

**STATE BOARD OF EQUALIZATION**

1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 445-5550

April 8, 1987

A--- S. R---, President
R--- R--- Co., Inc.
XXXXX --- Ave.
--- ---, CA XXXXX

Re: SS -- XX-XXXXXX

Dear Mr. R---:

This is in response to your letter dated January 30, 1987 regarding the application of sales and use tax to tariffs.

You are in the roofing business and you use shakes and shingles imported from Canada. On June 6, 1986, President Reagan issued Proclamation 5498 which imposed a 35% ad valorem tariff on certain wood products, including shakes and shingles, imported from Canada between June 7, 1986 and December 6, 1988, inclusive. (USCCAN No. 6, Aug., 1986, pgs. A96-97 (the tariff becomes 20% between December 7, 1988 and December 6, 1990, inclusive, and 8% between December 7, 1990 and June 6, 1991, inclusive).)

You have sent a copy of a letter you received from your vendor dated October 23, 1986 which states:

“It has been a little better than four months since the implementation of the 35% tariff and at your request we have been paying the tariff on your behalf until you could get the proper systems in place with your broker. Please be kind enough to let me know which brokerage firm you will be using so that we may begin shipping tariff collect....”

You have also sent a copy of an invoice showing the amount of the tariff added to the amount of your vendor's invoice to you. You ask whether the tariff is subject to tax if paid by your vendor. You also ask if the tariff is subject to tax if you pay it directly.

Discussion

The critical factor in determining whether sales or use tax applies to the amount of the tariff is the person legally responsible for paying that tariff under federal law. As discussed below, that person is the “consignee.”

The measure of the sales or use tax includes the gross amount for which tangible personal property, such as shakes and shingles imported from Canada, is sold. (Rev. & Tax. Code §§ 6011(a), 6012(a).) Importers’ excise taxes are not excluded from the taxable measure:

“Gross receipts subject to sales tax and the sales price subject to use tax include the amount of any manufacturers’ or importers’ excise tax included in the prices of the property sold, even though the manufacturer or importer is also the retailer thereof, and it is immaterial whether or not the amount of such tax is stated as a separate charge.” (Reg. 1617(b). See Rev. & Tax. Code §§ 6011(c)(4), 6012(c)(4).)

An excise tax is a tax upon the performance of an act. (Black’s Law Dictionary, 5th Ed. 1979, pg. 506.) The tariff imposed on Canadian wood products by the President’s proclamation is a tax imposed on the act of importation. That is, it is an importer’s excise tax. Since an importer’s excise tax is not excluded from taxation, where the tariff on Canadian wood products is “regarded as a cost or expense of the seller of the goods, the [tariff] will be includable in the measure of tax....” (Business Taxes Law Guide (BTLG) Anno. 295.1250 (8/20/71).) The tariff will be regarded as a taxable cost of the seller when the seller is legally responsible for its payment. (BTLG Anno. 235.0080 (3/14/50).)

The consignee of the imported Canadian shakes and shingles is the person legally responsible for payment of the tariff. ((19 USC § 1505.) “Consignee as used in the tariff laws has a different meaning than when used in a purely commercial sense. The importer of record is the consignee for purposes of the tariff laws. United States v. Goodman (Ct.Int.Trade 1983) 572 FS 1284, 1287.) This would include the party designated as importer of record in the Consumption Entries of the Bureau of Customs. (A.N. Deringer, Inc. v. Consolidated Comp. Serv. Int., Inc. (D.Mass. 1974) 381 F.S. 1208, 1210.)

Code of Federal Regulations section 101.1(1) sets forth the following specific rules:

“‘Importer’ means the person primarily liable for the payment of any duties on the merchandise, or an authorized agent, acting on his behalf. The importer may be:

- (1) The consignee, or
- (2) The importer of record, or

(3) The actual owner of the merchandise, if an actual owner's declaration and superseding bond has been filed in accordance with § 141.20 of this chapter, or

(4) The transferee of the merchandise, if the right to withdraw merchandise in a bonded warehouse has been transferred in accordance with Subpart C of Part 144 of this chapter.”

As explained by Code of Federal Regulations section 141.1(b)(1), liability for the import tariff

“constitutes a personal debt due from the importer to the United States which can be discharged only by payment in full of all duties legally accruing, unless relieved by law or regulation. Payment to a broker covering duties does not relieve the importer of liability if the duties are not paid by the broker. The liability may be enforced notwithstanding the fact that an erroneous construction of law or regulation may have enabled the importer to pass his goods through the customhouse without payment. Delivery of a customs bond with an entry is solely to protect the revenue of the United States and does not relieve the importer of liabilities incurred from the importation of merchandise into the United States.”

The information you have provided us does not disclose who is the consignee or importer of record for the imported shakes and shingles. If the seller is the consignee under federal law for purposes of the tariff, the seller is legally responsible for payment of the tariff to the United States, and the seller passes the amount of the tariff on to you as part of the sale price. (See BTLG Anno. 235.0060 (3/16/54).) If so, the tariff is an importer's excise tax that is part of the sale price, and the amount of the tariff must be included in the taxable measure, whether stated as a separate charge or not. (Rev. & Tax. Code §§ 6011, 6012, Reg. 1617(b).) If the seller is the consignee, this taxable result is true even if you pay the tariff directly to the United States because the tariff is legally imposed on the seller. Since you pay the tariff on behalf of the seller, the tariff is part of the taxable sale price and is subject to tax.

In the seller's letter dated October 23, 1986, it states that the tariff has been paid by the seller on your behalf. This indicates that you may be the consignee under federal law for purposes of the tariff. “If you are the consignee [for purposes of the tariff laws] at the time the goods enter the United States, the [tariff] is legally imposed upon you and [your payment of the tariff] will not be regarded as payment on the purchase price of the goods” and will not be part of the taxable measure. (BTLG Anno. 235.0060 (3/16/54).) Similar to the discussion above, if you are the consignee, this nontaxable result is true even if the seller pays the tariff to the United States because the tariff is legally imposed on you.

In summary, if you are the consignee, the tariff is legally imposed on you and that tariff is not part of the taxable sale price. If the seller is the consignee, the tariff is legally imposed on the seller and that tariff is part of the taxable sales price. The seller's letter mentioned above also

indicates that a broker will become involved. If so, the rules discussed above continue to apply. If the broker is the consignee under federal law for purposes of the tariff, the taxable result would depend on whose behalf the broker acts as agent. If the broker is the seller's agent, the amount of the tariff is subject to tax. If the broker is your agent, the amount of the tariff is not subject to tax. If you have further questions, please feel free to write us again.

Sincerely,

David H. Levine
Tax Counsel

DHL:ss

bc: --- – District Administrator
Mr. Donald J. Hennessy