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December 29, 19932

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Mr. L--- R. S---, D.P.M.
A--- Inc.
XXX --- --- ---
--- ---, CA XXXXX

**Re: Application of Tax to Canceled Contract
for Sale of Molds**

Dear Mr. S---:

This is in response to your letter dated November 17, 1993. You state in your letter that A--- entered into a contract with F--- T--- and E--- (F---) to construct a set of steel molds to be used in the production of orthotic foot appliances. The molds that were constructed could not be used for the purpose for which they were intended. The contract was canceled and no tangible personal property was transferred to A---. You are, however, planning to reimburse F--- for the labor incurred. You state in your letter that F--- has "paid sales tax on the molds and supplies that were used to construct the molds" and is now seeking recovery of "that tax" from you. It is unclear from your letter whether F--- paid sales tax on its purchases of the supplies from its vendors or whether F--- has paid sales tax on its intended sale to you.

I assume that your inquiry relates to whether sales tax is applicable to F---'s charges to you.

Discussion

Revenue and Taxation Code section 6051 imposes a sales tax on all retailers measured by their gross receipts from retail sales of tangible personal property. Although the sales tax is imposed upon the retailer, the retailer may collect sales tax reimbursement (usually itemized on the invoice as "sales tax") from the purchaser if the contract of sale so provides. (Civ. Code § 1656.1.)

Under the facts of your letter, F--- must pay sales tax, and may collect reimbursement from you if your contract so provides, if there has been a sale of tangible personal property. A “sale” is defined in Revenue and Taxation Code section 6006 to include:

“(a) Any transfer of title or possession, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. (Emphasis added.)

We were not provided with a copy of a contract for the sale of the molds. I assume that the contract did not contain a provision providing for the passage of title of any tangible personal property to A--- prior to actual delivery of the tangible personal property. Although both parties had originally contracted for the transfer of tangible personal property, there has been no transfer of any tangible personal property. As such, no taxable sale has occurred. Since F--- did not make a taxable sale, it may not collect reimbursement from you for any sales tax. However, please note that F--- owes use tax with respect to any property it used during the contract which it acquired ex-tax for resale. Without reviewing your contract, we are unable to ascertain whether F--- is entitled to reimbursement from you with respect to such possible use tax liability. If your contract does require you to reimburse F--- for its use tax liability, that reimbursement should not be called “sales tax”.

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

Sincerely,

Ms. Sukhwinder K. Dhanda
Staff Counsel

SKD:plh