



STATE BOARD OF EQUALIZATION

LEGAL DIVISION - MIC 82
450 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0082)

Telephone No.: (916) 324-3828
Fax No: (916) 323-3387

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First District, Hayward

DEAN ANDAL
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May 23, 1995

BURTON W. OLIVER
Executive Director

Mr. W--- R. H---
Contracts Manager - Transit
ABC R--- P--- Corporation
XXX South --- Avenue
---, -- XXXXX-XXXX

RE: [No Permit Number]
Special Trackwork Procurement

Dear Mr. Hajny:

I am responding to your letter dated March 21, 1995 to the Legal Division. You requested a formal ruling from the State Board of Equalization as to whether or not your sales of tangible personal property pursuant to your Special Trackwork Procurement Contract (Contract No. P0070) ("the Contract"), awarded November 12, 1993, are exempt from sales and use tax. We note that the Board staff cannot issue tax rulings; only the Board itself may do that. We can, however, give you our opinion regarding the correct application of tax to a given set of facts.

The Contract was executed between ABC R--- Corporation (hereinafter "ABC") and the S--- C--- R--- R--- A--- (hereinafter "SCRRA"). SCRRA is a joint powers authority organized under California law with power to contract for services necessary to achieve its purpose. Article III of the Contract sets forth ABC's duties as follows:

"[ABC] agrees to furnish in a competent manner all Goods and Technical Services required to complete the Contract in accordance with the Contract Documents. [ABC] shall furnish at [ABC's] own expense all labor, materials, equipment, tools, services, and any other items of expense necessary to perform the Contract, except such materials, equipment, and services as may be required in the Contract to be furnished by [SCRRA]. The Goods and Technical Services are defined in detail in the Contract Documents, which detailed definitions govern the interpretation and performance of the Contract, but may be generally described as follows:

"Work to be performed under this Contract includes but is not limited to: furnishing switches, frogs, point protectors, switch stands, guard rails, derails, and insulated joints on an 'as needed' basis for a two year period, with a one year option, as more particularly indicated or described in the Contract Specifications."

Paragraph 1.01. D. adds to the tangible personal property listed above "switch rods; heel block; helper roller; frog, switch and guard rail special plates; bolts; nuts; and washers; and related fasteners with screw and track spikes. The cost will not include cost for running rail and closure rail; and tie plates, screw spikes, and clips, for running and closure rails; and wood ties." Part 2 of the Contract describes the property in more detail.

Paragraph GC-15 provides for progress payments. The pages of Part B, "General Conditions- Procurement," of the contract were two-sided, and only the odd-numbered pages got copied. Paragraph GC-15 was on page B-14, so we do not know its terms. However, "title to Goods and any property (including but not limited to materials and work in progress) for which any payments are made shall pass to [SCRRA] at the time of payment." ABC is to invoice SCRRA for the goods delivered at the time of delivery, and will pass title at that time. (This phrase indicates that progress payments are due at the time of delivery.) Despite title passage to SCRRA, ABC retains the risk of loss until the goods are accepted by SCRRA. (Contract, para. GC-12.) The Contract indicates that ABC is not required to install any of the tangible personal property sold.

OPINION

A. Sales and Use Tax Generally.

In California, except where specifically exempted by statute, Revenue and Taxation Code section 6051 imposes an excise tax, computed as a percentage of gross receipts, upon all retailers for the privilege of selling tangible personal property at retail in this state. (Unless otherwise stated, all statutory references are to the Revenue and Taxation Code.) "[I]t shall be presumed that all gross receipts are subject to tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale" (§ 6091.) "Exemptions from taxation must be found in the statute." (Market St. Ry. Co. v. Cal. St. Bd. of Equal. (1953) 137 Cal.App.2d 87, 96 [290 P.O.2d 201].) "The taxpayer has the burden of showing that he clearly comes within the exemption." (Standard Oil Co. v. St. Bd. of Equalization (1974) 39 Cal.App.3d 765, 769 [114 Cal.Rptr. 571].)

B. Tax Consequences to ABC.

You are selling tangible personal property to a local governmental entity in California. Presumably the goods are produced out of state and shipped into this state for use here. ABC retains the risk of loss until after SCRRA accepts the goods. As a result, ABC does not complete its performance with respect to delivery until after the goods come to rest in California. Under California law, title to the goods thus does not pass until after the goods are delivered. (See, Cal.

U. Comm. Code § 2401.) The proper tax to be applied to this case, then, is sales tax. (Annots. 495.0680 & 495.0700. Sales and Use Tax Annotations are excepts from previous Board staff opinion letters and serve as guides to staff positions.)

The introductory paragraph of the Contract recites that SCRRA is a Joint Powers Authority organized under the laws of California. There is no statutory exemption for purchases by governmental entities other than the United States, its agents or instrumentalities. (§ 6381.) SCRRA is apparently not a Regional Rail Corporation organized under 45 U.S.C. § 741 et. seq. The only possible statutory exemption--for the sale of rail freight cars for use in interstate commerce (§ 6368.5)--does not apply here, because ABC is not selling rolling stock.

We are of the opinion that 49 U.S.C. section 11503(b) does not operate to exempt the sale of these items under the Railroad Revitalization and Regulatory Act of 1976. First, as noted above, they are not rolling stock but trackwork materials to be consumed entirely in California. Second, the tax is imposed on all retail sales such as this one and so does not discriminate against a rail carrier. (49 U.S.C. § 11503(b)(4); See, Nat. R.R. Pass Corp. v. Cal. Bd. of Equalization (N.D. Cal. 1986) 652 F.Supp. 923, 925-926.) We thus conclude that the sale of the tangible personal property which is the subject of this contract is subject to tax.

Since ABC is engaged in the business of selling tangible personal property in California, it is a retailer under our law. (§§ 6006, 6010.5, 6015, & 6017.) It therefore must obtain a seller's permit and report and pay tax. (§ 6066.) ABC should contact Ms. Barbara Bolda, Area Administrator, California State Board of Equalization, --- Area Out-of-State District Office, XXX North --- Drive, Room XXXX, ---, --- XXXXX-XXXX, telephone number (XXX) XXX-XXXX, to obtain a permit.

For your information, I have enclosed a copy of Board of Equalization Pamphlet Number 73, "Your California Seller's Permit." I hope the above discussion has answered your questions. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid
Tax Counsel

JLW:sr

cc: --- District Administrator - - -