

**M e m o r a n d u m****475.0112**

To: West Los Angeles – Auditing (AMB)

Date: January 10, 1978

From: Tax Counsel (JEM) - Headquarters

Subject: Regulation 1668

This is in response to your memo of November 23, 1977, requesting and interpretation of Regulation 1668.

Your questions concern the following hypothetical situation. Assume that S sells property to P and that the sale is not exempt from tax. P does not give a timely resale certificate to S, nor does he pay sales tax reimbursement or use tax to S. Subsequently S obtains a written statement from P that the property was: (1) purchased for P's own use and P has paid use tax to the state; or (2) purchased for resale and P has made no use of the property prior to resale. It is later discovered that P's statements are false.

1. Do P's statements relieve S from liability for the sales tax or from his obligation to collect use tax?

No. Subdivision (c) of Regulation 1668 provides that, absent a timely resale certificate, other evidence may be submitted to rebut the presumption of taxability and relieve the seller of his liability for the tax. Whether the other evidence is sufficient in this regard is a question of fact. Where the facts reveal that the transaction is taxable, the seller is not relieved of liability regardless of any statements made by the purchaser.

2. Is P liable for the tax?

If the applicable tax is the use tax, P is liable regardless of any statements made to S. A purchaser's liability for use tax is not extinguished until he pays the tax to the state or receives an appropriate receipt from the seller. (See Rev. & Tax. Code, §§ 6202, 6203.)

If sales tax applies, P is not liable. The incidence of the sales tax is on the purchaser, and the question of whether the purchaser will pay sales tax reimbursement is a matter of contract between the parties.

If the purchaser has agreed with the seller to pay the tax, the seller may sue to enforce the contract. As a matter of policy, however, the Board does not attempt to enforce such contracts, either under a third-party beneficiary theory or any other theory, in order to collect sales tax from the purchaser.

Revenue and Taxation Code Section 6094.5, as recently amended, provides in part:

Any person who gives a resale certificate for property which he knows at the time of purchase is not to be resold by him in the regular course of business is liable to the state for the amount of tax that would be due if he had not given such resale certificate.

This section would not apply to P under the circumstances of your hypothetical, since P did not give a timely resale certificate to S.

JEM:jc