

M e m o r a n d u m**460.0145**

To : Mr. William D. Dunn
Assistant Principal Tax Auditor

Date: September 15, 1993

From Elizabeth Abreu
Tax Counsel

(916) 324-8208

Subject: *R--- C--- Inc.*
SR -- XX-XXXXXX

This is in response to your memorandum dated June 24, 1993 in which you state:

“R--- C--- is an advertising agency making sales of advertising brochures, pamphlets and circulars and engaging in construction contracts to install signs. The taxpayer was collecting tax on installation of signs and in certain instances neglecting to charge tax on their sales of finished artwork.

“Mr. N--- contends that the petitioner should be allowed to offset the excess tax collected on installation of signs against the liability for sales of finished artwork when these items are shown on the same invoice. Mr. N--- apparently equates the ‘same invoice’ with the ‘same transaction.’

“It is the Department’s view that to be considered the same transaction within the meaning of section 6901.5, the tax must relate to the same property and not just be listed on the same invoice. For example, the sale of brochures and the sale of installed signs which are billed on the same invoice are different property and are not the same transaction simply because they are billed on the same invoice.”

This case is currently in petition status. Mr. N--- has requested that the Appeals Unit reconsider its position on this issue.

Civil Code section 1656.1 provides that whether a retailer may add sales tax reimbursement to the sales price of the tangible personal property sold at retail to a purchaser depends solely upon the terms of the agreement of sale. It is presumed that the parties agreed to the addition of sales tax reimbursement to the sales price of tangible personal property if the agreement of sale expressly provides for such addition of sales tax reimbursement or sales tax reimbursement is shown on the sales check or any other proof of sale.

Revenue and Taxation Code section 6901.5, which relates to excess tax reimbursement, reads:

“Credits and refunds--excess tax. When an amount represented by a person to a customer as constituting reimbursement for taxes due under this part is computed upon an amount that is not taxable or is in excess of the taxable amount and is actually paid by the customer to the person, the amount so paid shall be returned by the person to the customer upon notification by the Board of Equalization or by the customer that such excess has been ascertained. In the event of his or her failure or refusal to do so, the amount so paid, if knowingly or mistakenly computed by the person upon an amount that is not taxable or is in excess of the taxable amount, shall be remitted by that person to this state. Notwithstanding subdivision (b) of Section 6904, those amounts remitted to the state shall be credited by the board on any amounts due and payable under this part on the same transaction from the person by whom it was paid to this state and the balance, if any, shall constitute an obligation due from the person to this state.”

Subparagraph (b)(4) of Regulation 1700, which interprets the two code sections cited above, provides in pertinent part:

“(4) OFFSETS. If a person who has collected excess tax reimbursement on a transaction fails or refuses to refund it to the customer from whom it was collected, the excess tax reimbursement shall be offset against any tax liability of the taxpayer on the same transaction. Any excess tax reimbursement remaining after the offset must be refunded to the customer or paid to the state. The offset can be made when returns are filed, when a determination is issued, or when a refund is claimed. Such offsets can be made only on a transaction by transaction basis. Tax reimbursement collected on a specific transaction can be used only to satisfy a tax liability arising from the same transaction. The “same transaction” means all activities involved in the acquisition and disposition of the same property. The “same transaction” may involve several persons, such as a vendor, a subcontractor, a prime contractor, and the final customer; or a vendor, a lessor, and a series of sublessors. Tax reimbursement can be offset against the tax liability of the taxpayer whether the liability was satisfied by paying sales tax reimbursement to a vendor, paying use tax to a vendor, or paying use tax to the state.”

A typical application of the offset provision is a transaction in which a construction contractor purchases materials ex tax, furnishes and installs the materials under a construction contract, charges the customer tax reimbursement on the materials, and reports and pays tax on the contract with the customer. The construction contractor is the consumer of the materials and therefore liable for use tax on his or her use of the materials in the construction contract. The contractor has charged and collected excess tax reimbursement from the customer, but under

section 6901.5 and Regulation 1700, the excess tax reimbursement paid to the board may be offset against the contractor's liability for use tax.

In the present case, we assume that the taxpayer's invoices clearly show that tax reimbursement is being calculated and collected on charges for installation of signs. Such reimbursement is excess tax reimbursement because it is computed on an amount that is not taxable. If the sign is classified as materials and the taxpayer had purchased the materials ex tax, the taxpayer would be entitled to an offset of the excess tax reimbursement against its use tax liability on the use of the materials. However, the taxpayer is asking that the excess tax reimbursement be applied against its tax liability arising from sales of other property, not the same property. Regulation 1700(b)(4) states that tax reimbursement collected on a specific transaction can be used only to satisfy a tax liability arising from the same transaction and that "same transaction" means all activities involved in the acquisition and disposition of the "same property." Signs and finished artwork are not the same property. Therefore, the taxpayer is not entitled to an offset of the excess tax reimbursement against its liability on the sales of other property even if the other property and excess tax reimbursement are billed in the same invoice.

EA:cl

cc: --- --- District Administrator