STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
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February 19, 1988

Mr. --- --- ---
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--- ---, --- -----

RE: --- ---, Inc.
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Dear Mr. ---:

This is in response to your letter of January 7, 1985, which describes certain transactions, entered into by your client, --- ---, Inc. (---). You requested our advice as to whether or not ---'s treatment of the transactions for sales and use tax purposes was proper.

The nature of the transactions and your client's treatment of them was described in your letter as follows:

> "--- ---, Inc., is a licensed contractor that both (1) acts as a contractor in the sale and placement of aggregate and asphalt based road mix, and (2) sells aggregate and road mix to contractors who place the material. Their customary practice has been to treat as nontaxable those situations where it acts as a contractor and aggregate is taken from the company's own gravel pit while reporting as taxable the sale of aggregate and road mix to contractors. From time to time the company has been asked to bid prospective jobs alternatively as a material supplier (which would include sales tax) or as a contractor (which presumably would not include sales tax) under circumstances where the company contracts with the prime contractor for placement of the materials by the prime contractor. The cost of application paid by the prime contractor to the company would equal the amount charged by the company, in addition to the material cost, in its contract for the sale and placement of the material."

As discussed with you on the telephone the other day, it is our opinion that under situation (1) --- would generally be deemed a construction contractor as defined in Regulation 1521. The items (gravel and road mix) it contracts to furnish and install constitute "materials" under the regulation so it would generally be considered the consumer of such items with tax applicable to the sale to it or use by it of such materials (Regulation 1521(a)(4), (b)(2)(A)1., App. A). Of course, to the extent --- utilizes gravel or other items extracted from its own pits, no tax would be due. The exceptions to the general contractor-as-consumer rule are found in subsection (b)(2)(A)2. of the regulation. If --- is a seller of materials within these provisions, it would be regarded as the retailer of the items in question and tax would be due based on its gross receipts from such sales (Revenue and Taxation Code §§ 6012, 6051).

Based upon our discussions, we understand that ---'s contracts come within the general rule. Assuming that all materials which are furnished and installed are extracted from ---'s pits, then, ---'s treatment of situation (1) as nontaxable is proper.

Regarding situation (2), assuming there is no contractual arrangement between the land owner and --- which requires --- to furnish and install aggregate or road mix for the land owner, our opinion is that this situation is a retail sale of these items by --- to the prime contractor. Accordingly, ---'s reporting of sales tax based upon such sales is proper. The attempt to avoid this result by some type of sub-contract arrangement between --- and the prime contractor requiring the prime to install the items sold to it, is without substance for sales and use tax purposes. In this situation, --- would clearly not be acting as a construction contractor since it would not be responsible for final installation or placement of the goods (See Business Taxes Law Guide Annotations 190.0040 and 190.0050).

We hope this has answered your questions. If it has not, or if further assistance is required, feel free to contact us again.

Sincerely,

E. L. Sorensen, Jr.
Senior Tax Counsel

ELS:jb

cc: --- District Principal Auditor (--)