



---

**STATE BOARD OF EQUALIZATION**

August 1, 1991

Re: REDACTED TEXT

Dear REDACTED TEXT,

This is in response to your letter of May 2, 1991, requesting our opinion as to whether or not certain materials and freight charges are subject to sales tax liability.

Facts and Assumptions:

You described the facts in this matter as follows:

“I, REDACTED TEXT, am sole owner of a materials supply firm and supply aggregate materials to the general public F.O.B. pit and/or F.O.B. job site.

“I, REDACTED TEXT, am also 100% owner of REDACTED TEXT Trucking, Inc. and haul aggregate materials to various customers as a common carrier. Materials my customers order are furnished by various shippers, including the shipping firm owned by myself.

For the purpose of this opinion, we are assuming that: 1) your customers are “Construction Contractor other than United States Construction Contractors” as that term is defined in Sales and Use Tax Regulation 1521, a copy of which is enclosed; 2) the supply company REDACTED TEXT and the trucking company REDACTED TEXT are two completely separate legal entities; and 3) REDACTED TEXT is a common carrier and/or there is an independent contract between REDACTED TEXT and REDACTED TEXT pursuant to which the latter provides transportation services for the former.

Sales Tax – General Discussion

Except to the extent specifically excluded or exempted by statute, the Sales and Use Tax Law, California Revenue and Taxation Code (Section 6001 et seq.) imposes an excise tax in connection with the retail sale of all tangible personal property sold or purchased for use in this state. (All statutory citations are to the California Revenue and Taxation Code, unless otherwise noted herein.) Section 6051 imposes sales tax on the gross receipts from the retail sale of all tangible personal property sold in this state. The sales tax is imposed upon the retailer. California Civic Code Section 1656.1 allows the retailer to collect sales tax reimbursement from the consumer.

## Construction Contracts – Sale of Materials

Regulations 1521(b)(2)(A)(1) provides the general rule that:

“Construction contractors are consumers of materials which they furnished and install in the performance of construction contracts. Either sales tax or use tax applies with respect to the sale of the materials to or the use of the materials by the construction contractor.”

This provision applies to construction contractors other than United States construction contractors. (The rules with respect to sales of materials to United States Construction Contractors are contained in subsection (b)(1)(A) of the regulation.)

In our opinion, pursuant to the regulation, your construction contractor customers are consumers and your company would be considered to be the retailer. Consequently, you would be liable to pay sales tax on the gross receipts obtained from the sale of the materials. In all likelihood, you would pass this cost on to your customers as sales tax reimbursement. The sales tax liability described above would result regardless of whether the retail seller is REDACTED TEXT or REDACTED TEXT. However, if the retail seller is REDACTED TEXT, it should have a seller's permit. In this case, both the purchases of materials by REDACTED TEXT and the purchases of materials by REDACTED TEXT would be ex-tax and both companies would issue resale certificates to their suppliers. Under this scenario, REDACTED TEXT would be the retailer and it would be the entity to collect sales tax reimbursement from its purchasers.

## Transportation Charges

The extent to which transportation charges are subject to sales or use tax depends upon various factors. Sections 6011(c)(7) (with respect to use tax) and 6012(c)(7) (with respect to sales tax) as implemented and interpreted by Regulation 1628 provide that sales and use tax does not apply to separately stated charges for transportation of tangible personal property from the retailer's place of business or other point from which shipment is made directly to the purchaser, so long as the transportation is by facilities other than those of the retailer, i.e., by United States mail, independent contractor or common carrier. The amount of such transportation charge which is nontaxable cannot exceed the actual cost of the transportation to the retailer. The statutes and regulation also provide that when the property is sold for a delivered price or when transportation is by facilities of the retailer, such as the retailer's own truck, tax applies to charges for transportation to the purchase, unless: (a) the transportation charges are separately stated; (b) such charges are for transportation from the retailer's place of business or other point from which shipment is made directly to purchaser; and (c) the transportation occurs after the sale of the property is made to the purchaser. When the sale occurs before the transportation to the purchaser commences, tax does not apply to separately stated charges for the transportation by the retailer's facilities, so long as such charges are reasonable. Under the regulation, a sale is deemed to occur at the time and place when the retailer completes his performance with respect to physical delivery of the property, unless the parties to the sale explicitly agree that title is to pass at a prior time.

From your description of the facts, it appears that the exemption for transportation by facilities other than those of the retailer would apply. Accordingly, the transportation charges would not be subject to sales or use tax so long as: they are separately stated; shipment is made from the retailer's place of business or other point directly to the purchaser; and the transportation charges

which are invoiced to the customer not exceed the actual cost of the transportation charged by REDACTED TEXT to REDACTED TEXT.

On the other hand, if REDACTED TEXT purchases the materials from REDACTED TEXT or any other supply company, and it turn delivers and sells the materials F.O.B. job site, the shipping would be considered to be transportation by facilities of the retailer. Such charges are subject to sales or use tax unless they are: (a) separately stated charges for transportation of the materials from the point from which shipment is made directly to the purchaser; (b) the contract explicitly provides that title to the materials passes to the purchaser before the transportation occurs; and (c) such charges are reasonable. However, the Board of Equalization has consistently taken the position that the use of F.O.B. provisions creates a presumption that title does not pass until after delivery is completed and in such cases, the transportation charges are subject to sales or use tax. (See, e.g., Business Taxes Law Guide Sales and Use Tax Annotations 557.0160, 557.0200, 557.0210, 557.0520, and 557.0540.).

Finally, we note that neither REDACTED TEXT nor REDACTED TEXT have sellers permits. Accordingly, depending upon the factual circumstances as discussed above, one or both of the companies should apply for such permits. This can be accomplished by contacting our local district office, the address and telephone number for which are:

Board of Equalization  
Sacramento District Office  
1823 Old Winery Place  
Sacramento, California 95827  
(916) 855-7528

The forgoing represents our opinion with respect to each of the questions you have raised. A copy of each of the regulations referenced above is enclosed for your convenience.

If you have any further questions, please do not hesitate to write to use again.

Cordially,

Victoria Lani Arena  
Tax Counsel

VLA:cl

2989I

Enc.: Reg. 1571