

**STATE BOARD OF EQUALIZATION**

(916) 327-3400

August 8, 1989

Mr. R--- T---
XXX --- ---
--- ---, California XXXXX

S- -- XX-XXXXXX

Dear Mr. T---:

This letter is in response to your June 5, 1989 request for a legal opinion regarding the applicability of sales tax to your sale of a piece of sculpture to [ABC] County. The facts, as I understand them, are as follows. In October 1988, you entered into a contract with the County of [ABC] to design, fabricate and install a piece of sculpture, at the [H] Complex, XXXX --- Street, [ABC].

The sculpture is a three-dimensional work of art which was designed for a specific site on the grounds of the [H] Complex. The sculpture is affixed to the ground on which it stands, but is not attached to the building. You received \$13,000 for the project by means of two payments--one in December 1988 and one in March 1989. The contract specifies in Section 9 that the artist's fee of \$13,000 includes sales tax.

The facts, as you present them are, for sales and use tax purposes, consistent with the definition of a construction contract. Regulation 1521(a)(1)(A) defines a "construction contract" as one to "erect, construct, alter, or repair any building or other structure, project, development, or other improvement on or to real property." Clearly, installation of a piece of sculpture valued at \$13,000 is an "improvement to real property."

The tax treatment of a construction contract depends in a large part upon whether the contract is one to provide materials or to provide fixtures. Regulation 1521(a)(5) defines fixtures as "items which are accessory to a building or other structure and do not lose their identity as accessories when installed." Materials, on the other hand, are defined in section 1521(a)(4) as "tangible personal property incorporated into, attached to, or affixed to, real property . . . which, when combined with other tangible personal property, loses its identity to become an integral or inseparable part of the real property"

In general, construction contractors are consumers of materials which they furnish and install. Either sales or use tax applies to the sale or use of the materials. Either sales or use tax applies to the sale or use of the materials. (Reg. 1521(b)(2)(A).) Thus, the contractor pays sales tax reimbursement on materials at the time of purchase or must report and pay use tax on any materials purchased ex-tax.

On the other hand, construction contractors are retailers of fixtures which they furnish and install. (Reg. 1521(b)(2)(B).) With respect to fixtures, the contractor is obligated to pay sales tax.

The tax treatment of a commissioned piece of sculpture depends upon the degree to which the artwork is integrated into or merged with a building. The Board has held in the past, of example, that a mosaic tile mural constructed on the wall of a building qualifies as "material" because the artwork is an inseparable part of the building. (Business Taxes Law Guide 190.0840. The BTLG consists of annotations which provide guidance to previous staff decisions.) In this example, because the artwork is "material," the artist pays sales or use tax only on the material used in construction of the artwork, i.e., ceramic clay, paint, etc.

On the other hand, if a piece of sculpture maintains its integrity and identity even after installation, the sculpture is a "fixture." The sculpture which you created and installed at the [H] Complex under commission from [ABC] County qualifies as a fixture. Thus, you are considered to be the retailer of the sculpture.

On a lump sum contract, such as your contract with [ABC] County, the measure of tax is the cost price. The method of determining the cost price is described in detail in Regulation 1521 at subsection 9b)(2)(B)2.b. The portion applicable to your situation states that, if the fixture is manufactured by the contractor (as is your sculpture), and if the sale price cannot be established by the other described methods (which are inapplicable to your situation), then the cost price is deemed to be an aggregate of the following six factors:

1. Cost of materials, including such items as freight-in and import duties,
2. Direct labor, including fringe benefits and payroll taxes,
3. Specific factory costs attributable to the fixture,
4. Any manufacturer's excise tax,
5. Prorata share of all overhead attributable to the manufacture of the fixture, and
6. Reasonable profit from the manufacturing operations which, in the absence of evidence to the contrary, shall be deemed to be 5 percent of the sum of the preceding factors.

You should figure out the cost price based on these of the above six factors applicable to your circumstance. Please note that your cost price (the measure of tax), is likely to be significantly less than the amount paid to you under the contract. Further, installation labor is not taxable as it is excluded from the definitions of "gross receipts" (Rev. & Tax. Code § 6012(c)(3)) and "sales price" (Rev. & Tax. Code § 6011(c)(3)).

Because your contract was with [ABC] County, the sale is exempt from sales tax. Revenue and Taxation Code Section 6365 ("Artworks," enclosed) provides in relevant part as follows:

"(a) There are exempted from the taxes imposed by this part the gross receipts from the sale of, and the storage, use or other consumption in this state of, original works of art, which are:

"(1) Purchased by this state or any city, county, city and county, or other local governmental entity . . .

"(b) The exemption provided by this section shall apply only to works of art purchased to become part of the permanent collection of any of the following . . .

"(3) Any city, county, city and county, or other local governmental entity and this state which purchases or commissions public art for display to the public in buildings, parks, plazas, or other public places. These areas shall be open to the public not less than 20 hours per week for not less than 35 weeks of the calendar year."

Assuming that the sculpture was an original work of art and that it is displayed in an area open to the public, your sale is not subject to tax.

Unfortunately, despite the exempt nature of the sale, your contract specifies that the \$13,000 you received includes tax. Therefore, you received tax that is not owing.

Revenue and Taxation Code Section 6901.5 provides in pertinent part as follows:

"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 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.”

In order to comply with Revenue and Taxation Code Section 6901.5, you must refund to [ABC] county the tax you inadvertently, but incorrectly, collected. The tax rate in [ABC] County is 7%. The measure of tax can be determined by reference to Regulation 1521(b0(2)(B)2.b. and the above discussion.

I am enclosing a copy of the Board’s useful publication “Tax Tips for Construction and Building Contractors” which contains Regulation 1521.

Please feel free to contact me if you have further questions regarding this matter.

Sincerely,

Stella Levy
Tax Counsel

SL:cl

Enclosures