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**STATE BOARD OF EQUALIZATION**

(916) 445-5550

May 18, 1989

Re:

Dear

This is in response to your letter dated April 14, 1989 in which you ask two questions on the proper application of sales or use tax. You state that the relevant facts are as follows:

1. A purchase order is issued contingent upon a) delivery and installation, b) acceptance of the lease by the lessor and c) acceptance of the equipment by the lessee.
2. Completion of the deal --- from installation through acceptance -- may take up to 120 days.
3. The lease is not commenced nor is the equipment invoice paid until the Certificate of Acceptance is received from the lessee.
4. The vendor maintains title to the equipment until the purchase invoice is paid.

Your first question is whether the equipment vendor has any sales tax liability prior to payment of the equipment invoice. A retailer incurs liability for sales tax when the retailer makes a retail sale in this state. (Rev. & Tax. Code § 6051.) For purposes of application of sales tax, "sale" means any transfer of title or possession, in any manner or by any means whatsoever, of tangible personal property for a consideration. (Rev. & Tax. Code § 6006(a).) Although title may pass at a prior time, it may pass no later than the time and place at which the retailer completes his performance with reference to the physical delivery of the property, even though a document of title is to be delivered at a different time or place. (Reg. 1628 (b) (3) (D). See U.C.C. § 2401.) If the equipment vendor completes his performance with reference to the physical delivery of the property either upon delivery to a common carrier for delivery to the lessor or by delivery by the vendor directly to the lessor, the sale would generally occur at that time. If that sale were at retail, the vendor would incur sales tax liability for the sale at the time of that sale regardless of when the invoice was actually paid.

A retail sale is a sale for any purpose other than resale in the regular course of business. (Rev. & Tax. Code § 6007.) A lease of tangible personal property is regarded as a continuing sale unless the property is leased in substantially the same form as acquired by the lessor and the lessor has timely paid sales tax reimbursement or use tax measured by the purchase price of the property. (Rev. & Tax. Code §§ 6006(g) (5), 6006.1, Reg. 1660(c) (2).) Thus, the sale of tangible

personal property to a person who will lease the property without otherwise using it and who does not pay sales tax reimbursement or timely pay use tax measured by purchase price is a sale for resale. This means that the sale (lease) by the lessor would be subject to use tax on the lessee measured by rentals payable which the lessor is required to collect and pay to the state. This also means that the sale to the lessor by the vendor would be regarded as a sale for resale not subject to sales tax. However, we note that it is presumed that all gross receipts are subject to sales tax until the contrary is established and that the vendor would have the burden of proving that the sale to the lessor was a sale for resale unless the vendor takes from the lessor a timely resale certificate in good faith. (Rev. & Tax. Code § 6091.)

Your second question involves transactions where the rent begins on the date of installation, which is prior to the date regarded by the parties as the date of purchase. You ask whether the collection of rent negates your election to pay tax on the purchase of the equipment. As mentioned above, the lessor's lease of tangible personal property will be regarded as a sale unless the property is leased in substantially the same form as acquired and the lessor has paid sales tax reimbursement to the vendor or has timely elected to pay use tax measured by purchase price. You have not described the transactions in sufficient detail for us to fully understand. Once the lease between the lessor and the lessee commences, the lessor presumably must have purchased or leased the property from the vendor. Otherwise, the lessor would presumably have no right to lease the property to the lessee.

Since the lease between the lessor and lessee has commenced and the lessor has apparently not paid the vendor sales tax reimbursement, the lease will be regarded as a sale and use tax will be due measured by rentals payable for all leases of that property unless the lessor leases it in substantially the same form as acquired and timely elects to pay use tax measured by purchase price. To make such a timely election, the tax must be reported and paid timely with the return of the lessor for the period during which the property is first placed in rental service. (Reg. 1660(c) (2).) Under your circumstances as I understand them, this means that in order to avoid having the leases regarded as sales subject to use tax measured by rentals payable, the lessor must report and pay use tax measured by the purchase price of the leased property timely with the return of the lessor for the period during which the lessor first leases that property.

Enclosed for your information is a pamphlet entitled Tax Tips for Leasing of Tangible Personal Property. After reviewing this letter and the pamphlet, if you have further questions feel free to write again. If you wish to have more definitive answers regarding the circumstances covered herein, you should include copies of the relevant contracts between the vendor and the lessor and between the lessor and the lessee.

Sincerely,

David H. Levine  
Tax Counsel

DHL/smt:1381C  
Enclosure: Tax Tips Pamphlet #46  
bc: San Francisco District Administrator