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July 21, 2004

Ms. L--- L. M---
Manager-Sales & Use Tax Compliance and Audit
H--- ---, Inc.
XXXX --- ---
Building X-XX – Tax Department
---, Georgia XXXXX-XXXX

Re: H--- ---, Inc.
SR - - XX-XXXXXX

Dear Ms. M---:

This is in response to your letter dated December 9, 2003, requesting information on how tax applies to your business. You write:

“Facts

“H--- ---, Inc., d/b/a H---, is a Delaware corporation. H--- (‘H---’) sells, installs, and rents tangible personal property at wholesale and retail in California. In some instances, the installations may result in an improvement to real property. A portion of sales made by H--- in California are made to customers that will have the tangible personal property installed with the help of H---. In these cases, H--- is acting in the capacity of a general contractor. Most of these sales, including the one[]s further described here, are installed by independent and unrelated contractors authorized by H---, or H---’s subcontractor.

“The independent installer is contracted to provide material and labor related to the installation of these custom-made shutters. They are asked to quote H--- one cost price for the entire job, and H--- in turn sells that job to the customer as one lump sum retail price. H--- does not take physical possession of the inventory or materials involved in these custom-made shutters at any time during the transaction.

“The independent installer maintains their own stock of the materials to manufacture these shutters, and removes inventory from his stock as the orders are confirmed and measurements and other pertinent information [are] received.

“Scenario

“A customer enters a H--- retail establishment in California and informs the H--- Associate that they wish to purchase custom-made shutters. The Associate completes a customer service agreement, and takes a nominal deposit (usually \$30) from the customer. The customer data is then given to an independent Manufacturer/Installer of custom-made shutters. The Manufacturer/Installer contacts the customer, and arranges to visit the customer’s home to measure the windows and complete the sales. The customer selects product styles and finishes, and the installer makes note of any circumstances that will impact the installation of the finished product. The customer is given a final price quotation and product specifications by the independent installer. The customer then returns to The H--- local store and pays for the purchase. Alternately, the customer can call their local store and pay for the shutters with a credit card over the phone. When the product is installed, the independent installer notifies the local H--- store, and the store approves the corporate offices to release payment to the independent installer.

“Product Specifications

“The products sold to customers at issue here are custom-made shutters, commonly referred to as Plantation Shutters. They are made from wood or resin materials, and are manufactured to fit one particular window in a customer’s home. Shutters made for two different windows are not interchangeable with each other. The shutters are installed with finishing nails and glued or caulked into place in a similar manner as a doorframe. The actual shutter is attached by hinges to the shutter frame, and is custom made to fit the individual window and shutter frame. Removal of the shutter can result in substantial damage to the window frame. Examples of the shutters offered in this program are included with this letter. The shutters are sensitive to heat and humidity, and must be installed in temperature-controlled environments in order to insure proper fit.

“Issues

- “• Is the independent installer responsible for paying use tax on tangible personal property removed from their inventory for use in completing the installation of these custom-made shutters?
- “• Is the end customer required to pay sales tax to H--- on the tangible personal property installed?
- “• In California, is this custom program deemed to be the sale and subsequent installation of tangible personal property or a real property improvement?”

We understand you to ask the following questions. You ask whether the sales of fixtures or use of materials by the subcontractor performing the installation are subject to tax. You also ask if the customer contracting with H--- ---, Inc. (H---) is required to pay “sales tax” to H--- on the sale of the tangible personal property. Finally, you ask if the sale of the plantation shutters is a sale of tangible personal property and subsequent installation or an improvement to real property. Before discussing and responding to those questions, we note that although Revenue and Taxation Code section 6596 provides relief from liability under certain circumstances, for the purposes of Revenue and Taxation Code section 6596, this response is specifically limited to H---.

Discussion

Retail sales of tangible personal property in California are subject to sales tax measured by the gross receipts from the sale unless the sale is 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 property purchased from a retailer for storage, use, or other consumption in California. (Rev. & Tax. Code, §§ 6201, 6401.)

The application of tax to construction contracts is explained in Sales and Use Tax Regulation 1521, a copy of which is enclosed. A contract to erect, construct, alter, or repair any building or other structure, project, development, or other improvement on or to real property is a construction contract within the meaning of the Sales and Use Tax Law. (Reg. 1521(a)(1)(A)1.) Plantation shutters installed onto real property become an improvement to real property. Accordingly, a contract to furnish and install plantation shutters is a construction contract, and the application of tax is governed by Sales and Use Tax Regulation 1521.

Regulation 1521 defines the terms “materials” and “fixtures” as those terms apply to construction contracts. Materials are construction materials and components and other tangible personal property incorporated into, attached, or affixed to real property, such as a building, by a contractor in the performance of a construction contract which when combined with other tangible personal property lose their identity to become an integral and inseparable part of the real property. (Reg. 1521(a)(4).) Please refer to Appendix A of Regulation 1521 for a list of items typically regarded as materials. Generally, a construction contractor is the consumer of materials, which the contractor furnishes and installs in the performance of a lump-sum construction contract. (Reg. 1521(b)(2)(A)1.) When the contractor is the consumer of materials, tax applies to the sale to, or use by, the contractor of those materials. (*Id.*)

Fixtures are items which are accessory to a building or other structure and do not lose their identity as accessories when installed. (Reg. 1521(a)(5).) Please refer to Appendix B of Regulation 1521 for a list of items typically regarded as fixtures. A construction contractor is generally the retailer of fixtures, which the contractor furnishes and installs in the performance of a construction contract, and tax applies to the sale of the fixture by the construction contractor to a customer measured by the sale price. (Reg. 1521 (b)(2)(B).)

Venetian blinds are fixtures. (See Reg. 1521, Appendix B.) A “venetian blind” is defined as “a window blind made of a number of thin, horizontal wooden, metal, or plastic slats that can be set together at any angle to regulate the light and air passing through or be drawn up together at the top of the window by means of cords.” (*Webster’s New World Dictionary*, 3d College Ed., (1989) p. 1480.)

This agency’s long-standing interpretation has been that when shutters serve a function analogous to “venetian blinds or shades,” the shutters are fixtures. Movable shutters, which serve no function other than venetian blinds or shades, (i.e., rather than as doors, windows, or partitions) are fixtures because they do not lose their identity as accessories when installed. (Sales and Use Tax Annotation 190.2180 (4/26/55).)

For purposes of answering your question, I assume the plantation shutters described in your letter are used merely to regulate light and air passing through the plantation shutters, as well as for decorative purposes. Therefore, the use of the plantation shutters is analogous to “venetian blinds.” Accordingly, since the plantation shutters are attached to real property and do not lose their identity as accessories to the structure, they are fixtures. Unless the contracts are United States construction contracts (see Reg. 1521(b)(1)), the contractor is the retailer of the plantation shutters, and tax applies in accordance with Regulation 1521(b)(2)(B). Here the question is, “Who is the construction contractor: H--- or the subcontractor.”

You state that a customer will contract with the H--- for the sale and installation of the plantation shutters for a lump-sum price. However, the H--- will then arrange with a subcontractor for the furnishing and installation of the plantation shutters for a lump-sum price. Since the subcontractor, not H---, will actually furnish and install the plantation shutters, the subcontractor is the “contractor” referred to in Regulation 1521. In general, a subcontractor cannot avoid liability for tax on the sale or use of materials or fixtures furnished and installed by the subcontractor by taking a resale certificate from the prime or general contractor. (Reg. 1521(b)(6).) Accordingly, the sale by H--- (as the general contractor) to its customer is not subject to tax when both the furnishing and installation of the fixture (the plantation shutters) is performed by the subcontractor. In general, a construction contractor is the retailer of fixtures which the contractor furnishes and installs in the performance of a construction contract, and tax applies to the sale of fixtures by the construction contractor (the subcontractor) to the customer (the H---). (Reg. 1521(b)(2)(B)1.) In other words, when the contractor (the subcontractor) furnishes and installs a fixture, it is the retailer of that fixture and must report and pay sales tax to the Board measured by the sale price of the fixture.

The measure of the tax on the sale of a fixture which a construction contractor (the subcontractor) furnishes and installs in the performance of a construction contract is the sale price at which the fixture is sold as stated in the contract (the contract between the subcontractor and H---). If the contract does not state the sale price, such as in a lump-sum contract, the sale price is deemed to be the cost price of the fixture to the contractor (the subcontractor). (Reg. 1521(b)(2)(B)2.a.) If the construction contractor (the subcontractor) purchases the fixture in a completed condition, the cost price is deemed to be the sale price of the fixture to the

construction contractor (the subcontractor). (Reg. 1521(b)(2)(B)2.b.) If the construction contractor (the subcontractor) is the manufacturer of the fixture, the cost price is determined by additional standards set forth in Regulation 1521(b)(2)(B)2.b. Since the H--- contracts with the subcontractor on a lump-sum basis and you state the subcontractor manufactures or fabricates the fixture himself, the sale price to the H--- of the fixture is the cost price as determined by additional standards set forth in Regulation 1521(b)(2)(B)2.b.

The subcontractor is also the consumer of any materials it uses in installing the shutters, such as nails, glue, or caulking. As such, tax applies to either the sale to, or the use by, the subcontractor of those materials. (Reg. 1521(b)(2)(A)1.)

In summary, a contract to furnish and install plantation shutters is a sale of tangible personal property and an improvement to real property. Therefore, a subcontractor who furnishes and installs plantation shutters is liable for the tax. When the H--- contracts with its customer for a "lump-sum price" for the sale and installation of the plantation shutters, using the facts presented in the scenario above, the subcontractor is liable for the tax for sale of the plantation shutters to H---, as discussed above, and the subsequent sale by H--- to the customer is not subject to sales or use tax. The subcontractor is the consumer of materials used to install the shutters, with tax applying to the sale to, or the use by, the subcontractor of those materials. As the general contractor in this instance, H--- is neither the retailer nor the consumer of the materials and fixtures, and it may not properly collect sales tax reimbursement or pay the sales tax.

I hope this answers your questions. If you have any further questions after reviewing this letter, please write again.

Sincerely,

Robert Tucker
Senior Tax Counsel

RT:ds
Enclosure: Regulation 1521, Construction Contractors

cc: Out of State District Administrator (OH)