STATE OF CALIFORNIA

495.0668

STATE BOARD OF EQUALIZATION
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Fourth District, Los Angeles

GRAY DAVIS
Controller, Sacramento

BURTON W. OLIVER
Executive Director

April 29, 1992

Mr. --- ---, Controller
The S--- Co. – --- --- CA
XXX North --- Street
--- ---, California 9XXXX

Dear Mr. C---:

Re: SR -- XX XXXXXX-020

Enclosed is a copy of the Decision and Recommendation pertaining to the above-referenced petition for redetermination. I have recommended that the petition be granted in part and denied in part.

Please read the Decision and Recommendation carefully. If you accept the decision, no further action is necessary. If you disagree with the decision, you have the following two options:

REQUEST FOR REDETERMINATION. If you have new evidence and/or contentions not previously considered, you should file a Request for Reconsideration. Any such request must be sent to me within 30 days from the date of this letter, at the post office box listed above, with a copy to the Principal Tax Auditor at the same box number. No special form is required, but the request must clearly set forth any new contentions; and any new evidence must be attached.

BOARD HEARING. If you have no new evidence and/or contentions, but wish to have an oral hearing before the Board, a written request must be filed within 30 days from the date of this letter with Ms. Janice Masterton, Assistant to the Executive Director, at the above post office box.

The above options are also available to the Sales and Use Tax Department. If the Department requests reconsideration or an oral hearing before the Board, you will be notified and given a chance to respond.

If neither a request for Board hearing nor a Request for Reconsideration is received within 30 days from the date of this letter, the Decision and Recommendation will be presented to the Board for final consideration and action. Official notice of the Board's action will then be mailed to you.

Sincerely,

W. E. Burkett
Senior Staff Counsel

WEB:af

Enclosure

cc: Ms. Janice Masterton
Assistant to the Executive Director
(w/enclosure)

Mr. Glenn Bystrom
Principal Tax Auditor
(file attached)

--- --- – District Administrator
(w/enclosure)

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BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition for Redetermination Under the Sales and Use Tax Law of:	)	DECISION AND RECOMMENDATION
THE S--- CO. - --- --- CA.	)	No. SR -- XX XXXXXX-020
Petitioner	)	

The Appeals Conference in the above-referenced matter was held by Senior Staff Counsel W. E. Burkett on February 6, 1992 in --- ---, California.

Appearing for Petitioner: Mr. --- ---
Controller

Appearing for the
Sales and Use Tax Department Mr. --- ---
District Principal Auditor

Mr. --- ---
Senior Tax Auditor

Protested Items

The protested tax liability for the period October 1, 1985 through March 31, 1989 is measured by:

	Item	State, Local and County
B.	Ex-tax purchases of assets from out-of-state vendors, actual basis	$XXX,XXX
	Reaudit adjustment	($XXX,XXX)
	Per reaudit	
	Measure protested: 0	
	Petitioner protests interest only objecting to the period in which tax is asserted on certain purchases.	
C.	Ex-tax purchases of ink and paper becoming a part of a weekly shopping guide, The V-- S--, actual basis	$XXX,XXX

Summary

The petitioner is a corporation engaged in the business of publishing and distributing a daily newspaper. It also prints and distributes advertising material. A prior audit of petitioner was conducted through December of 1984.

The protest of Audit item B relates to purchases made from two separate vendors. The petitioner does not dispute the application of the California use tax but contends that the taxes on the purchases were determined in the wrong quarterly period resulting in the addition of excessive interest charges.

GHI, Inc.

The purchase from this vendor in the net amount of $XXX,XXX is listed on Audit schedule 12B-1, page 5 and included in the measure of tax deficiency determined for the first calendar quarter of 1987.

The petitioner contends that the items were returned to the vendor and reshipped and rebilled during the third calendar quarter of 1987. The representative of petitioner was requested to provide documents to support this contention.

On March 19, 1992, the petitioner's representative forwarded an internal memorandum from DEF Corporation No. 89385. This refers to items manufactured in 1989 and serviced by a representative of this vendor on December 6, 1989.

The position of the Sales and Use Tax Department (Department) on this item is set forth in a memorandum prepared by District Principal Auditor --- --- as follows:

> "The taxpayer was to provide documents regarding a purchase of $XXX,XXX from GHI Inc. set up in the first quarter of 1987. The documents were to have shown that the items were sent back to the manufacturer because they did not work; the items would have been reshipped at a later date, thus moving the incidence of tax forward.
>
> "The documents presented and attached hereto as Exhibit I are for an unrelated piece of equipment, purchased in 1989, returned in 1990, and purchased from DEF.
>
> "We are therefore unable to render an opinion on the GHI purchase in question."

JKL, Inc.

This purchase in the total amount of $XXX,XXX was listed on Audit schedule 12B-1, page 4 and included in the measure of tax deficiency for the second calendar quarter of 1987. It was reported on petitioner's sales and use tax return for the fourth calendar quarter of 1988 and credit was given for this reporting.

The petitioner's representative contends that the sale did not become subject to the tax until the complete installation was approved and that this occurred in the fourth quarter of 1988.

The following is a listing of the progress payments made in payment of the purchase price together with the dates in which the progress payments were made:

Check #3156	June 12, 1987	$XXX,XXX
		$XXX,XXX
Check #3325	June 20, 1987	$XXX,XXX
Check #5212	January 12, 1988	$XXX,XXX
Check #8521	November 12, 1988	$XXX,XXX

The position of the Department with respect to this item is set forth in the above-described memorandum of March 24, 1992 as follows:

> "The taxpayer was to provide documents regarding staged deliveries and progress payments which would show items were shipped in stages, thus moving forward the incidence(s) of use tax from the second quarter 1987 date used in the audit. The taxpayer contends the contract called for payments on approval.
>
> "The staff has yet to review a copy of the purchase contract. However, it has been established that progress payments were made. Additionally, we have reviewed the taxpayer's internal document entitled 'Capital Purchase Request Checklist'.
>
> "This document shows progress payments AND acceptance at 80% of payments. Thus, it can be established that the merchandise was operations and accepted when 80% was paid. This occurred on 1-12-88. Final payment was not made until 11-12-88, even though the equipment was operational in January.
>
> "Thus, it is our opinion, after reviewing these latest documents, that the incidence of tax on the measure of $XXX,XXX should be moved forward from 2-87 to 1-88. See Exhibits II and III."

Protested item C is made up of the purchase price of paper and ink used in the printing of the V-- S--, a weekly shopping guide prepared for distribution without charge to persons who do not receive the daily newspaper published by petitioner. One purpose of the weekly is to obtain total market coverage for certain advertising clients.

Petitioner initially protested the application of the tax on the grounds that the V-- S-- was an exempt newspaper. Its representative now concedes that this contention is without merit. It is submitted, however, that the V-- S-- meets all the requirements for exemption as printed sales messages exempt under the provisions of Revenue and Taxation Code Section 6379.5

The Department contends that the V-- S-- does not qualify as a specially ordered printed advertising circular because it was not printed to the special order of each customer. It also contended that about 10 percent was not mailed or delivered by the petitioner. Finally, that the exemption was not applicable for all periods prior to January 1, 1987 (measure of tax - $XXX,XXX).

Analysis and Conclusions

Item B

The petitioner is not entitled to an adjustment for the purchase from GHI, Inc. in the absence of evidence to prove that the taxes were determined in the wrong period. The information provided appears to relate to a purchase from another vendor for another period and is not at issue in this petition.

The claim for adjustment of the JKL, Inc. purchase is premised on the claim that the taxable event, passage of title, did not occur until such time as the property was installed and approved by the petitioner. The agreement of the parties did not expressly provide for the point of passage of title. We are therefore required to determine the point of passage of title by reference to general law provisions.

California Commercial Code Section 2401(2) provides that in the absence of an explicit agreement, title passes to the purchaser at the time the seller completes performance with reference to physical delivery of the property. The buyer's right to acceptance of goods may, in the absence of a contrary agreement, operate as a condition precedent to the buyer's obligation to pay the price. (See California Commercial Code Section 6207(1), official comment No. 1.) It does not, however, preclude the passage of title on the conditions stated in Section 6401(2) as outlined above. Title to goods is revested in the seller if the buyer rejects the goods. (See California Commercial Code Section 2401(4).)

In this matter it appears that there was a series of progress payments and some partial deliveries. In any event the evidence indicates that delivery was complete and the equipment operational on January 12, 1988. Accordingly, in the absence of evidence of prior

delivery, title should be regarded as passing to the petitioner at that time. The measure of tax deficiency for this item should be moved from the second calendar quarter 1987 to the first calendar quarter of 1988. We understand that credit has previously been computed for the overpayment made in the fourth calendar quarter of 1988.

Item C

The petitioner seeks exemption for the paper and ink utilized in printing the V-- S-- under the provisions of Revenue and Taxation Code Section 6379.5 which reads as follows:

> "6379.5 Printed sales messages for goods and services printed to the special order of the purchaser. There are exempted from the taxes imposed by this part the gross receipts from the sale of, and the storage, use, or other consumption in this state of catalogs, letters, circulars, brochures, and pamphlets consisting substantially of printed sales messages for goods and services printed to the special order of the purchaser and mailed or delivered by the seller, the seller's agent, or a mailing house, acting as the agent for the purchaser, through the United States Postal Service or by common carrier to any other person at no cost to that person who becomes the owner thereof."

Section 6379.5 provides an exemption from the taxation. In our interpretation of the scope of the exemption statute, we are obliged to follow well-established rules. Statutes granting exemption from taxation must be reasonably, but nevertheless strictly, construed against the taxpayer. (Santa Fe Transp. v. State Board of Equal., 51, Cal.2d 531, 539 [334 P.2d 907]; Fellowship of Humanity v. County of Alameda, 153 Cal.App.2d 673, 680 [315 P.2d 394].) The taxpayer has the burden of showing that he clearly comes within the exemption. (Fredericka Home v. County of San Diego, 35 Cal.2d 789, 792 [221 P.2d 31, 15 A.L.R.2d 1045].) An exemption will not be inferred from doubtful statutory language (Estate of Simpson, 43 Cal.2d 594, 597 [275 P.2d 467, 47 A.L.R.2d 991]); the statute must be construed liberally in favor of the taxing authority, and strictly against the claimed exemption (Estate of Steehler, 195 Cal. 386, 396 [233 P. 972]). And it is held that "settled principles of statutory construction require that any doubt be resolved against the right to the exemption…." (Sutter Hospital v. City of Sacramento, 39 Cal.2d 33, 39 [244 P.2d 390]; San Francisco Boys' Club, Inc. v. County of Mendocino, 254 Cal.App.2d 548, 557 [62 Cal.Rptr. 294].)

While the petitioner's contract was to produce and distribute advertisements for customers, we do not find anything to warrant a finding that the V-- S-- was printed to the special order of a purchaser. This, in our view contemplates that the particular item be styled, printed and distributed for one person. The ads placed in the V-- S-- are styled and printed by the petitioner for a host of advertising purchased by many customers. Additionally, the statute contemplates a sale and a purchase of tangible personal property. In this case the

customers do not acquire any interest in the printed material but merely the right to have their ad displayed in the product produced and distributed by the petitioner.

We do not find any support for the interpretation sought in the board's regulation or in the legislative history attending the enactment of this exemption section. In summary it is our conclusion that the petitioner's activity does not fit within the framework of the exemption statute.

Recommendation

It is recommended that the tax deficiency for the JKL, Inc. purchase be adjusted as outlined herein. In all other respects, it is recommended that the taxes be redetermined as computed by the reaudit dated July 13, 1990.

	4-9-92
W. E. BURKETT, SENIOR STAFF COUNSEL	DATE