STATE OF CALIFORNIA

550.0855

STATE BOARD OF EQUALIZATION
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001
TELEPHONE (916) 445-5550

October 25, 1990

REDACTED TEXT

Re: REDACTED TEXT

Dear REDACTED TEXT:

In a letter dated November 30, 1989, I answered your questions regarding the application of sales tax to your business of providing entertainment and catering. The advice in that letter remains accurate. However, one aspect of the letter may not have been sufficiently clear, and so I provide the following clarification.

As I explained, when you contract with a facility lessor on your own behalf for the lease of a facility at which you will serve food, we regard you as the equivalent of a restaurant. I then stated:

> "Based on this conclusion and the facts you have provided, we also conclude that you do not rent the props, costumes, displays, and flowers you provide for the events. Rather, when you 'rent' such items to your customers, we conclude that you are using those items in a manner similar to your use of items such as dishware in which to serve your food. Thus, you may not purchase or lease such items to be 'rented' ex tax for resale since you purchase or lease the items for your own use, and you may not deduct the amount of your charge for these items from your taxable gross receipts when providing taxable food service since these items are part of your overhead expense of doing business."

The last clause is correct, but may be interpreted more broadly than intended. Since possession and control of the "rented" property does not actually pass to your customer, you are the consumer of that property and may not obtain it ex tax by issuing a resale certificate. And separately state charges for "rental" items, which are used in connection with your preparation and service of food, may not be deducted from your taxable gross receipts from the sale of the meals (this would include charges for chairs, tables, silverware, and props and decoration for the dining area). However, separately stated charges for items not related to your sale of tangible personal property are not part of your taxable gross receipts. For example, you charge for optional entertainment is not subject to sales tax. Similarly, your charge for costumes for the entertainers are also not subject to sales tax. On the other hand, your charge for costumes for the

persons serving food may not be deducted from your taxable gross receipts since it is part of the charge for serving the food.

We hope this clarification is helpful. If you have any questions, please contact us.

Sincerely,

David H. Levine
Senior Tax Counsel

DHL:wk
2542C

bc: Santa Ana District Administrator
Mr. John Abbott – Please expedite revision of CLD 466 to include this clarification. I suggest:

Rental of Facilities. If a caterer contracts with a facility (room, auditorium, yacht, etc.) owner for the use of the facility for the serving of food by the caterer to the caterer's client, the caterer is considered the equivalent of a restaurant serving food, as opposed to a caterer serving food in a client's facility. Therefore, such a caterer should not be considered as renting props, costumes, displays, and flowers to the client for the event. The caterer may not purchase or lease such items for resale and may not deduct the amount of the charge for such items related to the service of the food from the caterer's taxable gross receipts. On the other hand, charges for items unrelated to the sale of tangible personal property are not part of the caterer's taxable gross receipts. For example, a charge for costumes for persons serving meals would be taxable while a charge for costumes for entertainers providing optional entertainment would not be taxable. When the facility in which the food service occurs is mobile, such as a yacht or bus, a charge for transportation is nontaxable. However, if the yacht remained moored and was not used for transportation, the charge for its use for food service would be taxable.

STATE OF CALIFORNIA

550.0855

STATE BOARD OF EQUALIZATION
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001
TELEPHONE (916) 445-5550

November 30, 1989

REDACTED TEXT

Re: REDACTED TEXT

Dear Mr. REDACTED TEXT

This is in response to your letter dated October 4, 1989. Your business involves organizing parties and entertainment during which you may supply flowers, costumes, props or displays, and catered food and beverages. The locations could include yachts and rented facilities and you may arrange for transportation of the participants to the facilities.

Mr. REDACTED TEXT Office has recently completed an audit of your business. He recommended that you obtain an opinion from us regarding the application of tax to your business. You have taken two deductions on your sales and use tax returns for the first two quarters of 1989 that are relevant to this question. You have claimed a deduction on line 9 for sales tax included in the amount listed on line 1. You have also claimed a deduction on line 10 for amounts attributable to transportation, yacht charters, costumes, props, displays, and flowers. You state the reason for this deduction is that these items were not related to the service of food or beverages. In your letter you also ask how tax applies to your charge for the rented facilities.

Charges for Rented Facilities and Transportation

We assume that when you arrange for the facilities at which you will hold activities, you contract with the facility owner and charge your customer accordingly. When you serve food in such facilities, we regard you as the equivalent of a restaurant serving food in your own facilities as opposed to a caterer service food in facilities of the customer since you are the person contracting for rental of the facilities.

Subdivision (a)(2) of Revenue and Taxation Code Section 6012 provides that "gross receipts," which is the measure of sales tax, includes "[t]he cost of the materials used, labor or service costs, interest paid, losses, or any other expense." As you know, sales tax applies to your charges for sales of food for consumption on you premises (as mentioned above, the facilities you rent are regarded as your premises for purposes of this analysis). (See Reg. 1603.) Your charge to your customers for the rented facilities is subject to sales tax when those facilities are regarded as an expense associated with your taxable sale of tangible personal property.

An example of application of this analysis is when you rent facilities at a location such as an Elks Lodge. When the rented facilities will be used solely to provide a location at which to serve meals to your customers, your charge to your customers for those facilities is subject to tax

and may not be deducted from your taxable gross receipts. (See Sales & Use Tax Annot. 550.0260 (12/3/64).) We would reach the same conclusion even if, after the meals were served, the tables were pushed aside so that the participants could engage in dancing. However, if the facilities were be provided for the purpose of the dance, and the food provided was clearly incidental to that dance, we would not regard the charge for the facilities as part of the taxable sale of tangible personal property. An example of food which we would regard as incidental to the dance would be when you provide only soft drinks and pretzels or nuts.

Your charge for transportation by bus charter of persons from one place to a different place is not subject to sales tax, even if a meal is served during the transportation. The reason for this conclusion is that we would regard the bus charter as having been arranged for purposes of transportation and not for the purposes of providing facilities for serving food. A closer question is your charge for a yacht charter when the yacht has facilities for a dining room or equivalent and a sit-down meal is provided. Under such circumstances it is very likely that the proving of the taxable meal service is a significant aspect of that yacht charter. However, since a yacht charter provides significant benefits to the participants that are unrelated to taxable sales of food, we ill regard such charges for yacht charters as not subject to tax and such charges may be deducted on line 10 of your return. We note that we would reach the opposite conclusion if the yacht remained moored and was not used for transportation.

Costumes, Props, Displays, and Flowers

For the first two quarters of 1989, you deducted from your taxable gross receipts your charges for costumes, props, displays, and flowers. This may be incorrect, depending upon the particular facts involved.

A retailer’s retail sale of tangible personal property is subject to sales tax measured by the retailer’s gross receipts from the sale. (Rev. & Tax. Code § 6051.) The retailer may make no deduction from the taxable gross receipts for any of the retailer’s overhead, even if that overhead is separately stated on the invoice to the customer. (Rev. & Tax. Code § 6012,) For example, when you provide meal service, your entire charge is subject to sales tax even if you separately state a charge for “rented” dishware since such dishware is not actually rented to your customer but rather is used by you in providing the meal service.

When you sell tangible personal property to your customers, your charges are subject to sales tax. If you sell the property prior to using it yourself, you may purchase the property ex tax by issuing your vendor a resale certificate. For example, if you purchase flowers and resell them to your customers prior to using them at a taxable activity (i.e., your contract specifically provides for title to pass to your customer prior to use of the flowers), you may purchase the flowers ex tax by issuing a resale certificate. Your charge to the customer would, of course, be subject to tax.

A lease (rental) of tangible personal property is a taxable sale under the Sales and Use Tax Law unless the property is leased in substantially the same form as acquired by the lessor and the lessor has paid sales tax reimbursement or timely paid use tax measured by purchase price. However, to constitute a lease the lessee must have control over the leased property. When

the "lessor" uses and controls the property, no lease exists even if the parties agree that a lease exists. (See Entremont v. Whitsell (1939) 18 Cal.2d 290, 293-96 (no lease when owner uses and controls property).) When the "lessor" uses and controls the property, there is no sale by leasing but rather the "lessor" is the consumer of that property.

When you lease to your customer property for which sales tax reimbursement was paid to the vendor or use tax was timely paid measured by purchase price or use tax was paid under the prime lease (you lease the property from the owner and pay use tax to the owner and then sublease the property to your customer) no use tax would be applicable to your receipts from the rental. Otherwise, your rental receipts are subject to use tax and may not be deducted from your taxable gross receipts. However, we believe that these conclusions do not apply to your business. As discussed above, we regard you as using and controlling the facilities you acquire a which to hold your events. Based on this conclusion and the facts you have provided, we also conclude that you do not rent the props, costumes, displays, and flowers you provide for the events. Rather, when you "rent" such items to your customers, we conclude that you are using those items in a manner similar to your use of items such as dishware in which to serve your food. Thus, you may not purchase or lease such items to be "rented" ex tax for resale since you purchase or lease the items for your own use, and you may not deduct the amount of your charge for these items from your taxable gross receipts when providing taxable food service since these items are part of your overhead expense of doing business.

Sales Tax Included

As noted above, you have taken a deduction on line 9 of your return for sales tax included in the amounts you list on line 1. This deduction is applicable when the amount you charge your customer includes sales tax reimbursement without separately stating that reimbursement. This only happens when you satisfy the provisions of subdivision (a)(2)(C) of Regulation 1700, a copy of which is enclosed. That provision states:

> "The retailer posts in his premises in a location visible to purchasers, or includes on a price tax or in an advertisement or other printed material directed to purchasers, a notice to the effect that reimbursement for sales tax will be added to the sales price of all items or certain items, whichever is applicable.
>
> "It shall be presumed that the property, the gross receipts from the sale of which is subject to the sales tax, is sold at a price which includes tax reimbursement if the retailer posts in his premises, or includes on a price tag or in an advertisement (whichever is applicable) one of the following notices:
>
>> "(A) All prices of taxable items include sales tax reimbursement computed to the nearest mill.
>>
>> "(B) The price of this item includes sales tax reimbursement computed to the nearest mill."

Unless you provide notice as described above, or your contract provides that tax is included, you would not be entitled to a deduction on line 9 of your return.

If you have further questions, feel free to write again. I have also discussed this with REDACTED TEXT, and he will be happy to discuss this with you further.

Sincerely,

David H. Levine
Tax Counsel

DHL:wak
1688C

Enclosure

bc: REDACTED TEXT
Mr. REDACTED TEXT CLD 465 which we discussed applies to rentals by a caterer. As we discussed, REDACTED TEXT operates its business similar to a restaurant which is the reason for the distinction between the conclusions in this letter and the conclusion in CLD 465.

bcc: Mr. Donald J. Hennessy – I believe that the rule discussed above and mention to Mr. REDACTED TEXT should be annotated with CLD 465.