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**STATE BOARD OF EQUALIZATION**

December 9, 1993

Re:

Dear:

Your letter to Elizabeth Abreu dated October 5, 1993 has been forwarded to me for a response. In your letter, you cite various points on which you disagree with Ms. Abreu concerning the application of tax to the transactions of your client. Specifically, you argue that these transactions are not subject to sales tax because they are not leases of tangible personal property.

Briefly, the transactions at issue concern the rental of heavy equipment which can only be operated by a licensed operator. The person desirous of renting the equipment has the option of hiring an independent licensed operator or using one provided by your client.

In Ms. Abreu's letter, you were provided with the rules applied by the Board staff with respect to tangible personal property provided by one party to another. The rule specific to your client is that if the person desiring to use the property has the option to obtain the property with or without an operator, the transaction is a lease even if the lessee elects to have the owner of the property provide the operator. When the owner of the property always requires the customer to use an operator provided by the owner (thus there is no option), then the owner is providing the service performed by the equipment and operator and is not leasing tangible personal property.

This has been our longstanding administrative interpretation that when a customer has the option to obtain equipment with or without an operator provided by the owner, the customer is leasing that property. In the substantial majority of such transactions, the Board's conclusion that they are leases provides an election to the lessor that would otherwise not be available. That is, if the transaction were a service and not a lease, then the service provider would owe tax on its purchase price of the property. If, instead, the transaction is a lease of tangible personal property in substantially the same form as acquired, the lessor may pay tax up front on the purchase price (the same as if the lessor were providing a service), or may choose to instead collect tax measured by rentals payable (which choice is not available to the service provider). Your argument would eliminate this election by the lessor and would have a substantial impact on the leasing industry which has relied on our interpretation for decades.

While your letter points to several areas of Ms. Abreu's letter with which you disagree, we do not find them convincing, and it remains the position of the Board that the interpretation provided above and in Ms. Abreu's letter is correct.

Because the rental transactions are leases and --- did not pay tax based on the purchase price, tax is (and was) due on the rentals payable. In future transactions, --- may decide that paying tax based on the purchase price is a better alternative and pay tax up-front on newly acquired equipment it intends to lease in substantially the same form as acquired. As noted above, if we were to accept your arguments, this would be a requirement, not an election. In light of our conclusions herein, ---, has a choice.

Sincerely,

Sukhwinder K. Dhanda  
Staff Counsel

SKD:plh

bc: Santa Ana District Administrator – EA  
Mr. Glenn A. Bystrom  
Mr. Raymond Harispe