

**STATE BOARD OF EQUALIZATION**

(916) 445-6493

August 23, 1988

Dear [X]

In your letter to the Board's legal staff dated April 19, 1988, which we received June 1, 1988, you request written clarification on the application of the Sales and Use Tax Law and Board regulations to three different situations.

I have quoted below the questions you raise, followed by our response to each.

Question

"1. Sellers of personal property frequently ship their product to the purchaser. Regulation 1630 sets forth, among other things, a list of 'Property Used as Containers or Parts of Containers of the Goods Shipped'. Included in this list is 'excelsior and other packaging material'. Very often styrofoam pellets, commonly called 'peanuts' or 'popcorn' because of their shape, are used as packing materials in the same manner as excelsior. Also frequently used is 'bubble pack', consisting of two layers of plastic film laminated together in such a way as to trap bubbles of air between the layers to achieve a cushioning effect. The 'bubble pack' is usually wrapped around the product or used as cushioning layers in packing. Another increasingly popular method of packaging items, particularly extremely fragile glass or electronic parts is the use of special gasses which are injected into the container and 'set up' to form a styrofoam sponge which conforms to the shape of the product. It would seem that all of these packing materials would fall under the description of packing and crating materials and would be exempt from sales tax under the container exemption. Please confirm or correct this interpretation of Regulation 1630."

Answer. We cannot determine from your letter whether the shipper who purchases these packing and crating materials is also the seller of the tangible property being shipped. If the shipper is not also the seller, then the applicable regulation is Regulation 1630. That regulation distinguishes between property used to condition goods for shipment or preserve and protect the goods during shipment, on the one hand, and property used as containers or as parts of containers of the goods shipped on the other hand. If the shipper uses the property to preserve and protect goods during shipment, the shipper is the consumer of the property, and the sale to the shipper is a taxable retail sale in all cases. However, if the shipper uses the property as a container or as parts of a container, the sale to the shipper is a taxable retail sale unless all the conditions are met which allow the shipper to regard the sale to him as an exempt sale for resale, under the provisions of Regulation 1630(b)(2). For example, the shipper must not be the seller of the contents, and must pass title to the container or container parts prior to use.

Our view is that the styrofoam pellets, bubble packs, and gases injected to form styrofoam sponge are all used as packing materials in the same manner as excelsior, and qualify as property used as containers or parts of containers of the goods shipped. Therefore, tax applies in the manner set forth in Regulation 1630(b)(2).

If the shipper is also the seller of the property shipped, then the applicable regulation is Regulation 1589, not Regulation 1630. In this case, the packing and crating materials are parts of nonreturnable containers. Since the shipper purchases these materials without the contents (the property being shipped), and then sells the contents together with the container, the shipper may purchase these materials ex-tax for resale. The sales price of the property shipped also includes the nonreturnable container used for the shipping. (Regulation 1589(b)(1)(A)).

Question

“2. It is understood that quarterly financial statements are exempt as periodicals. An annual report has been regarded as taxable due to the fact that it is not one of a series and has a different format. Please clarify the taxability of financial reports in cases where a corporation publishes three quarterly reports and in the last of its fiscal quarters recaps and expands the information in its annual report, which is the only report issued for the fourth quarter.”

Answer. Our opinion is that under the facts you relate, Regulation 1590(a)(2) provides an exemption from sales and use tax for both the three quarterly reports and the fourth-quarter annual report as a tax-exempt periodical. The annual report constitutes one of a series of a publication issued by the corporation at average intervals not exceeding three months. You are correct, however, that where the corporation issues the annual report separate and apart from its quarterly report series, then the annual report would be taxable while the four quarterly reports would be a tax exempt periodical. (Business Taxes Law Guide annotations 385.1000 and 385.1060).

Question

“3. Are quarterly or annual financial reports taxable in California when mailed directly from the printer to shareholders at addresses out-of-state? Would the delivery of the reports by the printer to a mailing house affect the taxability of the transaction? If the printer were located outside of California, would the taxability of the transaction be affected?”

Answer. I assume that in this question you are referring to financial reports, which are not exempt periodicals. If they were, the periodicals exemption would apply regardless of the circumstances of mailing or delivery. There is also a statutory exemption from sales and use taxes for printed sales messages, which meet the conditions for delivery required by Revenue and Taxation Code Section 6279.5 and Regulation 1541.5. However, we do not consider quarterly or annual financial reports to be printed sales messages with the meaning of Section 6379.5 since these reports are not printed for the principal purpose of advertising goods or services. Thus, the exemption afforded to printed sales messages does not apply to the facts you present.

When the printer prints and mails these reports directly to shareholders at out-of-state addresses, the transaction qualifies as an interstate shipment exempt from sales tax under Revenue and Taxation Code Section 6396 and Regulation 1620(a)(3)(B), if all of the conditions for the exemption are met as set out in that regulation. Where the printer delivers the reports to a mailing house designated by the purchaser, pursuant to a contract between the printer and the purchaser which requires out-of-state shipment, we regard the mailing house as a forwarding agent, and the transaction would likewise qualify for the sales tax exemption provided by Section 6396. However, if the printer simply delivers the reports to a mailing house, and thereafter the mailing house mails the reports out of state on instructions of the purchaser, the sale is not exempt. (Business Taxes Law guide Annotation 325.1560 (10/30/64). This assumes that the mailing house does nothing with the reports other than to prepare them for mailing. For example, if the mailing house were to store the reports on behalf of the purchaser, then the transaction would be subject to tax because the property was not actually shipped out of the state pursuant to the contract of sale between the printer and the purchaser.

If the printer is located outside of California, but the mailing house is located in California, and the printer prints and mails the reports to the mailing house, then the sales tax would not apply to the transaction, but the use tax would apply. (Regulation 1620(b)). Even though the mailing house later mails these reports to out-of-state addresses, our view is that the purchaser makes a taxable use of the property in California when a mailing house acting as its agent receives the reports and prepares them for mailing to out-of-state shareholders.

In any case, we note that reports mailed to in-state shareholders would be subject to tax. I enclose copies of Regulations 1541.5, 1590, and 1620 for your information. Please feel free to contact me if you have any further questions or comments about this letter.

Sincerely,

John Abbott
Tax Counsel

JA:jb
Enclosures