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June 3, 1997

Mr. R--- J--- H---
---, ---, --- & --- LLP
XXX South --- Street, ---th Floor
--- ---, CA XXXXX-XXXX

Re: Unidentified Taxpayer

Dear Mr. H---:

I am responding to your letter dated March 28, 1997 to Assistant Chief Counsel Gary J. Jugum concerning the application of sales and use tax to the sale and installation of shutters by your client ("S---"). I assume that S--- is not the true name of your client. As such, please be aware that this opinion letter does not come within the provisions of Revenue and Taxation Code section 6596.

You describe the factual situation as follows. S--- manufactures, sells, and installs shutters in residences. S--- sells both directly to residential customers, and to independent home improvement-type stores. In each instance, the installation of the shutters is performed by S---. S---'s sales to the stores are at a lower price than its direct sales to residential customers, and S--- separately states installation charges to the stores. However, installation is included in the purchase price to the customer, whether the shutters are sold through a store or directly to the customer by S---.

You indicate that S--- proposes to establish a new sales company (hereinafter "N---") which will be 95% owned by S---. For purposes of this opinion letter, we assume that both S--- and N--- are separate "persons" as defined in Revenue and Taxation Code section 6005, e.g., each is a corporation, and one is not merely an internal division of the other.¹

¹A "person" cannot make a sale, as defined in Revenue and Taxation Code section 6006, to itself. This means that a transfer of tangible personal property between divisions of the same entity is not a sale for sales and use tax purposes.

You state, "The new company will purchase shutters from S--- and make sales of shutters to customers, but the installation will continue to be done by S--- at a fixed installation charge. S--- will sell the shutters to the new sales company at a price similar to the price at which it sells to independent companies." We understand this to mean that N--- will consummate the sales transaction with the customer, but that S--- will actually furnish the shutters and install them.

You further state:

"S---'s current practice is to charge sales tax as a construction contractor pursuant to Regulation 1521, following a prior audit by the Board. That is, as a construction contractor, it is treated as the retailer of fixtures that it furnishes and installs. Reg. 1521(b)(2)(B). Shutters are treated as fixtures for these purposes. Reg. 1521(a)(5). Since S--- is the construction contractor and the manufacturer, it charges sales tax on the price at which it sells the shutters to the independent companies, exclusive of installation charges. Reg. 1521(b)(2)(B)(2)(b).

"The question raised is whether sales through the new sales company should be treated in the same manner. That is, should the measure of sales tax be the price charged to the sales company for the shutters exclusive of installation charges. Or, would a different result occur because the sale company is related?" (Quoted as written.)

Discussion

Please note that since you have not identified your client, we are unable to review the file of the prior audit and do not know whether you have correctly characterized the audit findings. For purposes of this opinion letter, we assume that your characterization of the shutters as fixtures is accurate and that S---'s existing practices in the reporting of sales and use tax are correct.

However, transfers between related parties (e.g., between a corporation and a majority-owned subsidiary corporation such as S--- and N---) are generally disregarded for sales and use tax purposes if they are not structured as if at arms length. (See, e.g., Sales and Use Tax Annotations 330.1875 (7/8/92) & 330.4070 (2/15/95). See also Mapo, Inc. v. State Bd. of Equalization (1975) 53 Cal.App.3d 245.) Thus, if S--- and its related entity N--- conduct their transactions with each other as if at arms length, we would treat their transactions in the same manner as transactions between S--- and the independent home improvement-type stores. We would consider the sales of shutters by S--- to N--- as arms length transactions if S---'s sales to N--- are made at the same or equivalent price as its sales to unrelated stores. If such is the situation, sales to N--- may be treated in the same manner as S---'s sales to independent stores for sales and use tax purposes.

I hope this information is of assistance. If you have further questions, please write again and provide us with more details of the transactions, the nature of each entity (e.g., are S--- and N--- separate corporations, or is N--- a division of S--- and not a separate "person?"), and copies of any relevant documents such as the contract between S--- and N--- for the furnishing and installation of the shutters.

Sincerely,

Sharon Jarvis
Senior Tax Counsel

SJ:cl

cc: Culver City District Administrator (AS)