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October 23, 1992

BURTON W. OLIVER
Executive Director

Ms. Begin deleted text REDACTED TEXT End deleted text
San Francisco, California 94111-3580

Re: Business Taxes Law Guide Annotation 515.0620

Dear Ms. Begin deleted text REDACTED TEXT End deleted text

Last week you asked for a copy of the backup memorandum to Business Taxes Law Guide Annotation 515.0620. We apparently advised you that it was not in our files. In a facsimile transmission of October 20, 1992, you note that someone in your office discussed the annotation with an attorney on our staff, and during that discussion he pulled the backup memorandum. You therefore ask that we check our files again.

We should have advised you that the backup memorandum is unavailable, not that it is not in our files. We apologize for the miscommunication. The annotation is in the process of being deleted, and we are therefore not releasing the backup. For the benefit of your research, below I explain the problem with the annotation.

The first part of the annotation relates to when a person is regarded as a seller. The person in the annotation had contracted to develop tangible personal property and, if a successful prototype were developed, the purchaser would have the option of purchasing four more. That contract showed that the developer was engaged in the business of selling tangible personal property, as opposed to contracting for a single sale during any twelve month period, and the developer was therefore a seller under the Sales and Use Tax Law. (See, generally, Reg. 1595(a).) However, the annotation (and the backup) does not explicitly set forth this basis, but rather could be misinterpreted to mean that simply contracting to sell a single item of tangible personal property is sufficient to make that person a seller.

A real life example of this distinction is the sale of a hammer. If an individual sells her used hammer, and makes no other sales of tangible personal property during any twelve month period in which the sale of the hammer occurred, then she is not a seller. On the other hand, if she had opened a hardware store, made a single sale of a hammer, and then closed down, notwithstanding that she made but one sale, she would nevertheless be regarded as a seller since she was, in fact, in the business of selling tangible personal property (just not a very successful business).

The annotation's analysis of "retailer" is also not sufficiently clear. Prior to 1949, Revenue and Taxation Code section 6015 defined retailer as every person engaged in the business of making sales at retail. The section was then amended to define retailer as every seller who makes any retail sale of tangible personal property. The language in the annotation is unclear, and could be misinterpreted as applying the pre-1949 definition of retailer. A sale of a prototype is generally at retail. Assuming that such was the case in the annotation, since the developer was a seller, the developer was liable for tax under the contract as soon as it sold the prototype since it was a retailer at that time, and not at some later time. That is, a person who is a seller is also a retailer whenever it makes any sale at retail.

I hope the information provided above is helpful.

Sincerely,

David H. Levine
Senior Tax Counsel

DHL:wk

515-0620.ltr

bc: Ms. Shirley Johnson
Mr. Donald Fillman