

Memorandum

460.0016

To: Mr. Dennis Fox (MIC: 92)
Program Planning Manager

Date: January 12, 1996

From: Sophia H. Chung
Staff Counsel

Subject: [X] Corporation
Account No. S- --- XX-XXXXXX

This is in response to your memorandum dated October 24, 1995, to Mr. Gary J. Jugum, Assistant Chief Counsel, requesting an opinion regarding whether the Claim for Refund Agreement, dated April 4, 1995, between [X] Corporation and its customer, is in accord with Sales and Use Tax Regulation 1700. The issue is whether [X] may bill its customer for expenses incurred in refunding excess sales tax reimbursement and in filing a claim for refund on behalf of its customer for the overpayment of use tax.

You provided the following background. In an audit of the period January 1, 1988, through June 30, 1991, the --- District Office determined that [X] was leasing equipment and selling materials in connection with its [---] process. [X] appealed the audit determination. While the appeal was in process, [X] collected tax on its [---] process receipts. Thereafter, the Board reversed the district's position and determined that the [---] process was a nontaxable service. [X] and its customer then executed the Claim for Refund Agreement in which the parties agreed that [X] would file a claim for refund on behalf of the customer. In consideration, the customer agreed to reimburse [X] for its expenses in filing the refund claim.

On September 6, 1995, [X] requested the Board's approval of its proposed refund acknowledgment letter. The proposed refund acknowledgment letter stated that [X] may separately bill each customer for expenses after the customer receives its tax refund from the state. The Board advised [X] that the statement was contrary to the provisions of Regulation 1700. In response, [X] apparently revised the proposed refund acknowledgment letter by deleting all references to reimbursed expenses.

[X] questions the reasoning behind the Board's conclusion that the reimbursement for expenses is inconsistent with Regulation 1700. [X] contends that because the tax to be refunded is primarily a use tax, it should be allowed to bill the customer for expenses incurred in filing a refund claim on the customer's behalf. [X] points out that each customer

could have filed individual refund claims for overpaid use tax but instead agreed to have [X] file a single claim.

DISCUSSION

EXCESS SALES TAX REIMBURSEMENT

Retail sales of tangible personal property in California are subject to sales tax, measured by gross receipts, unless the sale is specifically exempt from taxation by statute. (Rev. & Tax. Code § 6051.) Although the sales tax is imposed on the retailer, the retailer may collect sales tax reimbursement from the customer if the contract of sale so provides. (Civ. Code § 1656.1.) When an amount represented by the retailer to the customer as constituting reimbursement for sales tax is computed upon an amount that is either not taxable or in excess of an amount that is taxable, and is actually paid by the customer, the amount so paid is excess tax reimbursement. (Rev. & Tax. Code § 6901.5; Reg. 1700(b)(1).)

When excess tax reimbursement is collected, the retailer must refund the excess collections to the customers from whom they were collected, or remit such amounts to the state. (Rev. & Tax. Code § 6901.5; Reg. 1700(b)(2).)

Regulation 1700(b)(3)(B) provides that if the retailer has not made sales tax reimbursement refunds to each customer but desires to do so rather than incur an obligation to the state, the retailer must: (1) inform each customer in writing that excess tax reimbursement was collected and that the excess amount will be refunded to the customer, or, that at the customer's option, the customer will be credited with such amount; and (2) obtain and retain for verification by the Board an acknowledgment from the customer that the customer has received notice of the amount of indebtedness of the retailer to the customer. Regulation 1700 does not authorize the retailer to reimburse itself for expenses incurred in refunding excess sales tax reimbursement. Thus, any provision in the Claim for Refund Agreement which requires the customer to reimburse [X] for expenses incurred in refunding the excess sales tax reimbursement collected is contrary to Regulation 1700. [X] must refund the excess tax reimbursement in full to the customer from whom an excess amount was collected. The customer's right to receive a refund of the excess tax reimbursement collected cannot be contingent upon the customer's reimbursement of [X]'s expenses.

OVERPAID USE TAX

When sales tax does not apply, use tax, measured by the sales price, applies to the use of tangible personal property purchased from a retailer for the storage, use, or other consumption in California, unless the use is exempt from taxation by statute. (Rev. & Tax. Code §§ 6201, 6401.) Revenue and Taxation Code section 6901 provides that any overpayment of the use tax by a customer to a retailer who is required to collect the tax, and who gives the customer a receipt therefor, shall be credited or refunded by the state to the

customer. Accordingly, each customer may directly file a claim for refund with the Board for the overpayment of use tax. Alternatively, each customer has the discretion to hire a representative to file a claim for refund on its behalf.

The distinction between sales tax and use tax is highly technical. The Board has an obligation to ensure that the true taxpayer, the purchaser in this instance, has an understanding that it may file a refund directly with the Board without incurring costs. We have reviewed the agreement in question. Our understanding is that the customer knowingly and willingly entered into the agreement for its convenience. Therefore, [X] may charge for services rendered in filing a claim for refund on behalf of its customers for the overpayment of use tax.

SHC:rz

cc: Mr. Gary J. Jugum