

**STATE BOARD OF EQUALIZATION**

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 (P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
 (916) 324-8208

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August 12, 1992

Mr. D--- H. S---
 D. H. S--- & Company
 XXX --- Street
 ---, CA XXXXX

BURTON W. OLIVER
Executive Director

Dear Mr. S---:

This is in response to your letter dated May 28, 1992, in which you state:

"We are requesting a determination as to the applicability of sales tax in the following set of circumstances for contractors who are producing and placing asphalt concrete material under street and road contracts.

"Specifically, we represent two licensed contractors, one of which is a producer of aggregate and asphalt concrete paving materials and the other is a licensed paving contractor. These two contractors have formed a joint venture (ongoing partnership) for the purposes of supplying and performing on paving contracts for streets, roads and subdivisions to various private, federal, state and county agencies. The intent of the parties is that they will secure work in the name of the joint venture and collect revenues through a joint venture bank account. The revenues will be allocated to each joint venture partner's separate corporation based on line items in the bid. Those line items, pertaining to the production of aggregate base and asphalt concrete materials, shall be allocated to the joint venture party responsible for producing that material and those line items for hauling, placing and compacting will be allocated to the other partner. Costs incurred by each joint venture partner in the performance of their 'line items' in the overall contract will be paid from their respective corporate bank accounts. The partner supplying the materials will be responsible for paying sales tax on the purchase of asphalt petroleum from the supplier.

"A joint venture contractor's license will be secured and all contracts will be executed in the joint venture name."

Since contracts to pave surfaces are construction contracts, application of tax to such contracts is governed by Sales and Use Tax Regulation 1521 (copy enclosed). Construction contractors who furnish and install materials, such as asphalt, are generally treated as the consumers of the materials which they furnish and install in the performance of construction

contracts. Either sales tax or use tax applies with respect to the sale of the materials to or the use of the materials by the construction contractor. (Regulation 1521(b)(2)(A)(1). See, however, Regulation 1521(b)(2)(A)(2) for the exceptions to this rule for certain types of contracts in which the construction contractor is treated as the retailer of the materials.) A contractor who only furnishes materials and has no obligation to install the materials is not a consumer, but rather a retailer of the materials.

Without copies of the agreement between the contractors and a sample construction contract which is representative of the contracts entered into by the parties, we cannot give a definitive opinion on the application of tax to these transactions. From your description, it does not appear to us that the understanding between the contractors is a true joint venture because they have not agreed to share profits and losses. Rather, the contractors appear to be a "group or combination acting as a unit," and therefore this combination is a "person" as that term is defined under Revenue and Taxation Code section 6005. This combination, which is the construction contractor responsible for furnishing and installing asphalt under construction contracts, is the consumer of the asphalt furnished in such contracts, and tax does not apply to its sales of asphalt.

In our opinion, however, the contractor which produces the aggregate and asphalt concrete paving materials is selling the paving materials to the combination. It is therefore making retail sales to the combination, and its measure of tax on the sales to the combination is the amount shown on the line items pertaining to the production of aggregate base and asphalt concrete materials.

Revenue and Taxation Code section 6596 provides the only basis for relief from tax if a taxpayer relies on incorrect written advice from the board. The primary conditions to qualify are that the request for opinion must be in writing and must disclose all relevant facts, including the identity of the taxpayer. Since you have not identified your clients, this opinion does not come within the provisions of section 6596 but rather is simply general advice regarding a set of hypothetical facts.

If you have further questions regarding Sales and Use Tax Law, please do not hesitate to write again.

Sincerely,

Elizabeth Abreu
Tax Counsel

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Enclosure