

**STATE BOARD OF EQUALIZATION**

1020 N STREET, SACRAMENTO, CALIFORNIA
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(916) 324-3828

July 30, 1991

Mr. J--- H---
S--- H---
--- Square
XXXX --- Avenue
---, California XXXXX

RE: SY -- XX-XXXXXX

Dear Mr. H---:

I am writing this to confirm our telephone conversation of July 25, 1991, wherein we discussed whether your special order agreements qualified as fixed-price contracts under the Sales and Use Tax Law. I called in response to a letter which J--- P. H---, the bookkeeper for your store, dated July 16, 1991, wrote to the Franchise Tax Board. The Board of Equalization administers the sales and use tax as well as several other business taxes.

In her letter, Ms. H--- indicated that, when the contract is written, the customer places a non-refundable 20% down payment. She also attached a blank special order form to her letter. The amount of the sales tax reimbursement is set forth on the form. The "Warranties and General Information" section contains the following statement:

"Special Orders: Please give careful consideration when making your selection. There will be no cancellation accepted on Special Orders, because this merchandise is ordered according to your exact instructions, and may not be right for other customers."

OPINION

As you are aware, on June 30, 1991, the Legislature enacted Senate Bill 179, Statutes 1991, Chapter 88. This bill amended Sections 6051 and 6201, and added Sections 6051.2m 6051.5, 6201.2 and 6201.5 which raised the state-wide sales and use tax rate to seven and one-quarter per cent. (SB 180, passed by the Legislature and enrolled, but not yet signed by the governor, makes minor amendments to Chapter 88.) This bill also added Section 6376.1 which provides that certain

contracts executed prior to July 15, 1991, in which the seller is obligated to sell or the buyer is obligated to purchase tangible personal property for a fixed price are not subject to the new rates.

In determining whether a contract is a "fixed-price" contract we have consistently required that it satisfy the following criteria: (1) it be binding prior to July 15, 1991, (2) neither party has an unconditional right to terminate the contract; and (3) the agreement must include a provision which fixes the tax obligation on a tax-included basis or sets forth either the amount or the rate of tax and does not provide for an increase in the amount of tax.

First, S--- H---'s special order contract sets forth the amount of tax. Second, the buyer's right to cancel is subject to the duty to forfeit the deposit; this is not an unconditional right to terminate. Finally, the parties have not reserved the right to alter the tax obligation in the event of a change in tax rates. For these reasons, as I stated over the phone, we are of the opinion that the special order agreement constitutes a contract for a fixed price within the meaning of Section 6376.1 so that such special orders executed prior to July 15, 1991, are exempt from the new rates.

I hope the above discussion has answered your question. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid
Tax Counsel

JLW:es
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