

M e m o r a n d u m**565.0276**

To: Mr. Robert L. Buntjer
Supervisor, Audit Review & Refunds

April 11, 1990

From: David H. Levine
Tax Counsel

Subject: S--- C--- E--- C---,
Employees Federal Credit Union

This is in response to your memorandum dated March 9, 1990, regarding the application of tax to construction contracts for federal credit unions.

This credit union had a building constructed in California. Its attorney, W--- A---, states that the construction contractors for that building charged the credit union for sales and use taxes on materials and fixtures. The credit union has obtained assignments of potential refunds from the construction contractors and has filed a claim for refund of taxes it claims it paid with respect to fixtures and materials.

You note that our past approach has been to consider this type of contract to be a United States construction contract. Mr. A--- notes that Revenue and Taxation Code section 6384, which sets forth the application of sales and use taxes with respect to construction contracts performed for the United States, specifies only the United States and not its instrumentalities. He further notes that section 6381 provides an exemption from sales tax for sales to the United States and its instrumentalities. Mr. A--- concludes that section 6384 does not apply to federal credit unions since they are not the United States. Rather, he concludes that the section 6381 exemption applies because a federal credit union is an instrumentality of the United States pursuant to the Federal Credit Union Act. (12 U.S.C. § 1751 et seq.)

Although we agree with Mr. A---'s conclusion regarding the application of section 6384 to construction contracts performed for federal credit unions, we disagree with his analysis. Section 6384 does not specify that it also applies to unincorporated agencies and instrumentalities of the United States, but it is clear that it does and we have always interpreted it as such. For example, the Department of Justice is an executive department of the United States. (28 U.S.C. §501.) The Drug Enforcement Administration (DEA) is an agency of the Department of Justice. (5 U.S.C. App.1, Reorganization Plan No. 2 of 1973, §4.) Under Mr. A---'s analysis, it appears that a construction contract for the DEA would not come within section 6384 because that section does not specify agencies of the United States. However, a construction contract for the DEA does, in fact, come within section 6384. The reason a construction contract for a federal credit union does not come within section 6384 is that a federal credit union is not "the United

States” for purposes of section 6384 in that it is an incorporated instrumentality which is not wholly owned by the United States.

Since a construction contractor performing a construction contract for a federal credit union is not a United States construction contractor under section 6384 and subdivision (a)(3) of Regulation 1521, that construction contractor is treated as is any other construction contractor except a United States construction contractor: as a consumer of materials and a seller of fixtures. The construction contractor will owe sales tax on sales of fixtures unless those sales are specifically exempt by statute. Federal credit unions are exempt from sales and use taxes by federal statute (12 U.S.C. § 1768), and are exempt from California sales and use taxes under Revenue and Taxation Code section 6352. Therefore, no sales or use tax is applicable to the transfer (sale) of fixtures from the construction contractor to the federal credit union. (See Diamond National Corp. v. State Board of Equalization (1976) 425 U.S. 628.)

A person performing a construction contract for a federal credit union is a consumer of materials it furnishes and installs in the performance of the construction contract, as are all construction contractors when furnishing and installing materials in the performance of construction contracts. (Reg. 1521(b)(2)(A)(1). Since the contractor does not sell the materials to the federal credit union, the exemption discussed above for sales to federal credit unions is inapplicable. Rather, tax applies to the sale of materials to the construction contractors or to the use of those materials by the construction contractors.

I note that Mr. A--- asserts that the credit union paid taxes with respect to materials. I assume that such “taxes” relate to the cost of materials (which would include applicable sales tax reimbursement or use tax paid by the contractors with respect to the materials) used in the calculation of the total price for the construction contract. Since the construction contractor is the consumer of materials whether it is a United States construction contractor or not, the construction contractor may not properly collect sales tax reimbursement with respect to such materials from the person with whom it contracts. If the construction contractor actually charged the credit union sales tax with respect to materials the construction contractor used, that would constitute excess tax reimbursement. My understanding is that excess tax reimbursement is not an issue in this case, and in any event, tax was properly due with respect to the contractors’ use of those materials.

We conclude that sales of fixtures by the construction contractors to the federal credit union were exempt from sales tax; however, there is no basis for refunding taxes properly paid with respect to the consumption of materials by the construction contractors. If you have further questions, feel free to write again.

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cc: Mr. E. L. Sorensen, Jr.
Mr. Donald J. Hennessy