



STATE BOARD OF EQUALIZATION

September 22, 1964

G---, D--- & C---
Lawyers
XXX --- --- Street
--- ---, California XXXXX

Attention: Mr. J--- M. M---

-- A - X-XXXXX
C--- R---
Company

Gentlemen:

Your letter of June 5, 1964, requested that we withhold submitting our report until you have been able to contact the heirs of the C--- R--- Company. Since two months have elapsed, we assume that you have not been able to receive other information from them. At any rate, the submission of our hearing report does not cut off your right to submit other information, and we therefore have proceeded with it. This letter is to inform you of our recommendation to the board in the matter of the above named taxpayer's petition for redetermination of use tax on the Cottrell Press. We regret that we must recommend that the petitioner be denied.

As you know, § 6201 of the California Sales and Use Tax Law imposes the use tax upon the storage, use, or other consumption of tangible personal property purchased from a retailer for use in California. Sections 6008 and 6009 exclude from "storage" and "use" any storage and use for purposes of resale. Our auditors first became aware of the press in 1958, and we have a letter dated February 5, 1958, from our Santa Ana office who was then conducting an audit of Mr. C--- M. B---, the president of the taxpayer. This letter notes that the press is subject to tax unless it is being held for resale. We believe a further investigation was conducted at this time although no record of it appears.

At any rate, a thorough investigation was made at the time of an audit of the taxpayer in 1960. Auditor John K. Gee reported on June 20, 1960, that he spoke with Mr. S--- G---, manager of the C--- R--- Company and that he told him that the press was still being held for resale. The auditor made a physical investigation of the press and noted it was stored in a warehouse on East XXth Street and was not electrically wired or bolted to the floor. It should be noted that if the press was subject to the tax upon being brought into California, a timely determination could have been issued in June of 1960. The reason it was not issued was the taxpayer's representations to our auditors that the press was being held for resale. Again in 1961 upon a close out audit, an investigation was made, and the same situation was found to exist. Mr. Gee reported at this time, "The new owners [the T--- M--- - T--- Company] recognize the problem of tax liability when the

first use is made.” On this basis, we conclude that the first use other than storage and use for resale was the transfer of the press to the T--- M--- - T--- Company through the sale of stock.

Your principal argument is the statute of limitations and specifically that the press could not have been held for resale in the regular course of business of the taxpayer. The taxpayer’s course of business was printing. We believe it is perfectly proper for a printer to purchase a press for resale. If it was not previously in his course to do so, there is no reason why he cannot broaden his business to include such a transaction. This is even clearer when the circumstances of the present acquisition are reviewed. The taxpayer purchased the press at a considerable saving from a bankruptcy even though it apparently did not intend to use it at the time. Subsequent actions demonstrate that it hoped to sell the press at a profit. In such circumstances, the Board of Equalization would not try to impose the use tax as long as no use other than holding it for resale was made.

We do not believe the case Market Street Railway Co. v. State Board of Equalization, 137 Cal. App. 2d 87 [290 P.2d 20] cited in your letter of June 5, 1964, is controlling. In that case, the court merely commented on “the course of business” in Bigsby v. Johnson (1941), 18 Cal. 2d 860 [118 P.2d 289]. This was not an attempt to define the sections in issue here. The court merely was answering the contention of the taxpayer that a certain sale was not made in its regular course of business. The court in Bigsby held that whether a sale was made in the retailer’s regular course of business did not matter because the tax applied in any event. The court was assuming for purposes of argument that the sale was not in the regular course of business and saying that the tax applied anyway.

Your letter also mentions that we do not have any evidence overcoming § 6246. To the contrary, we have reports of our auditors made after interviews with the taxpayer in 1960 and 1961. We also have their statements at the preliminary hearing that they were told that the press was being held for resale. You also mention that the period of the assessment is erroneous because the petitioner formed an intent to sell their stock in the early part of 1960. The tax, however, applies to overt acts and not to the formation of intent.

We would again like to call to your attention that the only reason the tax was not imposed in June of 1960 was the taxpayer’s insistence that the press was being held for resale. A determination made at that time would have covered the period when the press was first brought into California. The sales tax is a self-assessed tax and depends upon taxpayer’s cooperation.

Our auditors were most cooperative in allowing the press to be held for resale for a period of some four years. They have documented this action by reports of conversations with the taxpayer’s representatives. In these circumstances, we feel the taxpayer should not be allowed to take a position which contradicts its earlier one. Indeed, we think all the elements of estoppel in paid are present, which would prevent the taxpayer’s assertion of a defense based on the statute of limitations.

You are entitled to a board hearing on this matter. If you disagree with our conclusions and desire a hearing, please let us know within 30 days. If you still wish to contact the heirs of the

previous owner, we, of course, can extend this time. If you do not desire such a hearing, please sign and return two of the enclosed waiver of board hearing forms. The third copy is for your files.

Very truly yours,

John H. Knowles
Associate Tax Counsel

JHK:lar
Enclosures

cc: Hollywood – Subdistrict Administrator

Attached are two copies of hearing officer's report dated September 3, 1964, which has been approved. This hearing was held in Hollywood on May 20, 1964.