STATE BOARD OF EQUALIZATION
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August 23, 1989

Mr. A--- D. S---
Attorney At Law
XXX --- Avenue, Suite XXX-
---, CA XXXXX

Re: J--- H--- R--- E---
SY --- XX-XXXXXX

Dear Mr. S---:

This is in reply to your June 28, 1989 letter regarding the application of sales and use tax to charges by J--- H--- R--- E--- (J---) on its leases of tax-paid equipment.

You explained that J--- is a lessor of equipment used in construction. The equipment includes booms, scissor lifts, hoists, material lifts and personnel lifts, but does not include mobile transportation equipment. J--- purchases tax-paid all of the equipment that it leases and leases the equipment in substantially the same form as acquired.

J--- maintains offices throughout Northern California. Recently, J--- opened an office in ---, Nevada. J--- wishes to clarify the sales and use tax consequences where equipment is transferred between the Northern California offices and the office in Nevada. You presented the following hypotheticals and asked for our opinion as to the application of the tax.

"Hypothetical I

J--- purchases equipment tax paid in California. The equipment is first leased in Nevada and used there for more than 90 days. It is then moved to California and leased."

Since J--- purchases the equipment tax paid in California and uses the property outside California more than 90 days before bringing it back to California, no further California use tax, including any district use tax, is due.

"Hypothetical 2

Same as 1, except that the equipment returns to California before 90 days."

As you know, certain districts in California have adopted district transactions (sales) and use taxes. Subdivision (b)(1) of Transactions and Use Tax Regulation 1823 provides:

> "State-administered district use tax applies if tangible personal property is purchased from a retailer on or after the operative date of the district taxing ordinance and the property is purchased for use in the district and is actually used there, provided any one of the following conditions exist:...
>
> > "(B) The place of sale is in this state but not in a district having state-administered transactions (sales) and use taxes...."

If J--- purchases the equipment in a place in California which does not impose a district transactions tax (e.g., Placer County) and returns the property to lease in a district which does impose such a tax (e.g., Sacramento County), and has not used the equipment outside the district over 90 days from the date of purchase, J--- would be liable for payment of the ½ percent district tax imposed in the district. We are enclosing a copy of Regulation 1823 for your further information.

Hypothetical 3

J--- purchases equipment in California tax paid and begins leasing it in California. The equipment is then moved to Nevada and leased there. Subsequent thereto the equipment is moved back to California and leased."

Again, if J--- returns the property to California to a district which imposes a district use tax and has not used the property out of state for a period in excess of 90 days, the district use tax is due.

"Hypothetical 4

J--- purchases equipment in Nevada tax paid and begins leasing it in Nevada for a period exceeding 90 days. The equipment is then moved to California and leased."

When J--- brings the equipment to California, J--- would have no use tax liability for J---'s use of the property in California, because J--- used the equipment for a period in excess of 90 days outside California. (Reg. 1620, subd. (b)(3).) However, when J--- leases the property, the lease is a sale by J---, because J--- has not paid California sales tax reimbursement to the vendor nor timely paid use tax to California on J---'s purchase. The applicable tax to the lease is the use tax which is imposed on the lessee. J---, as lessor, must collect the tax from the lessee. (Reg. 1600, subd. (c)(1).) The Board cannot allow a credit against the use tax due on the rentals on account of taxes paid to Nevada, because the California use tax is imposed on J---'s lessee, a

person other than the one paying the out-of-state tax reimbursement or tax. (Reg. 1600, subd. (c)(8).)

"Hypothetical 5

Same as 4, except that the equipment is moved to California within 90 days of its purchase."

If J--- brings the equipment to California within 90 days, then the presumption arises that the property was purchased for use in California, and California use tax may be due. In such case, J--- has an election to report and pay California use tax on the purchase of the property. If the Nevada tax equals the applicable California tax, no further tax is due. If the Nevada tax is less than the California tax, J--- is entitled to the credit provided by Revenue and Taxation Code section 6406.

"Hypothetical 6

J--- purchases equipment in Nevada tax paid with the intent of using it in California. J--- reports the purchase of the equipment in its sales/use tax return for the period in which the equipment is purchased. The equipment is first leased in Nevada for a period exceeding 90 days. The equipment is then moved to California and leased."

The facts of this hypothetical appear to be the same as those stated in Hypothetical 4; however, here you note that J--- intends to use the equipment in California. This factual situation is addressed in Business Taxes Law Guide Annotation 330.2290, which states:

"Intent of Purchaser. Taxpayer purchased tangible personal property in another state. Tax was paid with respect to the purchase in the state in which the purchase was made. Taxpayer leased the equipment to customers in the other state for a substantial period of time. Upon termination of the lease the taxpayer transported the property to California with the intention of placing the property in lease service here. The property was brought into this state more than 90 days after the date of purchase. The property was then placed in rental service in this state.

"The leasing of the property is a 'sale' by taxpayer and a 'purchase by taxpayer's lessee and is taxable. Taxpayer has no election to pay use tax measured by the purchase price of the property since the property was not purchased for use in this state.

Where the property is in rental service outside this state for more than 90 days before it is brought here, it will be regarded as having been purchased for use in this state only if it can be specifically established that at the time the property was purchased the purchasers intended to utilize it in this state. If, for example, a taxpayer purchased certain equipment to be utilized in the performance of a

> contract to be performed in this state, but the equipment was first utilized outside this state due to a delay in the commencement of the California contract, then the taxpayer could pay tax measured by the sales price to him of the equipment even though the equipment might have been utilized for more than 90 days in another state. The tax would have to be paid with the return for the period during which the equipment was first placed in rental service in this state. The taxpayer could then take any credit allowed by Revenue and Taxation Code Section 6406. 4/28/75, 11/26/71."

As we noted in response to Hypothetical 4, the general rule is that, when property is used out of state over 90 days and is brought to California, there is no option available to the lessor to pay California use tax measured by the purchase price. The annotation provides an exception to that rule when the lessor can specifically establish that, at the time of purchase, the lessor intended to use the property in California. Under such circumstances, the property would be deemed purchased for use here, and the taxpayer has the option to pay the use tax liability based upon the purchase price. The example cited, which would give rise to the exception, occurred where the property was purchased for use under a contract to be performed in California but the property was actually first used outside California due to a delay in the commencement of the California contract.

On the other hand, a mere general intention that property will be rented in California does not bring a transaction within the purview of the exception to the general rule. In order to come within the exception, a contract with a California lessee or some other indicia of a specific intention to bring the property into California within 90 days of its purchase is required.

Our position, then, is that in order for the lessor to have an election to pay use tax based upon the purchase price rather than rentals payable, the lessor must establish either (1) the property entered California within 90 days of its purchase, or (2) the property did not enter California within 90 days of the purchase, but there is evidence of a specific intention that the property was purchased for use in California within 90 days of its purchase.

We hope this answers your questions; however, if you need further information, feel free to write again.

Very truly yours,

Ronald L. Dick
Tax Counsel

RLD:sr
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