

## AS TO QUESTION 2:

The answer to question 1, *supra*, requires that question 2 be answered in the negative.

## AS TO QUESTION 3:

Section 949.11, F. S., provides that when a parole is temporarily revoked pursuant to §949.10, F. S., the parolee "shall be given a hearing pursuant to §947.23" and I think that the following provisions of said §947.23 should be followed when a hearing is held pursuant to §949.11:

Within a reasonable time thereafter the commission shall make findings upon such charge of parole violation and shall enter an order determining whether said charges of parole violation have been sustained. The commission shall in and by said order revoke said parole and return said person to prison to serve the sentence theretofore imposed upon him, or reinstate the original order of parole, or shall enter such other order as it may deem proper.

Therefore, it is my opinion that the commission should make an order reinstating the parolee to parole supervision under the circumstances recited in question 2.

073-61—March 14, 1973

## TAXATION

USE TAX LIABILITY OF PROMOTIONAL MATERIAL MAILED  
TO FLORIDA RESIDENTS FROM OUTSIDE STATE

To: J. Ed Straughn, Executive Director, Department of Revenue, Tallahassee

Prepared by: Winifred L. Wentworth, Assistant Attorney General and James D. Whisenand, Legal Intern

## STATEMENT OF FACTS:

The mail advertising material is sent by a mail-order record club *without charge* through the United States mail, postage prepaid, from mailing points outside the State of Florida. There is no personal sales activity either by employees or independent sales representatives of the club in the State of Florida. The club is a division of a corporation, which is engaged in business activities in Florida, and Florida does have sufficient jurisdiction or nexus over the corporation to warrant its registration as an out-of-state dealer under Ch. 212, F. S. In fact, the corporation is and has been registered as a dealer for several years.

## QUESTION:

Is there any liability for use tax under Ch. 212, F. S., for mailing of advertising or promotional materials in the foregoing circumstances?

## SUMMARY:

Remittance of use tax pursuant to Ch. 212, F. S., is not compelled when a sender deposits advertising or promotional material in the mail out of state for delivery without charge to Florida residents and retains no effective control, possession, or ownership of the material.

The question may in my opinion be answered in the negative. According to the facts submitted, the record club is a division of a parent corporation subject to registration as a Florida out-of-state dealer under Ch. 212, F. S., and solicits by direct mail and newspaper advertising the sale of phonograph records to Florida

residents. The record club's sole contact with Florida, other than its corporate organization, is through such advertising campaigns. Advertising materials destined for Florida residents are, as above stated, deposited in the United States mail system outside the state.

Florida imposes a use tax on the cost of tangible personal property imported into the state for use, consumption, distribution, or storage. Section 212.06, F. S. Although the corporate division in question may for jurisdictional purposes have sufficient contact with the state, through the unitary aspects of its corporate structure, to be required to remit taxes when due, there appears to be authority in recent decisions for considering the specific act in question to be nontaxable, based apparently on the absence of any use of the materials in Florida by or in control of the club or its agents, and the gratuitous character of such transactions so far as the recipients are concerned. Compare *Hoffman-LaRoche, Inc. v. Porterfield*, 243 N.E.2d 72 (Ohio 1968), *Rabren v. Radio Corporation of America*, 252 So.2d 55 (Ala. 1971).

Pursuant to Title 39, United States Code of Federal Regulations, a sender maintains a right of recall over mail and relinquishes legal control, possession, and ownership of the material upon *delivery* to the recipient. [See] 39 C.F.R. §153.5(a), (b) and (c). The opinions above cited, however, rely upon the expense of recall, formal application required for each piece of mail, worthlessness of any returned promotional material, and the unlikelihood of recall as a rationale for concluding that the corporate sender for all practical purposes divests itself of ownership, possession, and control at the time of mailing out of state. *Hoffman-LaRoche, Inc. v. Porterfield*, *supra*, at 74.

In the absence of a conflicting decision or any consideration of the issue by the Florida courts, you may in my opinion conclude against application of the tax based on a finding that the corporate sender under these particular circumstances does divest itself of control of the promotional materials out of state upon deposit in the mail for delivery to the respective Florida resident.

073-62—March 15, 1973

#### WORKMEN'S COMPENSATION

#### ADJUSTMENTS DUE TO PENSION OR OTHER BENEFITS RECEIVED BY PUBLIC EMPLOYEES

To: L. K. Ireland, Jr., Secretary, Department of Administration, Tallahassee

Prepared by: Halley B. Lewis, Assistant Attorney General

#### QUESTIONS:

1. Are the provisions of §440.09(4), F. S. 1971,\* relating to adjustments in pension or benefit funds to reflect moneys received under workmen's compensation applicable to benefits paid pursuant to state-administered retirement laws?
2. If §440.09(4) does apply, does it apply to all provisions of all state-administered pension and retirement acts and if not, which provisions are excepted?
3. If retirement benefits must be adjusted to workmen's compensation benefits awarded under Ch. 440, F. S., what is the latest date at which such adjustment must begin?

\*Editor's note: Note that §440.09(4) was subsequently repealed by §2, Ch. 73-127.