

**STATE BOARD OF EQUALIZATION**

1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 324-3828

November 6, 1991

Mr. J--- B---
C.F.O., C--- - A--- B--- Co., Inc.
XXXX --- Street
---, CA XXXXX

Re: Pre-fabricated Buildings
[no permit number]

Dear Mr. B---:

It was a pleasure to make your acquaintance over the phone recently. I am now responding to your letter to me of October 24, 1991, which pursuant to our conversation, you wrote to request an opinion as to whether your company's product qualified as real or personal property.

I. FACTUAL BACKGROUND

You describe the product which your company (hereinafter "C--- - A---") manufactures as follows:

- "A. Manufactured steel frame relocatable building.
- "B. Transportable size range is from 10x16x12 to 14x60x14.
- "C. Weight range is from 10,000lbs-30,000lbs.
- "D. Square footage of buildings range from 160 sq.ft. and beyond.
- "E. Building foundations will be either pressure treated lumber or concrete (slab or piered) similar to that of residential or commercial foundations.
- "F. The 12x16 and 12x28 might be used to house communication equipment."

During our telephone conversation on October 22, 1991, you indicated that C--- - A--- makes the buildings in sections in the factory and assembles them on site. You further stated that a building may be anchored to the foundation or may be held in place by its own weight, and although considered to be permanent, could be taken down and moved if necessary. They are, however, not easily transportable.

II. OPINION

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.) “Tangible personal property” is defined as “personal property which may be seen, weighed, measured, felt, or touched or which is in any other manner perceptible to the senses.” (§ 6016.) “[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.)

The Revenue and Taxation Code does not define when an item of tangible personal property is converted into. We have, therefore, adopted the definition in Civil Code Section 660 which provides as follows:

“A thing is deemed to be affixed to land when it is ... permanently resting upon it, as in the case of buildings;”

B. Construction Contracts

The Sales and Use Tax Law regarding construction contractors is interpreted and implemented by 18 California Code of Regulations Section (hereinafter “Regulation”) 1521. Regulation 1521(a)(1)(A) defines a “construction contract” as a contract, whether on a lump sum, time and material, cost plus, or other basis, to, among other things, “erect, construct, alter, or repair any buildings or other structure, project, development, or other improvement on or to real property.”

The Regulation discusses prefabricated buildings, in part, as follows:

“A contract to furnish and install a relocatable classroom, or other prefabricated or modular building of similar size, is a construction contract whether the building rests in place by its own weight or is physically attached to realty. It is immaterial whether the building is erected upon or affixed to land owned by the owner of the building or is leased to the landowner or lessee of the land.

“Generally, a contract to furnish and install a small prefabricated building, such as a shed or kiosk, which is movable as a unit from its site of installation, is a construction contract only if the building is required to be physically attached to real property by the seller, upon a concrete foundation or otherwise. The sale of such a unit to rest in place by its own weight, whether upon the ground, a concrete slab, or sills or piers, is not a construction contract even though the seller may deliver the unit to its site of use.”

(Reg. 1521(c)(3).) Section 6012.6, which defines a factory-built school building, while it does not specify a size, does describe such a building as one “which is either wholly manufactured or is in substantial part manufactured at an office location, to be assembled, erected, or installed” on a site.

Construction contractors are consumers of materials which they furnish and install in the performance of construction contracts. Either sales or use tax applies with respect to the sale of the materials to or the use of the materials by the construction contractor. (Reg. 1521(b)(2)(A).) “Materials” means and includes construction materials and components, and other tangible personal property which is incorporated into, attached to, or affixed to, real property by contractors in the performance of construction contracts and which, when combined with other tangible personal property, loses its identity to become an integral and inseparable part of the real property. (Reg. 1521(a)(5).)

C. Tax Consequences to C--- - A---

The facts as you recite them indicate that the buildings in question are of considerable size (i.e., larger than a building customarily thought of as a “shed” or “kiosk”), are built at the factory in sections, and are then moved to the site where they are assembled. They do not appear to be capable of being moved as a unit. We are of the opinion that they qualify as prefabricated or modular buildings or similar size to a relocatable classroom under the above regulation. As a result, C--- - A---’s contracts to assemble and install such buildings qualify as construction contracts, whether or not the buildings are physically attached to realty or rest there on their own weight.

As a result, the items which C--- - A--- uses in the performance of these contracts, such as 2x4’s, nails, etc., qualify as “materials” as defined above. C--- - A--- is thus the consumer of these materials with the result that its suppliers must pay sales tax and may collect sales tax reimbursement (or must collect use tax, whichever is applicable) when they sell the materials to C--- - A---. The measure of tax is the cost of the materials to C--- - A---. If C--- - A--- attaches to or install in its buildings any items which do not lose their identity after attachment, such as sinks and cabinets, they are termed “fixtures” under the regulation. C--- - A--- is the retailer of fixtures. It may purchase them from its suppliers free of tax by giving resale certificates substantially conforming to Regulation 1668, and must pay tax and measured by the sales price may collect tax reimbursement upon their sale to the owner. (Reg. 1521(a)(5); (b)(2)(B).)

Mr. J--- B---

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For your information, I have enclosed a copy of Board of Equalization Pamphlet No. 9, "Building and Construction Contractors", which contains a copy of Regulation 1521. 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
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Enclosure: Pamphlet 9