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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PEOPLEPC, INC.,

Plaintiff and Appellant,

v.

STATE BOARD OF EQUALIZATION,

Defendant and Respondent.

D054163

(Super. Ct. No. 37-2007-00066036-
CU-MC-CTL)

Court of Appeal Fourth District
FILED
SEP 04 2009
Stephen M. Kelly, Clerk
DEPUTY

APPEAL from a judgment of the Superior Court of San Diego County, Luis R. Vargas, Judge. Reversed.

In this action by PeoplePC, Inc. (PeoplePC) for refund of use taxes paid to the State Board of Equalization (the Board) for the time period from July 1, 1999, through June 30, 2002, we are called upon to interpret the printed sales message tax exemption of Revenue and Taxation Code¹ section 6379.5, and California Code of Regulations, title 18, section 1541.5 (hereafter Regulation 1541.5) to determine whether the trial court

¹ All statutory references are to the Revenue and Taxation Code unless otherwise indicated.

properly granted the Board's motion for summary judgment. The trial court determined that PeoplePC's special order compact discs (the CD's), printed with a promotional message for discounted Internet service, were not printed sales messages exempt from California use taxation.

People PC appeals, contending that the trial court's conclusion was contrary to the parties' stipulated facts and a proper construction of section 6379.5, read together with Regulation 1541.5. We agree and reverse.

I.

FACTUAL AND PROCEDURAL BACKGROUND

PeoplePC, a Delaware corporation with its principal place of business in California, sells Internet access service to consumers in California and throughout the United States. During the period from July 1, 1999 to June 30, 2002, PeoplePC arranged for mass mailings from California of the CD's, the primary purpose of which was to induce prospective customers to sign up for its low cost Internet service. The surface of each of the CD's contained a custom silk-screen message, printed to the special order of PeoplePC, stating: "\$9.95 a month for unlimited Internet . . . with 250 free hours a month." The primary purpose of the CD's was to promote and advertise the sale of PeoplePC's Internet access service.

The CD's contained specially designed software, the sole purpose of which was to enable a potential customer to sign up for PeoplePC's service over the Internet. In effect, the software functioned like an order form affixed to a print catalog, allowing new

customers to purchase the service. Recipients could not use the software to access the Internet directly without first signing up for the service.

The CD's were purchased by PeoplePC from an out-of-state vendor and were shipped to California fulfillment houses. There, the CD's were shrink-wrapped to cardboard carrier pieces, which also featured a promotional message, and the completed packages were bulk mailed from California through the United States Postal Service to potential customers of PeoplePC, located throughout the United States, at no cost to the recipients. Upon receipt, the CD's became the property of the recipient. The CD's had no independent value to the recipient, except as an advertisement accompanied by a means to order the Internet service.

Asserting the CD's were taxable gifts, the Board assessed use tax on PeoplePC. The taxpayer paid the assessed taxes and filed a claim for refund, contending the CD's constituted printed sales messages, which were exempt from California taxation. After the Board denied its refund claim, PeoplePC filed its complaint for refund of taxes in San Diego County Superior Court.

The parties entered into a stipulation of facts and submitted the case on cross-motions for summary judgment. After taking the matter under submission, the trial court ruled that "PeoplePC was not exempt from the use tax as a matter of law." It found that "[t]he CD's in question were not 'printed sales messages' under . . . section 6379.5 and Regulation 1541.5 and, thus, do not qualify for the printed sales message exemption to the sales and use tax laws." In so ruling, the court stated:

"The surface of each of the CD[']s was printed by a silk-screening process. (Stipulated Fact No. 9). The software on the CD[']s 'was not designed to allow recipients to use the software to access the Internet directly without signing up for the PeoplePC service; recipients could not use the [CD']s to access the Internet without first signing up for the PeoplePC service.' (Stipulated Fact No. 12). The primary purpose of the CD[']s was to promote the sale of the PeoplePC service. (Stipulated Fact No. 18). PeoplePC relied on the CD[']s as the principal way to promote and take orders for their service. (Stipulated Fact No. 19). [¶] The stipulated facts prove, as a matter of law, the principal purpose of the CD[']s was not advertising, but was storing software for creating new Internet service customer accounts."

The court denied PeoplePC's summary judgment motion, granted the Board's motion, and ordered judgment entered in favor of the Board. Judgment was entered October 15, 2008.

II.

DISCUSSION

On appeal, PeoplePC renews its argument that the CD's were exempt printed sales messages within the meaning of section 6379.5 and Regulation 1541.5, not taxable gifts of tangible personal property. PeoplePC asks that we reverse the trial court's determination.

A. *Standards of Review*

We review de novo the trial court's decision to grant the Board summary judgment on stipulated and undisputed facts. (*Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 975.) Because the court was presented with purely legal questions, its statement of decision is not binding on us and we are free to draw our own conclusions of law from the stipulated and undisputed facts. (*Sea World, Inc. v. County of San Diego*

(1994) 27 Cal.App.4th 1390, 1397; *Independent Energy Producers Assn., Inc. v. State Bd. of Equalization* (2004) 125 Cal.App.4th 425, 436.)

Moreover, as the primary issue before this court presents a question of law, namely the meaning of section 6379.5 and Regulation 1541.5, we independently review the issue. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8 (*Yamaha I*); *Wallace Berrie & Co. v. State Bd. of Equalization* (1985) 40 Cal.3d 60, 65 (*Wallace Berrie*)). "The ultimate interpretation of a statute is an exercise of the judicial power . . . conferred upon the courts by the Constitution and, in the absence of a constitutional provision, cannot be exercised by any other body." (*Yamaha I*, at p. 7, citing *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 326, citations omitted.)

In conducting our review, we are mindful that statutes providing an exemption from the sales and use tax must be reasonably, but nevertheless strictly, construed against the taxpayer. An exemption will not be inferred from doubtful statutory language, and ""settled principles of statutory construction require that any doubt be resolved against the right to the exemption. . . ."" (*Standard Oil Co. v. State Bd. of Equalization* (1974) 39 Cal.App.3d 765, 769-770 (*Standard Oil*); *McConville v. State Bd. of Equalization* (1978) 85 Cal.App.3d 156, 159 (*McConville*)).

B. *Pertinent Statutory Scheme and Regulations*

The California sales and use tax law "embodies a comprehensive tax system . . . on the sale, use, storage or consumption of tangible personal property within the state." (*Wallace Berrie, supra*, 40 Cal.3d at p. 66.) Although sales and use taxes "are mutually

exclusive[, they are] complementary, and . . . designed to exact an equal tax based on a percentage of the purchase price of the property in question." (*Ibid.*) The intent behind the California Sales and Use Tax Law (§ 6001 et seq.) is to apply the use tax so as to ensure that the basic excise tax will be levied on transactions which might otherwise inequitably escape taxation.

Unless a specific exemption applies, section 6051 imposes a sales tax on retailers for the privilege of selling tangible personal property at retail in California. The sales tax is measured as a percentage of the retailer's gross receipts from California sales.

(§ 6051.) When the sales tax does not apply, and the transaction is not otherwise exempt, section 6201 imposes a use tax on the storage, use or other consumption in California of tangible personal property purchased from a retailer, measured by a percentage of the sales price of the property. (§§ 6201, 6401.) Primary liability for the use tax is imposed on the person storing, using or otherwise consuming the tangible personal property.

(§ 6202.)

Use tax will apply if the first taxable use of property for the purpose intended is made in California. A gift, or a transfer of tangible personal property made voluntarily and without consideration, is a taxable use of property within the meaning of section 6202. (Civ. Code, § 1146; Rev. & Tax. Code, § 6202.) "Persons who make gifts of property to others are the consumers of the property and the tax applies with respect to the sale of property to such persons." (Cal. Code Regs., tit. 18, § 1670, subd. (a).) A gift occurs for sales and use tax purposes when tangible personal property is delivered to a common carrier in California for shipment to in-state or out-of-state donees. (*Yamaha*

Corp. of America v. State Bd. of Equalization (1999) 73 Cal.App.4th 338, 364

(*Yamaha II*) [items purchased out of state and delivered to a common carrier in California for delivery as promotional gifts to out-of-state parties are subject to California use tax because the gift takes place in California upon delivery to the carrier].)

The statute at issue in this case, section 6379.5, provides an exemption from California sales and use taxation for printed sales messages. The section provides in full:

"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." (§ 6379.5.)

Regulation 1541.5, which implements and explains section 6379.5, further defines printed sales messages in subdivision (a)(1) as

"catalogs, letters, circulars, brochures, and pamphlets printed for the principal purpose of advertising or promoting goods or services. The term includes such items as department store catalogs, brochures advertising automobiles and vacations, circulars advertising professional services, and coupon books. The term does not include campaign literature and other fund-raising materials, stationery, reply envelopes, except as provided for in (b) of this regulation, order forms, sales invoices, containers for sample merchandise, newspapers or periodicals, calendars, notepads, cash register tapes, or directories unless they meet the principal purpose of advertising or promoting goods or services." (Reg. 1541.5, subd. (a)(1).)

Regulation 1541.5, subdivision (b) clarifies that "tax does not apply to the sale or use of printed sales messages which are: [¶] (1) Printed to the special order of the purchaser; [¶] (2) 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; [and] [¶] (3) Received by any other person at no cost to that person who becomes the owner of the printed material." (*Ibid.*)

Further, subdivision (b)(7) of Regulation 1541.5 provides that the tax exemption applies to "charges for containers, such as envelopes or wrapping paper, when sold with the printed sales messages for shipment or delivery, or when sold to persons who place the printed sales messages in the container and sell the printed sales messages together with the container." Regulation 1541, subdivision (b)(8) states that reply envelopes and order forms "will be considered part of the printed sales message when such property is inserted in, stapled, glued, or otherwise affixed to the printed sales message in such a manner that it becomes a component or integral part of the printed sales message and is sold together with the printed sales message."

C. *The Issue Framed*

The parties do not dispute that unless the printed sales message exemption applies, when the CD's were delivered to the California fulfillment houses for mailing to its potential customers, a taxable gift of tangible personal property occurred. At issue is only the applicability of the printed sales message exemption.

The parties agree that the CD's satisfy the first three criteria of section 6379.5 and Regulation 1541.5, subdivision (b) in that the CD's were (1) printed to PeoplePC's special order; (2) mailed by PeoplePC's agent through the United States Postal Service; and (3) received by PeoplePC's potential customers, at no cost, who then became the owners of the printed material. The only question presented is whether the CD's constitute printed sales messages within the meaning of section 6379.5 and Regulation 1541.5.

PeoplePC's position is that a printed sales message within the meaning of section 6379.5, as interpreted by Regulation 1541.5, is any printed matter that falls within the five statutorily enumerated items (catalogs, letters, circulars, brochures, and pamphlets), which is printed for the principal purpose of advertising or promoting goods or services. PeoplePC asserts that the CD's, imprinted with a promotional message, constitute printed sales messages within the meaning of section 6379.5 and Regulation 1541.5 because they are circulars, whose stipulated principal purpose was to advertise or promote the sale of PeoplePC's Internet access service.

The Board's position, on the other hand, is that the tax exemption granted in section 6379.5 is limited to sales messages printed *on paper* catalogs, letters, circulars, brochures, and pamphlets. The Board maintains that section 6379.5's exemption for circulars does not include the CD's because they are not paper, but plastic compact discs, which store a computer program for accessing PeoplePC's Internet service.

D. *Analysis*

1. *The Printed Sales Message Exemption of Section 6379.5 Is Not Limited to Catalogs, Letters, Circulars, Brochures or Pamphlets Printed on a Paper Medium*

We turn first to the potentially dispositive contention of the Board that the printed sales message exemption of section 6379.5 is limited to catalogs, letters, circulars, brochures, and pamphlets printed *on paper*, and reject it.

The applicable principles of statutory construction are well settled. "In construing statutes, we must determine and effectuate legislative intent." (*Woods v. Young* (1991) 53 Cal.3d 315, 323.) "To ascertain intent, we look first to the words of the statutes'

... , 'giving them their usual and ordinary meaning'" unless otherwise clearly intended or indicated. (*Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268 (*Lennane*), citations omitted; *Standard Oil, supra*, 39 Cal.App.3d at p. 768.) "If there is no ambiguity in the language of the statute, 'then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.'" (*Lennane*, at p. 268.) If, however, there is ambiguity in the statutory language, we resort to extrinsic sources to determine legislative intent, including the ostensible legislative object to be achieved and the legislative history. (*Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 828 (*Freedom Newspapers*); *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1163.) We also look for guidance to an administrative agency's interpretative rulings, giving such rulings the appropriate degree of judicial deference. (*Yamaha I, supra*, 19 Cal.4th at pp. 7-8.)

We begin our analysis by noting that section 6379.5 and Regulation 1541.5, the Board's interpretative regulation of that statute, are silent as to the question before us, namely whether catalogs, letters, circulars, brochures and pamphlets consisting substantially of printed sales messages for goods and services must be printed *on paper*. We will not broaden or narrow the scope of section 6379.5 by reading into it language that does not appear in the text. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545 [a court may not rewrite a statute to conform to an assumed intention which does not appear from its language].) Instead, to determine legislative intent, we look to the words actually used in the statute, giving them their usual and ordinary meaning. (*Lennane, supra*, 9 Cal.4th at p. 268.) We focus, as do the parties, on the Legislature's use of the

term "circular," and turn to dictionary definitions to ascertain the ordinary meaning of that term.² (*Standard Oil, supra*, 39 Cal.App.3d at pp. 768-769 [a court may use dictionary definitions to ascertain the meaning of words used in a statute].)

Unfortunately, "[a]s is often the case in matters of statutory construction, both parties assert the disputed [word] is clear and unambiguous and its meaning is 'plain,' though they disagree over what the [word] means. It is not uncommon in such a contest for parties to support their varied interpretations with reference to disparate dictionary definitions of critical terms. Black's Law Dictionary may be set against Webster's in its various incantations, or various dictionary definitions of the same word may be put in play." (*Modesto City Schools v. Education Audits Appeal Panel* (2004) 123 Cal.App.4th 1365, 1374-1375.)

That is the case here. In support of its plain meaning argument, the Board points us to Merriam-Webster's dictionary definition from 1789 of a "circular," meaning "a paper (as a leaflet) intended for wide distribution." It also directs our attention to the Internet Web site "Dict.org" for a definition of a "circular," dating to 1913, meaning "[a] circular letter, or paper, usually printed, copies of which are addressed or given to various persons" In contrast, PeoplePC points to the American Heritage Dictionary definition of a "circular," meaning "[a] printed advertisement, directive, or notice

² The parties do not examine the ordinary meaning of the other statutorily enumerated items within section 6379.5 (catalogs, letters, brochures, and pamphlets) to ascertain if the Legislature meant to limit the tax exemption to messages printed on paper. However, we have done so and determine the Legislature's use of those terms does not connote any such intent.

intended for mass distribution," and to similar definitions found in "Dictionary.com" and "yourdictionary.com." At best, the parties' resort to the battle of the dictionaries discloses that the ordinary meaning of the term circular is uncertain. We therefore look to extrinsic evidence to assist us, and begin with the legislative purpose and history of section 6379.5. (*Freedom Newspapers, supra*, 6 Cal.4th at p. 828; *In re Do Kyung K.* (2001) 88 Cal.App.4th 583, 587.)

Section 6379.5 was enacted to eliminate the competitive advantage³ held by out-of-state printers when, to avoid payment of California taxes, large retail advertisers contracted with the out-of-state firms, instead of California companies, to print advertising materials, which were to be mailed at no cost to California consumers.⁴

3 Legislative materials state: "This tax inequity has placed the California industry at a competitive disadvantage with respect to \$85-90 million in sales during 1979. If this volume of sales had been handled by California firms, up to 3,000 additional jobs would have been created and various California taxes would have increased by about \$4.5 million." (Assem. Com. on Rev. & Tax., Rep. on Sen. Bill No. 2527 (1985-1986 Reg. Sess.) as amended July 10, 1986, pp. 2-3.)

4 The legislative history explained the different tax treatment to retail advertisers when printing was done out of state, as opposed to being done in California:
"With respect to advertising materials such as brochures, catalogs and other printed matter delivered free to consumers, they are considered gifts and are not taxable to the consumer. [¶] Tax applies on the purchase by the advertiser as follows (under regulations and interpretations issued by the Board of Equalization): [¶] 1) If the advertising materials are purchased by a California business from a California location (for example, a printer) and delivered to consumers in this state, either California sales or use tax must be paid by the business giving away the free advertising materials. [¶] 2) If the advertising materials are purchased by a California business from an out-of-state location and delivered to consumers in this state, no tax applies. No California tax applies because the sale took place out of state. The state where the sale took place also cannot tax the transaction because the advertising materials have been placed in interstate

Review of the history discloses no legislative attempts to require catalogs, letters, circulars, brochures or pamphlets be printed on paper to qualify for the tax exemption. Similarly, the history does not define, or even discuss, a circular as being a printing *on paper*. In fact, the only qualifications for the exemption mentioned in the legislative history are those actually enacted as part of section 6379.5 — namely, that catalogs, letters, circulars, brochures, and pamphlets be (1) printed to the special order of the purchaser; (2) mailed or delivered (through the United States mail or by common carrier) by the seller, his agent, or a mailing house acting as an agent for the purchaser; and (3) given at no charge to the recipient.

Finding no evidence in legislative history that a circular is a printing on paper, we turn to a review of sales and use tax Annotation No. 432.0033.600, providing that the definition of printed sales messages under section 6379.5 does not include "such items as disks." (2 State Board of Equalization, Business Taxes Law Guide, Sales and Use Tax Annotations (2009-1) (Annotations), Annot. No. 432.0033.600, p. 4602.)⁵ The Board

commerce." (Assem. Com. on Rev. & Tax., 3d reading analysis of Sen. Bill No. 2527 (1985-1986 Reg. Sess.) as amended Aug. 20, 1986, pp. 1-2.)

⁵ Annotation No. 432.0033.600, promulgated August 1, 1996, provides in full: "Sales messages delivered free to consumers on disk, diskette and videotape do not come within the printed sales message exemption. The definition of printed sales messages under section 6379.5 does not include such items as disks, diskettes and videotapes. Accordingly, the tax applies to the sale of these items for the purpose of delivering sales messages." (Annotations, *supra*, Annot. No. 432.0033.600, p. 4602.)

contends this annotation,⁶ written by its staff tax counsel in 1996, "could not be clearer: it limits the tax exemption to printed sales messages on paper." We also examine the January 1990 backup to sales and use tax Annotation No. 432.0074, which the Board claims supports its position that a circular is a printed sales message on paper.⁷ The backup, written by a senior tax counsel, states a poster printed on a single piece of paper qualifies as a circular under the common meaning of that term, and that when the poster is printed for the principal purpose of advertising or promoting goods and services, it constitutes a printed sales message.

As these administrative materials provide the Board's view of the meaning and effect of section 6379.5, they do not implicate the exercise of a delegated lawmaking power and thus are accorded situational deference. (*Yamaha I, supra*, 19 Cal.4th at pp. 11-12 [when an agency is merely construing a statute, the question of whether judicial deference to the agency's interpretation is appropriate and, if so, the extent of such deference, is fundamentally situational].) Under this standard, we review two kinds of

⁶ Annotations are opinions by the Board's legal staff and are intended to be used for guidance by the Board itself and tax practitioners. "More extensive analyses, called 'back-ups,' are available to those who request them." (*Yamaha I, supra*, 19 Cal.4th at p. 5.)

⁷ Without elaboration or argument, the Board states there are a number of other Board annotations that "apply to this action," including Annotation No. 432.0044 (July 11, 1996) (food carriers bearing a company's advertisement); Annotation No. 432.0012.500 (July 8, 1996) (book covers containing advertising); and Annotation No. 432.0064 (Aug. 9, 1993) (printed luggage tags). We will not develop the Board's argument, and decline to address the applicability of these annotations, if any, to the issue before us. (*Dills v. Redwoods Associates, Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1.)

factors: (1) those indicating the agency has a comparative interpretive advantage over the courts — e.g., the agency's experience and technical knowledge where the legal text is technical, obscure, open-ended or entwined with issues of fact, policy and discretion; and (2) those suggesting the agency's interpretation is likely to be correct — e.g., indications of careful consideration by senior agency officials, as opposed to ""an advice letter prepared by a single staff member" . . . , evidence that the agency "has consistently maintained the interpretation in question, especially if [it] is long-standing" . . . , and indications that the agency's interpretation was contemporaneous with legislative enactment of the statute being interpreted.'" (*Yamaha II, supra*, 73 Cal.App.4th at p. 351, citations omitted.) Thus, the deference due an agency interpretation — including the Board's annotations here — turns on a legally informed, common sense assessment of their contextual merit. "The weight of such a judgment in a particular case will depend upon *the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.*" (*Yamaha I, supra*, 19 Cal.4th at pp. 14-15, quoting *Skidmore v. Swift & Co.* (1944) 323 U.S. 134, 140.)

Given the above standards, we accord the Board's administrative rulings little deference. First, both are based on the Board's interpretation of the common meaning of a nontechnical term used in section 6379.5, namely the term "circular." As such, although the Board is charged with administering the sales and use tax, it has no interpretive advantage over the courts. (*Yamaha II, supra*, 73 Cal.App.4th at p. 350.) Second, although the administrative rulings have existed for some time, they were not

drafted contemporaneously with the enactment of section 6379.5.⁸ Third, the annotations were written by a single staff member, not senior agency officials. No requirement that a circular be printed on paper was ever included in the agency's Regulation 1541.5. Thus, there is no indication that the agency's rulings are "'probably correct.'" (*Yamaha II, supra*, 73 Cal.App.4th at p. 350.) Fourth, and most importantly, annotations are designed to benefit taxpayers by giving them information about the Board's legal position on issues, which facilitates business planning, increases taxpayer certainty about tax law, and allows taxpayers subject to the sales and use tax to structure their affairs accordingly, and, if they perceive the need, to lobby the Board or the Legislature to overturn these legal rulings. It is for this reason that the Board's annotations are exempt from the requirements of the Administrative Procedures Act. (*Id.* at pp. 352-353.) Yet, here, neither document clearly sets forth a Board policy position stating that a circular must be printed *on paper* to qualify for the printed sales message exemption. Annotation No. 432.0033.600 does *not* say that a "disk" is not a circular because it is plastic, not

⁸ Our independent research discloses a number of other annotations, written contemporaneously with the enactment of section 6379.5, which discuss the staff's view of what qualifies as a "circular" within the meaning of section 6379.5. (See, e.g., Annotation No. 432.0002.150 (Feb. 27, 1987) [advertising circulars]; Annotation No. 432.0024 (Aug. 27, 1990) [customized circulars]; Annotation No. 432.0069 (July 16, 1990) [posters]; Annotation No. 432.0075 (Mar. 17, 1992) [flyers].) However, these annotations were not brought to the attention of the trial court, and were not raised in the parties' appellate briefing. We therefore consider any argument as to them waived and disregard these annotations on appeal. (*Kendall v. Barker* (1988) 197 Cal.App.3d 619, 625 [appellate court is confined in its review to the proceedings which took place below and are brought up for review in a properly prepared record on appeal]; *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1 [matters which may be judicially noticed may nonetheless be disregarded on appeal].)

paper; and while the January 1990 backup mentions the Board previously determined that a poster printed on paper would qualify for the exemption, it does not say that a sales message printed on a medium other than paper would not qualify for the exemption. Thus, the administrative rulings relied on here are not the type of interpretative rulings that the business community and the general public could have used to order their affairs, and for that reason we cannot assume the position was presumptively accepted by the Legislature.

In summary, we find nothing to support the Board's position that the section 6379.5 printed sales message tax exemption is limited to catalogs, letters, circulars, brochures or pamphlets printed on a paper medium.

2. *The Definition of the Term "Circular" Used in Section 6379.5*

Having determined that a circular need not be printed on paper, we now determine what the term, as used in section 6379.5, means. We are mindful that section 6379.5 is a tax exemption, and statutes granting exemptions from taxation "are strictly construed to the end that such concession will not be enlarged nor extended beyond the plain meaning of the language employed." (*McConville, supra*, 85 Cal.App.3d at p. 159.) However, as Justice Holmes once reminded, "[a] word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." (*Towne v. Eisner* (1918) 245 U.S. 418, 425.)

We have reviewed the various definitions of the term circular referred to by the parties, and the stated legislative purpose of section 6379.5 to eliminate the competitive

disadvantage suffered by California printers when advertisements, intended to be mailed free to California consumers, are printed and mailed from out of state. (See pt. D.1, *ante*.) We determine that a reasonable and common sense meaning of the term "circular," consistent with the purpose of section 6379.5, is any "printed advertisement, directive, or notice intended for mass distribution."⁹ (See *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1291 [where more than one statutory construction is arguably possible, courts favor the construction that leads to reasonable results consistent with the apparent legislative purpose]; *Azadozy v. Nikoghosian* (2005) 128 Cal.App.4th 1369, 1373 [if the language permits more than one reasonable interpretation, the court looks to a variety of extrinsic aids and, after considering these aids, ""must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences""]; *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 289 [our task is to select

⁹ PeoplePC describes the two dictionary definitions of "circular" proffered by the Board as "outliers." We agree. Both definitions predate the enactment of section 6379.5. (*Telecare Corp. v. Leavitt* (D.C. Cir. 2005) 409 F.3d 1345, 1353 [the plain meaning of a statute is to be ascertained using standard dictionary definitions in effect at the time the statute is passed].) Moreover, the 1913 definition of a circular, meaning "a circular letter, or paper, usually printed, copies of which are addressed or given to various persons," fails to give effect to the associated term "letter" contained in section 6379.5. (*Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 960 [under the canon of statutory construction known as *noscitur a sociis*, "the meaning of a word may be ascertained by reference to the meaning of other terms which the Legislature has associated with it in the statute, and . . . its scope may be enlarged or restricted to accord with those terms"]; *People v. Jones* (2003) 112 Cal.App.4th 341, 354 (conc. & dis. opn. of Kolkey, J.) [a word takes meaning from the company it keeps].)

the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statutes' general purpose, and to avoid a construction that would lead to unreasonable, impractical, or arbitrary results].) Any other definition of the term circular would fail to promote the legislative purposes of section 6379.5, and would lead to unreasonable and arbitrary results.

3. *PeoplePC Established Its Entitlement to the Printed Sales Message Exemption of Section 6379.5*

Having determined the meaning of the term circular as used in section 6379.5, we now examine the central question before us, namely, given the stipulated and undisputed facts, has PeoplePC established its entitlement to the printed sales message tax exemption? Resolution of this question hinges on two issues: (1) whether the CD's were circulars; and (2) if so, whether the principal purpose of the CD's was to advertise or promote PeoplePC's Internet service. We turn now to an examination of these issues, recognizing that section 6379.5 provides an exemption from the sales and use tax which must be reasonably, but nevertheless strictly, construed against PeoplePC. Doubt will be resolved against the right to the exemption. (*McConville, supra*, 85 Cal.App.3d at p. 159.)

Section 6379.5 provides an exemption from the sales and use tax for circulars "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."¹⁰ (§ 6379.5.) Regulation 1541.5 elaborates that a printed sales message includes circulars "printed for the principal purpose of advertising or promoting goods or services." (Reg. 1541.5, subd. (a)(1).) It then gives a nonexclusive list of items falling within the definition, *such as* circulars advertising professional services and coupon books, and clarifies that the term does not include order forms "*unless* they meet the principal purpose of advertising or promoting goods or services." (*Id.*, italics added.)

We previously determined that a circular is any "printed advertisement, directive, or notice intended for mass distribution," and that it need not be printed on paper. (See pt. D.2, *ante.*) To advertise means to present or describe a product, service or event. (*Showing Animals Respect & Kindness v. City of West Hollywood* (2008) 166 Cal.App.4th 815, 827.) The parties stipulated that during the three-year tax period, PeoplePC arranged for mass mailings from California of over two million of the CD's, the surface of which contained a printed custom silk-screen message, prominently identifying PeoplePC as the service provider and stating: "\$9.95 a month for unlimited Internet . . . with 250 free hours a month." The CD's were sent to prospective customers of PeoplePC throughout the United States to induce them to sign up for its Internet service. In fact, the primary purpose of the CD's was to promote the sale of PeoplePC's Internet service. Thus, the stipulations appear to satisfy the definition of a circular,

¹⁰ As we noted earlier, the parties agree PeoplePC met three of the requirements of section 6379.5 and Regulation 1541.5, subdivision (b)(1)-(3) in that the CD's were (1) printed to PeoplePC's special order; (2) mailed by PeoplePC's agent through the United States Postal Service; and (3) received by PeoplePC's potential customers, at no cost, who then became the owners of the printed material.

consisting substantially of printed sales message advertising and promoting PeoplePC's Internet service, within the meaning of section 6379.5 and Regulation 1541.5.

However, again pointing primarily to Annotation No. 432.0033.600, the Board asserts: (1) compact discs which store computer programs do not constitute circulars within the meaning of section 6379.5; and (2) even if PeoplePC's interpretation of a circular under section 6379.5 is correct, it is not entitled to the exemption because the primary function of the CD's was to distribute software to potential customers to sign up for its service. For several reasons, we do not agree.

First, we have already rejected the Board's position that Annotation No. 432.0033.600 provides that a "disk" is not a circular because it is plastic, not paper. (See pt. D.1, *ante*.) Under the definition of a circular, a plastic compact disc can be the medium on which a taxpayer prints a sales message. (See pt. D.1, *ante*.) The stipulated facts disclose that is what occurred here: the surfaces of the CD's were printed with a custom silk-screen message, prominently identifying PeoplePC as the service provider and stating: "\$9.95 a month for unlimited Internet . . . with 250 free hours a month."

Second, Annotation No. 432.0033.600 denied the printed sales message exemption for advertising delivered *via* a software program stored on a "disk." (Annotations, *supra*, Annot. No. 432.0033.600, p. 4602 ["tax applies to the sale of [disks] *for the purpose of delivering sales messages*" (italics added)].) Thus the sales message discussed in Annotation No. 432.0033.600 was not *printed*, which was the very reason for legislative enactment of section 6379.5. In contrast, PeoplePC's sales message was *printed on the surface* of the CD's.

Third, section 6379.5 exempts circulars "consisting substantially of printed sales messages for goods and services." Regulation 1541.5, subdivision (a)(1) clarifies that a circular is a printed sales message when printed "for the principal purpose of advertising or promoting goods or services," and gives a *nonexclusive* list of examples of circulars which qualify for the exemption. (*Ibid.*) The backup to Annotation No. 432.0033.600 cited to Annotation No. 432.0028 as precedent for its ruling.¹¹ That annotation denied the printed sales message exemption to a software company where a "disk[]" was the vehicle used to deliver free promotional software to consumers for review and comment. (Annotations, *supra*, Annot. No. 432.0028, p. 4601.) The software could be used and had value to the recipient, independent of the advertising or product promotion. Thus, the *principal purpose* of the "disk" was not advertising or promotion of goods and services.

Here, in contrast to the situation in which a compact disc does more than advertise or promote a product or service, for example by delivering software, which has independent value to the recipient, the parties stipulated that the *sole* purpose for the software on the CD's, like an order form on a catalog, was to enable a potential customer

¹¹ Annotation No. 432.0028 provides in full: "A software company is in the business of selling software programs for resale. Before the company actually mass produces a software program, extensive product development is performed by sending early versions of the software to approximately 2,000 persons at no charge to the recipient. The recipients use the free software and notify the software company of any 'bugs' found in the program.

"The exemption for 'printed sales messages' does not apply to the sale of the computer software. Tax applies to the sale to the software company of the disks, the disk duplicating services and the supporting manuals." (Annotations, *supra*, Annot. No. 432.0028, p. 4601.)

to sign up for Internet service; it could not be used to access the Internet without signing up for PeoplePC's service. As such it functioned as an order form, whose principal purpose was to promote the sale of PeoplePC's service.¹² (Reg. 1541.5, subd. (a)(1) [exempting order forms whose principal purpose was to promote the advertiser's service].)¹³

Fourth, and most importantly, contrary to the conclusion reached by the trial court, the parties stipulated that the primary purpose of the CD's was to promote the sale of PeoplePC's Internet service. The Board disputes the legal effect of this stipulation, as well as the stipulation that PeoplePC relied on the CD's as the principal way to promote and take orders for its service, but the Board never sought to be relieved of the stipulations and is bound by them. "Unless the trial court, in its discretion, permits a party to withdraw from a stipulation [citations], it is conclusive upon the parties, and the truth of the facts contained therein cannot be contradicted." (*Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 141-142.) Furthermore, a stipulation of the parties is also binding on the court where the stipulation is not contrary to law, court rule or policy.

¹² Although not necessary to our decision, we note the order form contained in the CD's also would be exempt under Regulation 1541.5, subdivision (b)(7), (8). The order form was affixed to the printed sales message in such a manner as to become a component or integral part of the printed sales message, and was sold together with the printed message in the shrink-wrapped compact disc package sent to PeoplePC's potential customers. (Reg. 1541, subd. (b)(7), (8).)

¹³ Given these factors, in addition to those mentioned previously, we are not persuaded that great weight should be given Annotation No. 432.0033.600 in this particular case. (*Yamaha I, supra*, 19 Cal.4th at pp. 14-15.)

(*Greatorex v. Board of Administration* (1979) 91 Cal.App.3d 54, 58; *Robinson v. Workers' Comp. Appeals Bd.* (1987) 194 Cal.App.3d 784, 790.) Consequently, the trial court erred when it found "the principal purpose of the CD's was not advertising, but was storing software for creating new Internet service customer accounts," because the undisputed and stipulated facts do not support such a conclusion.

In sum, based on our independent review of the construction and application of section 6379.5 and Regulation 1541.5 to the stipulated and undisputed facts in this case, we determine as a matter of law that the CD's qualified for the sales or use tax exemption for "printed sales messages" under section 6379.5.¹⁴ Because the trial court concluded otherwise based on facts unsupported by the evidence, its order granting the Board's summary judgment motion and denying PeoplePC's summary judgment motion must be reversed and the judgment entered upon such order vacated. The matter is remanded to the trial court with directions to enter a new order granting PeoplePC's summary judgment motion and denying the Board's motion, and to enter judgment upon that order in favor of PeoplePC.¹⁵

¹⁴ Not all compact discs will qualify as circulars for the printed sales message exemption of section 6379.5. We limit our decision to the stipulated and undisputed facts presented here.

¹⁵ In light of our reversal, it is unnecessary to address PeoplePC's additional contentions of error regarding new rules of law and due process.

DISPOSITION

The judgment is reversed. The superior court is directed to enter judgment in favor of PeoplePC in accordance with this opinion. PeoplePC shall recover its costs on appeal.



HUFFMAN, J.

WE CONCUR:



BENKE, Acting P. J.



IRION, J.

