STATE BOARD OF EQUALIZATION
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May 10, 1991

Mr. D--- L. W---
County of [name]
Office of County Counsel
XXX --- ---
---, CA XXXXX

RE: SR -- XX-XXXXXX

Dear Mr. W---:

I am responding to your letter to me of March 4, 1991. You have requested an opinion as to whether sales and use tax applies to transactions whereby [name] County Mosquito Abatement District (hereinafter "the District") receives services, materials or cash as reimbursement from other mosquito abatement districts for the delivery of live mosquito fish.

I. FACTUAL BACKGROUND

As I understand it from your letter and our telephone conversation on February 15, 1991, the District raises mosquito fish and releases them into District waters as part of its mosquito abatement program. It sometimes raises more fish than it can use. It proposes to enter into agreements with other such districts whereby it will distribute the excess fish, if any, in return for reimbursement of its costs. The reimbursement may take the form of cash, materials, or services.

You attached to your letter a copy of the agreement that the District proposes to sue. A copy of that agreement is attached hereto as Exhibit "A" and incorporated herein as if fully set forth. As used herein, the term "Exhibit 'A'" also includes "agreements substantially similar to Exhibit 'A'."

A. Sales and Use Tax Generally

In California, except where specifically exempted by statute, Revenue and Taxation Code Section 6051 imposes an excise 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 noted, all statutory references are to the Revenue and Taxation Code.) A "retailer" is

one who engages in the business of making retail sales of tangible personal property (§ 6015(a).) A "retail sale" means a sale for any purpose other than resale in the regular course of business in the form of tangible personal property. "[I]t shall be presumed that all gross receipts are subject to tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale…." (§ 6091.) The retailer owes the sales tax, but it may collect sales tax reimbursement from the purchaser pursuant to agreement. (Civ. Code § 1656.1.)

To be taxable, a sale does not have to occur in the regular course of the seller's business. However, one is in "business" who engages in activity "with the object of gain, benefit, or advantage, either direct or indirect." Undoubtedly, the term "business" contemplates that the seller engage in more than one isolated sale, but those sales need not be made with the intent of making a profit. The test has been stated as follows:

> "[T]he term 'retailer' includes a seller whose main occupation is not the making of retail sales. The enterprise does not even have to be a commercial one. The test is whether there are sufficient sales of tangible personal property sold to a buyer not for resale in the regular course of the buyer's business."

(Market St. Ry. Co. v. Cal. St. Bd. of Equal. (1955) 137 Cal.App.2d 87, 93-96 [290 P.2d 20; § 6013; see, also Kamp v. Johnson (1940) 15 Cal.2d 187, 190 [99 P.2d 27].)

> "Generally, a person who makes three or more sales for substantial amounts in a period of twelve months is required to hold a seller's permit. A person who makes a substantial number of sales for relatively small amounts is also required to hold a seller's permit."
>
> "Tax does not apply to a sale of property held or used in the [sic] course of an activity not requiring the holding of a seller's permit unless the sale is one of a series of sales sufficient in number, scope, and character to constitute an activity for which the seller is required to hold a seller's permit or would be required to hold a seller's permit if the activity were conducted in this state…."

(Reg. 1595(a); the "occasional sale" rule). Sales and Use Tax Regulations are Board promulgations which have the force and effect of law.

Throughout this letter we will assume that the District will, under the proposed agreement, make at least three transfers of fish during any twelve-month period under this agreement.

A "sale" includes any transfer of title or possession of tangible personal property for a consideration. (§ 6006(a).) A "seller" includes every person engaged in business of selling tangible personal property of a kind the gross receipts from the sale of which are required to be included in the measure of sales tax. (§ 6014.) The suitability of the assets to retail sale determines whether or not a party is a "seller." (Santa Fe Energy Co. v. St. Bd. of Equalization, (1984) 160 Cal. App.3d 176, 180 [206 Cal.Rptr. 499].) The "consideration" need not be money; it may be any valuable consideration, including services. (Cal-Metal Corp. v. St. Bd. of Equalization, (1984) 161 Cal.App.3d 761, 764 [207 Cal.Rptr. 783].)

A unit of local government, such as a county or a mosquito abatement district, is a "person" for the purpose of sales and use tax. (§ 6005.) The provision in Article XIII, §1 of the State Constitution exempting "such [property] as may belong to this State, or to any county, city or county, or municipal corporation" from property tax is not applicable to sales and use taxes, which are excise taxes. (Douglas Aircraft Co. v. Johnson, (1939) 13 Cal.2d 545, 548 [90 P.2d 572].)

B. Joint Powers Agreements

If authorized by their legislative bodies, two or more public agencies may, by agreement, jointly exercise any power common to them. (Govt. Code § 6502.) The agreements shall state the purpose of the agreement or the power to be exercised and shall provide for a method by which the purpose may be accomplished or the power exercised. (§ 6503.) The parties may provide for contributions or advances from public funds or contributions of public personnel, property or equipment from public funds to the agency or entity agreed on to be disbursed by it. (§ 6504.)

Where the powers agreed upon are exercised by an entity not one of the parties to the agreement, the debts, liabilities, and obligations of the agency shall be the debts, liabilities, and obligations of the parties, unless the agreement specifies otherwise. (§6508.1.) One or more of the parties to the agreement may be the agency provided by the agreement to administer the agreement. One or more of the parties may agree to provide all or a portion of the services to the other parties in the manner provided in the agreement, and a mutual exchange of services may be the only consideration provided. (§6506.)

C. Tax Consequences to Glenn County

It can be seen that the term "seller" is broader than the term "retailer." Pursuant to the above authority, while a person may be engaged in a business, such as a service industry, which does not require it to hold a seller's permit, it may make enough sales of tangible personal property of a kind the sales of which are subject to tax to be termed a "seller" and so required to obtain a seller's permit and report tax on its sales. (See, e.g., Hotel del Coronado v. St. Bd. of Equalization (1971) 15 Cal.App.3d 612 [92 Cal.Rptr. 456].)

Clearly, this contract is one whereby the District agrees to sell the fish it has raised which are in excess of its own needs to other districts. The consideration is services, materials, or cash, in an amount to be determined by the parties, but not to exceed the District's cost of raising the fish. The District would thus be a person transferring title to tangible personal property for a consideration. The sales are at retail because the purchasers will use the fish rather than resell them. Finally, there is no statutory exemption for the sales of mosquito fish or for sales by local government entities in general. Accordingly, we conclude that the District's sales of mosquito fish to other districts pursuant to Exhibit "A" would be subject to tax.

The fact that the agreement is to be executed under the authority of Government Code Sections 6500 et. seq. does not alter the above conclusion. Those provisions supply authority for local government entities to enter into such agreements, but do not alter the tax consequences of doing so. Specifically, there is no statute in the above code sections which negates any of the basic elements of a retail sale: (1) a transfer of title or possession (2) by a seller (3) for a consideration (4) for a purpose other than resale in the form of tangible personal property.

II. CONCLUSION

To recap, we conclude that the transfer of fish from the District to any other district pursuant to an agreement substantially similar to Exhibit "A" would be a retail sale of tangible personal property subject to tax. The Joint Powers Law may permit the parties to enter into Exhibit "A" but does not alter the tax consequences. The sales and use tax law is an excise tax and so not subject to the constitutional exemption of county property from taxation. Finally, there is no statutory exemption for sales by county governments or agencies for governmental purposes or for mosquito fish in particular. Whether or not the District enters into such an agreement with any other district, it will have to obtain a seller's permit and report and pay tax.

Please remember that throughout this letter I have assumed that the District will make at least three sales of fish in a twelve-month period. If it makes less, it will be exempt from tax under Regulation 1595(a) because the District holds and uses the fish in the course of an activity which does not require a seller's permit, namely, mosquito abatement, and will not have made enough sales of those fish to be considered as making more that occasional sales.

For your information, I have enclosed a copy of Regulation 1595. I hope the above discussion has answered your question. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid
Tax Counsel

JLW:es
Enc.: Reg. 1595