



STATE BOARD OF EQUALIZATION

October 24, 1990

Mr. P--- E. H---
A/Counsellor Defense
Acquisition and Logistics
Embassy of A---
XXXX --- ---, ---
Washington, DC XXXXX-XXXX

Dear Mr. H---:

Your August 7, 1990 letter to John Abbott has been referred to me for reply. You have asked that we recognize the A--- G--- C--- O--- (AGCO) as engaged in the business of preparing goods for export or arranging for their exportation ... (which goods are) actually delivered to a port outside the continental limits of the United States prior to making any use thereof' for purposes of the Revenue and Taxation Code section 6387 sales tax exemption for exports, and Article 11 §10 Clause 2 of the Constitution of the United States.

The facts, as you have explained them, are as follows. The A--- G--- utilizes a freight forwarder to export tangible personal property purchased in California. Sales of such property are currently exempt from sales tax as shipments in foreign commerce under Rev. & Tax. Code sect. 6387 and Sales and Use Tax Regulation 1620. The A--- G--- proposes to itself assume the responsibilities of the freight forwarder through the AGCO. The sole purpose of the AGCO's operation in California will be to export and import "defense equipment" to and from Australia. It's contract with California suppliers will nominate the consignee in Australia and the purchase order will state that, "The property hereunder is for export and is to be delivered by you directly to a carrier or a forwarding agent for shipment to a point outside the United States, in accordance with shipping instructions hereafter to be furnished to you. The shipping instructions will instruct the vendor to ship the property to Australia, c/o AGCO, [city], California for export packing and forwarding.

You wrote to us on January 18, 1990 asking essentially the same question as posed in your recent correspondence, but providing less detail about AGCO's proposed operations. In his February 15, 1990 response to that letter, John Abbott advised you that tax would apply to sales made to the A--- G--- and delivered to it in this state "even though the disclosed intention of the

purchaser is to ship the property to a foreign country, and even though the property is actually shipped to a foreign country.” Mr. Abbott advised you that, in order for a sale to qualify for the export exemption from sales tax, the property must be delivered to an entity separate from, and dealing at arms-length with, the purchaser. According to your recent letter, AGCO will not be established as a legal entity separate from the A--- G---.

We have received a letter from Attorney J--- W. D--- in which he cites case precedent in support of the A--- G---’s contention that its purchases in California are exempt from tax as sales for export. We do not concur in counsel’s conclusions.

In most of the cited cases, e.g. Gough Industries v. SBE 51 Cal2d 746 (1959) and A.G. Spalding v. Edwards 262 U.S. 66 (1923) the property was delivered by the vendor to a third party or to a common carrier not to the purchaser. Title passed when the goods were delivered into the stream of commerce. The correct principle governing state taxation of exports is expounded by the Supreme Court in Coe v. Errol 116 U.S. 517, 527:

“Goods do not cease to be part of the general mass of property in the state, subject as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation in a continuous route or journey.”

The case of Richfield Oil (Richfield Oil Corp v. SBE), 329 U.S. 69 (1946) presented a unique set of facts in that the oil purchase was delivered via pipelines from a California refinery in a direct route into the hold of a tanker bound for New Zealand. The court found that, under these circumstances, the export process had begun when title was passed.

“The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved.” (Ibid p.82).

The case law supports our position that goods delivered in this state to the purchaser’s own warehouse or other place of business are not exempt from sales tax under the Import-Export clause of the U.S. Constitution. The courts have been clear the constitutional exemption attaches to the export and not to the property prior to its exportation.

“The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated.” (Cornell v. Coyne, 92 U.S. 418, 427)

If the property purchased by the A--- G--- continues to be delivered by the vendor to a common carrier, the property will continue to be exempt from taxation. If the property is delivered directly from the vendor into the hold of a ship bound for Australia or delivered aboard an aircraft with a scheduled departure for Australia, the exemption would also apply, under the holding of Richfield Oil. If, however, the goods are delivered, as proposed, directly to a department of the A--- G--- (i.e. AGCO) the sale of the property will be subject to California tax.

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

Sincerely,

Stella Levy
Tax Counsel

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cc: M---, L--- & B---