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June 30, 1994

BURTON W. OLIVER
Executive Director

C--- A. B---, C.P.A., P.A.
XXXX --- Avenue, Suite XXX
--- ---, Florida XXXXX

Dear Ms. B---:

I am writing in response to your June 10, 1994 letter on behalf of your client, the N--- C--- (TNC), to Assistant Chief Counsel Gary Jugum. You ask about the proper application of the California Sales and Use Tax Law to a contract which TNC has to build and install kiosks.

You indicate that TNC is a Florida corporation which has contracted to build and install some kiosks in a mall in --- ---, California. You indicate that the kiosks will be built in Florida, at an estimated 40 - 60 percent of the contract cost, and installed in California, with the remaining contract cost attributable to this installation. You state that title to the kiosks will not pass to the mall property owner until the installation of the kiosks is completed. You further state that the kiosks will be bolted or otherwise fastened to the mall floor. For the purposes of this analysis, I assume that it is a requirement of the contract that the kiosks be fastened or otherwise physically attached to the mall floor.

Discussion

Under the California Sales and Use Tax Law, sales tax is imposed on the gross receipts from retailers' retail sales of tangible personal property occurring in California, unless the sale is otherwise excluded or exempted by statute. (Rev. & Tax. Code § 6051.) When sales tax does not apply, use tax applies to the use of tangible personal property purchased from a retailer for use in California. (Rev. & Tax. Code §§ 6201, 6401.)

The application of California sales or use tax to TNC's contract to build and install kiosks in the --- --- mall is controlled by California Sales and Use Tax Regulation 1521. Regulation 1521 concerns construction contractors and the application of tax to construction contracts. Subdivision (a)(1)(A)1 of Regulation 1521 defines a construction contract to include a contract

to "[e]rect, construct, alter, or repair any building or other structure, project, development, or other improvement to real property...." Subdivision (c)(3) of Regulation 1521 specifically refers to kiosks as follows:

"Generally, a contract to furnish and install a small prefabricated building, such as a shed or kiosk, which is movable as a unit from its site of installation, is a construction contract only if the building is required to be physically attached to real property by the seller upon a concrete foundation or otherwise. The sale of such a unit to rest in place by its own weight, whether upon the ground, a concrete slab, or sills or piers, is not a construction contract even though the seller may deliver the unit to its site of use."

You indicate that the kiosks will be attached to the mall floor by bolts or otherwise "fastened" to the floor. I understand this to mean that the kiosks will not merely rest in place by their own weight, but will be physically attached in some way, such as by bolts. Assuming this is a requirement of the contract, TNC's contract to build and install the kiosks is considered a construction contract under the California Sales and Use Tax Law and TNC is a construction contractor under that contract.

Because Regulation 1521 considers a kiosk which is required to be physically attached to real property by the seller to be a small building, a construction contractor, such as TNC, which contracts to build and install a kiosk is the consumer of the materials used in building and installing it. For California sales and use tax purposes, materials are defined as construction materials and components, and other tangible personal property incorporated into, attached to, or affixed to, real property by construction contractors in the performance of a construction contract and which, when combined with other tangible personal property, loses its identity to become an integral and inseparable part of the real property. (Reg. 1521(a)(4).)

Since a construction contractor is the consumer of the materials which it furnishes and installs in the performance of a construction contract, sales tax or use tax applies with respect to the sale of those materials to or the use of those materials by the construction contractor. (Reg. 1521(b)(2)(A)1.) I assume that TNC will be purchasing the materials outside of California and will not pay its vendor California use tax. Since TNC will be consuming the materials in California in the performance of its construction contract, it will owe, and must report and pay, California use tax at the time of the use of the materials in California, measured by TNC's purchase price of those materials. (Rev. & Tax. Code §§ 6011, 6202.)

Your letter refers to TNC's building of the kiosks as "fabrication" and states your belief that TNC must remit California use tax based on TNC's costs to "fabricate" the kiosks. The labor performed by TNC in building the kiosks is not deemed taxable fabrication labor under the California Sales and Use Tax Law. However, I note that if TNC pays another person for fabrication, that charge is part of the taxable sales price. (Rev. & Tax. Code §§ 6006, 6011.)

Since we agree that if TNC builds and installs kiosks which TNC is required to physically attach to real property it is performing a construction contract, we do not reach your other questions. TNC is the consumer of the materials which it furnishes and installs in the performance of that construction contract and must pay use tax for the reporting period in which it consumes such property in California which it has purchased outside of this state. The measure of the use tax is the selling price of the materials to TNC. No tax is due on the cost of TNC's own labor, nor on its shipping costs. Sales tax would apply to the sale of any property to TNC in California.

I hope that this information is of assistance to you. If you have any further questions, please feel free to write again.

Sincerely,

Sharon Jarvis
Staff Counsel

SJ:es

cc: OH - District Administrator