

**STATE BOARD OF EQUALIZATION**

1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 445-6493

March 15, 1989

Ms. J--- K---
Auditing Supervisor
N--- P--- L--- Co.
P.O. Box XXXX
P---, Oregon XXXXX

N--- P--- L--- Co. – SS OH XX-XXXXXX
W--- M---, Inc. (no permit number)
Interstate shipments and sales for resale

Dear Ms. K---:

Your December 5, 1988 letter to Mr. Robert Gordon of the Board's Out-of-State District office was referred to the legal staff for reply. You request a ruling on whether or not sales you are making to your customer, W--- M---, Inc. of ---, Arizona, are subject to sales or use tax. You write:

- “1. We purchased the lumber in question from a California mill who produced the stock. We are a wholesaler only.
- “2. We sold the lumber to our customer on an FOB Mill basis - - Customer pick-up via their own transportation.
- “3. Our customer is W--- M--- Inc. of ---, AZ with the parent company being O--- M---.
- “4. Our mill released the lumber direct to our customer. We did not move the stock via our own transportation nor did we dispatch the truck that picked up the lumber for our customer.
- “5. Title to the stock was passed to our customer at the California mill where they picked it up via their own transportation.
- “6. Our customer has contacted us and sent us copies of the truck bill of lading that shows that the stock was taken out of the state and feels that since they used a common carrier that the sale should be exempt. They do not have a California Resale number and feel they do not need one according to

Regulation 1620. Since we did not deliver the stock to the carrier that removed the goods out of the state, we do not feel that this rule actually applies to the situation and, therefore, we charged tax on our invoice.

“7. O--- M--- (the parent company of our customer) feel they do not need a California Resale Number, according to Regulation 1668, as they make no retail sales in California. They do, however, make sales on a wholesale level to California Retailers who have their own resale numbers. The way we interpret regulation 1668 is that our customer is not required to hold a permit only if they make no sales in the state of California. We do not see that this regulation specifies no retail sales--it only specified ‘no sales’. Once again, we charged our customer tax.” (Emphasis in original).

Your also relate that your have had difficulties with several of your customers over similar situations. You write:

“In each case we have bought material from a California mill, sold it to an out-of-state customer on an f.o.b. mill basis- -customer pick up via their transportation, and title has passed in California from our mill direct to our customer. In each case where our customers have not had a California Resale number, we have charged tax. These customers have refused to pay tax and have all referred to phone conversations with the California State Board of Equalization as well as regulations 1620 and 1668 for exemption.”

Opinion

Your inquiry raises two separate issues regarding the application of sales tax to the transactions you have described. For purposes of this opinion, I assume it is the sales tax, not the use tax, which is the applicable tax if the transactions are subject to tax. The first issue is whether your sales to W--- M--- (and similar sales to other customer) are exempt from sales tax as shipments in interstate commerce under Sales and Use Tax Regulation 1620(a)(3)(B). The second issue is whether your sales to W--- M--- and other customers who do not hold California seller’s permits are exempt as sales for resale under Regulation 1668. If your sales are nontaxable for either of these reasons, you should not charge sales tax reimbursement to your customers.

With respect to the sales tax exemption for interstate shipments, Regulation 1620(a)(3)(B) provides in summary that sales tax does not apply when the property, pursuant to the contract of sale, is required to be shipped and is shipped to a point outside this state by the retailer. That out-of-state shipment may be accomplished by delivery by the retailer to a common carrier, whether the common carrier is hired by the purchaser or not. Our opinion is that your sales to your customers are not exempt from sales tax as interstate shipments because the facts you have related indicate that there is no contractual requirement between you and your customer that the property be shipped to a point outside of California. Rather, your only contractual obligation is to deliver the lumber sold to the purchaser at the California mill.

Please note, however, that our opinion is that your sales would qualify as nontaxable shipments in interstate commerce if your contracts of sale required that the lumber be shipped out of California by common carrier, even though the purchaser supplies the common carrier. The exemption would not be lost merely because the terms of your contract specified that the sale was on an f.o.b. mill basis.

With respect to the issue of whether your sales are exempt sales for resale, we assume for purposes of this opinion that you are satisfied that your customers are not making any storage, use, or other consumption of the lumber sold except for resale by your customers in the regular course of business. If this is the case, then you may accept a resale certificate in good faith from your out-of-state customers even if those customers do not hold a California seller's permit. Regulation 1668(b)(1)(C) specifically provides that a resale certificate may be issued by a person who does not hold a California seller's permit if the purchaser notes on the certificate that he is not required to hold a permit.

You are correct that if a person makes wholesale sales in California he is required to hold a California seller's permit even though none of his sales are sales at retail. However, it is also possible that an out-of-state company which purchases goods in California for resale, ships them to its out-of-state location, and then resells the goods at its out-of-state location to California customers for resale by its customers, would not be required to hold a California seller's permit because the purchaser's sales are not at retail and occur at an out-of-state location, not in California. (If that out-of-state company made sales at retail to California customers, it would be required to hold a California permit to collect use tax on those sales if it were a retailer engaged in business in California, under Revenue and Taxation Code Section 6203). Thus, we cannot tell for sure from the facts you relate whether or not your out-of-state customers are required to hold California seller's permits. It may be that all of their sales are made at their out-of-state location, and are not sales at retail. In any case, it is not your obligation to determine whether or not a purchaser is or is not required to hold a seller's permit. Rather, your obligation is to satisfy yourself that your sale to your out-of-state customer is in fact a sale for resale. If so, then you are in a position to accept a resale certificate in good faith from an out-of-state customer who does not have a seller's permit.

I enclose copies of Regulations 1620 and 1668 for your information. Please feel free to contact me if you have any further questions or comments about this letter.

Sincerely,

John Abbott
Tax Counsel

JA:jb
Enclosures