

**STATE BOARD OF EQUALIZATION**

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January 18, 1990

Mr. R--- F---
Vice President of Finance
S--- I---
XXX --- ---
--- ---, CA XXXXX-XXXX

RE: SR XX XX-XXXXXX

Dear Mr. F---:

I am responding to your letter of November 16, 1990 to the Board of Equalization Legal Division. You have requested guidance as to whether certain transactions are subject to sales tax.

I understand that your company rents lighting equipment to the entertainment community. Occasionally, your equipment is not returned, or is returned damaged or with parts missing. From your questions, I assume you charge the customers for replacement or repair. You wish to know if these charges are subject to sales tax. You also wish to know if your company is entitled to a refund of the sales tax which was paid when the equipment was originally purchased.

OPINION

In California, except where specifically exempted by statute, Revenue and Taxation Code Section 6051 imposes a tax, computed as a percentage of gross receipts, upon all retailers for the privilege of selling tangible personal property at retail in this state. (Unless otherwise stated, all statutory references are to the Revenue and Taxation Code.) "Whether a particular transaction within the state is subject to sales tax (6051) ...depends primarily on whether the transfer at issue is a sale." (Wallace Berrie & Co. v. State Board of Equalization (1985) 40 Cal.3d 60, 67 [219 Cal.Rptr. 142, 707 P.2d 204].)

A “sale” is a transfer of title or possession in any manner or by any means whatsoever, of tangible personal property for a consideration. (§ 6006(a).) In order to constitute a sale, there must be an intent to transfer and a transfer of title in the item being sold. Giffen v. Selma Food Co. (1907) 5 Cal.App.50, 53 [89 P. 855].) Where a lessor purchases an item of tangible personal property in a retail sale with respect to which it pays sales tax reimbursement or timely pays use tax measured by the purchase price of the property, and then leases it to a lessee in the same form as acquired, there is no “sale” for sales and use tax purposes to the lessee. The lessee is merely using the lessor’s property. (Title 18, Cal. Code Regs., Reg. 1660(b)(1)(E) and (b)(2). Sales and Use Tax Regulations are Board Promulgations which have the force and effect of law.)

OPINION

Your specific questions are as follows:

“1) Missing items – if a client loses our equipment, or part of our equipment, is this [a] taxable charge to the client? We have paid sales tax on the original purchase.”

As noted above, S--- pays sales tax reimbursement when it purchases the equipment; there is no taxable transfer to the lessee. When the lessee loses the equipment and pays the charge, we regard that it compensating S--- in damages for the loss of S---’s equipment. Compensation in this situation is not a “sale”; the charge is not subject to tax. (II Bus. Tax. L. Guide, Annot. 495.0220. Annotations are excerpts from previous Board Staff opinion letters and serve as a guide to Staff positions.)

“2) Damaged Items – If a client damages our equipment, is the charge to repair the damage a taxable charge?”

S--- here is repairing and reconditioning its own property, not the lessee’s property. Therefore, tax does not apply to those charges. Even if S---’s leases were taxable, charges for repairing or refurbishing the leasees property after a default would not be included in the taxable rental payments.

“3) Since we paid sales tax on the missing items, are we entitled to a refund of the sales tax on the purchase?”

S--- is not entitled to a refund of sales taxes which it paid when it originally purchased the equipment. The Sales and Use Tax Law does not, however, forbid it from charging the customer who lost the equipment for the total purchase price, including tax reimbursement, which S--- paid when it originally bought the equipment.

For your information, I have enclosed a copy of Regulation 1660. I hope the above discussion has answered your questions. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid
Tax Counsel

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