

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

GEORGE DEUKMEJIAN
Attorney General

OPINION	:	No. 79-524
	:	
of	:	
	:	January 31, 1980
GEORGE DEUKMEJIAN	:	
Attorney General	:	
	:	
Clayton P. Roche	:	
Deputy Attorney General	:	
	:	

SUBJECT: SALES AND USE TAX LAW APPLIED TO EDUCATIONAL MATERIALS—Although no specific exemption is provided in the law for church-related schools from the payment of sales or use tax, proposed subdivision (g) to Regulation 1506 of the State Board of Equalization could not be constitutionally applied to church-related schools with respect to the imposition of either a sales tax or a use tax on items “sold” by the school to its pupils.

The Honorable H.L. “Bill” Richardson, Senator, Twenty-Fifth District, has requested an opinion on the following questions:

1. Would proposed subdivision (g) to Regulation 1506 of the State Board of Equalization, which seeks to clarify and make specific the application of the Sales and Use Tax Law to educational materials furnished to students by institutions, organizations, or persons providing instructional services, be constitutional as applied to church-related schools?

2. Would church-related schools be entitled to an exemption from the requirements of proposed subdivision (g) to Regulation 1506 of the State Board of Equalization?

CONCLUSIONS

1 Proposed subdivision (g) to Regulations 1506 of the State Board of Equalization could not be constitutionally applied to church-related schools with respect to the imposition of either a sales tax or a use tax on items “sold” by the school to its pupils.

2. No specific exemption is provided in the law for church-related schools from the payment of sales or use tax, or the collection of the latter from the purchaser. The only potentially applicable exemption is section 6352 of the Revenue and Taxation Code, which generally exempts from the imposition of sales or use tax transactions which may not be taxed under the state or federal constitutions.

ANALYSIS

1. Proposed Subdivision (g) to Regulation 1506

The State Board of Equalization is considering adding a subdivision (8) to its Regulation 1506,¹ which presently defines “Miscellaneous Service Enterprises,” to clarify and make specific [the] application of the Sales and Use Tax Law to transactions in which educational materials are furnished to students by institutions, organizations, or persons providing instructional services.”² On April 13, 1979, the State Board of Equalization distributed the proposed regulation to interested parties. [T]he proposed changes were distributed for public comment only and have not been noticed for hearing or adoption. Whether regulations in such form will be adopted or whether any regulation on this subject matter will be adopted is uncertain at this time.”³

Proposed subdivision (g) to Regulation 1506 (hereinafter sometimes just “subdivision (g)”) defines “school” as “an institution or place for instruction or education which provides educational materials in connection with significant instructional services” and “includes public and private schools, including schools operated for profit, correspondence schools and instruction given by means of radio and television.”

¹ See presently Cal. Admin. Code, tit. 18, § 1506.

² Letter from the State Board of Equalization to this office, dated May 25, 1979.

³ *Ibid.* As of this writing, we are informed by the Board’s legal department that proposed subdivision (g) may be revised. We, however, render our opinion on the original version, as requested.

Subdivision (g) then sets forth a number of situations where a school is to be deemed a “retailer” as to its students, and a number of other situations where the school itself is to be deemed the consumer, thus making its supplier the “retailer.” The sales or use “tax applies”⁴ accordingly, with its attendant duties upon the “retailer” to pay or collect the tax as appropriate. For example, a private school which provides its students with textbooks as part of the tuition charged, and which need not be returned, would be a “retailer” as to such textbooks.⁵ However, as to certain “teaching aids” and “consumable supplies and materials” used in the classroom, the schools themselves would be deemed to be the consumers.⁶ Other provisions are set forth in the proposed regulations as to the application of the sales and use tax, but the foregoing are sufficient for the purpose of our analysis herein. The remainder of subdivision (g) is devoted to the mechanics of determining the “measure of the tax” and “cost price.” It is thus seen that if subdivision (g) were to be adopted by the State Board of Equalization the following applications of the sales and use tax are possibilities as to a private school such as a church-related school:

1. The school will be required to pay sales tax on the “gross receipts” of textbooks and other educational materials “sold” to its students, whether the school makes a direct

⁴ See generally, Cal. Admin. Code, tit. 18, § 1500(c) wherein the term “tax applies” is explained in the basic framework of the Sales and Use Tax Law. Thus, § 1500 points out, *inter alia*, that the term “tax applies” means that either a sales or use tax is imposed, both measured on the “gross receipts” from the sale, that anyone who is a “retailer” must comply with all requirements imposed upon retailers, including the payment of sales tax to the state, or the collection of use tax on behalf of the state; and that whenever the term “consumer” is found in the regulations of the Board, that it is understood that sales to such persons are retail sales as to which either the sales tax or the use tax is to apply.

⁵ Subdivision (g) 2 (A) provides:

“(A) Schools which make a charge to students are retailers of learning aids, such as texts, books, kits, tools, rest equipment, cassette tapes, and other similar educational materials title to which is transferred to students, whether or not a separate charge is made for such materials. Unless otherwise exempt, tax applies to the sale price of learning aids sold by school.”

⁶ Subdivision (g) (2) (B) and (C) provides.

“(B) Schools are consumers of teaching aids, such as handouts, folders, and other similar educational materials, which are utilized by instructors in lesson presentation, if no separate charge is made for such property. Schools are retailers of such teaching aids if a separate charge is made to students; and unless otherwise exempt, tax applies to such charges.

“(C) ‘Materials fees,’ which are charges for consumable supplies and materials used in the classroom, are not subject in tax. Schools are consumers of such supplies and materials. Tax applies to the sale price of such supplies and materials sold to schools.”

charge therefor or includes such “charge” in its tuition.

2. The school will be required to collect a use tax from its students for such textbooks and other educational materials if it is determined that a sales tax may not constitutionally be imposed upon church-related schools, unless (1) a use tax also may not be constitutionally imposed on the transactions, or unless the school may not constitutionally be required to collect the tax for the state.⁷

2. The Power of the Board of Equalization To Enact Proposed Subdivision (g) Should Private Schools Be Considered Retailers or Consumers of Educational Materials?

A threshold issue which is raised by proposed subdivision (g) is whether private schools which provide instructional services should be considered retailers or consumers of the educational materials such as textbooks which they provide to their students. At first blush it may appear surprising to see educational institutions classified as “retailers,” since they are not in the business of selling textbooks, etc., in the conventional sense. It could be argued that they should be considered consumers of such materials, since these are supplied to students, at least in the usual situation, as merely incidental to providing educational services. Accordingly, since proposed subdivision (g) declares that educational institutions shall be considered as “retailers in certain specified instances, the threshold issue is raised as to the power of the Board of Equalization to even enact such a regulation. Would such a regulation be valid?

In the relatively recent case of *Culligan Water Conditioning v. State Board of Equalization* (1976) 17 Cal. 3d 86, 93 fn. 4, the California Supreme Court set forth “[t]he applicable standard of review to be whether the regulations was arbitrary, capricious, or had no reasonable or rational basis.” Or as more elaborately explained by the Court of Appeal in *Action Trailer Sales, Inc. v. State Board of Equalization* (1975) 54 Cal. App. 3d 125, 132–133 in a recent case in which it upheld a regulation of the board:

“As was said in *Henry’s Restaurants of Pomona, Inc. v. State Bd. of Equalization*, 39 Cal. App. 3d 1009, at page 1020 [106 Cal. Rptr. 867]: The Legislature has delegated to the Board the duty of enforcing the sales tax law, and the authority to prescribe and adopt rules and regulations. (Rev. & Tax. Code, §§ 7051, 7052.) [¶] Such delegation is proper even though it confers some degree of discretion on the administrative body. So long as that

⁷ It is our understanding from consultation with the Board of Equalization’s legal staff that proposed subdivision (g) is in no way intended to set forth rules with respect to the initial retailer who supplies the church-related schools (or other schools) with educational materials or other supplies and equipment. We thus do not discuss the lag with respect therein.

discretion is executed within the scope of the controlling statute, it will not be disturbed by the courts. [Citations.] It is true that the validity of an administrative ruling such as California Administration Code, title 18, section 1660 depends upon whether it is ‘consistent and not in conflict with the statute [upon which it is based] and reasonably necessary to effectuate the purpose of the statute.’ (Gov. Code, § X 1374.) It is also true that the final responsibility for proper interpretation of a law rests with the courts. (*Whitcomb Hotel, Inc. v. Cal. Emp. Com.*, 24 Cal. 2d 753, 757 [151 P.2d 233, 155 A.L.R. 405].) However, as was said in *Mission Pak Co. v. State Bd. of Equalization*, 23 Cal. App. 3d 120, at page 125 [100 Cal. Rptr. 69]: ‘. . . in making this determination (with respect to the proper interpretation of a statute and the validity of an administrative ruling) “the construction of a statute by officials charged with its administration . . . is entitled to great weight” (*Morris v. Williams*, 67 Cal. 2d 733, 748 [63 Cal. App. 689, 433 P.2d 697]), and “if there appears to be some reasonable basis for the classification, a court will not substitute its judgment for that of the administrative body” (*Rible v. Hughes*, 24 Cal. 2d 437, 445 [150 P.2d 455, 154 A.L.R. 137]). “[T]he court should not substitute its judgment for that of an administrative agency which acts in a quasi-legislative capacity. [A court] will not, therefore, superimpose its own policy judgment upon the agency in the absence of an arbitrary and capricious decision” (*Pitts v. Perluss*, 58 Cal. 2d 824, 832 [27 Cal. Rptr. 19, 377 P.2d 83]; see also *Ralphs Grocery Co. v. Reimel* 69 Cal. 2d 172, 179 [70 Cal. Rptr. 407, 444 P.2d 79].) “If reasonable minds may well be divided as to the wisdom of an administrative board’s action, its action is conclusive’ (*Rible v. Hughes*, *supra*, at p. 445.)’ In addition, it has been said that an administrative ruling ‘comes before the court with a presumption of correctness and regularity, which places the burden of demonstrating invalidity upon the assailant [fn. Omitted].’ (*California Assn. of Nursing Homes etc., Inc. v. Williams*, 4 Cal App. 3d 800, 810 (84 Cal. Rptr. 590, 85 Cal. Rptr. 735].)”

An analysis of the pertinent statutes and case law demonstrates that the description of a school or other educational institution as the “retailer” of textbooks which it “sells” to its students is consistent with and not in conflict with the Sales and Use Tax Law, the basic requirement to sustain the validity of proposed subdivision (g).

Section 6051 of the Revenue and Taxation Code⁸ imposes a tax “[f]or the privilege of selling tangible personal property at retail . . . upon all retailers.” “Thus section 6051 proclaims two distinct conditions for sales tax liability: (1) the vendor must be a ‘retailer’

⁸ All section references are to the Revenue and Taxation Code unless otherwise indicated.

within the meaning of the act; and (2) the property must be sold ‘at retail.’” (*Davis Wire Corp. v. State Bd. of Equalization* (1976) 17 Cal. 3d 761, 765.)

“‘Sale’ means and includes: (a) Any transfer of title . . . conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. . . .” (§ 6006.) “The fact that the billing rendered to the customer does not show separately the sales price . . . is immaterial, for the form of the billing could in no way affect the essential character of the transaction if it was in fact a sale of tangible personal property within the meaning of the act.” (*Kamp v. Johnson* (1940) 15 Cal. 2d 187, 190.)

“‘Seller’ includes every person engaged in the business of selling tangible personal property of a kind the gross receipts from the retail sale of which are required to be included in the measure of the sales tax.” (§ 6014) “‘Business’ includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit, or advantage, either direct or indirect.” (§ 6013) “‘Retailer’ includes: (a) Every seller who makes any retail sale or sales of tangible personal property . . . [and] (b) Every person engaged in the business of making sales for storage, use or other consumption. . . .” (§ 6015) “Every individual, firm, copartnership, joint venture, trust, syndicate, association or corporation making more than two retail sales of tangible personal property during any 12-month . . . period shall be considered a retailer . . . in . . . [such capacity].” (§ 6019.)

It is clear that to be a “retailer” the particular individual need not be otherwise engaged in any commercial activity. The primary activity maybe the rendering of services such as provided by a railroad, a hotel, a Street railway, or a school. (See generally, *N.W. Pac. R.R. v. St. Bd. of Equalization* (1943) 21 Cal. 2d 524, 529; *Hotel Del Coronado Corp. v. State Board of Equalization* (1971) 15 Cal. App. 3d 612, 618–620; *Market St. Ry. Co. v. Cal. St. Bd. Equal.* (1955) 137 Cal. App. 2d 87, 94–96; *L.A., etc., Sch. Dist. v. St. Bd. of Equalization* (1945) 71 Cal. App. 2d 486.) As stated in the *Hotel Del Coronado* case, *supra*, at pages 619–620:

“It is not required that the principal activity of the taxpayer shall involve making retail sales of tangible personal property, if, in fact, the retail sales of tangible personal property made by the taxpayer are sufficient in number, scope and character to make the taxpayer a retailer under the provisions of the Revenue and Taxation Code.”

Thus, it is the fact of making more than an “occasional sale” which renders an individual or entity a “seller” or “retailer” no matter what his or its principal activity may be. (See *Davis Wire Corp. v. State Bd. of Equalization*, *supra*, 17 Cal. 3d at pp. 766–767).

We now reach the second basic factor for imposition of sales tax pursuant to section 6051, that is, that the sale must not only be made by a “retailer,” but must be made “at retail.” Section 6007 provides that “[a] ‘retail sale’ or ‘sale at retail’ means a sale for any purpose other than resale in the regular course of business in the form of tangible personal property. . . .” The phrase “in the regular course of business” modifies the word resale, and hence refers to the business of the purchaser and not to the business of the seller. (*Market St. Ry. Co. v. Cal. St. Bd. of Equal.*, *supra*, 137 Cal. App. 2d at pp. 93–94). Additionally, any sale made at retail need not be made with any intent to make a profit. (*Id.* at p. 95.)

Accordingly, under the foregoing definitions and legal principles it appears reasonable to conclude that a school or other educational institution which decides to sell its textbooks and other nonconsumable educational materials to its students is a “retailer” making sales at “retail,” thus satisfying the two criteria for imposition of the sales tax. The fact that the school or institution is not in the business of selling textbooks is immaterial. The fact that a separate charge may not be made is also immaterial.

There is, however, authority from which one could still argue that the school and not the students should be considered the consumers of the textbooks and other educational materials at issue herein, with the school’s supplier being the “retailer” and hence liable for the sales tax thereon. For example, in *Culligan Water Conditioning v. State Bd. of Equalization*, *supra*, 17 Cal. 3d at page 96, the Court stated with reference to whether the purchaser purchased a water softening service or the water softening element:

“The Board has set forth its general standard for classifying transactions involving the transfer of tangible personal property as follows: ‘The basic distinction in determining whether a particular transaction involves a sale of tangible personal property or the transfer of tangible personal property incidental to the performance of a service is one of the true objects of the contract; that is, *is the real object sought by the buyer the service per se or the property produced by the service . . .*’ (Cal. Admin. Code, tit. 18 § 1501, italics added.) Service is defined as ‘performance of labor for the benefit of another.’ (Webster’s New Internat. Dict. (2d. Ed. unabridged).) Essentially the crucial point of inquiry is whether the true object of the transaction is the finished article or the performance of labor. (*Albers v. State Board of Equalization* (1965) 237 Cal. App. 2d 494, 497 [47 Cal. Rptr. 69].)

“We think it quite clear that the true object of the water conditioning contract is the furnishing of the exchange unit which, by itself and without requiring any performance of human labor, softens the water. It is true that

human labor or service is involved in regenerating the nonexchange material, but realistically viewed the customer's purpose in entering into the contract is to obtain not personal services, but a properly generated and efficiently functioning water conditioning unit. . . ."⁹

Or as stated by the Court of Appeal in *King v. State Bd. of Equalization* (1972) [22 Cal. App. 3d 1006, 1012:

“The California sales tax law is a privilege tax measured by retailers' gross receipts from the sale of tangible personal property. (§ 6051.) Sales tax legislation of this kind excludes transactions which are primarily sales of services. (Due, *State Sales Tax Administration* (1963) p. 162; Oster, *State Retail Sales Taxation* (1957) pp. 6–7, 80, 86–91; Cohen, *The Taxable Transaction in Consumers' Sales* (1941) 8 Law & Contemp. Prob. 530, 530–537; Davis, *op. cit.*, 27 Ohio St.L.J. at pp. 453–454; Wahrhaftig, *Meaning of Retail Sales and Storage, Use or Other Consumption*, 8 Law & Contemp. Prob. 542, 555–557.) Where a service-supplying entrepreneur utilizes incidental, tangible material in his work, there is a tendency to regard him as a consumer and the sale to him as a retail sale. (Cohen, *op. cit.*, p. 531, Davis, *op. cit.*, p. 453. Wahrhaftig, *op. cit.*, p. 553.) Many transactions involve mixtures of materials and services, causing much difficulty in classifying them as taxable or excluded.”

Proposed subdivision (g) is intended to clarify and make certain the application of the Sales and Use-Tax Law to educational institutions, and the educational materials they

⁹ Cal. Admin. Code, tit. 18, section 1501 provides:

“Service Enterprises Generally. Persons engaged in the business of rendering service are consumers, not retailers of the tangible personal property which they use incidentally in rendering the service. Tax, accordingly, applies to the sale of the property to them. If in addition to rendering service they regularly sell tangible personal property to consumers, they are retailers with respect to such sales and they must obtain permits, file returns and remit tax measured by such sales. If their purchases of tangible personal property are predominantly for consumption rather than for resale, they should not give resale certificates covering such purchases but should follow the procedure prescribed in the regulation governing ‘Tax-paid Purchases Resold.’

“The basic distinction in determining whether a particular transaction involves a sale of tangible property or the transfer of tangible personal property incidental to the performance of a service is one of the true objects of the contract; that is, it the real object sought by the buyer, the service per se or the property produced by the service. If the true object of the contract is the service per se, the transaction is not subject to tax even though some tangible personal property is transferred. . . .”

“sell” to their students. In our view, reasonable minds can differ with respect to whether the school or the student should be considered the consumer of textbooks and other similar nonconsumable educational materials. This is patent when one considers the fact that currently some church-related schools at the secondary school level actually operate book stores either by themselves or through concessionaires where they sell textbooks and other materials. In short, some operate retail outlets for such materials, presently have seller permits to do so, and pay sales tax on these sales.

Considering the foregoing and (1) the deference the courts give to the administrative construction of the Sales and Use Tax Law by the Board of Equalization; (2) the fact that proposed subdivision (g) is essentially designed to clarify or supplement the Board’s own rules (Rule 1501, *supra*); and (3) the fact that proposed statutory subdivision (g) is in harmony with the statutory law, we conclude that proposed subdivision (g) falls within the board’s power to adopt. In short, we conclude that if it were adopted, it would be a valid regulation enacted pursuant to the discretion the Legislature has vested in the board. As noted by the Court in *Gen. Elec. Co. v. State Bd. of Equalization* (1952)111 Cal. App. 2d 180, 188:

“ . . . Close questions are bound to occur. The Legislature has seen fit to leave the determination of these questions to the state board under its rulemaking power. . . .”

3. May A Sales Tax Be Imposed?

As noted above, the Sales and Use Tax Law imposes upon all retailers a sales tax “[f]or the privilege of selling tangible personal property at retail. (§ 6051.)”¹⁰ The California Constitution contains no specific exemptions from the payment of sales or use tax. The law itself, however, contains a number of exemptions (§§ 6351–6376, general exemptions; §§ 6381–6396, exemptions from sales tax; §§ 6401–6422.1 exemptions from use tax). None of these specific exemptions would exempt educational institutions generally, or church-related schools specifically from sales tax liability.¹¹ Section 6352, however, does contain a general exemption from both the sales tax and the use tax where “this State is prohibited from [so] taxing under the Constitution or laws of the United States or under the Constitution of this State.”

¹⁰ See also section 7200 *et seq.*, the “Bradley-Burns Uniform Local Sales And Use Tax Law,” at sections 7202 and 7203.

¹¹ Section 6363.5 contains a specific exemption for meals served by religious organizations. This is the only specific exemption from the sales tax law for such organizations.

The issue presented then, is whether the Free Exercise Clauses of either the state or federal Constitutions would prohibit the state from imposing a sales tax upon church-related schools as contemplated by subdivision (g) of proposed regulation 1506.¹² In stating this issue, we also restrict the concept of church-related school to primary or secondary schools, since we discern no substantial “church-state” problem at the college or university level.¹³

Preliminarily, we note that in the Establishment Clause cases it is settled that aid to church-related schools may constitute an impermissible aid to religion. (See, e.g., *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973), *Committee for Public Education v. Nyquist* 413 U.S. 756 (1973); *Public Funds For Public School of N.J. v. Byrne* 590 F.2d 514 (3d Cir. 1979), *aff’d – US. –* (1979), 5/29/79.) Although certain *clearly* secular aid given even directly to church-related schools (e.g., medical services) may not violate the Establishment Clause (see *Wolman v. Walter*, *supra*), the United States Supreme Court cases demonstrate that a loan of even secular textbooks or secular *instructional* materials and equipment to church-related schools would be unconstitutional. Thus, the Court explained in *Wolman v. Walter*, *supra*, 433 U.S. at 249–251, the distinction between the loan of secular textbooks which it held to be constitutional in *Wolman v. Walter*, *supra*, *Meek v. Pittenger*, *supra*, and *Board of Education v. Allen*, 392 U.S. 236 (1968) from the “loan” of instructional materials and equipment which it found to be unconstitutional in *Wolman* as follows:

“Although the exact nature of the material and equipment is not clearly revealed, the parties have stipulated: It is expected that materials and equipment loaned to pupils or parents under the new law will be similar to such former materials and equipment except that to the extent that the law

¹² “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .” (U.S. Const., 1st Amend.)

“Free exercise and enjoyment of religion without discrimination or preference are guaranteed. . . . The Legislature shall make no law respecting an establishment of religion.” (Cal. Const., art. 1, § 4.)

¹³ This is so for several reasons. First of all, the United States Supreme Court, in the Establishment Clause cases, has distinguished between church-related schools at college level and those below such level, in determining the constitutionality of state-aid to such schools (*Hunt v. McNair*, 413 U.S. 734 (1975), upholding the South Carolina Educational Facilities Authority Act involving the issuance of revenue bonds for the benefit of the Baptist College of Charleston.)

Secondly at the college level books and supplies are normally sold clearly at retail at a bookstore which would, under current law and practice have a retailer’s permit and be a retailer which pays sales tax on its gross receipts.

requires that materials and equipment capable of diversion to religious issues will not be supplied. App. 36. Equipment provided under the predecessor statute, invalidated as set forth in n. 1, *supra*, included projectors, tape recorders, record players, maps and globes, science kits, weather forecasting charts, and the like. The District Court, 417 F. Supp., at 1117, found the new statute, as now limited, constitutional because the court could not distinguish the loan of material and equipment from the textbook provisions upheld in *Meek*. 421 U.S. at 359, 362, and in *Allen*, 392 U.S. at 248.

In *Meek*, however, the Court considered the constitutional validity of a direct loan to nonpublic schools of instructional material and equipment, and, despite the apparent secular nature of the goods, held the loan impermissible MR. JUSTICE STEWART, in writing for the Court stated:

“The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. See *Lemon v. Kurtzman*, 403 U.S., at 616–617. Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. “[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools’ existence. Within the institution, the two are inextricably intertwined.” *Id.*, at 657 (opinion of BRENNAN, J.)” 421 U.S., at 366.

“Thus, even though the loan ostensibly was limited to neutral and secular instructional material and equipment, it inescapably had the primary effect of providing a direct and substantial advancement of the sectarian enterprise.

“Appellees seek to avoid *Meek* by emphasizing that it involved a program of direct loan to nonpublic schools. In contrast, the material and equipment at issue under the Ohio statute are loaned to the pupil or his parent. In our view, however, it would exalt form over substance if this distinction were found to justify a result different from that in *Meek*. Before *Meek* was decided by this Court, Ohio authorized the loan of material and equipment directly to the nonpublic schools. Then, in light of *Meek*, the state legislature decided to channel the goods through the parents and pupils. Despite the technical change in legal bailee, the program in substance is the same as before: The equipment is substantially the same; it will receive the same use by the students; and it may still be stored and distributed on the nonpublic school premises. In view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in

support of the religious role of the schools.

“Indeed, this conclusion is compelled by the Court’s prior consideration of an analogous issue in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). There the Court considered, among others, a tuition reimbursement program whereby New York gave low-income parents who sent their children to nonpublic schools a direct and unrestricted cash grant of \$50 to \$100 per child (but no more than 50% of tuition actually paid). The State attempted to justify the program, as Ohio does here, on the basis that the aid flowed to the parents rather than to the church-related schools. The Court observed, however, that, unlike the bus program in *Everson v. Board of Education*, 330 U.S. 1 (1947), and the book program in *Allen*, there has been no endeavor “to guarantee the separation between secular and religious educational functions and to insure that State financial aid supports only the former.” 413 U.S., at 783, quoting *Lemon v. Kurtzman*, 403 U.S., at 613. The Court thus found that the grant program served to establish religion. If a grant in cash to parents is impermissible, we fail to see how a grant in kind of goods furthering the religious enterprise can fare any better. Accordingly, we hold §§ 3317.06(B) and (C) to be unconstitutional.”¹⁴

Thus, direct aid given to church-related schools by way of educational materials (and perhaps even indirect aid under *Wolman v. Walter*) violates the Establishment Clause, since it constitutes “establishing” a religion. *A fortiori*, any interference with church-related schools and their educational processes would violate the Free Exercise Clause. This would be true whether the interference would be with the secular educational

¹⁴ Although *Board of Education v. Allen*, *supra*, 392 U.S. 236 upheld the loan of secular textbooks by the State directly to students in church-related schools, its present viability is even open to question. The Court in *Wolman v. Walter* declined to overrule *Allen*, and followed it as to the textbook program therein as a matter of *stare decisis* (433 U.S. at pp. 236–238, 251–252 n. 18). As noted by Justice Marshall, however, in his separate opinion, concurring in part and dissenting in part in *Wolman v. Walter*, *Allen* was premised on the ability to separate a church-related school’s religious and secular educational functions. *Meek v. Pittenger* rejected this assumption as to secular teaching materials and equipment (421 U.S. at pp. 362–366). Therefore, as noted by Mr. Justice Marshall, *Meek v. Pittenger* “left the rationale of *Allen* undamaged only if there is a constitutionally significant difference between a loan of pedagogical materials directly to a sectarian school and a loan of those materials to students for use in sectarian schools. As the Court convincingly demonstrates, *ante*, [T]he material quoted in the text above] at 249–250, there is no such difference.” (433 U.S. at pp. 257–258.) See also the separate opinion of Mr. Justice Stevens (433 U.S. at p. 265, n. 2).

functions of the school or the purely religious educational functions, since “[w]ithin the institution, the two are inextricably intertwined.” (*Wolman v. Walter*, *supra*, 433 U.S. at p. 250.) The question, then, resolves itself to whether the imposition of sales tax upon a church-related school constitutes an interference with the “free exercise” of those “inextricably intertwined” educational processes within the meaning of the Free Exercise Cause. It is our conclusion that it would so interfere.

The lodestar in resolving this issue appears to be the relatively early case of *Murdock v. Pennsylvania* (1942) 319 U.S. 105. In that case, the United States Supreme Court held that a municipal ordinance requiring a business license, and the payment of a fee therefor, could not be constitutionally applied to Jehovah’s Witnesses who were “selling” religious books and pamphlets from door to door.¹⁵ The Court framed the issue as follows:

“The cases present a single issue—the constitutionality of an ordinance which as construed and applied requires religious colporteurs to pay a license tax as a condition to the pursuit of their activities.” (*Id.* at p. 110);

The Court taxed such matters as:

“ . . . the mere fact that the religious literature is ‘sold’ by the itinerant preacher rather than ‘donated’ does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project.”

And that

“ . . . an itinerant evangelist . . . does not become a mere book agent by selling the Bible or religious tracts to help defray his expenses or to sustain him.” (*Ibid*);

And, finally, that

“ . . . [o]n this record it plainly cannot be said that petitioners were engaged in a commercial rather than a religious venture. *It is a distortion of the facts to describe their activities as the occupation of selling books and*

¹⁵ Whether they were in fact selling the pamphlets is not clear. They requested “contributions” for the books and pamphlets in a certain amount, but accepted lesser sums, or even donated them to persons without funds. The Pennsylvania Court found a sale. Other states concluded differently. (319 U.S. at pp. 111–112.)

pamphlets. (Ibid, emphasis added.)

The Court then went on to hold that “. . . [a] state may not impose a charge for the enjoyment of a right granted by the Federal Constitution” (319 U.S. at p. 113) and that these license taxes “[on] their face . . . are a restriction on the free exercise of those freedoms which are protected by the First Amendment” (319 U.S. at p. 114).

Of significance to our inquiry is the dicta of the Court wherein it delineates certain areas where a state may properly tax churches, and certain areas where a state may not do so. The Court stated:

“We do not mean to say that religious groups and the press are free from all financial burdens of government. See *Grosjean v. American Press Co.*, 297 U.S. 233, 250. We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. The tax imposed by the City of Jeannette is a flat license tax, the payment of which is a condition of the exercise of these constitutional privileges. The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. *Magnano Co v. Hamilton*, 292 U.S. 40, 44–45, and cases cited. Those who can wax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy. Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation.” (319 U.S. at 112, emphasis added.)

Thus, the United States Supreme Court indicated that an income tax or property tax was not offensive to the Free Exercise Clause on the theory that religious groups may be required to pay their fair share of government. However, a tax or fee may not be exacted for the privilege of such “free exercise.”¹⁶

¹⁶ *Murdock v. Pennsylvania*, *supra*, 319 U.S. 105, was followed in a similar case shortly thereafter in *Follett v. McCormick* (1943) 321 U.S. In that case the Court stated after holding the local ordinance invalid:

“This does not mean that religious undertakings must be subsidized. The exemption

Thereafter, the California Supreme Court followed this dictum from *Murdock* in its decision in *Watchtower B. & T. Soc. v. County of L.A.* (1947) 30 Cal. 2d 426. The issue in that case was whether California could impose a personal property tax on pamphlets, books, and other literature of the Jehovah's Witnesses which were in storage at the distribution point for such material. The California Court noted that the property "tax levied here was one solely for the purpose of revenue to defray the general expenses of government, no element of regulation being involved" and that it was "not a license tax-a tax on the exercise of a right, privilege, occupation, calling, or activity." (*Id.* at 429.) The Court also noted that "[t]he power of taxation for revenue purposes is probably the most vital and essential attribute of the government" and "[i]t has never been supposed that property used in the exercise of freedom of press or religion is not subject to a uniform tax for revenue imposed upon all alike." (*Id.* at pp. 429-430.) The Courts finally concluded:

While the power to tax may involve the power to destroy it is clear that no such result will be accomplished by the tax here imposed. The property here involved is required to bear only its share of the burden of the maintenance of the government which is for its protection equally with other property in Los Angeles County. The very liberty invoked is made realistic by the protection afforded by that government." (*Id.* at p. 432.)

This same case was then litigated in the federal courts, which reached the same result as did the California Supreme Court, essentially on the same theories and reasoning. (*Watchtower Bible & Tract Soc. v. Los Angeles County*, 84 F. Supp. 352 (S.D. Cal. 1949), *aff'd*, 181 F.2d 739 (9th Cir. 1950). *cert. den.*, 340 U.S. 820 (1950).)

There is, however, a dearth of authority as to whether the state may exact or impose a sales tax upon a sale made in the conduct of a clearly religious activity in light of the Free Exercise Clause. The only case our research has disclosed in the United States on this precise question¹⁷ is a *South Dakota* case, *State v. Van Dallen*, 11 N.W.2d 523 (S.D. 1943). That case also involved activities of Jehovah's Witnesses, and the purported "sale" of their religious books and pamphlets. The defendants were tried and convicted of transacting business as retailers without a permit, and of failure to make and file a sales tax return. The

from a license tax of a preacher who preaches or a parishioner who listens does not mean that either is free from all financial burdens of government, including taxes on income or property. We said as much in the *Murdock* case. (319 U.S. p. 112.) But to say that they, like other citizens, may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment has made a high constitution privilege." (*Id.* at pp. 577-578.)

¹⁷ This result is confirmed in Annot., Exemption of Religious Organization From Sales Or Use Tax, (1973) 54 A.L.R.3d 1204.

South Dakota Supreme Court noted that the sales tax under their statute was a privilege or occupation tax and that imposing a tax upon an occupation was the equivalent of imposing a tax upon the privilege of engaging in an occupation. The Court therefore held that *Murdock v. Pennsylvania*, *supra*, 319 U.S. 105, was controlling; and that therefore the defendants had been improperly convicted since the state could not tax their occupation, vocation, or calling-which was the exercise of their religion.

In our opinion, the same result would obtain in California in the case of proposed subdivision (g) to Regulation 1506 with respect to church-related schools insofar as it attempts to impose a sales tax upon such schools. In California, as in North Dakota, the sales tax is a privilege or occupation tax. Section 6051 states that the tax is imposed “upon all retailers” “[f]or the privilege of selling tangible personal property at retail.” Or as characterized in *Roth Drug, Inc. v. Johnson* (1936) 13 Cal. App. 2d 720, 736, which upheld the constitutionality of the Retail Sales Act: “[t]he system of imposing an excise tax for the privilege of conducting a business which is based on a percentage of the gross receipts therefrom has long been recognized as valid.” (Emphasis added.) And as the United States Supreme Court has held, a tax may not be imposed or exacted for the privilege of engaging in the exercise of one’s religion under the Free Exercise Clause. (*Murdock v. Pennsylvania*, *supra*, 319 U.S. 105.)

We also reject the obvious argument that the state should be able to exact a sales tax under proposed subdivision (g) as to secular books and materials. As we have demonstrated at great length above under the Establishment Clause cases decided by the United States Supreme Court, in the conduct of a church-related school the secular cannot be separated from the religious. Both are “inextricably intertwined.” Additionally, since there is no requirement in California that private elementary, middle, or secondary schools utilize the same textbooks as are approved for and used in the public school system, much if not most of the argument that the secular may be segregated from the religious loses its vitality. Under the Establishment Clause cases, three tests or guidelines have evolved to determine whether impermissible aid is given to church-related schools. One of these is whether the statute would “foster an excessive entanglement with religion.”¹⁸ By analogy to the Establishment Clause cases, it is patent that an attempt to segregate for sales tax purposes the religious from the purely secular as to textbooks and other educational materials used in sectarian schools would completely entangle the state with religion. The state would be required to examine each book or other matter and make a subjective determination, which could be disputed by the church-related school, as to which the book or other matter was purely secular or was religious or had religious overtones. In short, the audit problem would

¹⁸ See, e.g., *Watman v. Walter*, *supra*, 433 U.S. at p. 236: “In order to pass muster, a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement.”

be staggering.

Accordingly, it is concluded that proposed subdivision (g) of Regulation 1506 of the State Board of Equalization may not be made applicable to church-related schools insofar as the sales tax is concerned.

4. May A Use Thx Be Imposed?

The Sales and Use Tax Law provides in section 6201 that “[a]n excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer . . . for storage, use, or other consumption” at the same rate as the sales tax. The use tax is complementary to the sales tax. As stated in *Union Oil Co. v. State Board of Equalization* (1963) 60 Cal. 2d, 441, 449, “fun substance, the sales and use tax laws constitute a double filter designed to catch all transactions which result in tangible personal property joining the aggregate of capital assets within the state.” The incidence of the tax, however, is on the purchaser. (§ 6202.) (See, e.g., *Bank of America v. State Board of Equalization* (1962) 209 Cal. App. 2d 780, 793.)

Despite the fact that the use tax is imposed on the purchaser, as a general proposition the law requires the “retailer” to collect the use tax for the state at the time of the sale. (§§ 6202–6206.) Therefore, the issue is whether a use tax may be imposed upon students of church-related schools for the books and other materials “sold” to them by the school.

Just as our research disclosed only one case in the sales tax area, our research has disclosed only one case concerning whether a use tax may be imposed upon a church against the contention that it violated the Free Exercise Clause. That case is an Alabama case, *State v. Toolen*, 167 So. 2d 546 (Ala. 1964). The State of Alabama issued a use tax assessment against a Catholic church on items which were of the type used exclusively for religious worship purposes such as candles, chalices, and altar missals. The Alabama Supreme Court, after analyzing *Murdock v. Pennsylvania*, *supra*, 319 U.S. 105, *State v. Van Dallen*, *supra*, 11 N.W. 2d 523, and the decisions of both the California Supreme Court and the federal courts of California in the *Watchtower Bible & Tract Soc.* cases, *supra* (84 F. Supp. 352, *aff’d.*, 181 F.2d 739, *cert. den.*, 340 U.S. 820, and 30 Cal. 2d 426), concluded that the question of the imposition of the use tax was closer to the *Watchtower Bible & Tract Soc.* situation in California than either the *Murdock* or *Van Dallen* situations. The Court apparently found a “taxable moment” when the religious items ended their interstate journey and came to rest in Alabama, and before their actual use in religious worship. The Court reasoned:

“There [*The Watchtower Bible & Tract Soc.* situation in the California cases] the taxation on the books and pamphlets which were used in their type

of preaching was on their storage, prior to their use. And the Alabama Use Tax is a tax on retail sales of articles to be stored, used, or consumed in this State and attaches when the goods come to rest in Alabama, prior to their use and irrespective of what that use may be.

“Here the use tax is uniform, nondiscriminatory, levied on all sales alike, regardless of the use of which the property may be put, applies at the same rate to purchases of rich and poor, individuals, partnerships and corporations alike; and the tax liability attaches after the act of transportation ends and property comes to rest in this State for use or consumption, unless there is a contractual intent to the contrary.” *State v. Hanna Steel Corp.*, 276 Ala. 50, 158 S.2d 906.

In our view, however, the theory of *State v. Toolen*, *supra*, 167 So.2d 546, is sufficiently distinguishable from our situation so as not to be persuasive authority. *State v. Toolen* involved an interstate journey between the supplier-retailer and the church consumer. The Court thus found that “the tax liability attaches after the act of transportation ends and the property comes to rest in . . . [Alabama] for use or consumption.” (*Id.* at 551.) In our situation we have no such interstate journey where it could be said that the textbooks and other educational materials come to rest between the sale of the materials by the church-related school to the student-consumer and their use. In the usual situation, the sale or distribution of textbooks and other educational materials would be to the students for immediate use, not “storage,” as part of one continuing process involving the teaching and education of children. Thus, the existence of a “taxable moment” which, as applied in *State v. Toolen* is renous at best, would not appear to be applicable or appropriate. In short, if one were to search for a moment when the educational materials come to rest in their journey from the initial supplier to the student-consumer, it would be more appropriate to find such a moment when the material was in the custody of the church-related school. However, such a finding would not suffice to impose a use tax, since the “moment” would be *prior* to the sale of the educational materials to the students.

Since we conclude that there is no “taxable moment” which arises from the “storage” of the educational materials in the sale-transaction involved herein, there remains only the question whether a use tax could still be imposed upon their “use” or “other consumption”—the other two grounds for imposition or the use tax under section 6201. We conclude that no tax may be imposed for the same reasons that we concluded that no sales tax may be imposed upon church-related schools. Since we found that the secular and religious education in church-related schools is “inextricably intertwined” so as to exempt the school from the sales tax under the Free Exercise Clause, we conversely find that the students should similarly be exempt from the use tax. By attending the schools the

students would be engaging in the practice of their religion in acquiring religious education. And under the case law, a tax may not be imposed for the exercise of such a privilege. (See *Follett v. McCormick*, *supra*, 321 U.S. at pp. 577–578, at footnote 16, *supra*.)

Accordingly, it is concluded that neither a sales tax nor a use tax may be constitutionally imposed upon textbooks or other educational materials “sold” to its students by church-related schools.¹⁹

This conclusion also answers the second question. Church-related schools would be exempt from the imposition of sales and use taxes under the provisions of section 6352, which, as noted at the outset, contains a general exemption from both the sales tax and the use tax where this State is prohibited from [so] taxing under the Constitution or laws of the United States or under the Constitution of this State.”

¹⁹ We thus need not meet the issue whether the church-related school may be required to collect the use tax for the State. On this point see generally *Bank of America v. State Board of Equalization*, *supra*, 209 Cal. App. 2d 780, 802-804.