STATE BOARD OF EQUALIZATION
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October 1, 1992

Mr. W--- V--- W---
P--- W---
P. O. Box XXXX
--- ---, CA XXXXX-XXXX

Re: Unidentified taxpayer

Dear Mr. V--- W---

This is in response to your letter dated July 22, 1992. You ask for a ruling with respect to application of sales and use tax to your client's lease transactions. Initially, I note that the legal staff does not issue rulings. Revenue and Taxation Code section 6596 provides the only basis for relieving a person of liability for sales or use taxes otherwise due. That section gives the Board the discretion to relieve a person of liability for tax if that person reasonably relied on written advise from the Board which stated that the transaction in question was not subject to sales or use tax. The advise from the Board must have been in response to a written request for advise that included all relevant facts, including the identities of the parties to the transaction. Since you have not identified your client, this letter does not come within the provisions of section 6596.

You describe the transactions as follows:

> "Company A rents sophisticated audio visual projection equipment to its customers for short periods (generally one to four days), which is typically used to run audio-visual programs during conventions, trade shows, concerts, telethons and other similar events. A typical agreement obligates Company A to supply the audio/visual equipment, a video wall processor, a computer that is programmed by Company A and other equipment required for the video production. A typical agreement also requires that the customer provide liability insurance to cover the equipment while in the customer's possession at the production site. In addition, a client may request some or all of the following optional services from Company A:

· Delivery and pickup of the equipment
· A crew to set up the equipment
· An engineer to operate the equipment
· A crew to take down the equipment
· Custom computer programming

"Charges for the rental of the equipment furnished by Company A and any optional services provided pursuant to the rental agreement (and related expenses if any) are always separately stated when billed to the customer. In accordance with California Sales and Use Tax Regulation 1660, Company A has elected to report use tax on a rental receipts basis and currently charges its California customers tax on all separately stated charges for the rental of equipment, delivery and pickup, set-up and charges for a crew to disassemble (take-down) the equipment. Consequently, California sales/use tax has not been paid on the purchase price of the rental property.

"Company A does not collect use tax on the optional charges for the engineer to operate the equipment, custom computer programming, rentals of equipment to out-of-state customers for use outside California and rentals to companies who will sublease the equipment. In the latter case, a valid resale certificate is obtained and kept on file."

You ask:

"1) Is Company A correctly collecting and remitting use tax on equipment rentals (including agreements where the customer elects that a Company A engineer operates the equipment)?

"2) Can Company A accept a resale certificate for rentals of equipment when an engineer is provided at the customer's request to operate the equipment?"

Discussion

You state that the providing of an engineer to operate the equipment is optional. Since this could be a critical factor in determining whether we agree that the transaction is, in fact, a lease, it is appropriate to emphasize that this opinion is based on the assumptions that the engineer is truly optional and that the customer actually gains possession and control of the equipment in question. (See, generally, Entremont v. Whitsell (1939) 13 Cal. 2d 290 (the lease of tangible personal property requires the transfer of possession and control, and if the "lessor" does not transfer possession and control to the "lessee," there is no true lease; rather, the "lessor" is simply the consumer of the property).)

You state that the lessor collects tax on delivery and pickup charges, set up charges, and take down charges. Although this may be correct, we do not have sufficient information to be certain. The delivery charges would be excluded from tax if meeting the requirements of Revenue and Taxation Code section 6011(c)(7) and Regulation 1628. I assume that the delivery is by facilities of the lessor. If so, one of the requirements for the charges to be excluded from tax is that the sale occurs before delivery. In the context of leases, the sale occurs before delivery, for purposes of exclusion of transportation charges from tax, if the lease commences prior to delivery. My experience is that leases such as the ones you describe usually commence after delivery.

Set up charges would be taxable unless the lessee has the option not to hire the lessor for the set up and that set up occurs after the lease commences. (See, e.g., BTLG Annot. 330.3310 (7/16/68, 1/30/87).) Charges for pick up and for taking down the equipment would be taxable unless the lessee has the option not to hire the lessor for such pick up and take down. (See, e.g., BTLG Annot. 330.3280 (12/28/66).)

We agree that charges for custom computer programming would not be taxable. Such nontaxable custom computer programming is defined in Regulation 1502. Since you have not provided any information about such computer programs, I have no opinion as to whether they actually qualify as custom programming within the meaning of the regulation. I note, however, that any computer program in existence at the time the lease contract is executed cannot be custom programming for purposes of sales and use tax.

When the lessee has the option whether or not to retain the services of the lessor's engineer, we agree that the charges for those services are not part of the lessor's taxable rentals payable. When the transaction is a true lease and the engineer's services are optional, the application of tax to the items discussed above remains the same regardless of whether or not the lessee chooses to obtain the services of the engineer.

With respect to your second question, this is a question of fact. The providing of the engineer is some indication that the lessee is the end user and will not act as a sublessee. On the other hand, it is also possible that the lessee has contracted to lease the property in question to its sublessee together with the optional services of an engineer. As discussed above, a lease involves the transfer of possession and control of tangible personal property. The same analysis applicable to whether we consider the transaction between the lessor and the lessee to be a true lease is also applicable to whether the transaction between the lessee and sublessee will be regarded as a true lease.

If the lessee is providing the leased equipment to its customer along with the services of the lessor's engineer, the lessee would be regarded as the consumer of the equipment if, as between the lessee and its customer, the lessee retained control of the equipment. When the lessee is the consumer under this analysis, it may not acquire the equipment for resale.

However, the critical question with respect to whether a timely and valid resale certificate will relieve the lessor of potential liability for use tax collection is whether such certificate is accepted by the lessor in good faith. If so, the lessor is relieved of liability for use tax collection.

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

Sincerely,

David H. Levine
Senior Tax Counsel

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