



STATE BOARD OF EQUALIZATION
450 N STREET, SACRAMENTO, CALIFORNIA
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0082
TELEPHONE (916) 324-2816
FAX (916) 323-3387
www.boe.ca.gov

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May 8, 2003

JAMES E. SPEED
Executive Director

Re: -----
SR -----

Dear Ms. ---:

This is in response to your facsimile dated February 4, 2003, and addressed to the Board of Equalization, requesting information on how tax applies to --- --- --- Company (“---”). Your inquiry was forwarded to me by Mr. Larry Bergkamp, Supervisor of the Board of Equalization’s Public Information and Administration Section. Mr. Bergkamp informed me that ABC is an accounting firm, and --- is a client of ABC. We apologize for the delay in our response.

You write:

“I would appreciate your help in clarifying the requirements for the C--- Project. I am faxing the information we received from XYZ and hope you will answer each question in detail:

“1) Is there an exemption certificate that must be signed by a Native American living on the reservation? Can the ‘description’ be ‘see invoice’ or should it be detailed on the certificate?

“2) What qualifies as exempt in this project?

“3) What documentation is needed to exempt this job?

“4) Please send all regulations that might pertain to this job.”

You provide a document captioned “--- Spa Resort Casino Project, Specific Job Instructions for Vendors/ Subcontractors” (“Specific Job Instructions”) which states in part that XYZ (“XYZ”) acts as “purchasing Agent for the Tribe.”¹ The Specific Job Instructions refer to a “Project Exhibit ‘R’ of XYZ Contract.” We note that neither Exhibit R, nor any construction contract, sales contract or other agreement, has been provided for our review.

We understand and assume that --- is a retailer of pipe fittings. Because your letter provides very little information concerning --- or its business relationship with XYZ regarding the AB Spa Resort Casino Project (“Project”), we make the following additional assumptions in order to respond to your inquiry. We assume that --- sells pipe fittings to XYZ, and that --- is not a construction contractor, as that term is defined in Regulation 1521.² (Hereafter, the term “construction contractor” is used as that term is defined in Regulation 1521.) We further assume that XYZ has entered into a construction contract with the AB Band of C Indians (“Tribe”) for construction of the Project, and that XYZ is the prime construction contractor for the Project.

Before responding to your questions, we note that this opinion letter provides only general advice and does not serve as protection under Revenue and Taxation Code section 6596, as explained by Regulation 1705, which provides that a person’s failure to make a timely tax return, or payment, due to reasonable reliance upon written advice from the Board may only be relieved when the person for whom the advice is sought is identified, and the advice from the

¹ The Specific Job Instructions provide in pertinent part:

- “1. The AB Band of C Indians is qualified for an exemption from California State Sales use tax on the purchase of tangible personal property provided certain criteria is met. See SPA Casino Project Exhibit ‘R’ of XYZ Industries Contract.
- “2. All XYZ Industries subcontractors, vendors and retailers should read and follow Exhibit ‘R.’
- “3. XYZ Industries is acting as purchasing Agent for the Tribe.
- “4. Applicable subcontractors/suppliers/retailers will bill the AB Band of C Indians, c/o XYZ Industries. The Project name MUST be referenced AB –SPA RESORT CASINO.

“BILL TO: AB Band of C Indians
 C/O XYZ Industries
 1661 E. 32nd St.
 ---, CA XXXXX

“5. All materials ordered for Spa Casino Project MUST be shipped directly to the AB Band of C Indian Reservation.

“SHIP TO: AB Band of C Indians
 --- --- ---,
 --- ---, CA 9XXXX

“**The package, invoice and the bill of landing MUST reference the above information.**”
(Boldface emphasis in the original; underlined emphasis added.)

“....

“13. Upon Contractors/Subcontractors/Vendor’s sale to the AB Band of C Indians, final delivery must be made on the Reservation and title must transfer to the AB Band of C Indians upon delivery.”

² Regulation 1521(a)(2) explains that “ ‘construction contractor’ means any person who for himself or herself, in conjunction with, or by or through others, agrees to perform and does perform a construction contract.” Regulation 1521(a)(1)(A)1., in turn, explains that a construction contract means and includes a contract to erect, construct, alter, or repair any building or other improvement on or to real property.

Board is provided in response to an inquiry which sets forth and fully describes the facts and circumstances of the activity or transactions for which the advice is requested. While your letter identifies --- by name, this response does not protect --- nor any other party to which your letter refers because it fails to set forth and fully describe the facts and circumstances of the activity or transactions for which the advice is requested.

In the future, to receive the protection of Revenue and Taxation Code section 6596, please provide all pertinent facts regarding the transaction in question, in addition to identifying ABC's client by name, in your initial request for advice.

Discussion

As a starting point, we will provide a brief discussion of the applicable principles of the California Sales and Use Tax Law.

Sales tax is imposed on a retailer's retail sale of tangible personal property in this state, measured by a percentage of gross receipts, unless the sale is specifically exempted or excluded by statute. (Rev. & Tax. Code, § 6051.) When sales tax does not apply, use tax applies to the storage, use or other consumption of tangible personal property purchased from any retailer for storage, use or other consumption in this state, measured by a percentage of the sales price, unless that use is specifically exempted or excluded by statute. (Rev. & Tax. Code, §§ 6201, 6401.) "Gross receipts" or "sales price" generally include all amounts received with respect to the sale of tangible personal property, with no deduction for the cost of materials used, labor or service costs, or other expenses of the retailer, unless there is a specific statutory exclusion or exemption. (Rev. & Tax. Code, §§ 6011, 6012.)

Specific provisions of the Sales and Use Tax Law apply to sales made on and off Indian reservations to Indians. These provisions are explained in Regulation 1616.³ When a non-Indian retailer negotiates and makes a sale of tangible personal property at an on-reservation place of business to a non-Indian customer (including a sale to an Indian who does not reside on a reservation) sales or use tax applies if the sale is otherwise subject to tax. (See Reg. 1616(d)(3)(B)2.) When a non-Indian retailer negotiates and makes a sale of tangible personal property at an on-reservation place of business to an Indian customer who resides on a reservation sales tax does not apply if the property is delivered to the Indian purchaser on a reservation. (Reg. 1616(d)(3)(B)1.) When a non-Indian retailer negotiates a sale of tangible personal property to an Indian at a place of business off a reservation, that sale is not subject to tax if the delivery is made to the Indian purchaser on a reservation and title (ownership) transfers to the purchaser on a reservation. (Reg. 1616(d)(4)(A).)

³ Please note that on February 4, 2003, the Office of Administrative Law ("OAL") approved proposed amendments to Regulation 1616(d)(3)(A)2. concerning Indian retailers' sales of meals, food, and beverages at eating and drinking establishments on the reservation. These amendments became effective March 6, 2003. A copy of the regulation as amended is enclosed for your reference.

Regulation 1616(d)(4)(C) also explains the application of tax to construction contracts for permanent improvements to real property on the reservation, while Regulation 1521 explains the application of tax to construction contracts in general.

We note that --- sells pipe fittings. Regulation 1521, Appendix A explains that pipe fittings are generally considered materials. (See also Reg. 1521(a)(4).) With regard to materials, in general, a construction contractor furnishing and installing materials is the consumer of materials, and tax applies to the vendor's sale of materials to the construction contractor (Reg. 1521(b)(2)(A)1.), not to the transaction between the construction contractor and its customer. Nonetheless, in general, a construction contractor may be deemed the retailer of materials, rather than the consumer of materials, upon compliance with the following provisions of Regulation 1521(b)(2)(A)2.:

“2. When Contractor is Seller. A construction contractor may contract to sell materials and also to install the materials sold. If the contract explicitly provides for the transfer of title to the materials prior to the time the materials are installed, and separately states the sale price of the materials, exclusive of the charge for installation, the contractor will be deemed to be the retailer of the materials.”

However, sales tax does not apply to sales of materials to Indian contractors (i.e., contractors who are Indians) if the property is delivered to the Indian contractor on the reservation. (Reg. 1616(d)(4)(C)1.) On the other hand, Reg. 1616(d)(4)(C)2. explains that sales tax does apply to sales of materials to non-Indian contractors (i.e., contractors who are not Indians) notwithstanding the delivery of the materials on the reservation and the permanent attachment of those materials to the realty.

Regulation 1616(d)(4)(C)2. can be interpreted as subjecting to tax all sales of materials to non-Indian contractors, irrespective of the provisions of Regulation 1521(b)(2)(A)2. (Cf. Reg. 1521(b)(1)(A) re sales of fixtures and materials to U.S. construction contractors.) While the matter is not entirely free from doubt, we instead read the provisions of Regulation 1616(d)(4)(C)2. together with the provisions of Regulation 1521(b)(2)(A)1. and 2. to reach the conclusions that (1) this provision of Regulation 1616(d) refers to those transactions in which the construction contractor is a consumer who furnishes and installs materials and not to those transactions in which the construction contractor would otherwise be deemed a retailer of materials; and (2) this provision of Regulation 1616(d) does not prohibit the construction contractor from being the retailer of materials if the construction contractor complies with Regulation 1521(b)(2)(A)2.⁴

⁴ This differs from the treatment of construction contractors who contract with the United States government. U.S. construction contractors are always consumers and never retailers of materials and fixtures which they furnish and install for the U.S. government. Tax always applies to the sale of fixtures and materials to the U.S. construction contractor or the U.S. construction contractor's use of the materials, even if the contractor were to purport to purchase the property as the agent of the United States or purport to sell the materials or fixtures to the U.S. prior to installing them. U.S. construction contractors are generally not the retailers of fixtures or materials (*In re Howell* (9th Cir. 1984) 731 F.2d 624) and, as such, cannot pass title of these items to the U.S. government prior to use and thereby avoid tax. (If the U.S. construction contractor provides a resale certificate to its vendor, the construction

When the construction contractor complies with the provisions of Regulation 1521(b)(2)(A)2. and thereby is deemed a retailer, the construction contractor may purchase the materials from its vendor for resale, and timely provide its vendor with a resale certificate as provided in Regulation 1668. The construction contractor may resell the materials as a retail sale prior to making any use of them (e.g., installing them) only by complying with the provisions of Regulation 1521(b)(2)(A)2.; that is, only if (1) its construction contract separately states the sales price of materials, exclusive of the charge for installation (e.g., a time and material contract as described in Regulation 1521(a)(7)), (2) the contract explicitly provides for the transfer of title to the materials prior to the time the materials are installed, and (3) in fact, the contractual provisions are carried out.⁵ The fact that the Indian Tribe may have paid the contractor will not exempt the transaction from tax if the above requirements are not met.

Even if the construction contract were to comply with the provisions of Regulation 1521(b)(2)(A)2., the construction contractor, as the retailer, must in fact pass title to the materials to the Indian Tribe on the reservation, and must do so prior to use in order for the retail sale of the materials to be exempt from tax.⁶ When this occurs, the contractor selling materials to the Indian Tribe should obtain an exemption certificate as described in Regulation 1667 from the Indian Tribe to substantiate that the contractor's sale was exempt from California sales or use tax.

The Specific Job Instructions which you have provided for our review state that vendors such as --- are to bill the Tribe "c/o XYZ" and that all goods must be shipped directly to the Tribe's reservation.⁷ The Specific Job Instructions further state that upon the vendor's sale, final delivery must be made on the reservation and title must transfer to the Tribe upon delivery.⁸ However, we note that these statements do not in themselves result in transfer of title on the reservation. For off-reservation sales of tangible personal property, title is transferred on the reservation only when the delivery requirements generally set forth in Regulation 1616(d)(4)(A), and more fully explained in Regulation 1628, are met.

As we have previously explained, Regulation 1616(d)(4)(A) provides that when a non-Indian retailer makes a sale of tangible personal property to an Indian negotiated at a place of business off a reservation, that sale is not subject to tax if the delivery is made to the Indian purchaser on a reservation and title (ownership) transfers to the purchaser on a reservation. With

contractor is liable for use tax. (Sales and Use Tax Annot. 190.2580 (7/24/91).) Such tax avoidance is possible only with a U.S. construction contractor's sale of supplies, and machinery and equipment where title to the property passes to the United States prior to the contractor's making any use of them. (Rev. & Tax. Code, §§ 6007.5, 6384; Reg. 1521(b)(1)(B); *Aerospace Corp. v. State Bd. of Equalization* (1990) 218 Cal.App.3d 1300.)

⁵ If a subcontractor in fact passes title, not to the Indian Tribe, but to the prime contractor, the prime contractor would be the consumer of materials as the construction contractor with the obligation to both furnish and install the materials, unless the prime contractor complies with Regulation 1521(b)(2)(A)2., so as to be a retailer with respect to those materials.

⁶ Title to tangible personal property generally would pass to the purchaser on the reservation only if (1) the seller delivered the tangible personal property by its own facilities (e.g., its own trucks) to the reservation; or (2) the seller shipped the tangible personal property (e.g., by mail or common carrier) F.O.B. destination on the reservation without including a provision passing title sooner. (Reg. 1628(b)(3)(D); Cal. U. Com. Code, § 2401.)

⁷ See footnote 1, *supra*.

⁸ See footnote 1, *supra*.

regard to the transfer of title, that subdivision further explains that generally, title (ownership) to the property transfers upon delivery if delivery is made by facilities of the retailer, and ownership transfers upon shipment if delivery is made by mail or carrier. (*Ibid.*)

Regulation 1628 sets forth an expanded discussion of where the sale (transfer of title or ownership) takes place. Subdivision (b)(3)(D) of that regulation explains that unless explicitly agreed that title is to pass at a prior time, the sale occurs at the time and place at which the retailer completes his or her performance with reference to the physical delivery of the property. The subdivision further explains that if the contract of sale requires or authorizes the retailer to send the property to the purchaser but does not require him to deliver it at destination, the retailer completes his or her performance with reference to the physical delivery of the property at the time and place of shipment, e.g., delivery of the property to a carrier for delivery by the carrier to the purchaser. (Reg. 1628(b)(3)(D).) However, when the seller ships the tangible personal property F.O.B. destination on the reservation with no provision that title passes at an earlier time, ownership will generally transfer on the reservation. (Reg. 1628(b)(3)(D); Cal. U. Comm. Code, § 2401.)

In other words, title to tangible personal property generally would pass to the Indian purchaser on the reservation only if either (1) the seller delivered the tangible personal property by its own facilities (e.g., its own trucks) to the reservation; or (2) the seller shipped the tangible personal property (e.g., by mail or common carrier) F.O.B. destination on the reservation without any provision passing title sooner. (Reg. 1628(b)(3)(D); Cal. U. Com. Code, § 2401; see Reg. 1616(d)(4)(A).)

We note that the Specific Job Instructions do not specify how delivery of goods is to be accomplished, i.e., whether delivery is to be by the facilities of the retailer or by common carrier; or if delivery is by common carrier, whether delivery is F.O.B. the reservation. Accordingly, although the Specific Job Instructions provide that the goods are to be delivered on the reservation and that title is to be transferred on the reservation, title in fact does not transfer on the reservation unless the delivery requirements specified above are followed.

Aside from the question of title passage, however, the further question arises as *to whom* --- makes the sale when selling pipe fittings in accordance with the Specific Job Instructions. That is, even if we were to assume that transfer of title to the pipe fittings occurred on the reservation, the gross receipts from ---'s sale of pipe fittings are subject to tax unless the sale of pipe fittings is made directly to the Tribe. In the following discussion of agency, we address the issue of the actual purchaser of ---'s pipe fittings.

Agency:

Again, we note that the Specific Job Instructions you provide state that XYZ is acting as the Tribe's purchasing agent. As we have noted, no contract or other agreement has been provided for our review. However, based upon the documents and information we have been provided, we do not believe that XYZ is in fact a true agent of the Tribe. Rather, XYZ is a

nonagent independent contractor as described in the Restatement Second of Agency, section 14 N. Comment b to that section states:

“Non-agent independent contractor. A person who contracts to accomplish something for another or to deliver something to another, but who is not acting as a fiduciary for the other, is a non-agent contractor. He may be anyone who has made a contract and who is not an agent. The term is used colloquially to describe builders and others who have contracted to accomplish physical results not under the supervision of the one who has employed them to produce the results.”

(See also Restatement Second of Agency, section 14 J (distinguishing between agent or buyer) and section 14 K (distinguishing between agent or supplier).)

We also do not believe that the Tribe may transfer its sovereign immunity from taxation to contractors by mere language of assignment. The United States Supreme Court has noted, “a finding of constitutional taxing immunity requires something more than the invocation of traditional agency notions....” (*U.S. v. New Mexico* (1982) 455 U.S. 720, 736.) The Supreme Court has specifically held in the context of United States immunity from state taxes that such immunity is appropriate only “when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned.” (*Id.* at p. 735.) The issue is “whether the contractors can realistically be considered entities independent of the United States. If so, a tax on them cannot be viewed as a tax on the United States itself.” (*Id.* at p 738.)

We conclude that the same reasoning articulated by the high court, above, is applicable to an Indian Tribe’s sovereign immunity from state taxes. In the information that we have been provided, we find only the declaration in the Specific Job Instructions that construction contractor “XYZ is acting as purchasing Agent for the Tribe.” There is no indication in the information provided that the Tribe-construction contractor relationship is anything other than a typical owner-contractor relationship as described in the Restatement Second of Agency, and no indication that the contractor can be viewed as anything other than an entity independent of the Indian Tribe. In other words, the Tribe-construction contractor relationship you have described is not an agency relationship. Moreover, apart from the issue of the validity of the purported agency relationship, the construction contractor is a separate entity from the Tribe, and may not exercise the Tribe’s sovereign immunity from taxation.

Although the Specific Job Instructions state that XYZ acts as purchasing agent for the Tribe, any such sale of goods to the non-Indian construction contractor (purported agent) is in fact a sale to the construction contractor, not to the Tribe, regardless of whether title passes to the construction contractor on or off the reservation. (Reg. 1616(d)(4)(A).) On the other hand, the retail sale of materials by the suppliers *directly* to the Tribe, *without* the involvement of the construction contractor, where title in fact transfers to the Tribe on the reservation prior to a use of the materials by the non-Indian construction contractors, would not be subject to tax.

Specific Questions

With the foregoing general discussion in mind, we now address the specific questions you pose.

Question 1

“1) Is there an exemption certificate that must be signed by a Native American living on the reservation? Can the ‘description’ be ‘see invoice’ or should it be detailed on the certificate?”

Response to Question 1

As we indicated in our general discussion, an exemption certificate pursuant to Regulation 1667 may be provided directly by the Tribe to its vendor for an exempt sale of materials in compliance with Regulation 1616(d)(4)(a). However, under the circumstances you describe, --- does not sell pipe fittings to the Tribe. Rather, --- sells the pipe fittings to XYZ, the non-Indian construction contractor (purported agent). As we have explained, XYZ may not exercise the Tribe’s sovereign immunity from taxation, and thus XYZ may not provide its vendor --- with an exemption certificate pursuant to Regulation 1667.

Regulation 1667(b)(1) explains that an exemption certificate relieves the seller from liability for the sales tax only if it is taken in good faith. Thus, in the event that XYZ nevertheless provides an exemption certificate to ---, --- may not accept the certificate in good faith. As such, under Regulation 1667, the certificate would not relieve --- for liability for sales tax.

In the event that --- does sell pipe fittings directly to the Tribe in an exempt sale (i.e., a sale that does not involve the construction contractor-purported agent, and where title in fact transfers to the Tribe on the reservation), the exemption certificate issued by the Tribe should include a specific description of the of the property purchased by the Tribe under the certificate, not simply a reference to the invoice. (Reg. 1667(c)(1).)

Question 2

“2) What qualifies as exempt in this project?”

Response to Question 2

The sales you describe are not exempt from tax. As we have discussed, ---’s sales to XYZ are not exempt sales to an Indian Tribe.

In addition, we note that XYZ does not resell the pipe fittings to the Tribe. Regulation 1668 generally explains that sales for resale are not subject to tax. Accordingly, ---'s sales to XYZ are not free from tax as sales for resale.

Question 3

“3) What documentation is needed to exempt this job?”

Response to Question 3

As we have indicated, the sales you describe are not exempt from tax. As such, no documentation will cure this defect.

Question 4

“4) Please send all regulations that might pertain to this job.”

Response to Question 4

We enclose copies of Regulation 1616⁹ and 1521, which explain the requirements for exempt sales to Indian Tribes. In the event that --- sells materials directly to the Tribe, without the involvement of XYZ (purported agent), we provide a copy of Regulation 1667 which explains exemption certificates. We also provide copies of Regulation 1668, explaining sales for resale, and Regulation 1705, explaining the circumstances under which persons may rely on an opinion of Board staff. We must note that without all the facts we cannot assure that these are the only regulations that pertain to the Project. However, based upon our understanding of your letter, the regulations we enclose appear to be the major pertinent regulations.

If you have any further questions after reviewing this letter, please feel free to write again.

Sincerely,

Carla J. Caruso
Senior Tax Counsel

CJC:ds

Enclosures: Regulations 1521, 1616, 1667, 1668, 1705

cc: Mr. Larry Bergkamp (MIC:44)
Mr. Timothy Munz (MIC:44)

⁹ See footnote 3, *supra*.