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January 20, 1995

Mr. K--- M---
V--- C---
XXX ---
---, CA XXXXX

Dear Mr. M---:

Re: V--- C---
SR - XX-XXXXXX

I am responding to your letter dated September 8, 1994. You ask how tax applies to your business of copper cladding residential steel hoods. For purposes of this opinion I assume that the hoods in question are new. You fabricate copper cladding in your shop and install it on site. The copper cladding cannot be removed without being destroyed.

Retail sales of tangible personal property in California are subject to sales tax measured by the gross receipts from the sale unless the sale is specifically exempt by statute. (Rev. & Tax. Code § 6051.) A retail sale is a sale for any purpose other than resale in the regular course of business in the form of tangible personal property. (Rev. & Tax. Code § 6007.) Thus, a sale for resale is not a retail sale and is not subject to sales tax.

If you are reselling the materials purchased in California in the form of tangible personal property without any use prior to the resale, then sales of the materials to you are nontaxable sales for resale. On the other hand, if you are not reselling the materials in the form of tangible personal property, then sales to you are taxable retail sales.

One factor in determining the proper application of tax is whether you are performing a construction contract within the meaning of Regulation 1521. Sales and Use Tax Regulation 1521 (a copy of which is enclosed) explains the application of California sales and use tax to

construction contracts. A construction contract includes a contract to furnish and install property becoming an improvement to real property. (Reg. 1521(a)(1)(A)1.) You state that you furnish and install the copper cladding on site. It is not clear, however, whether "on site" means that the hood on which the copper cladding is attached is already part of the real property when you install the cladding, or instead means that the hood is at the site but not attached to the real estate when you attach the cladding. We will, therefore, discuss both possibilities.

If you attach the copper cladding before the hood is part of the real property and do not thereafter install the completed hood onto the real property, then you are not performing a construction contract. Instead you are selling the copper cladding and owe tax on your gross receipts from that sale. Since the hoods in question are new, you are regarded as performing fabrication when you attach the cladding, and your entire charge is subject to tax with no deduction for your labor charges. (Rev. & Tax. Code § 6012.)

If you attach the copper cladding to a hood which is already part of real property, we regard you as a construction contractor since you both furnish and install tangible personal property becoming an improvement to real property. The tax treatment of the copper cladding you furnish and install depends on whether the copper cladding is characterized as materials or fixtures. Regulation 1521 defines the terms "materials" and "fixtures" as those terms apply to construction contractors. Materials are defined as items of tangible personal property that are incorporated into, attached to, or affixed to real property by contractors in the performance of a construction contract and which, when combined with other tangible personal property lose their identity and become an integral and inseparable part of the real property. (Reg. 1521(a)(4); see also Reg. 1521, Appendix A.) A construction contractor is generally the consumer of materials which the contractor furnishes and installs in the performance of a construction contract. The construction contractor may not take a resale certificate for materials that he furnishes and installs. The sale of those materials to the contractor is a retail sale and either sales tax or use tax applies with respect to the sale of the materials to or the use of the materials by the construction contractor. This is explained in subdivision (b)(2)(A)1. of Regulation 1521.

Fixtures are defined by Regulation 1521 as items which are accessory to a building or other structure and do not lose their identity as accessories when installed. (Reg. 1521(a)(5); see also Reg. 1521, Appendix B.) For California sales tax purposes, hoods are considered fixtures. (BTLG Annot. 190.0270 (4/5/77).) A construction contractor is generally the retailer of fixtures which the contractor furnishes and installs in the performance of a construction contract, and tax applies to the sale of the fixtures by the construction contractor to its customer. (Reg. 1521(b)(2)(B)1.)

Although you are installing cladding onto hoods, which are classified as fixtures, the cladding itself is classified as materials. When you furnish and install cladding onto new hoods which are already part of the real property at the time you install the cladding, you will be regarded as the consumer of the cladding if you bill in a lump sum. If you do not bill in a lump sum, you nevertheless will be regarded as the consumer of the cladding if you do not pass title to

the cladding to your customer prior to its attachment and you do not bill your customer an amount for "sales tax" computed upon your marked up billing for materials. (Reg. 1521(b)(2)(A)2.) Assuming that you qualify as a consumer under these rules, tax will apply to the selling price of the cladding to you.

If you have any further questions, please do not hesitate to write again.

Very truly yours,

Victor G. Matl
Staff Counsel

VGM:cl

Enclosure: Regulation 1521

cc: --- District Administrator