

**STATE BOARD OF EQUALIZATION**

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February 6, 1995

Mr. D--- R---
G--- & J---
One --- ---, Suite XXX
--- ---, CA XXXXX-XXXX

Re: Unidentified Taxpayer;
Regulation 1700(b)(4)

Dear Mr. R---:

This is in response to your letter dated December 8, 1994 requesting a ruling on the offset provisions of Sales and Use Tax Regulation 1700(b)(4). I initially note that the Board staff does not issue rulings. Revenue and Taxation Code section 6596 sets forth the circumstances under which a taxpayer may be relieved of liability for taxes when relying on an incorrect written response to a written request for opinion. In order to come within the provisions of section 6596, all relevant facts, including the identity of the taxpayer, must be disclosed. This opinion does not come within section 6596 because you have not identified your client and have not disclosed all relevant facts related to the transactions in question. I further note that your letter provides legal conclusions regarding the application of tax to certain transactions between your client and its vendors and customers without stating the facts upon which those conclusions are based. Our response to your inquiry is therefore based on your conclusions and not necessarily on the actual facts. If we were apprised of the actual facts, our opinion might be different.

You state:

"The Client sells goods and services to its customers. These goods will be transferred as part of the sale to its customers. Believing that the sale of goods to its customers was subject to sales tax, the Client delivered a resale certificate to the vendor who had sold the goods in question to the Client, and no sales tax was paid on the Client's purchase of the goods from the vendor. The Client then charged its customer sales tax reimbursement based on the value of these goods and remitted the tax to the SBE. The goods purchased

from the vendor were transferred by the Client to its customers, when the customers purchased the goods and services from the Client.

"The Client has now determined that its sales to its customers were not properly subject to sales tax because the property being transferred to the customers was incidental to the performance of a service. As a result, the Client should have paid sales tax reimbursement to its vendor and should not have charged its customers sales tax reimbursement."

You further state that your client's factual situation is different than "that of a repairman or printer who uses shop supplies or printing aids is performing a job for a customer" as set forth in Sales and Use Tax Regulation 1700(b)(4).

You ask whether Sales and Use Tax Regulation 1700(b)(4) applies to your Client's facts so that your Client may offset the sales tax liability arising from the purchases from its vendor with the excess sales tax reimbursement collected from your client's customers.

Discussion

"Excess tax reimbursement" is defined as an amount represented by a person to a customer as constituting reimbursement for sales tax computed on an amount that is either not taxable or in excess of the amount that is taxable and is actually paid by the customer. (Rev. & Tax. Code § 6901.5; Reg. 1700(b)(1).) When excess tax reimbursement has been collected, the retailer must refund the excess tax to the customer from which it collected it. (Rev. & Tax. Code § 6901.5; Reg. 1700(b)(2).) If the excess is not refunded to the customer, it must be remitted to the Board. (Id.) Your client believes that its transfer of property to its customers was not subject to tax because the property your client transferred to its customers was incidental to the performance of a service. If the property was not sold but was in fact transferred incidental to the providing of a service, your client collected excess tax reimbursement when it required its customers to pay sales tax reimbursement on those transfers.

You also state that your client wants to offset the excess tax reimbursement it collected against its sales tax liability arising from its extax purchases under resale certificates. I note that if property purchased by your client under a resale certificate is transferred by your client incidental to the providing of a service, your client is regarded as the consumer of such property and owes use (not sales) tax on its consumption of that property. (Rev. & Tax. Code §§ 6094, 6201, 6204; Reg. 1501.) With this in mind, the provision relevant to offsets is found in Sales and Use Tax Regulation 1700(b)(4) which provides, in pertinent part:

"(4) OFFSETS. If a person who has collected excess tax reimbursement on a transaction fails or refuses to refund it to the customer from whom it was collected, the excess tax reimbursement shall be offset against any tax liability of the taxpayer on the same transaction. Any excess tax reimbursement remaining after the offset must be refunded to the customer or paid to the state. The offset can be made when returns are filed, when a determination is issued, or when a refund is claimed. Such offsets can be made only on a transaction by transaction basis. Tax reimbursement collected on a specific transaction can be used only to satisfy a tax liability arising from the same transaction. The 'same transaction' means all activities involved in the acquisition and disposition of the same property. The 'same transaction' may involve several persons, such as a vendor, a subcontractor, a prime contractor, and the final customer; or a vendor, a lessor, and a series of sublessors. Tax reimbursement can be offset against the tax liability of the taxpayer whether the liability was satisfied by paying sales tax reimbursement to a vendor, paying use tax to a vendor, or paying use tax to the state.

"An offset of a taxpayer's own liability against tax reimbursement collected from a customer can be made only with respect to transactions in which possession of the property on which the taxpayer's liability is based is transferred, either permanently or temporarily, to the customer, as in the case of construction contracts or leases"

This means that excess tax reimbursement collected on a specific transaction may only be used to satisfy a tax liability arising from the acquisition and disposition of that same property. A typical application of this provision is a transaction in which a construction contractor purchases materials extax, furnishes and installs the materials under a construction contract, mistakenly charges the customer tax reimbursement on the materials, and reports and pays sales tax to the Board on its "sales" of materials. If the construction contractor is the consumer of the materials and therefore liable for use tax on his or her use of the materials in the construction contract (see Reg. 1521(b)(2)), the contractor has charged and collected excess tax reimbursement from the customer. Under Revenue and Taxation Code section 6901.5 and Regulation 1700(b)(4), the excess tax reimbursement paid to the Board may be offset against the contractor's liability for use tax.

In the present case, we understand that your client did not pay California sales tax reimbursement or use tax when purchasing the property it has now concluded it consumed in the course of rendering services to its customers. You also state that when your client transferred

this property to its customers, it regarded the transfers as sales and therefore collected sales tax reimbursement from its customers and reported sales tax to the Board. It is also your belief that your client is not similar to a repairman or printer using shop supplies or printing aids in performing a job for a customer. If these conclusions are correct, your client may offset only the excess tax reimbursement it mistakenly collected against its use tax liability on the use of the property transferred incidental to the providing of a service. That is, once your client knew that its transactions were not subject to tax, any amounts thereafter collected as sales tax reimbursement cannot be used as an offset against its own tax liability. If an offset is made, your client will also maintain the burden of proving that tax was in fact paid to the state on the same transaction and must refund any excess tax reimbursement remaining after the offset to its customers or pay such amounts to the state. (Reg. 1700(b)(4).)

If you have any further questions, please write again.

Sincerely,

Warren L. Astleford
Staff Counsel

WLA:plh

cc: --- --- District Administrator - --