

**STATE BOARD OF EQUALIZATION**

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November 1, 1995

Mr. P--- M. S---
XXX --- ---
--- ---, CA XXXXX

Re: No Seller's Permit Number

Dear Mr. S---:

This responds to your letter dated August 31, 1995 to the Legal Division. We assume that you are writing on your own behalf (as opposed to writing on behalf of a client) and that you are one of the parties referred to in the examples in your letter. If these assumptions are not accurate, this opinion letter does not come within the provisions of Revenue and Taxation Code section 6596.

You write asking our opinion of the tax consequences in two examples which you provide. Both examples involve three parties: "A", "B", and "C". You indicate that A is a cabinet contractor with no manufacturing facilities who is in the business of finding cabinet jobs, obtaining the contracts for cabinets to be built and installed by other contractors, and providing the cabinet "layout" which you describe as plans (usually computer generated) for constructing the cabinets. (We understand from this that A does not make or install the cabinets, but subcontracts this work after preparing plans for the cabinet construction.) You indicate that B is a manufacturer and installer of cabinets. You indicate that C is the prime contractor or customer.

For purposes of this opinion, we assume that the contracts in question are not contracts with the United States government. We also assume that when you use the term "prefabricated cabinet" in your examples, below, you use the term as it is defined in Sales and Use Tax Regulation 1521(c)(2) to be a cabinet which is a fixture, meaning that 90 percent of the total direct cost of labor and material in fabricating and installing the cabinet is incurred prior to its affixation to the realty. (A copy of Regulation 1521 is enclosed for your information.)

Example 1

A enters into a contract with C to furnish and install prefabricated cabinets for a lump sum of \$10,000. A enters into a subcontract with B for B to manufacture and install the prefabricated cabinets for a lump sum of \$8,000. A prepares the plans, and B then manufactures and installs the cabinets. We understand your use of the term "lump sum" to mean that each contract is for a stated lump sum and that the contracts do not separately state a sale price at which the cabinets are sold. (See Reg. 1521(a)(8) & (b)(2)(B)2.a.) You ask who is the retailer of the cabinets and liable for the sales tax, and what is the correct measure of tax.

Example 2

Example 2 is the same as Example 1, except C will pay the full amount of its agreed \$10,000 lump sum contract price directly to B (instead of to A), and B will pay to A \$2,000 for A's portion of the job. You indicate that the billing for the full \$10,000 amount may be done either by an invoice for \$10,000 from A to C, or by an invoice for \$10,000 from B to C, but that in either event C will make the full \$10,000 payment to B, and B will pay \$2,000 to A. You ask who is liable for the tax in this example (and if it makes any difference whether the invoice to C is from A or B), and what the measure of the tax is. You also ask whether any part of A's charge of \$2,000 for obtaining the contract and producing the cabinet construction plans is taxable.

Discussion

Revenue and Taxation Code section 6051 imposes a sales tax on all retailers measured by their gross receipts from retail sales of tangible personal property occurring in this state, unless the sale is otherwise excluded or exempted by statute. When sales tax does not apply, use tax applies to the use of property purchased from a retailer for use in California. (Rev. & Tax. Code §§ 6201, 6401.)

As discussed below, contracts to furnish and install prefabricated cabinets are construction contracts. Sales and Use Tax Regulation 1521 explains the application of sales and use tax to construction contracts. How tax applies to cabinets depends upon whether the cabinets are considered to be materials or fixtures. Prefabricated cabinets, such as those which A and B contract to furnish and install, are fixtures. (Reg. 1521(c)(2).) In general, a construction contractor is the retailer of fixtures which the contractor furnishes and installs in the performance of a construction contract, and tax applies to the sale of the fixtures by the construction contractor to a customer. (Reg. 1521(b)(2)(B)1.) Tax does not apply to charges for installing fixtures. (Reg. 1521(b)(2)(B)2.)

As you recognize in your examples, the significant question is whether A or B is the construction contractor who is regarded as the retailer of the cabinets. Subdivision (a)(1)(A)1 of Regulation 1521 defines a construction contract to include a contract to erect, construct, alter or repair any building or other structure. Subdivision (a)(1)(B)2 excludes from the definition of construction contract those instances where the contracting party furnishes the property but is not responsible for the final affixation or installation of the property. Since both the contract

between A and C, and the contract between A and B are contracts to furnish and install prefabricated cabinets, both contracts are construction contracts and both A and B are construction contractors within the meaning of Regulation 1521.

However, to determine whether A or B is the construction contractor who is regarded as the retailer of the cabinets, the basic rule is that the last person who has the true responsibility to furnish as well as the true responsibility to install the cabinets is the construction contractor/retailer with respect to the cabinets. (See BTLG Annot. 190.0980 (10/24/52).) Here, since A subcontracts both the furnishing and installing of the cabinets, its subcontractor, B, is the last person who has the true responsibility to both furnish and install the cabinets, and is the construction contractor/retailer.

Tax applies to the construction contractor/retailer's sale price of the prefabricated cabinet/fixture. When, as here, the contract does not state the sale price for which the prefabricated cabinet/fixture is sold, the sale price is deemed to be the cost price, and tax applies to that cost price. (Reg. 1521(b)(2)(B)2.a.) For a contractor which manufactures its own fixtures, such as B, the cost price is deemed to be the price at which similar fixtures in similar quantities ready for installation are sold by the contractor to other contractors, or, if the contractor does not make this kind of sale, the amount stated in the contractor's price lists, bid sheets or other records. (Reg. 1521(b)(2)(B)2.b.) If the cost price cannot be established in this way, it is established by an aggregate of the cost of materials, direct labor, overhead costs and a reasonable profit, as detailed in subdivision (b)(2)(B)2.b[1]-[6] of Regulation 1521.

In Example 1, you ask who is the retailer of the prefabricated cabinets and liable for the sales tax. Since B is the construction contractor/retailer referred to in Regulation 1521(b)(2)(B), B is the retailer of the cabinets, and B is liable for the sales tax on its sale of the cabinets to A. The measure of the tax is determined by applying the rules contained in Regulation 1521(b)(2)(B)2 to the contract between A and B. In other words, since the contract between A and B does not state the sale price at which B sells the cabinets, the sale price is deemed to be the cost price of the fixture to B, as determined pursuant to the provisions of Regulation 1521(b)(2)(B)2.b.

In this situation A has no tax liability. However, I note for your information, that since B is the retailer in this situation, A is not the retailer and may not issue a resale certificate for the cabinets.

In Example 2, you ask who is liable for the tax and what the measure of the tax is. The same analysis applies here as in example 1. The result is that B is the retailer and liable for the sales tax. The measure is determined in the same way as in example 1. The outcome is the same under either method of billing which you describe. No other charge is taxable, and A has no tax liability. (See Reg. 1501.) (Please note that this conclusion is specifically based on our understanding that A contracts with C. If, instead, B contracts directly with C to furnish and install the cabinets and contracts with A to purchase the plans, it appears that A's transfer of the plans to B would be a taxable sale of tangible personal property.)

In summary, B is the retailer of the prefabricated cabinets and sales tax applies to B's cost price of the cabinets. A has no tax liability. Please write again if we may answer further questions, and please identify the name of the party for whom you are requesting the advice.

Sincerely,

Sharon Jarvis
Staff Counsel

SJ:rz

Enclosure: Reg. 1521

cc: --- District Administrator - --