STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

June 9, 1965

Gentlemen:

This is to inform you of the position we have taken with respect to the petition for redetermination and claim for refund of the above-named taxpayer. It is our recommendation to the Board that the audit erroneously included in the measure of tax the value of a Cary Lift which was traded in for a larger unit. We also recommend that the claim for refund of use tax on a DC-3 airplane be granted. However, we must recommend that the protest of the sales of lumber and plywood to construction contractors be disallowed.

We believe you established the Cary Lift was not traded in for a larger unit, but rather returned pursuant to a breach of warranty and that this unit was not suitable for the purpose for which it was purchased. Accordingly, the requirements of Ruling 64 that the full purchase price be refunded or credited and that the purchaser not be required to purchase property of a greater value have been met, even though the taxpayer elected to exchange the smaller unit for the larger. A returned merchandise deduction is proper in these circumstances.

The airplane was purchased from "X", an insurance company, which was engaged in an activity not required to hold a seller's permit. Section 6006.5(a) of the California Sales and Use Tax Law allows as an occasional sale sales of property not held by a seller in the course of an activity for which he is required to hold a seller's permit, provided it is not one of a series of sales sufficient in number, scope, and character to require the holding of such a permit. The sales of used office equipment would have required the holding of a seller's permit if the business had been located in California. Its out-of-state location is not grounds for exemption. Nevertheless, the sale of the DC-3 airplane was exempt under this section because the airplane was not held or used in connection with the sales of used office equipment. The sale of the airplane, we believe, is isolated and is not one of a series sufficient in number, scope, and character to require holding a seller's permit. The sale of a used automobile and trade-ins of two other automobiles, when combined with the sale of the airplane, might possibly be considered a sufficient series except that Sales Tax General Bulletin 57-12 explains that trade-ins by a service enterprise need not be considered as a part of a series. Without them the sales are insufficient to be considered a series.

We believe the sales of lumber pursuant to the two construction contracts were properly set up in the audit. In both cases the taxpayer invoiced the construction contractors for the goods and received a credit. In the "Y" contract, page 17 of the specifications provided that the contractor shall submit a bill of materials listing the lumber and plywood needed and it was the taxpayer's intention to furnish the maximum possible quantities of all materials. This paragraph also stated, "The Contractor shall check quantities of all

materials received from the Owner and shall be thereafter responsible for any losses or shortages". In Addendum No. 4 of the specifications is the following provisions:

> "The Owner shall be credited by the Contractor for all lumber and plywood furnished by him to the Contractor at the prices included with the Contractor's preliminary Lumber List and Plywood List, both dated November 3, 1961, which prices are f.o.b. the Owner's Mill, sales tax included, except for the plywood prices which are f.o.b. Mill, Arcata, California, sales tax included. Freight from the Owner's Mill to the place of fabrication by the Contractor shall be for the Contractor's account." (Emphasis ours.)

The fact that the contract designates the prices are "f.o.b. mill" leads us to believe that there was a delivery to the contractor of the goods at this point. This is substantiated by the statement that freight was for the contractor's account. Moreover, after delivery the risk of loss was on the contractor. The law of sales prior to the adoption of the Uniform Commercial Code was that the risk of loss followed legal title (see Civil Code § 1742). Finally, the statement that sales tax was included shows the parties intended a sale.

The statement "sales tax included" makes the provisions of Section 6054.5 applicable to the contract and even if this were not a sale, the amount of the tax would either have to be refunded to the customer or paid to the state.

In the "A" contract, the sales tax included statement does not appear. However, again the contractor submitted a bill of materials with his bid stating the f.o.b. mill price, and again he was responsible for losses or shortages after delivery. In the agreement dated March 30, 1964, the contractor agreed, in the first paragraph, to "furnish all labor, all materials exclusive of those specified to be furnished by the Owner, all hand and power tools and equipment" etc. The materials specified to be furnished by the owner, by the specifications, do not include plywood and lumber. Paragraph five of the specifications sets forth that the owner shall perform all grading, place and compact fill materials, and labor for underground drainage, fire protection system, lighting, electrical, water, and other building utilities, relocation of the railroad spur, steam vaults, and all special equipment foundations. It is our conclusion that the contractor was required to provide the materials, but also required to purchase lumber and plywood for the job from the taxpayer insofar as the taxpayer wished to furnish them.

Our recommendations will be presented to the Board for their consideration. You have not requested to appear before the Board; but if you desire to do so, you should make the request within 30 days.

Very truly yours,

John H. Knowles
Associate Tax Counsel

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