

**STATE BOARD OF EQUALIZATION**

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January 28, 1991

Ms. D--- C. C---
S--- C--- Co., Inc.
XXXX --- --- Avenue
---, CA XXXXX

RE: SR -- XX-XXXXXX

Dear Ms. C---:

I am responding to your letter of November 29, 1990. I apologize for the delay in responding to your question. We did not receive the previous inquiries which you mentioned in your letter. You have requested an opinion regarding the application of district transaction and use taxes to certain of your company's shipment contracts. You also requested advice regarding title clauses in the documents your customers receive.

I. FACTUAL BACKGROUND

You set forth the factual background of your problem as follows:

"S--- C--- Co., Inc. (hereinafter "S---") is located in Los Angeles County, and is involved in the manufacture and sale of cleaning compounds to companies throughout L.A. County, Orange County, San Diego County, and Ventura County. Our orders are either received via purchase order, or verbally by phone. What we need clarified in the following scenarios is where "sales takes place" when delivered/shipped as indicated, and with that, which county's tax rate should be used on the invoice.

- (A) Order delivered to company outside of L.A. County via our own truck.
(We understand that freight charges for our truck use are also subject to tax.)

- (B) Order delivered to company outside of L.A. County via common carrier, as arranged by us.
- (C) Order delivered to company outside of L.A. County via common carrier, as arranged by that company (purchaser).
- (D) Order delivered to company outside of L.A. County via U.P.S.

You do not elaborate on how S--- obtains its orders or how often it delivers its products out of L.A. County in its own trucks. You also do not state whether or not S--- has offices or sales representatives in Orange County, San Diego County or Ventura County.

As you are aware the tax consequence of delivering goods into the above counties vary depending on whether there are countywide districts imposing transactions and use taxes. Ventura County has no districts which impose transactions and use taxes, and San Diego County has two. Orange County has no countywide district at this time, but one will go into effect on April 1, 1990, and will impose a transactions and use tax at that time.

II. OPINION

A. Transactions and Use Taxes

1. “Out-of-District” Exemption

Sections 7261 and 7262 require that each district imposing a tax ordinance must include in its ordinance certain uniform provisions. One of these required provisions exempts from the transactions tax imposed on retailers, but not the use tax imposed on purchasers, sales of property to be used outside the district where the retailer ships to a point outside its district pursuant to a contract of sale between the retailer and the purchaser. Section 7261 (a)(6). In interpreting and applying this exemption, Title 18, California Code of Regulations, Regulation 1823(a)(2) provides that the transactions tax does not apply to gross receipts from sales of tangible property:

“(B) To be used outside the district when the property sold is shipped to a point outside the district pursuant to the contract of sale, by delivery to such point by the retailer or his agent, or by delivery by the retailer to a carrier for shipment to a consignee at such point. If the purchaser uses the property in a district imposing transactions (sales) and use taxes, the use tax may apply.”

(Regulations are Board promulgations that have the force and effect of law.)

2. Retailer's Duty to Collect Use Tax

Pursuant to Section 7262 and Regulation 1827 the retailer is obligated to collect the district use tax, if any, imposed by the purchaser's district if it is engaged in business in that district. Under Regulation 1827(c) the definition of "retailer engaged in business in the district" includes:

- “(1) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business in the district.
- “(2) Any retailer having any representative, agent, salesman, canvasser or solicitor operating in the district under the authority of the retailer or its subsidiary for the purpose of selling, delivering, or the taking of orders for any tangible personal property.”

3. Tax Consequences to S---

A retailer has the duty to collect the use tax of a district into which it ships tangible personal property if it is considered under Regulation 1827 to be doing business there. As I noted previously, your letter does not mention how S--- obtains its customers. Perhaps it has sales agents or jobbers which solicit orders in the counties you mention. Even if not, S---'s own trucks may be making regular deliveries into those counties. Thus, even though it apparently has only one place of business, it could be considered under the above conditions to be doing business in the counties you mention and so have a duty to collect any applicable use tax.

The facts make it clear that S--- sends the orders out of Los Angeles County, either by its own trucks or through carriers (U.P.S. is a carrier). Consequently, pursuant to Section 7261(a)(b) and Regulation 1823(a)(2)(B), these sales are not subject to the LATC Transaction Tax. Ventura County has no district tax, but San Diego County does, and Orange County's tax will go into effect on April 1, 1991. Since S---'s products are sold to be used in San Diego and Orange Counties, they are currently subject to use taxes in San Diego County and will be in Orange County after April 1, 1991. If S--- does business in those counties through an office or through representatives, whether it employs those representatives or they are independent contractors, or if it makes regular deliveries by its own trucks into those counties, S--- must collect the applicable use tax, pursuant to Regulation 1827(c). The district tax rate in San Diego County is 1%, and that in Orange County will be ½%, in addition to the statewide uniform rate of 6%. If S--- does not do business in those counties, it has no duty to collect the district use tax on their behalf.

B. Transportation Charges

You asked about “title clauses” to be printed on documents S---’s customers receive. Section 6012(a)(3) and Regulation 1628(a) provide that the “gross receipts” which are the measure of sales tax include the cost of transportation of the property sold. However, Section 6012(c)(7), and Regulation 1628(b)(2) provide that in the case of a sale of tangible personal property, tax does not apply to separately stated charges for transportation of property from the retailer’s place of business or other point from which shipment is made directly to the purchaser, provided the transportation is by other than facilities of the retailer, i.e., the United States mail or common carrier. The amount of such transportation charge which is nontaxable cannot exceed the actual cost of the transportation to the retailer. Subsection (b)(2) of this regulation provides that when transportation is by facilities of the retailer, such as by the retailer’s own truck, tax applies to charges for transportation to the purchaser, unless (i) the transportation charges are separately stated, (ii) are for transportation from the retailer’s place of business or other point from which shipment is made to the purchaser, and (iii) the transportation occurs after the sale of the property is made to the purchaser. When the sale occurs before the transportation to the purchaser commences, tax does not apply to separately stated charges for the transportation by the retailer’s facilities, provided such charges are reasonable. Under this regulation, a sale is deemed to occur at the time and place which the retailer completes his performance with reference to the physical delivery of the property, unless the parties to the sale explicitly agree that title is to pass at a prior time. (Sections 6011(a)(3) and 6011(c)(7) apply identical provisions to the definition of the “sales price” for the purpose of the state use tax.)

Thus, unless the transportation charges are separately stated and S--- and its customers transfer title to the purchased goods to the customers prior to S--- shipping the goods, the cost of transporting the goods through its own facilities is part of its “gross receipts” or “sales price” subject to sales and use tax and so to transactions and use tax.* We have previously determined that in order to be effective the required title-passage clause must appear on the confirmed purchase order of other document evidencing passage of title prior to shipment. You also asked how such a clause should be worded. While we cannot specify a clause that will work in all instances, we have previously determined that a clause worded substantially as follows operated to pass title to the purchaser prior to shipment by the seller for the purpose of Regulation 1628:

“Title to the materials shall pass directly from the seller to the buyer at the shipping point prior to shipment. Seller shall set out and deduct freight charges prior to computing sales or use tax.”

For your information, I have enclosed copies of Board of Equalization Pamphlet No.’s 44, “District Taxes”, and 44-A, “Questions and Answers on District Taxes”, and Regulation 1628. These should answer any questions you may have. If you need anything further, please do not hesitate to write again.

*Most of the tax involved is always sales tax (Everything except district taxes imposed outside LA County). The same rules apply to the application of sales tax to transportation charges.

Ms. D--- C. C---

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January 28, 1991
800.0980

Sincerely,

John L. Waid
Tax Counsel

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Encs.