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STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

LEGAL DIVISION (MIC:82)
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March 31, 1994

Ms. REDACTED TEXT
COMPANY A

BURTON W. OLIVER
Executive Director

Re: REDACTED TEXT
Sales to U.S. Government

Dear Ms. REDACTED TEXT:

I am responding to your letter dated February 7, 1994, to the Legal Division. You ask for a ruling as to whether or not you may accept an exemption certificate under Regulation 1667 from COMPANY B, a United States Government Contractor. We note that the Board staff cannot issue tax rulings; only the Board itself may do that. However, we can give you our opinion regarding the correct application of tax to a given set of facts.

COMPANY B has represented to you that the materials it is purchasing are "for the use of the U.S. government" and so exempt from sales or use taxes. You attached to your letter a copy of a "U.S. Tax Exemption Certificate" which the government agency in question (REDACTED TEXT) issued to COMPANY B, and which COMPANY B is presumably using as support for its claim of exemption.

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 noted, all statutory references are to the Revenue and Taxation Code.) A "retail sale" means a sale for any purpose other than resale in the regular course of business in the form of tangible personal property. (§ 6007.)

"It 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 unless he takes from the purchaser a certificate to the effect that the property is purchased for resale." (§ 6091.)

Persons engaged in the business of rendering services are consumers, not retailers, of the tangible personal property which they use incidentally in rendering the service. Tax thus applies

to sales of the property to them. (Reg. 1501.) They may not buy such materials for resale.

B. Sales to Persons Contracting with the United States.

The case of Aerospace Corp. v. S.B.E. (1990) 218 Cal.App.3d 1300 altered this rule in the case of persons rendering services to the United States. The court declared that tax does not apply to sales of materials to such persons. Under this rule, such persons may buy materials for resale to the federal government if their federal contracts contain certain clauses passing title to the property to the United States prior to use by the purchasing contractor, whose following resale to the United States is exempt from tax under Section 6381. There is no exemption for purchases for use by the United States.

Contractors performing work for the Federal Government are generally not agents of the government. (U.S. v. New Mexico (1972) 455 U.S. 720.) As a result, they may not buy property "on behalf of" the United States. For the sale to them to be free of tax, they must purchase the property for resale.

A sale for resale is not, strictly speaking, exempt from tax but rather is excluded from the operation of the Sales and Use Tax Law. Though COMPANY B's sales to the United States may be exempt from tax under Section 6381, for COMPANY A's sales of the materials to it to not be taxable, it must certify to COMPANY A that it is purchasing the materials for resale. The certificate must specifically state that COMPANY B is purchasing for resale. The use of terminology like "exempt" is not acceptable. (Reg. 1668(b)(1)(D).) COMPANY A may therefore not rely on this exemption certificate to relieve it from the duty of paying tax on these sales.

The fact that this is an invalid use of an exemption certificate does not automatically mean that tax applies to these sales. Under the Aerospace rule, if COMPANY B's contracts with the United States contain the required title-passage clauses then it may purchase the materials at issue ex-tax for resale by presenting COMPANY A with a resale certificate substantially conforming to the requirements of Regulation 1668. As you do not provide any information on that issue (you probably do not have it), I cannot render an opinion on that point.

For your information, I have included a copy of Regulation 1668. I hope the above discussion has answered your question. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid
Tax Counsel

JLW:es

Enclosure: Reg. 1668