



STATE BOARD OF EQUALIZATION

LEGAL DIVISION (MIC:82)
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November 16, 1993

BURTON W. OLIVER
Executive Director

R--- A. B---, APC
Attorneys at Law
--- --- Tower
XXX ---, Suite XXXX
--- ---, CA XXXXX-XXXX

Re: J. P. M--- T--- Sales
SR -- XX-XXXXXX

Dear Mr. B---:

This is in response to your two separate facsimile transmissions dated November 15, 1993. In a letter to you dated November 10, 1993, Staff Counsel Donald L. Fillman addressed your questions regarding establishing that certain sales were exempt sales for export as specified in Regulation 1620. You have now set forth certain assumptions and stated:

"Unless I receive from your office within the next fifteen (15) business days a written communication presenting opposing legal citation, legislative enactment or intent or regulatory enactment, with specific official citation to the legal authority(ies) relied upon by the SBE, I will assume the foregoing assumptions are valid and correct...."

You, of course, may make any assumptions you wish, but you may, of course, be mistaken when you do so. I note that your client is currently in audit and you are in a dispute over this very issue with the Sales and Use Tax Department. We do not generally respond directly to a taxpayer or its representative when that taxpayer is undergoing an audit. We instead generally respond to the Department. If the taxpayer wishes the Legal Division to provide an analysis, the taxpayer would send that inquiry to the Department, who would include its opinion when sending the inquiry to Legal. We respond to the Department and the Department then completes its audit. If the taxpayer disagrees with the audit results, there are a series of administrative appeals procedures leading up to a conference before the Appeals Section and, if necessary, ultimately a hearing before the Board.

In this particular case, Mr. Fillman responded directly to you per the request of the Department. You believe that there is no requirement that the seller obtain a bill of lading from the customs broker in order to support an exemption from sales tax under subdivision (a)(2)(C) of Regulation 1620. As Mr. Fillman explained, subdivision (d) of Regulation 1620 states that, contrary to your belief:

"Proof of Exemption. Bills of lading or other documentary evidence of the delivery of the property to a carrier, customs broker, or forwarding agent for shipment outside this state must be retained by the retailer to support deductions taken under (B) above. Bills of lading, import documents of a foreign country or other documentary evidence of export must be obtained and retained by retailers to support deductions taken under (C) above."
(Emphasis added.)

This cannot be any more clear as to the requirement for a bill of lading to support a claim for exemption. Nevertheless, Mr. Fillman explained that:

"[W]hether your client's sales qualify as exempt sales for export is a question of fact. Thus, if it does not have the documentation mentioned above, it is still possible to establish its right to the exemption. I note, however, that it has the burden of proof on this issue. (Rev. & Tax. Code § 6091.)"

"If the audit staff believes that your client has not met this burden of proof, and issues a Notice of Determination with which you do not agree, you have the right to file a Petition for Redetermination. (Rev. & Tax. Code § 6561.) You will then have an opportunity to present your case at an appeals conference, and thereafter, if necessary, to the Board."

Looking only at subdivision (a)(3)(D) of Regulation 1620, it would appear that obtaining and retaining a bill of lading is a prerequisite to obtaining the exemption. However, as explained by Mr. Fillman, quoted above, it is still possible to qualify for the exemption if you establish the facts supporting that claim of exemption. The administrative pronouncement of what documentation is required is set forth in the regulation, and has the force and effect of law. (Rev. & Tax. Code § 7051.) If you wish a definitive response as to what is required, that is our response: to support a claim of exemption, your client must obtain and retain the documentation set forth in the regulation. If it does not, it may still qualify if it convinces the finder of fact of the existence of the necessary facts.

The finder of fact at this point is the Sales and Use Tax Department. If you wish to know what facts will convince them, ask the person who is conducting your audit. As noted above and in Mr. Fillman's letter, if you do not convince the Department of the existence of the necessary facts, you will have the opportunity to convince the Appeals Section as a finder of fact. The

final administrative finder of fact is the Board itself, and you will have the opportunity to present your case before it if you are unable to convince a previous level of the review process.

In your second facsimile transmission of the same date concerning the same subject matter, you conclude with the following statement:

"Unless I receive such information [of a factual nature] from you within the next fifteen (15) business days, I will assume [the existence of three assumptions of fact that you wish to make]."

It is the audit staff who has knowledge of the circumstances surrounding the facts whose existence you wish to assume, not the Legal Division, and it is therefore the audit staff to which you must address your discussion regarding the factual background of the audit currently being conducted. I also note that if you are asserting that your client should be relieved of liability for taxes properly due, then it must look to Revenue and Taxation Code section 6596 for its only basis of relief. That provision gives the Board the discretion to relieve someone of liability for tax if that person reasonably relied on written advice from the Board in response to a written request for advice that included all relevant information regarding the transaction in question. The Board has no authority to relieve someone of liability for tax unless the circumstances come within the provisions of section 6596. You have not indicated any facts which would bring the disputed transactions within those provisions.

Please note that this is the final letter that the Legal Division will write you on this subject at this stage of the proceedings. If you write another letter with language such as "if I do not receive within ___ days ...," you are on notice that our failure to respond does not acquiesce in any statement you make therein.

Sincerely,

David H. Levine
Senior Staff Counsel

DHL:cl

cc: J. P. M--- T--- Sales
--- --- District Administrator
Mr. Donald L. Fillman