

M e m o r a n d u m**305.0028.750**

Board of Equalization Legal Division-MIC: 82 Telephone: 327-2291

To: Mr. Vic Anderson, Supervisor
Audit Evaluation and Planning Section
(MIC:40)

Date: August 5, 1997

From: Pat Hart Jorgensen
Senior Staff Counsel

Subject: Exempt Indian Contractors

This is in response to your memorandum of May 19, 1997 in which you inquire whether an Indian Contractor, comprised of members of the --- qualifies as an "Indian contractor" for purposes of Regulation 1616.

As I understand the facts, ---), a subsidiary of the --- an --- corporation, has entered into a contract to engage in construction activity on the ---. Reservation in California. You explain that it is unknown whether -- is a corporation organized under tribal authority and, if so, whether it qualifies as an Indian contractor for purposes of Regulation 1616. In other words, you inquire whether Regulation 1616 (d)(4)(c) is limited to California Indian tribes and, if so, is this regulation only applicable when the Indian contractor installs fixtures and materials onto property located on the Indian contractor's reservation.

As you know, the general rule is that retail sales of tangible personal property in California are subject to sales tax, measured by gross receipts, unless specifically exempted by statute. (Rev. & Tax. Code § 6051.) A retail sale is a sale for any purpose other than resale in the regular course of business. (Rev. & Tax. Code § 6007.) However, Indians living on Indian reservations enjoy a special status by federal treaty. As a result, under specified conditions, sales by non-Indians made to Indians living on a reservation are exempt from tax. Specifically, Regulation 1616(d)(4) provides that sales tax does not apply to sales of tangible personal property made to Indians negotiated at places of business located outside Indian reservations if, and only if, the property is delivered to the purchaser on the reservation and, in addition, if ownership of the property transfers to the purchaser on the reservation. Subdivision (d)(2) or Regulation 1616 explains that Indian organizations are entitled to the same exemption accorded to Indians. This subdivision further explains that:

"'Indian Organization' includes, Indian tribes, tribal organizations and also includes partnerships all of whose members are Indians. The term includes corporations organized under tribal authority and wholly owned by Indians. The

term excludes other corporations, including other corporations wholly owned by Indians."

To paraphrase Regulation 1616(d)(2), only those corporations organized under tribal authority which are wholly owned by Indians qualify as "Indian Organizations" for purposes of Regulation 1616(d).

With respect to sales by off-reservation retailers to Indian contractors, the rule set forth in paragraph (d)(4)(C) 1. is as follows:

"Indian Contractors. Sales tax does not apply to sales of materials to Indian contractors if the property is delivered to the contractor on a reservation. Sales tax does not apply to sales of fixtures furnished and installed by Indian contractors on Indian reservations. The terms 'materials' and 'fixtures' as used in this paragraph and [paragraph 2.] are as defined in Regulation 1521 'Construction Contractors.'"

As written, there is nothing in subdivision (d)(4)(C) 1. which requires that the Indian Contractor performing work on an Indian reservation must either be a member of the tribe which resides on the reservation or reside on the reservation upon which the contract is performed. Accordingly, so long as an Indian contractor, regardless of the tribe of affiliation or state of qualification as an Indian contractor, arranges to have materials delivered, pursuant to a construction contract, to an Indian reservation located in California, sales tax will not apply.

From the information you have provided it appears that --- is a corporation organized under tribal authority and wholly owned by Indians. This is evidenced by the Articles of Incorporation submitted ---, Corporate Secretary of the --- I have attached a-copy of 25 United States Code Annotated (USCA) section 450b which defines an Indian tribe as including any --- village or regional or village corporation covered by the --- Claims Settlement Act (---). (copy attached) includes the ---Association as an existing --- Association covered by the ---.

Ms. --- explains that --- is a corporation wholly owned by the ---. However, without a copy of the articles of incorporation of ---, we cannot verify whether --- is organized under tribal authority. Accordingly, unless --- establishes that it is organized under tribal authority, the application of sales tax will be determined under Regulation 1616(d)(4)(C) 2. which provides:

"Non-Indian Contractors. Sales tax applies to sales of materials to non-Indian contractors notwithstanding the delivery of the materials on the reservation and the permanent attachment of the materials to realty. Sales tax does not apply to sales of fixtures furnished and installed by non-Indian contractors on Indian reservations."

If you have any further questions, please feel free to contact me again.

PHJ :cl

cc. Mr. Dennis Fox, (MIC:92)
Mr. David Theiss (MIC:40)
Ms. Janet Vining
Mr. David H. Levine