

M e m o r a n d u m**325.0578**

To: Inglewood – Auditing (JKI)

August 15, 1977

From: Tax Counsel (GJJ) - Headquarters

Subject: B--- M---
M--- Inc.SR -- XX XXXXXX
SY -- XX XXXXXX

This is in response to your memorandum of May 24, 1977. You have sought our advice relative to certain issues raised at a local discussion of a petition for redetermination filed by the referenced taxpayer.

We understand that B--- is a mold maker and the transactions involve sales of molds without tax to M---, Inc. The sales were considered exempt by taxpayer as a sale in interstate commerce or sale for export. No resale certificate was furnished by M---.

Upon completion by taxpayer all molds were sent to an unrelated extruder for shot sampling. The extruder was under contract to M---. The purpose of the shot sampling was to produce sample parts for the purpose of determining whether the mold met M---'s specifications. If the mold did not meet specifications, it would be returned to taxpayer for correction or change. Correction or change might be necessitated as a result of taxpayer's error or as a result of an error in the specifications furnished to taxpayer by M---. In the latter instance, an engineering change order (ECO) would be issued to taxpayer, and taxpayer would bill M--- for the additional work.

Taxpayer does not have the ability to shot sample the molds. When the mold was determined to meet specifications it would be picked up by an export packer under contract to M--- and consolidated or packed for shipment in interstate commerce or for export. The packer would pick up the mold from taxpayer's place of business (if the mold had been returned to taxpayer by the extruder) or from the place of business of the extruder. Taxpayer treated all sales of molds destined for another state or a foreign country to be exempt. Our auditor initially disallowed all deductions. Taxpayer then provided bills of lading from the files of M--- showing out-of-state shipment. Relying on a hearing report dated August 30, 1974, by Mr. R. H. Anderson, you nevertheless remained of the opinion that the sales did not qualify as exempt export or interstate commerce transactions.

We note initially that it was later concluded that shot sampling was a testing procedure excluded from the definition of “use” under Revenue and Taxation Code Section 6009.1. Accordingly, the testing did not constitute a “use” under Section 6421 that could trigger tax liability against the purchaser who gave an exemption certificate. By memorandum dated February 11, 1976, Mr. T. P. Putnam proposed to the petition unit that this advice be transmitted to M---. The central issue before us at this time thus becomes one of whether the sales in question properly qualify as interstate commerce sales or as export sales.

You have raised certain specific questions:

(1) M--- has sought confirmation of its understanding that if the mold maker itself performed the testing or if the mold maker subcontracted testing to an outside extruder, this testing would not of itself trigger application of sales tax to taxpayer’s sale. We are in agreement with this analysis. Indeed, as we indicated to you when we discussed this matter on May 25 here in Sacramento, we are of the opinion that a temporary delivery to the purchaser or to an extruder hired by the purchaser for testing purposes does not necessarily disqualify the transaction from qualifying as a sale in interstate commerce or as an export sale. BTLG Annotation 325.0920 indicates that a temporary transfer of possession for testing will not deprive the seller of the interstate commerce exemption provided the property is returned to the seller for out-of-state shipment in accordance with the contract of sale.

(2) If the testing is performed by taxpayer or its subcontractor, it is immaterial that title may have passed to the purchaser. In other words, testing by the manufacturer or the manufacturer’s subcontractor does not constitute delivery to the purchaser under Regulation 1620(a)(3)(A) notwithstanding the fact that title may have already passed to the purchaser.

(3) You next raise a question as to when title passes in the circumstance where the property is delivered to the extruder hired by M---. In accordance with M---’s purchase order, title to the mold passes at the F.O.B. point designated on the order, but only after inspection and acceptance. We are in agreement with your analysis that title passes at the extruder’s when the mold meets specifications. When the mold is sent back to taxpayer for minor adjustments not requiring further shot sampling, title passes upon subsequent acceptance at the seller’s place of business.

(4) Mr. S--- W---, Tax Counsel for M---, has argued on behalf of taxpayer that sales tax does not apply in instances where molds were delivered by taxpayer directly into the hands of an export packer.

We are in agreement with his position on this point. Revenue and Taxation Code Section 6387 provides that tax does not apply to sales of property “purchased for use solely outside this state and delivered to a forwarding agent, export packer, or other person engaged in

the business of preparing goods for export or arranging for their exportation, and actually delivered to a port outside the continental limits of the United States prior to making any use thereof.” This exemption is a statutory exemption. It would be clear that sales tax would not apply, notwithstanding the absence of language concerning export in the contract of sale, if taxpayer had delivered the molds to the export packer without delivering them first to the extruder. In accordance with the principle of Annotation 325.0920, we are of the opinion that the temporary delivery of the goods to the purchaser’s representative (the extruder) would not disqualify the transaction from exemption under Section 6387.

Tax would nevertheless apply to items delivered to a carrier for interstate shipment. Regulation 1620(a)(3)(B) provides that sales tax does not apply when the property pursuant to contract of sale is required to be shipped and is shipped to a point outside this state by the retailer. As you point out, the requirements of paragraph (a)(3)(B) seem to differ from the requirements of (a)(3)(C) concerning exports. As indicated previously the application of the tax with respect to delivery to export packers is governed by Revenue and Taxation Code Section 6387.

In ultimate summary of all this, we are of the opinion that where taxpayer delivers the molds to an export packer, sales tax will not apply. It is irrelevant that title may have passed previously to the purchaser, and it is irrelevant that taxpayer or taxpayer’s subcontractor or an extruder hired by M--- may have tested the molds. Where taxpayer delivers the molds to a carrier for interstate shipment, the molds will be regarded as having been delivered to the purchaser or his representative where the goods are first sent to an extruder hired by M---, unless the contract of sale requires taxpayer to ship the goods to an out-of-state point.

Sales tax will apply where taxpayer delivers the molds to an extruder hired by M--- and the extruder delivers the molds to an export packer or to a carrier for interstate shipment.

Gary Jugum

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cc: Mr. R. H. Anderson