

**STATE BOARD OF EQUALIZATION**

LEGAL DIVISION (MIC:82)
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Controller, Sacramento

February 8, 1995

BURTON W. OLIVER
Executive Director

Mr. B--- R---, President
S--- C---, Inc.
XXX --- Avenue, Suite XXX
--- ---, CA XXXXX

RE: S--- C---, Inc.
SR -- XX-XXXXXX

Dear Mr. R---:

I am responding to your letter dated November 3, 1994 regarding the application of tax to moveable, space-saving storage systems and stationery shelving which you furnish and install.

You state that you purchase the storage systems and the shelving from an out-of-state manufacturer and install the property on the premises of your customers. You further state that you will be assessing your customers use tax "as applicable to construction contractors," computed on "materials as used," and bill your customers in a lump sum.

Revenue and Taxation Code section 6051 imposes a sales tax on all retailers measured by their gross receipts from retail sales of tangible personal property occurring in this state, unless the sale is otherwise exempted by statute. When sales tax does not apply, use tax measured by the sales price of the tangible property sold applies to the use of the property purchased from a retailer for use in California. (Rev. & Tax. Code §§ 6201, 6401.)

Sales and Use Tax Regulation 1521 explains the application of California sales and use tax to construction contracts. A construction contract includes a contract to furnish and install property becoming an improvement to real property. (Reg. 1521(a)(1)(A)1.) You state that the moveable storage systems are mounted on rails which are permanently attached to the floor. The installation of the stationery shelving includes seismic bracing which is attached to the concrete floor by bolts and fastened to walls. Therefore, it is our understanding that the storage systems and the shelving you install become an improvement to real property. The fact that the storage

unit moves along the rail to facilitate retrieval of the stored material does not change the character of the system as an improvement to real property. Thus, your contract to furnish and install the storage systems and shelving is defined by the regulation as a construction contract and you are a construction contractor within the meaning of Regulation 1521.

The application of tax to construction contracts depends on whether the property furnished and installed is classified as "materials" or "fixtures." Materials are defined as items of tangible personal property that are incorporated into, attached to, or affixed to real property by contractors in the performance of a construction contract and which, when combined with other tangible personal property lose their identity and become an integral and inseparable part of the real property. (Reg. 1521(a)(4); see also Reg. 1521, Appendix A.) A construction contractor is generally the consumer of materials which the contractor furnishes and installs in the performance of a construction contract. Fixtures are defined by Regulation 1521 as items which are accessory to a building or other structure and do not lose their identity as accessory when installed. (Reg. 1521(a)(5); see also Reg. 1521, Appendix B.) A construction contractor is generally the retailer of fixtures which the contractor furnishes and installs in the performance of a construction contract, and tax applies to the sale of the fixtures by the construction contractor to its customer. (Reg. 1521(b)(2)(B)1.)

You apparently believe that the storage systems and the shelving you furnish and install constitute "materials." However, our review of the literature you have provided indicates that the prefabricated shelving you furnish and install is similar to cabinets. We therefore conclude that the prefabricated shelving constitutes fixtures. (See Reg. 1521(c)(2), Appendix D.)

Since the storage systems and the shelving are fixtures, you are a retailer and sales tax applies to your sale of these fixtures. The measure of sales tax is your sales price. (Reg. 1521(b)(2)(B)1.) Since your contract does not separately state the sales price of the fixtures, the sales price of the fixtures is deemed to be the cost price to you at the time of the attachment. (Reg. 1521(b)(2)(B)1.) If you were purchasing the storage systems and the shelving in a completed condition, that is, ready-made for installation in the same form as acquired with no additional assembly whatsoever, the cost price is deemed to be the sale price to you. (Reg. 1521(b)(2)(B)2.b.) In your case, however, our review of the literature you provided indicates that the fixtures are shipped disassembled and must be assembled on site before they can be installed. If this is so, we regard the assembly to be taxable fabrication rather than nontaxable installation. Assuming your price lists, bid sheets, or other records do not state the sale price of the storage systems or the shelving to your customers, then the cost price is the price you pay for the storage systems and the shelving plus the cost price of the jobsite assembly labor according to the formula described in subdivision (b)(2)(B)2.b. of Regulation 1521.

With respect to the rails which you permanently attach to the floor, subdivision (c)(7) of Regulation 1521 considers guide rails when attached to realty as "materials" for purposes of California sales and use tax. We regard you as a consumer of materials you furnish and install in the performance of your lump sum construction contracts. Either sales tax or use tax applies with respect to the sale of the materials to you or the use of the materials by you.

I am enclosing a copy of Regulation 1521 and a pamphlet entitled "Tax Tips for Construction and Building Contractors". I hope this letter and the enclosures provide the answer to your question. If you have further questions, please do not hesitate to write again.

Very truly yours,

Victor G. Matl
Tax Counsel

VGM:cl

Enclosures

cc: San Francisco District Administrator - BH

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August 2, 1995

BURTON W. OLIVER
Executive Director

Mr. R--- A. P---, CPA
P---, Inc.
Certified Public Accountants
XXXX --- --- Road
Building X, Suite XXX
--- ---, California XXXXX

Re: S--- C---, Inc.
SR --Y XX-XXXXXX

Dear Mr. Petersen:

This is in response to your April 28, 1995 letter in which you replied to our letter of February 8, 1995. I apologize for the delay in response. As I explained to your associate Mr. R--- S---, our previous response was under review for accuracy prior to receiving your April 28, 1995 letter, and we were unable to respond to your current inquiry until determining whether our previous response was correct. We have so concluded.

S--- C--- contracts to furnish and install certain storage systems, purchasing them from an out-of-state manufacturer. Our previous letter explained the application of tax to construction contracts such as those of S--- C---. As we explained, a construction contractor is the consumer of materials it furnishes and installs, and tax applies to the sale price of those materials to the contractor. A construction contractor is the retailer of fixtures it furnishes and installs, and owes sales tax on the contractor's sale price of the fixtures. When the contract does not state the sale price, that price is deemed to be the contractor's cost price as set forth in subdivision (b)(2)(B)2 of Regulation 1521. Our previous letter stated:

“Since your contract does not separately state the sales price of the fixtures, the sales price of the fixtures is deemed to be the cost price to you at the time of the attachment. (Reg. 1521(b)(2)(B)1.) If you were purchasing the storage systems and the shelving in a completed condition, that is, ready-made for installation in the same form as acquired with no additional assembly whatsoever, the cost price is deemed to be the sale price to you. (Reg. 1521(b)(2) (B)2.b.) In your case, however, our review of the literature you provided

indicates that the fixtures are shipped disassembled and must be assembled on site before they can be installed. If this is so, we regard the assembly to be taxable fabrication rather than nontaxable installation. Assuming your price lists, bid sheets, or other records do not state the sale price of the storage systems or the shelving to your customers, then the cost price is the price you pay for the storage systems and the shelving plus the cost price of the jobsite assembly labor according to the formula described in subdivision (b)(2)(B)2.b of Regulation 1521.”

In your current inquiry, you ask “that the interpretation be reconsidered based on a factual misunderstanding which serves as the basis for the interpretation.” It appears that, perhaps, you have misunderstood the importance of our opinion letters. We cannot provide an opinion which conclusively makes a transaction taxable or not under circumstances where the application of tax depends on the actual facts surrounding the transaction. Instead, we provide opinions on how tax applies in particular situations based on the factual representations provided to us by the taxpayer or, when necessary, based on the factual assumptions we make. How tax applies in any “fact-based” situation ultimately depends on the actual facts regarding the transaction. The actual facts are always subject to review and analysis during an audit and subsequent administrative review. As such, we are only able to comment on how tax applies based on our understanding of the facts presented. We do not find, conclusively, that certain facts will, in fact, exist. A Board auditor, upon his or her independent review during audit, may conclude that the facts are different from the facts on which a letter from the Legal Division is based.

You have provided us schedules of cost analysis which you believe show that S--- C--- incurs less than 90 percent of the total cost of furnishing and installing the storage systems prior to installation. As noted above, we do not make binding factual findings in opinion letters. Therefore, I will limit my discussion to the basic legal rules applicable to the analysis.

The 90 percent calculation of subdivision (c)(2) of Regulation 1521 is performed on a cabinet by cabinet basis (“If more than one cabinet is fabricated and installed under the contract, each cabinet will be considered separately in determining whether the cabinet is prefabricated.”) The calculation is performed by comparing the total direct cost of all labor and materials in fabricating a cabinet to the point of installation to the total direct cost of all labor and materials in completely fabricating and installing that cabinet. The act of attaching a piece of the cabinet is “jobsite fabrication” (i.e., part of the cost prior to installation onto real property) unless that piece becomes an improvement to real property **by virtue of that attachment**.

S--- C--- furnishes and installs rails becoming an improvement to real property. You believe that the cost of furnishing and installing the rails should not be used in the calculation of whether the shelving is prefabricated. In our previous letter we concluded that the rails on which moveable shelving moves constitute materials. The basis for this conclusion is that the shelving moves along the rails such that the rails are not regarded as an integral part of the shelving. It appears that such rails are only used on moveable systems. If, however, rails were also installed in connection with stationary systems, those rails might be regarded as part of the stationary

storage systems (it would depend on the actual facts). That is, rails are regarded as materials when they are not regarded as part of the storage system. Thus, when rails qualify as materials, we agree that the cost of furnishing and installing the rails is not part of the calculation of whether the storage system is prefabricated and thus a fixture.

You make the same argument with respect to flooring. Flooring was not addressed in our previous letter. Although you have not described what you mean by "flooring," flooring is generally regarded as materials. (See Reg. 1521, Appendix A.) If the property you refer to as flooring constitutes materials, then for the reasons discussed above we again agree that the cost of furnishing and installing it is not included in the calculation of whether the storage system is prefabricated and thus a fixture.

I believe that this should be sufficient to answer your questions. The important aspects of the calculation can be summarized as follows. The calculation of whether a cabinet is a fixture is performed on an individual basis. That is, depending on the facts, one cabinet furnished and installed under a contract may be a fixture while a substantially similar cabinet furnished and installed under the same contract may constitute materials. The cost of furnishing and installing materials which do not become part of the cabinet under consideration is not part of the calculation as to that cabinet. All labor is part of pre-installation labor except for that labor to physically attach property to cause it to become an improvement to real property by virtue of that attachment, and labor performed on property already an improvement to real property.

I trust this answers your remaining questions; however, if you have further questions, feel free to write again.

Sincerely,

David H. Levine
Supervising Staff Counsel

DHL/cmm

cc: Glenn A. Bystrom (MIC:43)
Dennis Fox (MIC:40)
San Francisco District Administrator (BH)