

**STATE BOARD OF EQUALIZATION**

(916) 445-5550

July 25, 1990

Ms. K--- V--- G---
Operations Manager
O--- P---
XXX --- ---
--- ---, CA XXXXX

Re: SY -- XX-XXXXXX

Dear Ms. V--- G---:

This is in response to your letter dated June 16, 1990 regarding the application of sales tax to the sale and installation of certain property.

You apparently contract with a customer for the installation of cabinets. You then apparently contact with B--- M--- & A--- L--- P--- Company for the acquisition and actual installation of those cabinets. It is your position that since you are a dealer and purchase the cabinets for your client, your resale certificate should be valid and no tax charged to you by B--- M---. You in turn invoice your client for the cabinets and sales tax. B--- M--- has referred to our Tax Tip Pamphlet for Construction and Building Contractors and has informed you that they must charge you tax. You ask whether you are required to pay tax on the cabinets. If so, you ask whether you are not to charge your customer the tax.

Initially, I note that sales tax is a tax on the retailer. The retailer may collect reimbursement for its sales tax liability from the customer if pursuant to contract. Although this is usually invoices as "sales tax," it is actually sales tax reimbursement. When sales tax applies, the retailer is not required by state law to collect reimbursement from the customer, but usually does so pursuant to the contract with its customer. I therefore answer the questions: whether B--- M--- owes the sales tax on its sales and may therefore collect reimbursement for that sales tax from you; and whether you may in turn collect reimbursement for sales tax from your customers.

I assume your questions relate solely to property that B--- M--- installs as a construction contractor. I note that your invoice to your customer includes items that do not become part of the real estate, for example, chairs. The discussion below applies only to items which are installed and become part of the real estate and not to other items that remain tangible personal property.

B--- M--- has advised you correctly. When it furnishes and installs cabinets or shelving which become part of the real property, it acts as a construction contractor. You have not described

the shelving installed by B--- M---. My opinion is based on the assumption that the shelving is substantially prefabricated prior to installation and would be regarded as fixtures under Regulation 1521. (Regulation 1521 is included in our Tax Tip Pamphlet for Construction and Building Contractors, a copy of the most recent edition is enclosed for your information.)

As the construction contractor who furnishes and installs these fixtures, B--- M--- is regarded as the retailer, and sales tax applies to that sale. Since B--- M---'s contract is with you, if that contract so provides B--- M--- may collect sales tax reimbursement from you for its sales tax liability. A construction contractor cannot avoid liability for sales tax on its sale of fixtures by taking a resale certificate from a prime contractor, an interior decorator, designer, or other person. (Reg. 1521(b)(6)(A).) In the transactions about which you inquire, you are acting in a capacity equivalent to a prime contractor, interior decorator, or designer. Therefore, your issuance of a resale certificate to B--- M---, the construction contractor, cannot serve to relieve B--- M--- of liability for sales tax.

As mentioned above, as the retailer of the shelving, B--- M--- is the person owing the sales tax and may therefore collect reimbursement from you for that tax. Since you are not regarded as the retailer of the shelving, you do not owe sales tax and may therefore not collect reimbursement from your customer for sales tax. Since you owe no sales tax on such transactions, any sales tax (reimbursement) collected on such transactions from your customers constitutes excess tax reimbursement as described in subdivision (b)(1) of Regulation 1700, a copy of which is enclosed. Excess tax reimbursement must be returned to the customer or paid to the state, except as provided in subdivision (b)(4) of Regulation 1700 (which describes when a person collecting excess tax reimbursement may offset that amount against any of that person's tax liability on the same transaction). We recommend you review this provision to ascertain what offsets you may take against any excess tax reimbursements you have already collected. In the future, you should not collect any amount from your customers represented as sales tax or sales tax reimbursement for transactions in which you are not regarded as the retailer of tangible personal property. Rather, if you wish to cover this cost of doing business, you should do so when setting the price you charge to your customers.

If you have further questions, feel free to write again.

Sincerely,

David H. Levine
Senior Tax Counsel

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Enclosures