



**STATE BOARD OF EQUALIZATION**

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March 27, 2002

Ms. --- ---  
--- --- ---  
Suite XXXX  
--- --- Street  
---, --- XXXXX-XXXX

**Re: Construction Contractor with Project on Indian Reservation  
Unidentified Taxpayer**

Dear Ms. ---:

This is in response to your September 25, 2001 letter to Assistant Chief Counsel Janice L. Thurston. I apologize for the delay in our response.

Preliminarily, we note that our response to your letter does not constitute written advice pursuant to Revenue and Taxation Code section 6596, since you failed to identify the taxpayer and possibly all relevant information concerning the transaction in question. If your client wishes to obtain the protection provided by section 6596, you should provide us with the identity of the client (as well as all relevant facts) in your initial inquiry to us.

Your letter states in part:

“An Indian Tribal enterprise (“Tribe”) has selected the Construction Company as the general contractor to construct various large buildings on an Indian reservation. The Tribe is organized under Tribal authority and wholly owned by a federally recognized Indian tribe. The Construction Company will subcontract with numerous subcontractors (*i.e.*, first-tier subcontractors) to complete the project. These subcontractors may also contract with another tier of subcontractors (*i.e.*, second-tier subcontractors).”

We understand you to mean that the Tribal enterprise which has contracted with the Construction Company is organized under Tribal authority and wholly owned by a federally recognized Indian Tribe. We have assumed that the Construction Company itself is not a Tribal entity.

We will provide a general discussion prior to responding to your four specific inquiries.

As a starting point, sales tax is imposed on a retailer's retail sale of tangible personal property in this state, measured by a percentage of gross receipts, unless the sale is specifically exempted or excluded by statute. (Rev. & Tax. Code § 6051.) When sales tax does not apply, use tax applies to the storage, use or other consumption of tangible personal property purchased from any retailer for storage, use or other consumption in this state, measured by a percentage of the sales price, unless that use is specifically exempted or excluded by statute. (Rev. & Tax. Code §§ 6201, 6401.) "Gross receipts" or "sales price" generally include all amounts received with respect to the sale of tangible personal property, with no deduction for the cost of materials used, labor or service costs, or other expenses of the retailer, unless there is a specific statutory exclusion or exemption. (Rev. & Tax. Code §§ 6011, 6012.)

When a non-Indian retailer makes a sale on or off the reservation to a non-Indian customer (including a sale to an Indian who does not reside on the reservation), or a sale to an Indian customer off a reservation, sales or use tax applies if the sale is otherwise subject to tax. A non-Indian retailer's sale of tangible personal property to an Indian is not subject to tax if the delivery is made to the Indian purchaser on a reservation and title (ownership) transfers to the purchaser on the reservation. (Reg. 1616(d)(4)(A).)<sup>1</sup>

Regulation 1616(d) also sets forth the application of tax to construction contracts for permanent improvements on the reservation. In general, the construction contractor is the retailer of fixtures it furnishes and installs. (Reg. 1521(b)(2)(B)1.) However, sales tax does not apply to a construction contractor's charges for fixtures the contractor furnishes and installs on Indian reservations. (Reg. 1616(d)(4)(C).)

The general rules regarding a construction contractor's sales of machinery and equipment are set forth in Regulation 1521. Construction contractors are the retailers of machinery and equipment even though the machinery and equipment is furnished in connection with a construction contract, and generally tax applies to the contractor's gross receipts from such sales. (Reg. 1521(b)(2)(C)1.) However, if delivery is made to an Indian purchaser on the reservation and title to the machinery or equipment passes to the Indian purchaser on the reservation before the construction contractor makes any use of the machinery or equipment, the sale to the Indian purchaser is exempt from tax. (Reg. 1616 (d)(4)(A).)

In general, a construction contractor furnishing and installing materials is the consumer of materials, and tax applies to the vendor's sale of materials to the construction contractor (Reg. 1521(b)(2)(A)1.), not to the transaction between the construction contractor and its customer. Under Regulation 1616(d)(4)(C), sales tax does not apply to sales of materials to Indian contractors if the property is delivered to the Indian contractor on the reservation. On the other hand, sales tax does apply to sales of materials to non-Indian contractors notwithstanding the

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<sup>1</sup> Please note that the Board will hold a public hearing on changes to Regulation 1616 on March 27, 2002. A copy of the currently proposed amendments (underlined portions) to Regulation 1616 is enclosed for your reference.

delivery of the materials on the reservation and the permanent attachment of those materials to the realty. (Reg. 1616(d)(4)(C).)

However, a construction contractor is deemed the retailer of materials, rather than the consumer of materials, if the following provision of Regulation 1521(b)(2)(A)2. applies:

“2. When Contractor is Seller. A construction contractor may contract to sell materials and also to install the materials sold. If the contract explicitly provides for the transfer of title to the materials prior to the time the materials are installed, and separately states the sale price of the materials, exclusive of the charge for installation, the contractor will be deemed to be the retailer of the materials.”

Regulation 1616(d)(4)(C)1. can be interpreted as subjecting to tax, all sales of materials to non-Indian contractors, irrespective of the provisions of Regulation 1521(b)(2)(A)1. (Cf. Reg. 1521(b)(1)(A) re sales of fixtures and materials to U.S. construction contractors.) While the matter is not entirely free from doubt, we instead read the provisions of Regulation 1616(d)(4)(C)1. together with the provisions of Regulation 1521(b)(2)(A)1. and 2. to reach the conclusions that (1) this provision of Regulation 1616(d) refers to those transactions in which the construction contractor is a consumer who furnishes and installs materials and not to those transactions in which the construction contractor would otherwise be deemed a retailer of materials; and (2) this provision of Regulation 1616(d) does not prohibit the construction contractor from being the retailer of materials if the construction contractor complies with Regulation 1521(b)(2)(A)2.<sup>2</sup>

When the construction contractor complies with the provisions of Regulation 1521(b)(2)(A)2. and thereby is deemed a retailer, the construction contractor may purchase the materials from its vendor for resale, and timely provide its vendor with a resale certificate as provided in Regulation 1668. The construction contractor may resell the materials as a retail sale prior to making any use of them (e.g., installing them) only by complying with the provisions of Regulation 1521(b)(2)(A)2.; that is, only if its construction contract separately states the sales price of materials, exclusive of the charge for installation (e.g. not a lump sum contract, but a time and material contract as described in Regulation 1521(a)(7)), the contract explicitly

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<sup>2</sup> This differs from the treatment of construction contractors who contract with the United States government. U.S. construction contractors are always consumers and never retailers of materials and fixtures which they furnish and install for the U.S. government. Tax always applies to the sale of fixtures and materials to the construction contractor or the construction contractor's use of the materials, even if the contractor were to purport to purchase the property as the agent of the United States or purport to sell the materials or fixtures to the U.S. prior to installing them. U.S. construction contractors are never the retailers of fixtures or materials (*In re Howell* (9<sup>th</sup> Cir., 1984) 731 F.2d 624) and, therefore, cannot pass title of these items to the U.S. government prior to use and thereby avoid tax. Such tax avoidance is possible only with a U.S. construction contractor's sale of supplies, machinery or equipment where title to the property passes to the United States prior to the contractor's making any use of it. (Rev. & Tax. Code §§ 6007.5, 6384; Reg. 1521(b)(1)(B); *Aerospace Corp. v. State Bd. of Equalization* (1990) 218 Cal.App.3d 1300.)

provides for the transfer of title to the materials prior to the time the materials are installed and, in fact, the contractual provisions are carried out.<sup>3</sup> The fact that the Indian Tribe may have paid the contractor will not exempt the transaction from tax if the above requirements are not met. (See Sales and Use Tax Annot. 305.0007 (3/31/89).)

A construction subcontractor generally cannot avoid liability for tax on materials or fixtures furnished and installed by him or her by taking a resale certificate from the prime contractor. (Reg. 1521(b)(6)(A).) A construction contractor who has obtained a seller's permit may, however, accept a resale certificate from the prime contractor if the prime contractor will be a retailer of those materials, i.e. the prime contractor sells materials to the Indian Tribe in compliance with Regulation 1521(b)(2)(B)2., and title to the materials passes prior to use (installation) by the subcontractor.

Even if the construction contract were to comply with the provisions of Regulation 1521(b)(2)(B)2., the subcontractor (or prime contractor if the prime contractor is the retailer) must in fact pass title to the materials to the Indian Tribe on the reservation prior to use for the retail sale of materials to be exempt from tax.<sup>4</sup> When this occurs, the retailer selling materials to the Indian Tribe should obtain an exemption certificate from the Indian Tribe to substantiate that its sale was exempt from California sales or use tax.

You state that the Tribe has sought to designate the Construction Company as its agent.<sup>5</sup> We have not been provided with the construction contracts, or with an agency agreement, if it exists. As far as we can determine from the information that was provided, the Construction Company, its subcontractors and its sub-subcontractors would be nonagent independent contractors as described in the Restatement Second of Agency, section 14 N. Comment b to that section states:

*“Non-agent independent contractor. A person who contracts to accomplish something for another or to deliver something to another, but who is not acting as a fiduciary for the other, is a non-agent contractor. He may be*

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<sup>3</sup> If a subcontractor in fact passes title, not to the Indian Tribe, but to the prime contractor, the prime contractor would be the consumer of materials as the construction contractor with the obligation to both furnish and install the materials, unless the prime contractor complies with Regulation 1521(b)(2)(B)2., so as to be a retailer with respect to those materials.

<sup>4</sup> Title to tangible personal property generally would pass to the purchaser on the reservation only if (1) the seller delivered the tangible personal property or equipment by its facilities (e.g., trucks) to the reservation; (2) the seller shipped the tangible personal property (e.g., by mail or common carrier) F.O.B. destination on the reservation; or (3) the contract specifically provided for title to pass to the Indian Tribe on the reservation. (Reg. 1628(b)(3)(D); Cal. U. Com. Code § 2401.)

<sup>5</sup> Evidently the Tribe has sought to establish agency by attempting compliance with Regulation 1540, as it read prior to its amendment effective April 23, 2000. The former version of Regulation 1540 set forth several requirements for determining whether an agency relationship exists. The current version of Regulation 1540, dealing specifically with the advertising industry, incorporates a rebuttable presumption that an advertising agency acts as an agent for its clients. This presumption was based upon the standard customs and practices of the advertising industry.

anyone who has made a contract and who is not an agent. The term is used colloquially to describe builders and others who have contracted to accomplish physical results not under the supervision of the one who has employed them to produce the results.”

(See also Restatement Second of Agency, section 14 J (distinguishing between agent or buyer) and section 14 K (distinguishing between agent or supplier).)

In any event, we do not believe that the Tribe may transfer its sovereign immunity to contractors, subcontractors and sub-subcontractors by mere language of assignment. The U.S. Supreme Court has noted, “a finding of constitutional taxing immunity requires something more than the invocation of traditional agency notions....” (*U.S. v. New Mexico* (1982) 455 U.S. 720, 736.) The Supreme Court has specifically held in the context of United States immunity from state taxes that such immunity is appropriate only “when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned.” (*Id.* at p. 735.) The issue is “whether the contractors can realistically be considered entities independent of the United States. If so, a tax on them cannot be viewed as a tax on the United States itself.” (*Id.* at p 738.) In the information that we have been provided, your statement that the Construction Company acts as an agent of the Tribe provides insufficient indication that the Tribe-contractor relationship is anything other than a typical owner-contractor relationship as described in the Restatement Second of Agency, and no indication that the contractor, subcontractors and sub-subcontractors can be viewed as anything other than entities independent of the Indian Tribe.

You contend that the Construction Company has fulfilled all requirements of agency as identified by the Board of Equalization. In reaching your conclusion, you have mistakenly assumed that Regulation 1540 and Sales and Use Tax Annotation 305.0005 (3/9/95) set forth all elements necessary to determine that an agency relationship exists between an Indian Tribe and a non-Indian subcontractor. This assumption is flawed on a number of grounds. We note that Regulation 1540, which you cite as setting forth all necessary elements of agency, has been amended, and the language you cite is no longer in effect.<sup>6</sup> Significantly, neither that previous version of Regulation 1540 nor the version of Regulation 1540 currently in effect contains any reference to sovereign immunity, an issue essential to proper analysis of your situation. Moreover, Annotation 305.0005 does not provide a full analysis of agency as it pertains to your clients. There is no discussion of sovereign immunity in Annotation 305.0005, because the taxability of the transaction in question was resolved on a different ground, *i.e.*, failure to fulfill the delivery and title requirements of Regulation 1616.

Furthermore, we note that Board annotations “do not have the force and effect of law.” (Reg. 5200(a)(1).) Rather, annotations are a “research tool” in regard to the interpretation of statutes and Board regulations, as applied by the Board staff to specific factual situations. (Reg. 5200(c).) Although annotations are synopses of past advice provided by the Board’s legal staff,

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<sup>6</sup> See footnote 5, *supra*.

the advice is not binding and may be revised at any time. (Ops. Memo. No. 1092 (3/6/01).) Therefore, even assuming your analysis of Annotation 305.0005 was correct (which it is not), the Board is not compelled to apply the reasoning of the annotation to your factual situation.

We next respond to your specific inquiries.

“Issue One: Do the procedures developed and followed by the Construction Company permit it to act as the Tribe’s purchasing agent and make non-taxable purchases on the Tribe’s behalf?

“....

“Conclusion One: Pursuant to Cal. Code Regs. 18, § 1616 (cited and quoted above) and SBE Annotation No. 305.0005, the Construction Company can act as the Tribe’s purchasing agent and make non-taxable purchases of materials, fixtures, and equipment on the Tribe’s behalf if the Tribe and the Construction Company follow the following procedures:

- “1. Prior to the Construction Company’s making any purchases, it must get written authority (*i.e.*, a contract) from the Tribe to act as the Tribe’s purchasing agent. The written authority should provide that the Tribe appoints the Construction Company to act as its agent to:
  - “a) make purchases for the Tribe’s construction job,
  - “b) enter into contracts with suppliers, subcontractors, and subcontractors acting as retailers and issue payments to vendors or suppliers, subcontractors, and
  - “c) subcontractors acting as retailers using monies provided to it by the Tribe.
- “2. When the Tribe issues a purchase order to, or enters into a subcontract with, a vendor or supplier, subcontractor, or subcontractor acting as a retailer, the order or contract must specify that the Construction Company makes the purchase or enters into the contract as the Tribe’s purchasing agent.

“In order to establish an agency relationship between the Construction Company and the Tribe, the Construction Company must always reveal the name of its principal – that is, the Tribe. In order to comply with this requirement, the Construction Company should always use the Tribe’s entire name.

- “3. Both purchase orders and subcontracts must specify that any sale to the Construction Company acting as a purchasing agent is not complete, and title does not pass, until delivery is accepted by the purchaser (*i.e.*, the Tribe) or its purchasing agent at the construction site on the Indian reservation.
- “4. Invoices issued to the Construction Company by a vendor or supplier, subcontractor, or subcontractor acting a retailer must note that:
  - “a) the Construction Company makes the purchase as the purchasing agent of the Tribe, and
  - “b) shipping terms are F.O.B. Indian reservation.
- “5. Delivery of all purchased materials, fixtures, equipment, or fabricated or pre-fabricated property must be made to, and take place at, the construction site on the Indian reservation, prior to installation or incorporation into realty by the Construction Company or any of its subcontractors.
- “6. Title to all purchased materials, fixtures, equipment or fabricated or pre-fabricated property must pass to the Tribe, or the Construction Company acting as the Tribe’s purchasing agent, at the construction site on the Indian reservation.
- “7. Any shipping document must provide that shipping terms are F.O.B. construction site on the Indian reservation.
- “8. When the Construction Company issues a payment to a vendor or supplier, subcontractor, or subcontractor acting as a retailer, the check must comply with the following:
  - “a) The check must specify that the Construction Company issues the check on the behalf of the Tribe as its purchasing agent, and
  - “b) The amount billed to, or received from, the Tribe for purchases made, or contracts entered into, by the Construction Company as the Tribe’s agent must be the same amount the Construction Company pays to the vendor or supplier, subcontractor, or subcontractor acting as a retailer when the Construction Company acts as the Tribes purchasing agent.

“9. The Construction Company cannot use the items purchased as the Tribe’s agent for its own use.

“10. Record Retention:

“The Construction Company should keep and store for 3 ½ years after the completion of the last purchase made by it or one of its subcontractors all records pertaining to any transaction between it and the Tribe or it and any supplier or vendor, subcontractor, or subcontractor acting as a retailer.

“Ruling Request One: The Construction Company respectfully requests that the Legal division review conclusion one above and the procedures described therein and tell it:

“1. whether or not conclusion one and the above-described procedures correctly state California law pertaining to : (a) the exemption provided Indian Tribes and their purchasing agents, and (b) California’s agency requirements, and

“2. whether or not compliance with the above-described procedures permits the Construction Company to make non- taxable purchases of materials, fixtures, and equipment on the Tribe’s behalf.”

Answer to Opinion Request One:

A retail sale made as described in your “conclusion one” is a sale to the non-Indian (purported agent) not to the Indian Tribe. As set forth in our discussion of agency, *supra*, we do not believe that the Construction Company, nor its subcontractors or sub-subcontractors, has created a valid agency relationship with the Tribe or that these purported agents can exercise the Tribe’s sovereign immunity.

Accordingly, we believe that the seller enters into the retail sales contract with the non-Indian Construction Company, its subcontractors, or its sub-subcontractors, not with the Tribe. The non-Indians’ disclosures of purported agency to vendors of the materials do not render the agency relationship legally valid. In any event, the purported agent may not provide the seller with a declaration of exemption from California sales tax executed by the Tribe, because we do not believe that the Tribe can exercise sovereign immunity from tax liability through an agent, whether that agent is purported or valid.

Regulation 1616(d)(4)(C)2. provides that sales tax applies to sales of materials to non-Indian contractors notwithstanding the delivery of materials on the reservation and the permanent attachment of the materials to realty. Here you specify that delivery of materials on the reservation will be F.O.B. destination, and we assume that such delivery will be by common carrier. We further assume that the materials will be permanently attached to realty. Because the



materials are in fact sold to the non-Indian Construction Company, its sub-contractors, or its sub-subcontractors, the reservation delivery and the ultimate attachment of the materials to the realty on the reservation do not prevent sales tax from being imposed on these sales. (*Ibid.*) The retail sale of materials that you describe is a sale to the non-Indian contractor, subcontractor or sub-subcontractor (purported agent), and is subject to tax regardless of whether title passes to the non-Indian on or off the reservation. (*Ibid.*)

Similarly, the sale of machinery and equipment is a retail sale to the non-Indian Construction Company, subcontractor or sub-subcontractor. Under these circumstances, the Construction Company, subcontractor or sub-subcontractor is the consumer of the machinery and equipment, and the sale to the Construction Company, its subcontractor or sub-subcontractor is subject to tax. (Rev. & Tax. Code § 6051.)

With regard to fixtures, Regulation 1616(d)(4)(C)2. provides that sales tax does not apply to the sales of fixtures furnished and installed by non-Indian contractors on the reservation. Accordingly, when the non-Indian contractors, subcontractors or sub-subcontractors purchase fixtures and install the fixtures on the reservation, sales tax does not apply. The non-Indian contractor, as retailer to the Indian Tribe, should obtain an exemption certificate from the Indian Tribe to substantiate that its sale is not otherwise subject to California sales or use tax.

“Issue Two: When the Construction Company pays vendors for purchases that it makes as the Tribe’s purchasing agent, must the Construction Company pay the vendors using a separate bank account?

“....

“Conclusion Two: As previously discussed, the Construction company believes that it must issue payments to its vendors or subcontractors that specify that it does so on behalf of the Tribe as its purchasing agent. No California tax authority requires a purchasing agent (such as the Construction Company) to establish a separate bank account to be used solely for making payments on behalf of the agent’s principal (*i.e.*, the Tribe). The check issued by the Construction Company will specify that it is the payor acting on behalf of the Tribe as its purchasing agent. If for some reason the Construction Company cannot make this specification on the check, it will issue a transmittal letter that will accompany the payment. The letter will describe the purpose of the payment and states that the Construction Company makes it on behalf of the Tribe as its purchasing agent.

“Ruling Request Two: The Construction Company respectfully requests that the Legal division review conclusion two above and tell it:

“1. whether or not it must establish a separate bank account to be used solely for making payments on behalf of the agent’s principal (*i.e.*, the Tribe), or whether or not it can use a general banking account as long as it

can identify the amounts received from the Tribe for payments on the Tribe's behalf and payments actually made on the Tribe's behalf,

"2. whether or not each payment check must specify that the Construction Company issues it as the payor, acting on behalf of the Tribe as its purchasing agent, and

"3. assuming that the check must identify the Construction Company as the Tribe's purchasing agent, whether or not the Construction Company can, in lieu of specifying this information on the check, issue a transmittal letter that accompanies the payment and provides this information."

Answer to Opinion Request Two:

As noted above, we believe that the Construction Company is not an agent of the Tribe. Payment by the Construction Company to the vendors using a separate bank account does not alter our response. Similarly, specification on each payment check, or by transmittal letter, that the Construction Company is acting on behalf of the Tribe as its (purported) purchasing agent in no way changes our conclusion.

"Issue Three: Can the exemption provided to Indian Tribes (*i.e.*, Cal. Code Regs. tit. 18, § 1616(d)(4)) extend beyond contractors to subcontractors through a subagency relationship established in the primary construction contract between the Construction Company and the Tribe?

"....

"Conclusion Three: In order for the subcontractors to comply with the Tribe's exemption, they too, like the Construction Company, must act as the Tribe's purchase agents. The realities surrounding general contractors, subcontractors, and construction projects make it impractical for each subcontractor to directly contract with the Tribe to establish a direct purchasing agent relationship. Despite this, the Construction Company believes that, under California law, if the contract between it and the Tribe provides that any tier of subcontractor the Construction Company directly (*i.e.*, first-tier subcontractors) or indirectly (*i.e.*, second-tier subcontractors) hires also acts as the Tribe's purchasing agent, and the subagents comply with the agency requirements mandated in Cal. Code Regs. tit. 18, § 1540, these various tiers of subcontractors can make non-taxable purchases for the Tribe in compliance with Cal Code Regs. tit. 18, § 1616(d)(4), the off-reservation sales exemption. The subcontractors would, of course, follow and comply with the other mandates of the exemption and the procedures outlined and specified above at conclusion one. No California authority prohibits the Tribe from contractually creating a subagency relationship with the Construction

Company's subcontractors by means of the contract between the Tribe and the Construction Company.

“Other states permit exemptions to flow through general contractors to their subcontractors through a subagency relationship established in the primary construction contract between the general contractor and its customer. For example, in South Carolina, if a general contractor enters into a contract with the federal government to construct a building on property owned by the government, the state exempts the contractor's purchases if the contract between the parties comply with the exemption's mandates. S.C. Code Ann. § 12-36-2120(29). That is, the contract between the parties must provide that title to and possession of the property transfers to the federal government either at the time of the purchase or sometime after it. *Id.* The South Carolina Department of Revenue permits the exemption to extend beyond contractors to subcontractors through a subagency relationship established in the primary construction contract between the general contractor and customer. That is, if the contract between the general contractor and the federal government provides that any building materials purchased by one of the general contractor's subcontractors for the government construction project complies with the mandates specified in S.C. Code Ann. § 12-36-2120(29), the exemption extends to the subcontractor's purchases.

“Ruling Request Three: The Construction Company respectfully requests that the Legal division review conclusion three above and tell it whether or not California's exemption for purchases made by Indian Tribes extends to the various tiers of subcontractors through a subagency relationship if:

“1. the general contract between the Construction Company and the Tribe provides that any tier of subcontractors the Construction Company directly (*i.e.*, first-tier subcontractors) or indirectly (*i.e.*, second-tier subcontractors) hires can act as the Tribe's purchasing agent for purposes of the exemption, and

“2. the various tiers of subcontractors comply with the mandates of Cal. Code Regs. tit 18, § 1616(d)(4) by complying with the procedures outlined and described above in conclusion one.”

Response to Opinion Request Three:

As we stated in our response to your “conclusion one,” we do not believe that the Construction Company nor its subcontractors has created a valid agency relationship with the Tribe or that these purported agents can exercise the Tribe's sovereign immunity. As we explained in our discussion of agency, *supra*, the version of Regulation 1540 upon which you

rely to establish agency is no longer in effect, and in any event, contained no reference to the essential issue of sovereign immunity.<sup>7</sup>

Your “conclusion three” regarding a “flow-through” agency relationship from the contractor to tiers of subcontractors assumes that an agency relationship has been formed in the first instance between the Tribe and the Construction Company. Even assuming that we accept the notion of “flow through agency” here, we do not believe that an agency relationship has been created between the Tribe and the Construction Company. Thus, no agency relationship exists to “flow through” to the tiers of subcontractors hired directly or indirectly by the Construction Company. We believe that the Construction Company, and any tier of subcontractors hired directly or indirectly by the Construction Company under the general contract between the Construction Company and the Tribe, are not agents of the Tribe.

“Issue Four: Can a fabricator subcontractor perform fabrication off the reservation, act as a retailer and sell the fabricated property to the Tribe or the Construction Company (acting as the Tribe’s purchasing agent) and install the fabricated property, while at the same time permitting the Tribe, through its purchasing agent, the Construction Company, to take advantage of California’s exemption and make a non-taxable purchase of the fabricated property?”

“....

“Conclusion Four: When a subcontractor purchases materials for fabrication and installs fabricated property, the state deems the subcontractor the final consumer of those materials. The fabricating subcontractor, as the final consumer, can act as a retailer as can any other contractor that establishes itself as a retailer in the manner prescribed for lump-sum (*i.e.*, Cal. Code Regs. tit. 18, § 1521(b)(2)(A)(2)) or time-and-material (*i.e.*, Cal Code Regs. tit. 18 § 1668(a)(1)) contracts. In other words, the fabricating subcontractors must do the following:

“1. enter into a subcontract with the Construction Company that specifies the Construction Company as the purchasing agent for the Tribe,

“2. enter into a contract with the purchasing agent which provides that title to the materials or fabricated property sold by the fabricating subcontractor passes to the Tribe prior to installation and at the construction site, on the reservation,

“3. make delivery of the materials or fabricated property it sells to the Tribe at the construction site on the reservation,

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<sup>7</sup> See footnote 5, *supra*.

“4. register as a retailer/vendor in California and obtain a resale number.

“5. issue invoices to Construction Company or the Tribe that separately state charges for materials, fabricated property, and installation.

“6. issue its suppliers resale certificates.

“If these procedures are followed, we believe that the fabricator subcontractor can perform fabrication off the reservation, sell the fabricated property to the Tribe or the Construction Company (acting as the Tribe’s purchasing agent), and install the fabricated property, while at the same time permitting the Tribe, through its purchasing agent, the Construction Company, to take advantage of California’s exemption.

“Ruling Request Four: The Construction Company respectfully requests that the Legal division review conclusion four above and tell it whether or not, if the procedures in conclusion four are followed, a fabricator subcontractor can perform fabrication off the reservation, sell the fabricated property to the Tribe or the Construction Company (acting as the Tribe’s purchasing agent), and install the fabricated property, while at the same time permitting the Tribe, through its purchasing agent the Construction Company, to take advantage of California’s exemption and make a non-taxable purchase of the fabricated property.

Response to Opinion Request Four:

A sale of tangible personal property includes any transfer of title or possession for a consideration. (Rev. & Tax. Code § 6006(a).) This includes the producing, fabricating, processing, printing or imprinting of tangible personal property for a consideration for consumers who either furnish directly or indirectly the materials used in the producing, fabricating, processing, printing or imprinting. (Rev. & Tax. Code § 6006(b).)<sup>8</sup>

In the circumstance described in your “conclusion four,” the fabrication subcontractor performs fabrication of materials it purchases from a vendor, and in turn sells the fabricated product. You state that the fabrication subcontractor either sells the fabricated product to the Tribe or to the Construction Company acting as the Tribe’s purchasing agent.

Once again we note, as set forth in our discussion of agency (*supra*), that we do not believe the Construction Company has created a valid agency relationship with the Tribe or that this purported agent can exercise the Tribe’s sovereign immunity. The Construction Company’s

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<sup>8</sup> Regulation 1526(b) further explains that producing, fabricating, and processing includes any operation that results in the creation or production of tangible personal property.

disclosure of purported agency to the fabrication subcontractor does not render the agency relationship valid. Accordingly, when the fabrication subcontractor sells the fabricated product to the non-Indian Construction Company, the fabrication subcontractor does not sell this product to the Tribe. In any event, the Construction Company may not provide the fabrication subcontractor with a declaration of exemption from California tax executed by the Tribe, because we do not believe that the Tribe can exercise sovereign immunity from tax liability through an agent, whether that agent is purported or valid.

If the fabrication subcontractor sells the fabricated product directly to the Tribe (instead of selling the fabricated product to the purported agent Construction Company), the fabrication subcontractor can be deemed a retailer, assuming it has qualified under 1521(b)(2)(A)2. As we discussed, *supra*, a fabrication subcontractor may resell the fabricated product to the Tribe as a retail sale prior to making any use of it (e.g., installing it) only by complying with the provisions of Regulation 1521(b)(2)(A)2.; that is, only if its construction contract separately states the sales price of the fabricated product, exclusive of the charge for installation (e.g. not a lump sum contract, but a time and material contract as described in Regulation 1521(a)(7)), the contract explicitly provides for the transfer of title to the fabricated product prior to installation, and, in fact, the contractual provisions are carried out. Moreover, the fabrication subcontractor must pass title to the fabricated product to the Tribe on the reservation before the fabricated product is installed for the retail sale of the fabricated product to be exempt from tax.<sup>9</sup> When this occurs, the Tribe can provide the fabrication subcontractor with a declaration of exemption executed by the Tribe.

We trust that the above discussion answers your inquiries. If you need further information, do not hesitate to contact us.

Sincerely,

Carla J. Caruso  
Senior Tax Counsel

CJC: ds

Enclosures: Regulation 1616; Proposed Amendments to Regulation 1616

cc: District Administrator (--)

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<sup>9</sup> See footnote 4, *supra*.