

**STATE BOARD OF EQUALIZATION**

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September 27, 1995

Ms. M--- S---
S--- U--- Inc.
XXXX --- ---, Suite XXX
--- ---, CA XXXXX

Re: S- -- XX-XXXXXX

Dear Ms. S---:

This responds to your facsimile letter dated September 14, 1995 to the Board's Legal Division. You write that S--- U--- Inc. (S---) intends to bid on a contract to refurbish a hydroelectric turbine in this state.

We assume for purposes of this opinion that the turbine is part of the fixed works of a hydroelectric plant, and that by the term "refurbish" you mean that S--- will recondition and repair the turbine, and there will be no fabrication by S--- or its subcontractor. We assume that the contract will be a contract to repair and recondition the turbine in place or, if not, that the contract will require S--- to reattach the turbine to the realty. We also assume that the contract is not a contract to perform work for the United States Government.

You state that the job will consist of labor and mechanical machinery parts. The labor may be of two types: supervision (probably by an employee of S---), and field labor performed by S---'s subcontractor to disassemble, refurbish, reassemble and test the turbine. You ask whether tax applies with respect to the mechanical machinery parts and labor.

Discussion

Retail sales of tangible personal property in California are subject to sales tax measured by the retailer's gross receipts, unless specifically exempted or excluded by statute. (Rev. & Tax Code § 6051.) When sales tax does not apply, use tax applies to the use of property purchased for use in California. (Rev. & Tax. Code §§ 6201, 6401.)

The application of tax to construction contracts is explained in Regulation 1521, a copy of which is enclosed. A contract to erect, construct, alter, or repair any fixed works, such as a hydroelectric plant, is a construction contract within the meaning of the Sales and Use Tax Law. (Reg. 1521(a)(1)(A)2.) Included in such construction contracts is a contract to repair a fixture in place or to repair a fixture which the contractor is required by the contract to reattach to the realty. (Reg. 1521(c)(6).) We define repair or reconditioning as refitting property for a use for which it was originally produced, as opposed to fabrication which is an operation which results in the creation or production of tangible personal property or which is a step in that operation or process. (Regs. 1526(b); 1546.) We regard a hydroelectric turbine as a fixture. (BTLG Annot. 190.2300 (4/7/66).) Therefore, the contract to repair and recondition the hydroelectric turbine of a hydroelectric plant is a construction contract, and, if S--- obtains the contract, S--- and its subcontractor will be construction contractors. (Reg. 1521(a)(2).)

The application of tax to a contract to repair or recondition a fixture is specifically addressed in Regulation 1521(c)(6). In pertinent part the regulation states:

“Sales or use tax applies to the gross receipts or sales price of the parts sold by a contractor who is a retailer under this provision. Either sales tax or use tax applies to the sales price of the parts sold to or used by a contractor who is a consumer under this provision.”

“(A).....”

“(B) Construction Contractors Other Than United States Construction Contractors.

“1. A contractor is the retailer of the parts furnished in the performance of a construction contract to repair a fixture when the sale price of the parts is billed separately from the repair labor.

“2. A contractor is the consumer of the parts furnished in the performance of a lump sum construction contract to repair a fixture.”

How tax applies to the sale or use of parts will depend upon whether S--- or the subcontractor is the “contractor” referred to in Regulation 1521(c)(6), above. The basic rule is that the last person who has the true responsibility to furnish as well as the true responsibility to install the parts is the “contractor” with respect to those parts. (See BTLG Annot. 190.0980 (10/24/52).)

Thus, if S--- furnishes the parts and subcontracts the labor, S--- is the last person who has the true responsibility to both furnish and install the parts, and is the “contractor” referred to in Regulation 1521(c)(6). Under these circumstances, if S--- bills its customer separately for the sale price of the parts, S--- is the retailer of those parts and tax applies to S---’s gross receipts from or sales price of those parts sold to its customer. (Reg. 1521(c)(6)((B)1.) However, if

under these circumstances S--- instead bills its customer lump sum for the parts and labor, S--- is the consumer of the parts furnished in the performance of the contract and tax applies to the sale of those parts to or use (furnishing) of those parts by S---. (Reg. 1521(c)(6)(B)2.)

On the other hand, if S--- subcontracts both the furnishing of the parts and their installation to the subcontractor, the subcontractor is the last person who has the true responsibility to both furnish and install the parts, and is the “contractor” referred to in Regulation 1521(c)(6). Under such circumstances, if the subcontractor bills S--- lump sum for the labor and parts, the subcontractor is the consumer of the parts and tax applies to the sale of the parts to or the use of the parts by the subcontractor in performing the construction contract. (Reg. 1521(c)(6)(B)2.) In this situation S--- has no tax liability. However, under these circumstances if the subcontractor instead bills S--- separately for the sale price of the parts, the subcontractor is the retailer of the parts and tax applies to the subcontractor’s gross receipts or sales price of the parts sold to S---. (Reg. 1521(c)(6)(B)1.) Since the subcontractor is the retailer in this situation, S--- is not the retailer and may not issue a resale certificate for its purchase of the parts.

Tax does not apply to charges for the labor or services used to install or apply the parts. (Rev. & Tax. Code §§ 6011(c)(3); 6012(c)(3).) This includes the disassembly and reassembly of the turbine, and testing of the turbine to assure that it works properly after the repair and reconditioning. Tax does not apply to charges for supervision of the project by S---. (See Reg. 1501.)

I hope this information is of assistance. Please write again if we may answer any other questions.

Sincerely,

Sharon Jarvis
Staff Counsel

WJ:rz
Enclosure - Reg. 1521

cc: District Principal Auditor - BH