

**STATE BOARD OF EQUALIZATION**

1020 N STREET, SACRAMENTO, CALIFORNIA
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(916) 327-3400

July 24, 1990

Ms. E--- T---
S--- W--- Gallery
XX --- Street
--- ---, California XXXXX

Re: S--- W--- Gallery
SR -- XX-XXXXXX

Dear Ms. T---:

This letter is in response to your June 15, 1990 request for legal advice regarding the application of sales and use tax to sales of art in public places. Since you did not identify the taxpayer, this letter does not constitute specific written advice to the taxpayer under Revenue and Taxation Code Section 6596. Rather, this letter constitutes general comments regarding the applicability of California Sales and Use Tax Law to a set of hypothetical facts.

You state that "[t]his issue has surfaced often during various works of art in public places projects throughout the state and clarification would be helpful for our approval of contracts between a given city and our artists. Specifically, you asked about an artist who will execute a sculptural fountain for a California city. The sculpture will be "site specific" and integral to a particular landscape. I assume that the sculpture will be affixed to the ground on which it stands but will not be attached to a building. The artist will pay sales tax reimbursement on purchases of materials. You ask whether tax is owing on the \$50,000 sales price of the sculpture.

Assuming that the \$50,000 sale price includes installation by the artist, the scenario you describe is consistent with the definition of a construction contract. Regulation 1521(a)(1)(A) defines a "construction contract" as one to "erect, construct, alter, or repair any building or other structure, project, development, or other improvement on or to real property." Clearly, installation of a piece of sculpture valued at \$50,000 is an "improvement to real property."

The tax treatment of a construction contract depends in a large part upon whether the contract is one to provide materials or to provide fixtures. Regulation 1521(a)(5) defines fixtures as "items which are accessory to a building or other structure and to not lose their identity as accessories when installed." Materials, on the other hand, are defined in section 1521(a)(4) as "tangible personal property incorporated into, attached to, or affixed to, real property...which, when

combined with other tangible personal property, loses its identity to become an integral or inseparable part of the real property....”

In general, construction contractors are consumers of materials which they furnish and install. Either sales or use tax applies to the sale or use of the materials. (Reg. 1521(b)(2)(A).) Thus, the contractor pays sales tax reimbursement on materials at the time of purchase or must report and pay use tax on any materials purchased ex-tax. On the other hand, construction contractors are retailers of fixtures which they furnish and install. (Reg. 1521(b)(2)(b).) With respect to fixtures, the contractor is obligated to pay sales tax.

The tax treatment of a commissioned piece of sculpture depends upon the degree to which the artwork is integrated into or merged with a building. The Board has held in the past, for example, that a mosaic tile mural constructed on the wall of a building qualifies as “material” because the artwork is an inseparable part of the building. (Annotation 190.0840. The annotations provide guidance to previous staff decisions.) In this example, because the artwork is “material,” the artist pays sales or use tax only on the material used in construction of the artwork, i.e., ceramic clay, paint, etc.

On the other hand, if a piece of sculpture maintains its integrity and identity even after installation, the sculpture is a “fixture.” Assuming that the sculpture which you describe qualifies as a fixture, the artist is considered to be the retailer of the sculpture and may, therefore, purchase construction materials ex-tax.

On a lump sum contract, the measure of tax is the cost price. The method of determining the cost price is described in detail in Regulation 1521 at subsection (b)(2)(B)2.b. The portion applicable to this situation states that, if the fixture is manufactured by the contractor (as is the sculpture), and if the sale price cannot be established by the other described methods (which are inapplicable to this situation), then the cost priced is deemed to be an aggregate of the following six factors:

1. Cost of materials, including such items as freight-in and import duties,
2. Direct labor, including fringe benefits and payroll taxes,
3. Specific factory costs attributable to the fixture,
4. Any manufacturer’s excise tax,
5. Prorata share of all overhead attributable to the manufacture of the fixture, and
6. Reasonable profit from the manufacturing operations which, in the absence of evidence to the contrary, shall be deemed to be five percent of the sum of the preceding factors.

The cost price is based on those of the above six factors applicable to the circumstances. Please note that the cost price (the measure of tax), is likely to be significantly less than the amount paid under the contract. Further, installation labor is not taxable as it is excluded from the definitions of "gross receipts" (Rev. & Tax. Code § 6012(c)(3)) and "sales price" (Rev. & Tax. Code § 6011(c)(3)).

On any contract with a city, county, or other governmental entity, the sale is exempt from sales tax. Revenue and Taxation Code Section 6365 ("Art works," enclosed) provides in relevant part as follows:

"(a) There are exempted from the taxes imposed by this part the gross receipts from the sale of, and the storage, use or other consumption in this state of, original works of art, which are:

"(1) Purchased by this state or any city, county, city and county, or other local governmental entity...

(b) The exemption provided by this section shall apply only to works of art purchased to become part of the permanent collection of any of the following...

"(3) Any city, county, city and county, or other local government entity and this state which purchases or commissions public art for display to the public in buildings, parks, plazas, or other public places. These areas shall be open to the public not less than 20 hours per week for not less than 35 weeks of the calendar year."

Thus, assuming that the sculpture is an original work of art and that it is displayed in an area open to the public, the sale you describe is not subject to tax.

Problems may be created for an artist by a government contract which specifies that the amount paid for the artwork include tax. This results in the artist receiving sales tax reimbursement that in fact is not owing.

Revenue and Taxation Code Section 6901.5 provides in pertinent part as follows:

"Credits and refunds--excess tax. When an amount represented by a person to a customer as constituting reimbursement for taxes due under this part is computed upon an amount that is not taxable or is in excess of the taxable amount and is actually paid by the customer to the person, the amount so paid shall be returned by the person to the customer upon notification by the Board of Equalization or by the customer that such excess has been ascertained. In the event of his or her failure or refusal to do so, the amount so paid, if knowingly or mistakenly computed by the person upon an amount that is not taxable or is in excess of the

taxable amount, shall be remitted by that person to this state. Notwithstanding subdivision (b) of Section 6904, those amounts remitted to the state shall be credited by the board on any amounts due and payable under this part on the same transaction from the person by whom it was paid to this state and the balance, if any, shall constitute an obligation due from the person to this state.”

In order to comply with Revenue and Taxation Code Section 6901.5, the artist must refund the tax inadvertently, but incorrectly collected.

I am enclosing a copy of the Board’s useful publication entitled “Tax Tips for Construction and Building Contractors” which contains Regulation 1521.

Please feel free to contact us again if you have further questions.

Sincerely,

Stella Levy
Tax Counsel

SL:cl

Enclosures