



STATE BOARD OF EQUALIZATION

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Executive Director

May 16, 1997

Ms. M--- R---
A--- H--- R--- Company
XXXX --- Road
---, Illinois XXXXX-XXXX

Re: SC -- XX-XXXXXX

Dear Ms. R---:

This is in response to your letter dated May 6, 1997 regarding the application of tax to transactions between you and your customer, W--- F---, Limited. We responded to a previous inquiry from you; you provided a copy of that response to W---, and it then sent us its own inquiry. W--- provided you a copy of our response to its inquiry, and you each interpret it differently. You have paid sales tax on past sales to W---, but have been unable to collect sales tax reimbursement from W--- for that tax. You ask our assistance in obtaining a refund of the tax you paid or reimbursement for that tax from W---. You explain:

“It is our understanding that W--- F---, Limited needs to supply A--- Hotel R--- Company with a California Resale Certificate and also a letter stating the purchases from A--- H--- R--- Company were resold by W--- F--- Limited and have not been used by W--- F---, Limited.

“Ms. D--- G---, President of W--- F--- Limited has interpreted your letter differently. Ms. Grossman believes that the current Blanket Certificate that states ‘is exempt from sales and use tax for the following reason: Other authorized exemption We are export only,’ is good enough and we should treat her company as tax exempt in California....”

W---’s original claim appeared to be that your sales to it qualified for exemption, presumably as sales in foreign commerce. In response to your first inquiry, we explained why the certificate issued by W--- was not a valid exemption certificate and why your sales to W--- were not exempt sales in foreign commerce. In its inquiry that followed, W--- stated that it “is

EXEMPT from Sales Tax since ALL our sales are for RESALE overseas.” That is, W--- is claiming that your sales to it are nontaxable sales for resale. Thus, we then explained that the certificate it had issued you was also not a valid resale certificate, which means that you have the burden of proving that the sales were actually sales for resale. If you cannot do so, tax is due on the sales.

Notwithstanding our previous correspondence, W--- remains confused regarding what constitutes a valid exemption certificate and regarding the difference between an exemption certificate and a resale certificate. It continues to assert that the certificate it had provided you is sufficient to establish that no tax was due on your sales to it. W--- is mistaken.¹ W--- is not “tax exempt” in California. If W--- is purchasing tangible personal property for use, tax applies; if it is purchasing that property for resale prior to any use, tax does not apply. The fact that W--- exports all the property outside California after taking delivery from you in this state is irrelevant to the question of whether your sales to it are sales for resale. What is relevant is whether W--- resells the property prior to any use and whether it issues you a timely and valid resale certificate. Subdivision (b)(1)(D) of Regulation 1668 is explicit on a critical element of a valid resale certificate: “The document must contain the phrase ‘for resale.’ The use of phrases such as ‘non-taxable,’ ‘exempt,’ or similar terminology is not acceptable.” So that there will be no doubt whatsoever, I note that the “certificate” W--- relies on has no relevance for any purpose under the California Sales and Use Tax Law.

For future transactions, if W--- is truly purchasing the property for resale, it should issue you timely resale certificates *in the form set forth in Regulation 1668*. The certificate *must* contain the phrase “for resale.” If it does not contain that phrase, and instead claims the transaction is exempt, the document will not qualify as a resale certificate. If it fails to issue you a timely and valid resale certificate, your sales to it will be presumed to be taxable retail sales unless you establish the contrary. From your point of view, this is much more difficult than the taking of a timely and valid resale certificate.²

For the transactions that have already occurred, your sales to W--- are presumed to have been taxable retail sales. (Rev. & Tax. Code § 6091.) Since only a timely resale certificate serves to avoid this presumption, a resale certificate issued now for past sales would not be sufficient to establish that those sales were for resale, even if the certificate were otherwise complete and in the proper form.

¹I am at a loss to understand W---’s continued contention that the “exemption certificate” it gave you is sufficient. We have already reviewed that certificate with the belief that W--- was claiming that your sales to it were exempt sales in foreign commerce, and we explained why the certificate was not valid for that purpose. We then reviewed the certificate with W---’s explanation of its business and explained that the relevant certificate, if applicable, would be a resale certificate as specified in Regulation 1668 and that, again, the certificate it proffered did not qualify.

²If you take such a certificate in good faith, you would not have any liability for sales tax on the transaction. If the Board thereafter questioned whether the purchaser actually purchased the property for resale, we would look to the purchaser for supporting documentation. (See Reg. 1668(a)(2) (purchaser is liable for tax with respect to any property it uses that had been purchased under a resale certificate).)

Based on the information you and W--- have provided, it appears that your contract with W--- provided for the collection of sales tax reimbursement if tax were due, and that W--- avoided having to pay such reimbursement when the sale occurred by giving you the "exemption certificate." Based on these facts, if sales tax is due, you are entitled to collect sales tax reimbursement (usually itemized as "sales tax") from W---. (Civ. Code § 1656.1.)

Although it is presumed that you properly reported sales tax on your sales to W---, this presumption can be overcome with adequate documentation. However, since the presumption can only be overcome by showing that W--- purchased the property for resale, it is obviously W--- who would have the necessary documentation to show this. If W--- continues to assert that it does not owe you sales tax reimbursement because it resold the property, it is W--- who must provide you such supporting documentation to avoid its otherwise applicable contractual obligation to pay you sales tax reimbursement in the amount of sales tax you paid.

If W--- provides you documentation that establishes that it resold the property without use (or is actively holding such property for resale and has not used it), then you should file a claim for refund along with such documentation with Board's Refunds Section, MIC:39, P.O. Box 942879, Sacramento, CA 94279-0039, (916) 445-1315. Unless W--- provides you sufficient documentation to support such a claim for refund of the tax you paid, it owes you reimbursement for such sales tax. If you have questions regarding the documentation necessary to support a claim for refund, you should contact the Refunds Section. However, I suggest that you gather what documentation W--- provides you and file a claim for refund without delay. If it appears that you are entitled to a refund but the Refunds Section believes that it requires some additional documentation, it will contact you.

I hope this will help you resolve your dispute with W---; however, if you have further questions, please feel free to write again.

Sincerely,

David H. Levine
Supervising Tax Counsel

DHL/cmm

cc: --- District Administrator (--)
Refunds Section (MIC:39)
Ms. Pat Hart Jorgensen (MIC:82)