

**STATE BOARD OF EQUALIZATION**

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February 27, 1995

BURTON W. OLIVER
Executive Director

R--- K. M---
Law Office of R--- K. M---
XXXX --- ---, Unit X
---, CA XXXXX

Re: Unidentified Taxpayer

Dear Mr. M---:

I am writing in response to your letter dated November 23, 1994 to Chief Counsel E. L. Sorensen, Jr. You write requesting an opinion on the sales and use tax consequences of your client's contracts to furnish, install, and monitor fire and security alarm systems. We note that you do not identify your client, and this opinion, therefore, does not come within the provisions of Revenue and Taxation Code section 6596.

The facts as described in your letter are that your client purchases fire and security alarm systems (alarm systems), paying sales tax reimbursement at the time of purchase. Your client then contracts to furnish, install and monitor an alarm system for a customer.

The contract is for 36 months, and the customer pays a monthly monitoring fee. In addition, the customer pays your client an amount for the alarm system itself. Sometimes this amount is the same as your client has paid for the alarm system, and sometimes the amount is marked up.

At the end of the 36-month contract, the customer receives a certificate of ownership of the alarm system. However, if the customer fails to comply with the contract conditions, one of the contract's default remedies is that your client may remove the alarm system from the customer's premises.

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 from a retailer for use in California. (Rev. & Tax. Code §§ 6201, 6401.)

A sale includes any transfer of title or possession in lieu of title, conditional or otherwise, of tangible personal property for consideration. (Rev. & Tax. Code § 6006(a).) This includes a transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the sales price. (Rev. & Tax. Code § 6006(e).)

Any person engaged in the business of selling tangible personal property in California of a kind the gross receipts from the retail sale of which are required to be included in the measure of the sales tax must apply for and obtain a seller's permit from the Board of Equalization. (Rev. & Tax. Code § 6066, Reg. 1699(a).) Such a seller may purchase tangible personal property ex-tax for resale by issuing a resale certificate if the property is purchased for resale in the ordinary course of business and the purchaser intends to make no use of the property other than retention, demonstration or display while holding it for resale. (Rev. & Tax. Code §§ 6091, 6092, 6094; Regs. 1521(b)(6)(A), 1668(a).) If a purchaser who gives a resale certificate makes any use of the property other than retention, demonstration or display while holding the property in the regular course of business, that use is taxable to the purchaser. (Rev. & Tax. Code § 6094(a).)

Of importance in determining how the Sales and Use Tax Law applies to your client's contracts to furnish and install alarm systems is whether the contracts are construction contracts. Sales and Use Tax Regulation 1521 explains the application of sales and use tax to construction contracts.

A construction contract includes a contract to furnish and install property which becomes an improvement to real property. (Reg. 1521(a)(1)(A)1.) Our understanding is that an alarm system which your client furnishes and installs will become an improvement to real property, and that your client's customer will become the owner of that improvement upon completion of the contract terms. Thus, your client's contract to furnish and install an alarm system is defined by the regulation as a construction contract, and your client is a construction contractor. (See also, Business Taxes Law Guide Annot. 190.2130 (2/22/71).)

Regulation 1521 also defines the terms "materials" and "fixtures" as those terms apply to construction contractors. Materials are construction materials and components, and other tangible personal property incorporated into, attached or affixed to real property, such as a building, by a construction contractor, which when combined with other tangible personal

property lose their identity to become an integral and inseparable part of the real property. (Reg. 1521(a)(4).) Appendix A to Regulation 1521 lists typical items regarded as materials, e.g., electrical wiring and connections. A construction contractor is generally the consumer of materials which the contractor furnishes and installs in the performance of a construction contract. Tax applies to the sale to, or use by, the contractor of those materials. (Reg. 1521(b)(2)(A)1.)

“Fixtures” are defined by Regulation 1521 as items which are accessory to a building or other structure and do not lose their identity as accessories when installed. (Reg. 1521(a)(5).) Appendix B to Regulation 1521 lists typical items regarded as fixtures, e.g., “burglar alarm and fire alarm fixtures.” 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 fixtures by the construction contractor to a customer. (Reg. 1521(b)(2)(B)1.)

The measure of the tax on the sale of a fixture which a construction contractor furnishes and sells in the performance of a construction contract is the sale price stated in the contract at which the fixture is sold. If the contract does not state the sale price, that price is deemed to be the cost price of the fixture to the contractor. (Reg. 1521(b)(2)(B)2.a.) If the contractor purchases the fixture in a completed condition, the cost price is deemed to be the sale price of the fixture to the contractor. (Reg. 1521(b)(2)(B)2.b.) If the contractor has not purchased the fixture in a completed condition, the cost price is determined by additional standards set forth in Regulation 1521(b)(2)(B)2.b.

Tax does not apply to charges for installing fixtures. (Rev. & Tax. Code § 6012(c)(3); Reg. 1521(b)(2)(B)2.)

A contractor may claim a tax-paid purchases resold deduction for any property of which it is the retailer when it has either reimbursed its vendor for sales tax or has paid use tax with respect to the property, and has resold the property prior to making any use of it. (Reg. 1521(b)(6)(C).) The deduction (under the caption “Tax-paid purchases resold”) must be taken on the retailer’s sales and use tax return in which its sale of the property is included. If the deduction is not taken in the proper quarter, the retailer must file a claim for refund of the tax instead. (Reg. 1701.)

Under the facts described in your letter, your client is a construction contractor who furnishes and installs alarm system fixtures. Although title to the alarm system is held by your client until the completion of the 36 month contract as security for the payment of the contract amounts, the transfer of possession of the alarm system to your client’s customer upon installation is a sale of tangible personal property within the meaning of the Sales and Use Tax Law. (Rev. & Tax. Code § 6006(a) & (e).)

Since the alarm system is a fixture which is furnished and installed by your client in the performance of a construction contract, your client is a retailer of that alarm system. Therefore, your client must remit sales tax to the Board of Equalization measured by the sale price of the alarm system fixture which is stated in your client's contract with its customer. If no sale price is stated in the contract, the sale price is deemed to be the cost price of the fixture to your client. The sale price does not include your client's charges for monitoring the alarm system. (See Reg. 1521(b)(2)(B)2.) (We note that while charges for services which are required as part of a sale of tangible personal property are generally included in the sale price of the property, Regulation 1521 specifically states the components of the sale price of a fixture (see, e.g., Reg. 1521(b)(2)(B)2.b.), and mandatory services such as your client's monitoring service are not among those components.)

Your client may purchase the alarm systems from its vendor extax for resale. In order to do so, your client must apply for and obtain a California seller's permit from the Board of Equalization. Your client owes sales tax to the State of California for alarm systems which it has already sold to customers, measured by the sale price of those alarm systems. However, as to alarm systems which your client has already purchased and for which it has paid sales tax reimbursement at the time of purchase, your client may apply for a tax-paid purchases resold deduction or file a claim for refund. (See Regs. 1521(b)(6)(C), 1701.)

The electrical wiring, connections, and other materials consumed by your client in installing an alarm system are materials consumed in performing a construction contract. As such, tax applies to the sale to, or use by, your client of these materials. The charges for installing the alarm system are not subject to tax.

I hope this information is of assistance. Please write again if you have further questions.

Sincerely,

Sharon Jarvis
Staff Counsel

SJ:es