. C. L. Cordell
Mr. W. D. Dunn
Mr. Donald Holmes
MR. H. K. Lackmann
Mr. R. J. Hyman
Mr. D. E. Carey
Mr. G. G. Walrath

M e m o r a n d u m

To: Mr. Glenn Bystrom July 10, 1996

From: Gary Jugum

Subject: Non-Attorney Opinions

I have reviewed Bob Nunes' memorandum of November 19, 1976 to all District and Subdistrict Administrators.

We are in agreement with his conclusion, as follows:

Mail Order Merchandise. There are a number of merchandising programs which involve major oil companies, major air lines and others who enter into agreements with direct mail order firms for the sale of merchandise to customers of the oil companies, etc. Under these programs, brochures and other sales literature promoting various products are mailed to the customers of the oil companies, etc., in an envelope with the customer's periodic credit card statement. Purchases of the advertised products can usually be charged to the customer's credit card. The merchandise is generally shipped to the purchaser by the mail order firm. The oil companies, etc., receive compensation based on the volume of sales generated.

It has been concluded that the oil companies, airlines, etc., should be held as the retailer provided all of the literature and order forms lead the customer to believe that this is the party with whom they are contracting. If the literature identifies the mail order firm as the seller, that party must be held as the retailer.

In the latter situation, the oil company, etc., will be considered the agent or solicitor of the mail order firm if the solicitation is from a California location, and the mail order firm will be considered to be engaged in business in California. On the other hand, if the solicitation by the oil company, etc., is from a location outside California, there will be insufficient participation within this State, and the mail order firm will not be considered as engaged in business in California.* The fact that the solicitor or agent may be engaged in business in this State on its own behalf is insufficient participation. Additionally, when a mail order firm contracts with two or more oil companies, etc., and it is disclosed as the seller, it can be held liable for collection of the tax on all of its sales in California notwithstanding the fact that the sole solicitation in this State relates to only one of the parties with whom the mail order firm has contracted. 11/19/76

*based on the oil company's actions out-of-state on its behalf. DHL 1/21/00

Gary Jugum
by MB