

**STATE BOARD OF EQUALIZATION**

916-324-8208

February 26, 1992

[X]
XXX --- ---
--- ---, -- XXXXX

Re: [X]

Dear [X]:

Your letter dated October 28, 1991 has been forwarded to me for a response. In your letter you state:

“We are in the decorative rock sales and decorative rock design business. We purchase rock from various quarries and rock supply dealers and resell this rock directly to customers. We have a holding yard where we keep most of this rock in one location. We also sell direct to rock suppliers, and complete the appropriate resale cards.

“When we sell direct to customers, the customer picks out the rock they wish and a determined price is met. We charge tax on the amount. We then rent equipment to prepare the rock for delivery and make the delivery. This amount is segregated on; the invoice. Equipment such as a crane truck, forklift, and flatbed trucks are rented. We do not charge tax for this expense. We also charge a delivery fee on the preselected rock dependant on the location it will go to. We segregate this cost and do not charge tax to the customer. I also charge for my consultation time on the rock design. We set this rock for the customer which is included in the price of the rock, but I charge for my consultation in the design process. I discuss the further planning of design including probable plants, I create a visual scene from a drafting method for the rock placement including angles, contours, area of placement. I do not charge tax on this cost.”

We assume that you place the large rocks and spread the rock used as ground cover on a customer's property at the locations specified in his or her landscape plans (as opposed to dumping such rocks on the customer's driveway). In that case, your contract with your customer is a construction contract which is governed by the rules in Sales and Use Tax Regulation 1521, a copy of which is enclosed.

Generally, a construction contractor who provides “materials” (including decorative rocks) is the consumer of the materials which he or she furnishes and installs in the performance of a construction contract. Either sales or use tax applies with respect to the sale of the materials

to or the use of the materials by the construction contractor. Regulation 1521 (b)(2)(A)1. In other words, unless the exception discussed below applies, sales to you of the decorative rocks are taxable. If you have given a resale certificate to the vendor from whom you purchased a rock, you must pay use tax measured by your cost of the rock when you take the rock out of inventory for use in your construction contract. On the other hand, since you are the consumer and not the retailer of the rocks, your charges to your customers are not subject to sales tax.

There is an exception to this rule, that a construction contractor is the consumer of materials furnished and installed, when materials are furnished pursuant to certain time and material contracts. A time and material contract is one which sets forth a charge for the materials and a separate charge for installation of those materials. This is explained in subdivision (a)(7) of Regulation 1521. If title to the materials explicitly passes to the customer under the time and material contract prior to installation, the contractor is the retailer of the materials (and not a consumer). Alternatively, if the contractor bills the customer for "sales tax" on the charge for the materials (which must at least equal the contractor's costs of the materials) under a time and material contract, the contractor is the retailer of the materials.

We cannot provide you a definitive answer because it is not certain from the facts in your letter whether your contracts with or billings to your customers state the charge for the materials separately from the charge for installation. Nor is it clear whether the "sales tax" you "charge" is stated separately to your customers or is simply used to calculate your total charge. Assuming that your charges for the rocks and the charges for "sales tax" are stated separately to your customers, you are regarded as the retailer of the rocks to your customers. Under such circumstances, the "gross receipts" from your sales of the rocks are subject to sales tax. (Of course, this means you may properly purchase such rock without paying sales tax reimbursement by giving your suppliers a resale certificate.)

If your sales of rocks to your customers are taxable under the time and materials contract exception, your taxable gross receipts from the sales of rocks include your charges for transportation unless certain requirements are met. We assume, however, that you do not meet the requirement that you have explicitly agreed in writing with each of your customers that title to the rocks will pass prior to delivery. Therefore, your transportation charges, including rental charges, are also subject to tax. Rev. & Tax. Code § 6012(a)(3).

If you have further questions regarding sales and use tax law, please do not hesitate to write again.

Sincerely,

Elizabeth Abreu
Tax Counsel

EA:wk