



STATE BOARD OF EQUALIZATION

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July 17, 1995

Mr. C--- P. F---
C--- P--- Incorporated
P.O. Box XXXX
---, WA XXXXX

RE: SY -- XX-XXXXXX
Lump-Sum Contract

Dear Mr. F---:

I am responding to your letter dated February 21, 1995 to the Sacramento Out-of-State District Office. I apologize for the delay. Your original appears to have been lost in the mail. We apparently did not receive your letter until your fax of April 5, 1995 came in. You ask about the application of sales tax to contracts by your company, C--- P---, Inc. ("CPI") to install concrete trellis (walls) to real property for one lump- sum price. You indicate that you have been paying sales tax and collecting sales tax reimbursement on the total amount billed to the customer and attached an invoice as evidence. Your position is that such contracts should be viewed as lump-sum contracts with tax attaching only to the sale to CPI on the materials it purchases.

OPINION

1. Sales Tax Generally.

In California, except where specifically exempted by statute, Revenue and Taxation Code Section 6051 imposes a sales tax, computed as a percentage of gross receipts, upon all retailers for the privilege of selling tangible personal property at retail in this state. (Unless otherwise noted, all statutory references are to the Revenue and Taxation Code.) Likewise, Section 6201 imposes a use tax on the storage, use, or other consumption in this state of tangible

personal property purchased from any retailer for use, storage, or other consumption in this state, unless otherwise exempted from taxation by statute, purchased for use in this state in a transaction not subject to sales tax.

2. Taxation of Construction Contracts.

The application of tax to construction contracts depends on whether or not the construction contractor is furnishing and installing materials or is furnishing and installing fixtures. If the latter, the contractor is the retailer of the fixtures; tax applies to such sales. (Reg. 1521(b)(2)(B).) Construction contractors are consumers of materials which they furnish and install in the performance of construction contracts. In that case, then, the taxable event is the sale to the contractor, with the supplier paying tax and collecting sales tax reimbursement or use tax from the contractor who then factors that cost into the contract price with regard to the materials purchased for the purpose of performing the contract. (Reg. 1521(b)(2)(A).) Sales and Use Tax Regulations are issued by the Board to aid in the enforcement and administration of the Sales and Use Tax Law and have the force and effect of law.)

You indicate in your letter that the contracts at issue are to install concrete walls on real property for a lump sum. We have previously concluded that pre-made concrete items are "materials" when installed as improvements to real property. (Annot. 190.0320 (9/29/64). Sales and Use Tax Annotations are excerpts from previous Board Staff opinion letters and serve as guides to staff positions.) Under these circumstances, CPI is the consumer of the materials used to make these concrete walls. That is, CPI is not regarded as selling tangible personal property to its customers. Tax is due, rather, on the sale to, or use by, CPI of the materials it installs. Thus, if CPI purchased the materials in question free of tax, it must report use tax measured by its purchase price of such materials on Line 2 of its Sales and Use Tax Return. Since CPI is not regarded as selling tangible personal property to its customers when furnishing and installing the materials in question, it owes no sales tax on the contract price and may not collect any amount as sales tax reimbursement (usually designated as "sales tax" on the receipt) from them.

With respect to past periods, any amount collected as "sales tax" from your customers on lump-sum construction contracts for the furnishing and installing of materials as improvements to real property constitutes excess tax reimbursement. Such amounts must be refunded to the customer or paid to the state. You have apparently already remitted such amounts to the Board.

For past periods, CPI owes use tax on its purchase price of materials which it purchased ex tax and then consumed in construction contracts without reporting use tax on the purchase price of such materials on Line 2 of its return. In determining the net use tax liability owed by such a contractor, the Board offsets any excess tax reimbursement collected by the contractor and remitted to the state against the contractor's use tax liability as follows:

“[O]ffsets can be made only on a transaction by transaction basis. Tax reimbursement collected on a specific transaction can be used only to satisfy a tax liability arising from the same transaction. The “same transaction” means all

activities involved in the acquisition and disposition of the same property. The "same transaction" may involve several persons, such as a vendor, a subcontractor, a prime contractor, and the final customer; or a vendor, a lessor, and a series of sublessors. Tax reimbursement can be offset against the tax liability of the taxpayer whether the liability was satisfied by paying sales tax reimbursement to a vendor, paying use tax to a vendor, or paying use tax to the state.

"An offset of a taxpayer's own tax liability against tax reimbursement collected from a customer can be made only with respect to transactions in which possession of the property upon which the taxpayer's tax liability is based is transferred, either permanently or temporarily, to the customer, as in the case of construction contracts. . . ." (Reg. 1700(b)(4).)

Because CPI collected tax reimbursement at the full contract price, we assume that the amount of excess tax reimbursement that it collected from its customers and remitted to the Board exceeds the amount of use tax it owes measured by the purchase price of the same property it transferred to its customers as part of the construction contract for which they paid the excess tax reimbursement. Thus, its use tax liability will be entirely offset by the excess tax reimbursement remitted to the state. CPI must immediately cease collecting such amounts from its customers and instead must report use tax as explained above.

For your information, I have included copies of Regulations 1521 and 1700 and State Board of Equalization Pamphlet Number 9, "Construction Contractors." I hope the above discussion has answered your questions. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid
Tax Counsel

JLW:sr

Enclosures: Regs 1521 & 1700
Pamphlet No. 9

cc: Out-of-State District