

**STATE BOARD OF EQUALIZATION**

1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 445-5550

October 11, 1989

Mr. R--- . C---
B---, P--- & H---
S--- Street Tower
--- M--- Plaza
--- ---, CA XXXXX

Re: S--- Industries, Inc.
SZ - XX-XXXXXX

Dear Mr. C---:

This is in regard to your letter dated September 12, 1989 regarding the application of sales or use tax to certain construction contractor transactions.

V--- D--- Company is developing land and has a current contract with G--- B--- for the grading of the development site. V--- has also been negotiation with G---for the construction of streets, curbs, and gutters. In turn, G---has discussed with S--- Industries the furnishing of materials to be used in that construction, such as rock, aggregate, asphaltic concrete, and ready-mix concrete, some of which would be obtained by S--- from its nearby quarry. S--- is also a licensed construction contractor.

The parties are now discussing a change in the proposed contractual relationships whereby S--- would enter into a contract with V--- for the furnishing and installation of the materials to construct the streets, curbs, and gutters. Rock and aggregate would be supplied by S--- from its own quarry. S--- would then subcontract with G---to receive and install materials supplied by S---. S--- will attempt to structure the pricing of its prime contract with V--- and its subcontract with G---so that it will receive the same amount for its materials that it would have received had G---acted as the prime contractor and S--- acted as a supplier to G---.

You also explain that V--- does not currently have a contractual relationship with G--- or S--- regarding the furnishing and/or installation of the materials. The proposed arrangement would make S--- contractually obligated to V--- for furnishing and installation, in the event that

G--- failed to perform its obligations under its subcontract with S---, V--- would look solely to S--- for performance and S--- would be free to seek any appropriate redress from G---.

You ask that we confirm the following:

1. "Sales or use tax liability would be incurred on materials purchased by S--- in the form of tangible personal property for use in the performance of a construction contract for the construction of the streets, curbs and gutters. Sale tax liability would be incurred by suppliers on the sale to S--- in California of such items as asphalt and cement purchased by S--- in the form of tangible personal property, measured by the gross receipts received by the supplier. If acquired in a transaction not subject to the sales tax, use tax liability would be incurred by S--- measured by the sales price to S---.
2. No sales or use tax liability would be incurred on the furnishing and installation of rock and aggregate from S---'s own quarry pursuant to its contract with V--- D--- Co."

A construction contractor is a person who agrees to perform and does perform a construction contract. (Reg. 1521(a)(2).) As you know, a construction contractor is a consumer of any materials it uses in the performance of a construction contract. Your statements, quoted above, are accurate statements of the application of tax to materials used by S--- in the performance of a construction contract. The question is whether we will regard S--- as the construction contractor under these facts or whether the agreements will be disregarded and S--- regarded as a supplier to G---, the construction contractor.

Generally, we will regard as a construction contractor the person agreeing to perform a construction contract for the landowner when the contract requires that person to furnish and install the items to be attached to the real property. If that person then subcontracts with another person to perform the services required by the prime contractor and supplies the subcontractor with the materials to install, we would still regard the general construction contractor as the consumer of the materials supplied to the subcontractor for installation. This conclusion assumes that there has been no previous contract with respect to such construction activity which had been revised or eliminated to restructure the relationships. This conclusion also assumes that the general construction contractor does not subcontract for installation of materials he supplies with the person who hires him for the performance of the construction contract. In such transaction, we would regard the purported general contractor as a supplier of materials to the purported subcontractor, who is actually the person contraction to purchase supplies. For example, in the transaction about which you inquire if G--- was the person hiring S--- to perform the general construction contract, we would regard S--- as selling materials to G---, the consuming construction contractor.

As you have set forth the facts, there was no previous contractual relationship between the parties with respect to the particular construction contract activities about which you inquire. S--- is a licensed construction contractor and has full responsibility to V--- as the construction contractor for doing the street work, regardless of the performance of its subcontractors. G---'s only relationship to S--- with respect to this project is as a subcontractor. Based on these facts, we conclude that sales or use tax will be incurred on materials purchased by S--- for use in the performance of its construction contract with V---. No sales or use tax liability will be incurred when S--- consumes materials obtained from its own quarry when no sale of that material to S--- is involved.

If you have further questions, feel free to write again.

Sincerely,

David H. Levine
Tax Counsel

DHL:wak
1621C

cc: Mr. Gary J. Jugum
Mr. E. L. Sorensen, Jr.