

**STATE BOARD OF EQUALIZATION**

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August 16, 1990

Mr. --- S. C---
H--- and S---
T--- F--- N--- Plaza, Suite XXXX
---, -- XXXXX

Dear Mr. C---:

Since the California State Board of Equalization administers the Sales and Use Tax Law, your May 22, 199X letter to Mr. Glenn Rigby, Chief Counsel of the Franchise Tax Board, regarding the application of sales tax to sales of containers, has been referred to this Board's legal staff for reply.

You provided the following background:

"The taxpayer is engaged in the business of producing and selling industrial, medical and specialty gasses. Some of the gasses are transferred to customer vessels while in the liquid state, while others are delivered to customers in cylinders, usually in the gaseous state.

"Cylinders. For customers who purchase gasses in smaller volumes, the Taxpayer delivers the gas in returnable cylinders. The cylinders are equipped with safety valves and require other control equipment in order to utilize the gas. The Taxpayer charges rent on the cylinders in the form of a fixed monthly fee for each cylinder delivered.

"Vessels. For customers having a greater demand, the Taxpayer installs a large storage vessel with its related equipment at the customer's site. Such 'customer stations' are generally leased to the customer by the Taxpayer, and are removed by the Taxpayer if the customer ceases to purchase gas from the Taxpayer. Most of the customer stations include vaporizing equipment to convert the product from the liquid form in which it is delivered and stored to

its gaseous form. The Taxpayer charges periodic rent for each vessel.

“Typical Customers. The Taxpayer sells oxygen to industrial customers for use in steel production, welding and for use in respiratory care.

“The Taxpayer sells carbon dioxide for use in wastewater treatment, chemical processing, low-temperature testing and steel manufacturing. The vast majority of such customers convert the carbon dioxide to its gaseous state or a snow-like substance for freezing purposes. Carbon dioxide is also used as a component for some products, such as carbonated beverages.

“Finally, the Taxpayer sells a variety of specialty gasses to customers for such wide-ranging uses as inert-gas welding, steel manufacturing, laboratory instrumentation calibration, health care and sterilization.”

Given this information, you asked whether there is an exemption in California for the sale of tangible personal property either used in manufacturing, assembling, processing, or production of tangible personal property or used in food processing. No, as provided in Sales and Use Tax Regulation 1525, Property Used In Manufacturing, tax applies to the sale of tangible personal property to persons who purchase it for the purpose of use in manufacturing, producing or processing tangible personal property and not for the purpose of physically incorporating it into the manufactured article to be sold.

The application of tax to the sale and lease of the cylinders and vessels is as follows:

Cylinders.

Sales and Use Tax Regulation 1589, Containers and Labels, provides the application of tax to sales of the cylinders you described. Subdivision (b)(1) of the regulation provides that tax does not apply to sales which generally includes leases of:

“(A) Nonreturnable containers when sold without the contents to persons who place the contents in the container and sell the contents together with the container.

“(B) Returnable containers when sold with the contents in connection with a retail sale of the contents, or when resold for refilling.

“(C) All containers when sold with the contents, if the sales price of the contents is not required to be included in the measure of the sales tax or the use tax.

“(D) Tax applies to all other sales of containers except sales for the purpose of resale to other sellers of containers who purchase them for resale without the contents.”

Since the taxpayer purchases these cylinders empty and fills them to sell with the contents, the sale of the cylinders to the taxpayer is not within any of the conditions which qualify for the exemption and is a taxable retail sale. Accordingly, sales tax applies to the sale of cylinders to the taxpayer in California. (Rev. & Tax. Code § 6051.) If the taxpayer purchases cylinders out of state for use in California, the use in California is subject to use tax. (Rev. & Tax. Code § 6201.) Tax then does not apply to the taxpayer’s charge to its customers for the use of the cylinders.

Vessels.

We assume that the taxpayer purchases a vessel and delivers it empty to its customer’s site. In such case, the application of tax to the charge for the vessels you described is different from the application of tax to the charge for the cylinders. If the taxpayer has not made a use of the vessel prior to leasing it, the taxpayer has an election to pay tax in either of two ways.

First, if the taxpayer purchases a vessel and pays sales tax reimbursement or timely pays use tax measured by the purchase price and leases the vessel in substantially the same form as acquired, tax does not apply with respect to the rentals charged to the taxpayer’s customer. (Sales and Use Tax Reg. 1660, subd. (c)(2).) If the tax has not been so paid, and the taxpayer wishes to pay tax measured by the purchase price, the taxpayer must report and pay the tax timely with the return for the period during which the property is first placed in rental service. A timely return is one filed within the time prescribed by Revenue and Taxation Code sections 6452 or 6455, whichever is applicable.

On the other hand, if the taxpayer does not elect to so pay tax based on cost, the tax is measured by the rentals payable by its customer. Generally, the applicable tax is a use tax upon the use in this state by the lessee. The taxpayer, as lessor, must collect the tax from the lessee at the time rentals are paid by the lessee and give the lessee a receipt of the kind called for in Sales and Use Tax Regulation 1686. (Reg. 1660, subd. (c)(1).)

You did not provide us with the name of your client. Revenue and Taxation Code section 6596 provides that, if the Board finds that a person’s failure to make a timely return or payment is due to a person’s reasonable reliance on written advice from the Board, the person may be relieved of sales and use tax imposed and any penalty or interest. The Board may provide such relief only where the response is in writing to a specifically identified taxpayer. We would need the name of you client to maintain appropriate records with respect to the

information provided and properly document the client's file regarding the request for information. In the absence of such information, our response is intended only to provide general information as to the application of tax and cannot be a basis for reliance by your client for purposes of section 6596.

We assume that you understand the application of tax to charges for the various gases furnished by the taxpayer. Accordingly, we have not given an opinion regarding that application of tax. If you need further information, feel free to write again.

Very truly yours,

Ronald L. Dick
Senior Tax Counsel

RLD:sr

bc: --- District Administrator
Mr. David H. Levine