



**STATE BOARD OF EQUALIZATION**

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January 16, 1991

Burton W. Oliver  
*Executive Director*

Mr. [O]  
Assistant Treasurer and Tax Specialist  
[B]  
XXX --- ---  
--- ---, -- XXXXX-XXXX

RE: S- -- XX-XXXXXX

Dear Mr. [O]:

This is in response to your letter dated December 11, 1990, regarding the application of sales tax to certain charges made by [D].

You contracted with a company named [I] to design and construct a trade show exhibit booth. [I] referred you to [D] to manufacture ten exhibit modules. Those modules were transferred by [D] to [I] in California for assembly. After assembly, [I] shipped the modules outside California. You list seven invoices and ask whether the charges listed in the invoices are subject to tax. If taxable, you ask whether you may pay any remaining sales tax liability directly to California. You also note that [D] had requested an opinion from us as to whether its delivery to [I] in California meant that those sales were subject to sales tax. You have attached a copy of Tax Counsel Stella Levy's response dated November 15, 1990.

A retailer's retail sale of tangible personal property in California is subject to sales tax unless specifically exempt by statute. (Rev. & Tax. Code § 6051.) A sale in California is exempt from sales tax if the contract of sale requires the property to be shipped outside of California and the property is shipped to a point outside this state by the retailer by means of (a) facilities operated by the retailer, or (b) delivery by the retailer to a carrier, customs broker, or forwarding agent for shipment to such out-of-state point. (Rev. & Tax. Code § 6396.) As stated in Ms. Levy's opinion to [D], the sales in question do not satisfy the requirements of the exemption since the property was delivered in California to [I] on your behalf. I note that

[I] does not qualify as a "forwarding agent" since that term includes only such persons or firms that are engaged in the business of arranging for the shipment of goods. (See Business Taxes Law Guide Annotation 325.1480 (1/30/50).)

Since the transactions do not qualify for the exemption, all transactions constituting sales of tangible personal property are subject to sales tax. Subdivision (a) of Revenue and Taxation Code section 6006 defines sale as any transfer of title or possession of tangible personal property for a consideration. Subdivision (b) defines sale to also include the producing or fabricating of tangible personal property for a consideration for consumers who furnish either directly or indirectly materials used in that producing or fabricating. Thus, when [D] creates the modules from scratch and transfers them to [B], that transfer is a sale under the California Sales and Use Tax Law. In addition, when [B] or someone on behalf of [B] provides the raw materials to [D] and [D] assembles or fabricates those materials into the final module, that activity is also a sale. The charge for such work would be subject to sales tax. On the other hand, the charge for repair labor is not subject to sales tax as explained in Regulation 1546, a copy of which is enclosed.

You describe the work performed under one invoice as predominantly for services such as drilling holes in the modules. You state that this work was performed after the modules had been used in a trade show in New York and then returned to California. Your description also indicates that the furnishing of tangible personal property by [D] was not a significant portion of the invoice. This work may have been fabrication which would constitute a sale and therefore be taxable. The work may instead have constituted repairs with sales tax applying only to charges for tangible personal property furnished by [D] as described in Regulation 1546.

Modification performed on a new item is always fabrication constituting a sale under subdivision (b) of section 6006. Modification is also fabrication constituting a sale if that work results in a substantial change to the property so that it is fitted for a new or different use. For example, if an exhibit is cannibalized in order to create a different exhibit, that work is taxable fabrication labor. On the other hand, labor that merely restores a used item to its original condition constitutes repair labor. We have insufficient information to ascertain whether the work performed for invoice 9874 constitutes fabrication or repair labor. If constituting fabrication, [D]'s charge is subject to sales tax. It appears all other invoices represent sales of tangible personal property in California with sale tax applying to those sales.

Regulation 1699.5, a copy of which is enclosed, specifies when the Board will issue a direct payment permit. One condition is that the Board determines that issuance of the permit is to the mutual convenience of all parties. Issuance of a direct payment permit is not deemed to be to the convenience of the Board if the applicant has had gross receipts from the sales of tangible personal property of less than \$75,000,000 in any calendar quarter during the twelve months preceding the application. (Reg. 1699.5(b)(4).) Your recent tax returns indicate that your gross receipts are far below this threshold. Your taxable purchases are presumably also below the threshold. You therefore do not qualify for a direct payment permit.

Mr. [O]

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January 16, 1991  
325.0495

If you have further questions, feel free to write again.

Sincerely,

David H. Levine  
Senior Tax Counsel

DHL;cs

Enclosure: Regulations 1546, 1699.5