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July 5, 1994

Mr. D--- B. N---  
N--- S--- & F---  
XXXXX --- ---  
--- ---, CA XXXXX

Re: S- -- XX-XXXXXX

Dear Mr. N---:

This is in response to your letter dated May 3, 1994. You are a construction contractor who furnishes and installs materials both inside and outside California. You also sell fixtures and other tangible personal property. Your letter is a follow up to a Decision and Recommendation issued by Staff Counsel Lucian Khan on March 16, 1994. You ask whether you can issue a resale certificate to your suppliers for your purchases for all projects, whether they are inside or outside this state, and whether you are purchasing fixtures or materials. For purposes of this opinion, I assume that all of your construction contracts are lump sum contracts.

As you know, you are the retailer of any fixtures you furnish and install in the performance of a contraction contract. You may therefore purchase ex-tax under a resale certificate any fixtures, and any property incorporated into fixtures prior to their installation, that you will furnish and install pursuant to a contraction contract. Of course, if you furnish and install the fixtures in California, sales tax will apply to your sale. If you furnish and install the fixtures outside California and had made no use of them in California, no California tax will apply.

The handling of your purchases of materials is more complex, as you recognize. You are a consumer of any materials you furnish and install pursuant to a construction contract. Unless you are purchasing materials for resale or a specific statutory exemption applies, the sale of materials to you in California is subject to sales tax, and you would not be entitled to purchase such materials ex-tax by issuing your vendor resale or exemption certificates.

The applicable exemption is provided by Revenue and Taxation Code section 6386, which exempts from sales tax the sale of property which the purchaser will use outside this state in the performance of a contract to improve real property and which, as a result of such use, is incorporated into and becomes a part of real property located outside this state. This exemption is only applicable if the purchaser certifies in writing to the seller that the property will be used in this manner. When you purchase materials in California that you know will be used in a manner meeting the requirements of section 6386, the sale to you of such materials is subject to sales tax unless you issue to your vendor a timely exemption certificate as specified in Regulation 1521.

The other reason that the sale of materials to you in this state would not be taxable is if you purchase the materials for resale. For example, you may resell such materials "over the counter," or you may purchase items some of which you may use as is (i.e., as materials) and some of which you may incorporate into fixtures which you will resell. An example of such items would be certain wood products which are used as materials and alternately incorporated into, for example, prefabricated cabinets. If, when you purchase such materials, you purchase them as a fungible lot, a significant portion of which you intend to resell and a portion of which you will consume, and at the time of your purchase you do not know which particular items will be resold and which will be consumed (i.e., they are all placed in resale inventory and removed for sale or use as needed), you may properly issue a resale certificate. Of course, you would owe sales tax on any sales of such items in this state. You would be required to report use tax on your purchase price of any such items you consume with the return for the reporting period in which the items are removed from resale inventory for use, except as noted below.

When you hold property in legitimate resale inventory and remove the property for your use outside California, you are not regarded as making a taxable use of the property in this state, and no California use tax would apply. (Rev. & Tax. Code § 6009.1; see also Proposed Reg. 1668.) Thus, if you hold materials in legitimate resale inventory and remove them for use outside this state in the performance of a contract to improve real property outside this state, no California tax would apply even though you would not have issued an exemption certificate to your vendor. The critical prerequisite for this result is that the property was properly purchased under a resale certificate. That is, if you know when you make a certain purchase that the property will be used in a manner that would qualify the sale to you as exempt under section 6386, you may not issue a resale certificate. Your issuance of a resale certificate in such circumstances would be an improper use of a resale certificate. (See Rev. & Tax. Code § 6094.5.) Rather, the sale to you is taxable unless you issue the required certificate.

In summary, under the California Sales and Use Tax Law, you are regarded as selling fixtures furnished and installed pursuant to construction contracts. Therefore, you may issue resale certificates when purchasing fixtures that you will resell in this manner, whether the contract is to improve real property in this state or outside. However, you may issue a resale certificate when purchasing materials only when you will actually be reselling those materials, which includes circumstances where you purchase materials as a fungible lot, a significant

portion of which you intend to resell and a portion of which you will consume, but at the time of your purchase you do not know which items you will consume and which you will resell (i.e., they are all placed in resale inventory and removed for sale or use as needed). If you use such materials properly purchased under a resale certificate outside this state in the performance of a construction contract, no California tax will apply. However, if at the time of your purchase in this state you know that certain materials will be consumed in the performance of a construction contract, you may not issue a resale certificate with respect to those materials. The sale to you of such materials will be subject to sales tax unless you issue your vendor a timely exemption certificate.

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

Sincerely,

David H. Levine  
Supervising Staff Counsel

DHL:cl

cc: Van Nuys District Administrator