

**M e m o r a n d u m****325.0055**

To: Mr. R. M. Gilbertson, District Principal  
Auditor – San Jose District Office

October 20, 1988

From: John Abbott, Tax Counsel

Subject: S--- P---, Inc. – SY -- XX-XXXXXX  
K--- Company, Inc. – SZ -- XX-XXXXXX

Use tax – participation by seller’s out-of-state representatives

In your August 29, 1988 memorandum to me, you raise the question about whether it is the sales tax or the use tax which applies to a taxable transaction between the seller, K--- Company, Inc., of Maryland, and the purchaser, S--- P---, Inc., of California. You write:

“The purchase order was sent by S--- P--- direct to Maryland. The auditor has determined there was no participation by any local branch or office of the seller in the transaction. Delivery was made via common carrier freight prepaid FOB destination. The installation was performed by seller’s representatives from the Maryland plant facility. The seller did not collect the tax. In a recent audit of the seller, a decision was made not to audit the division selling this equipment because a prior audit revealed negligible results.

“This transaction has generated a significant amount of controversy among members of our staff. Proponents of the application of use tax to the transaction cite Regulation 1620(a)(2)(B), annotation 325.0020 and annotation 325.0120. Proponents of the applicability of sales tax feel that the combination of the terms FOB destination, freight prepaid with installation by the seller’s representatives from Maryland result in this being a sales tax transaction.”

Opinion

Our opinion is that the use tax, not the sales tax, applies to this transaction. In both of the annotations you cite, and also in annotation 325.0080 (3/31/55), the retailer had a local office or place of business, and the issue of whether the sales tax or the use tax was the applicable tax depended on whether there was sufficient involvement by that local office or place of business. Under the facts you relate, however, K--- Company has no office or place of business in California involved in this transaction at all. Where this is the case, under Regulation

1620(a)(2)(B), the sales tax can never apply. It makes no difference whether the terms of delivery are FOB destination or whether the installation is performed by the seller's out-of-state representatives.

JA:jb