

**STATE BOARD OF EQUALIZATION**

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December 9, 1992

BURTON W. OLIVER
Executive Director

Mr. J--- L. M---
Q--- H--- Ltd.
XXX --- Drive
--- ---, CA XXXXX

Dear Mr. M---:

This is in response to your letter dated October 15, 1992 regarding the application of sales tax to your business. You state that you are a licensed producer of HUD Code factory-built housing and have a license from the Department of Housing and Community Development.

You have reviewed our tax tips pamphlet on mobilehomes and factory-built housing, but you remain confused regarding your liability for sales tax. You note that the pamphlet excludes factory-built housing from the definition of mobilehomes. Since you produce factory-built housing, you conclude that the rules applicable to mobilehomes do not apply to your business.

You note that the pamphlet explains that factory-built housing includes only those units approved by the Department of Housing and Community Development ("Department") or by a local building authority under contract with the Department. State insignias would be issued by the Department and attached to each such qualifying unit. Since your units do not meet these requirements, you conclude that they are also not factory-built housing. You ask for further clarification.

Discussion

Sales tax is imposed on a retailer's retail sales of tangible personal property measured by the retailer's gross receipts from those sales. (Rev. & Tax. § 6051.) A retail sale is a sale for any purpose other than resale in the regular course of business. (Rev. & Tax. Code § 6007.) All sales of tangible personal property by a retailer are presumed to be taxable retail sales. The

person making the sale has the burden of proving that the sale was a sale for resale unless that seller takes from the purchaser a valid and timely resale certificate in good faith. (Rev. & Tax. Code § 6091.) This is explained in Regulation 1668, a copy of which is included in the pamphlet you have reviewed.

When you sell tangible personal property to a person who will not resell it prior to any use, you owe sales tax on your gross receipts from that sale unless that sale is specifically exempt from tax by statute. Although that sales tax would be imposed upon you, the retailer, you would be entitled to collect reimbursement from your customer for your sales tax liability if your contract provided for such reimbursement. (Civ. Code § 1656.1.)

You note the statement in the pamphlet that if an item is factory-built housing, it is excluded from the definition of mobilehomes. You therefore conclude that since the units you produce are factory-built housing, they could not be mobilehomes. You proceed to conclude that they are also not factory-built housing for purposes of sales tax. While your conclusions are probably correct, I believe the analysis of your first conclusion is based on confusion with respect to the use of the term "factory-built housing" in the pamphlet.

When you state that your units are not mobilehomes because they are factory-built housing, you are probably using that term in the sense of the general industry understanding of "factory-built housing." That term, however, is not used in the pamphlet in the way the general industry understanding of the term might define it, but rather as that term is defined by Regulation 1521.4 for purposes of the Sales and Use Tax Law. Your units cannot be excluded from the definition of mobilehomes by virtue of being factory-built housing if, as you also conclude, your units do not qualify as factory-built housing for purposes of sales tax. We instead conclude that they do not qualify as mobilehomes because there is nothing in your letter that indicates that they are mobilehomes.

As noted above, your sales of tangible personal property are presumed to be taxable retail sales. The question of whether a unit qualifies as factory-built housing is relevant because there is a partial exemption from sales tax for sales of qualifying factory-built housing to consumers. The exemption, set forth in Revenue and Taxation Code section 6012.7 and explained in Regulation 1521.4, exempts from sales tax 60 percent of the sales price of qualifying factory-built housing. This means that if you sold to a consumer (Reg. 1521.4(b)(3)) a unit that qualified as factory-built housing, tax would apply to 40 percent of your charge (Reg. 1521.4(c)(1).)

You state that your units are not approved by the Department or by the local building authority under contract with the Department. You also state that state insignias are neither issued by the Department nor attached to your units. Since a unit qualifies as factory-built housing only if approved by the Department or by a local building authority under contract with the Department and an insignia of such approval issued by the Department is attached to the unit,

we agree with your conclusion that your units do not qualify as factory-built housing for purposes of sales tax. (Reg. 1521.4(b)(1).)

Since your units are neither mobilehomes nor factory-built housing, there is no other applicable exemption from tax apparent from the facts contained in your letter. Therefore, when you make a sale to a person who will not resell the purchased property, tax applies to your full sale price. An example of this would be a sale to a property owner who will construct the unit himself for his residence.

When you make sales to construction contractors, tax applies as explained in Regulation 1521, a copy of the most recent version of which is enclosed. As discussed in the regulation, construction contractors are generally consumers of materials which they furnish and install during the performance of a construction contract and are retailers of fixtures they furnish and install. This means that a construction contractor would generally not be entitled to purchase materials for resale; rather, sales of materials to a construction contractor would generally be taxable retail sales. On the other hand, a construction contractor is a retailer of fixtures. The distinction between materials and fixtures is explained in Regulation 1521, and examples are listed in Appendices A and B.

I assume that your units include both materials (such as 2 x 4s and wallboard) and fixtures (such as plumbing fixtures and airconditioning units). When you sell such units to construction contractors who will furnish and install the units, the contractor could, if he or she chose to, issue you a resale certificate with respect to your sale of the fixtures. If you timely and in good faith take such a certificate that is fully completed as explained in Regulation 1668, tax would not apply to your charge for those fixtures because you would be selling them for resale. However, your charge for the materials incorporated into your units would remain taxable because the contractor is not regarded as reselling the materials. Please note that when you are selling your units to construction contractors who will furnish and install the units, you should regard your entire charge as taxable unless the contractor issues you a timely and valid resale certificate.

If you contract to furnish and install one of the units you produce, you would be a construction contractor for purposes of that contract and tax would apply as explained in Regulation 1521. You would be a consumer of materials and sales or use tax would apply to the sale of those materials to you or, if you acquired the materials without having paid tax or tax reimbursement, use tax would apply to your use measured by your purchase price. You would be the retailer of the fixtures you furnish and install as part of the units and you would owe sales tax on those sales. The measure of that tax would be your "cost price" as that term is defined by subdivision (b)(2)(B) of Regulation 1521.

Mr. J--- L. M---

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December 9, 1992
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You did not include your seller's permit number in your letter. So that we can place a copy of this letter in the proper file, please provide us with your correct seller's permit number. If you have further questions, feel free to write again.

Sincerely,

David H. Levine
Senior Tax Counsel

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Enclosure