

M e m o r a n d u m**460.0149**

To: Mr. Don Bauman
Evaluation & Planning

Date: July 2, 1987

From: David H. Levine
Tax Counsel

Subject: Excess Tax Reimbursement

You have referred to us a memorandum dated May 28, 1987 from the Oakland District Principal Auditor to Principal Tax Auditor Glenn Bystrom regarding excess tax reimbursement and tax included price. There is one specific question regarding an audit in progress and three general questions.

Audit

A cabinet retailer billed lump sum and claimed a tax-included allowance. All contracts were verbal and taxpayer claims all customers knew the price was tax included even though tax was not separately stated on the invoices. Taxpayer's bid sheets and worksheets reveal that sales tax was calculated and included in the total amount invoiced.

Under Civil Code section 1656.1, a retailer may add sales tax reimbursement to the sales price of tangible personal property if the contract of sale provides for such reimbursement. The cabinet retailer states that the contracts, although verbal, provide for a tax-included price. The only issue is whether this claim is true. If so, the retailer's tax-included allowance must be permitted. The retailer's bid sheets and worksheets support this result, but not conclusively. Since the retailer has the burden of showing his right to the allowance, the audit staff may require him to establish the relevant terms of the sale contracts by producing statements from his customers.

General Questions

1. Retailers, such as bars, do not make a separate charge for tax and do not have posted signs regarding tax included. Should a tax-included allowance be permitted?

As discussed above, the only issue is whether the contract between retailer and purchaser provides for the addition of sales tax reimbursement to the sales price. Civil Code section 1656.1(a) sets forth three means to gain a presumption that the sales price includes tax: the sale contract expressly provides that such is the case; sales tax reimbursement is shown on the sales check or other proof of sale; or an appropriate sign is posted visible to purchasers. Here, the retailer does not make a separate charge and presumably does not show a separate charge on the sales check. No sign is posted. And common sense tells us that each customer is not told that tax is included. Since the retailer has the burden of establishing his right to any deduction, his claim for a tax-included allowance must be denied.

2. A retailer posts a sign that states, "all prices include sales tax." The retailer sells an item for consumption on his premises and reports it as taxable, taking a tax-included allowance. He sells the same item to go, at the same price as for consumption on premises, and he deducts the full sale price as an exempt to-go sale. The question is whether the retailer is collecting excess sales tax reimbursement on the exempt sales because the sign says all prices include sales tax.

When a retailer "represents" that an amount constitutes reimbursement for taxes to a purchaser, and the purchaser actually pays the amount to the retailer on a sale not subject to sales tax, that amount is "excess tax reimbursement." (Rev. & Tax. Code § 6901.9.) Civil Code section 1656.1 provides a presumption that the parties agreed to the addition of sales tax reimbursement if a sign is posted that reimbursement will be added to the sales price "of all items or certain items, whichever is applicable." (C.C. § 1656.1(a)(3) (emphasis added).) Based on this provision, we must presume that the parties agreed to the addition of sales tax reimbursement to the sales price of all items, even exempt sales, in conformity with the sign actually posted by the retailer. That is, the retailer represented that sales tax reimbursement would be collected on exempt sales and the customer paid it. This is excess tax reimbursement under Revenue and Taxation Code section 6901.5. However, please note that it is excess tax reimbursement by virtue of the presumption set forth in Civil Code section 1656.1. That presumption is rebuttable. (C.C. § 1656.1(d).) To rebut the presumption, the retailer would have to carry the burden of showing that the amount presumed to have been represented and paid as sales tax reimbursement was understood by the purchaser to have been for some other purpose.

3. Same question as number 2, except the sign states "all prices include applicable sales tax."

The meaning of this sign is that sales tax reimbursement is added only to those sales which are taxable. There is therefore no excess tax reimbursement included.