



505.0740

STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

February 26, 1958

REDACTED TEXT

Gentlemen:

Our records show that under date of January 28, 1957, a notice of determination under the Sales and Use Tax Law was mailed to your, which included within its measure the purchase price of ROTC uniforms. The determination became final inasmuch as no petition for redetermination was filed within the time required by law. You wrote us on May 15, 1957, which letter was acknowledged on May 22, 1957. The matter was subsequently referred to the legal staff for review.

Considerable research has been done by members of our staff on the problem, and we cannot agree with the contention made in your letter and apparently was made by Colonel Glover, Chief of Staff's Office, 6th Army, that the sale was a sale to the United States.

We have reviewed the contract and the provisions of Title 10, Section 4386 of the United States Code, pursuant to which supplies and uniforms are furnished to institutions maintaining units of the Reserve Officers' Training Corps. Under this law the Secretary of the Army may issue "uniforms, except that he may pay commutation at a rate fixed by him annually instead of uniforms". The agreement provides that the Secretary of the Army will "pay at the expense of the Govt. and subject to appropriate regulations, commutation in lieu of the issue of Govt. uniform clothing". We find nothing to indicate that the Government is purchasing uniforms or that the amount of "commutation" could be used to pay the full price of the uniforms, which is inclusive of the applicable sales tax.

The sales tax, being legally upon the vendor, is not a tax insofar as the purchaser is concerned, but is a part of the price. This has been recognized consistently for many years by the Comptroller General of the United States, who on January 31, 1942, rendered opinion A-88639 advising that the price paid by the California Department of Employment for supplies or equipment may not be viewed as including as such the tax imposed on vendors, and that although the sale price of the supplies may have been increased by reason of the tax, the tax loses its identity and is merged in the price, and that the theory that Federal grants "which may be made to the State to cover the additional expense would be diverted to the payment of a State tax seems no longer tenable".

Again in 1955, the Comptroller General in opinion B-122839 said "Whether the United States is required to pay for articles it purchases a total amount inclusive of a tax imposed by a state rests upon a determination of whether the legal incidence of the tax is on the vendor or the vendee. Where the legal incidence of the tax is on the vendor, the United States has no right – except as may be conferred by the statute or by agreement with the vendor – to purchase the articles on a tax-free basis".

Thus, even in the absence of statutory exemption of sales to the United States, the United States recognized that where the tax is a vendor's tax, the United States as a purchaser much reimburse the vendor for the tax, which is only a part of the purchase price. Although we have an exemption of a sale directly to the United States, it is quite clear to us that these sales in question are not sales to the United States, and that the Federal funds made available through the "commutation" may be lawfully used to reimburse for the vendor's tax. We find no power to pledge the credit of or to bind the United States contractually in the agreement. We find no authority to make the purchase as agent of the United States in the applicable statute.

We are informed that title to the uniform passes to the student when he completes his obligation to the Army. If the student does not complete his course, the institution may sell the uniform.

The contract contemplated that the University is to purchase the uniforms in its own name and on its own credit. The government is obligated only to reimburse the University when the uniforms are purchased. The University is not given the power to act as agent of the Government or to pledge the Government's credit.

We are informed by our San Francisco office that at the request of the vendor, you issued a resale certificate to cover the purchase of the uniforms. Upon the basis of the resale certificate, the vendor apparently did not return the tax to the State. Therefore, we believe that you are legally liable for the amount of the applicable tax. See REDACTED TEXT v. State Board of Equalization, 142 Cal. App. 2d 760.

If you wish, we will schedule this matter for a hearing before a hearing officer is San Francisco. Please advise us if you wish that such a hearing be scheduled.

Very truly yours,

E. H. Stetson
Tax Counsel

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