

**STATE BOARD OF EQUALIZATION**

(916) 445-8485

July 21, 1989

This is in response to your letter of June 9, 1989 to Ms. Cindy Rambo, the Board's Executive Director.

We understand that [M] arranges for the shipment of household goods for all military and civilian Department of Defense (DOD) employees located west of the Mississippi River.

Apparently, [M] does not itself move the goods but, rather, contracts with various private household carriers to provide those services. Recently, the [C], which represents the carriers, contacted [M], indicating that many of their members were being assessed tax under the California Sales and Use Tax Law for sales of containers and packing materials utilized in moving DOD employees' household goods.

You stated that for "ease of calculation," the contracts between [M] and the carriers provide that on every shipment the charge for containers and packing materials is based upon the hundred-weight of the total shipment. You state that, "...[t]he reality of this contracting practice is that there are occasions where the United States is charged for containers and packing materials which it does not receive."

Your specific question is: "Is it sufficient that the carriers charge the United States based on the hundred-weight of the shipment or must the carrier specifically tally every single container and all the packing material used?"

Before answering your question, we will briefly outline and discuss the relevant legal principles and authorities. "Sale" is defined in part to mean a transfer of title of tangible personal property for a consideration (Rev. & Tax. Code S 6006(a)). "Retail sale" is defined to include a sale for any purpose other than resale in the regular course of business (Rev. & Tax. Code § 6007). "Use" is defined to include the exercise of any right or power over tangible personal property incident to its ownership (Rev. & Tax. Code § 6009).

Generally, unless specifically exempted by statute, a retail sale of tangible personal property in California is subject to sales tax (Rev. & Tax. Code § 6051). One of the exemptions of interest to this discussion is the exemption of sales to U. S. Government entities such as [M] (Rev. & Tax. Code S 6381). Under Section 2401 of the Uniform Commercial Code, title to goods cannot pass under a contract of sale prior to their identification to the contract and, title passes to the buyer and the sale takes place at the time and place at which the seller completes his performance with reference to the physical delivery of the goods unless there is an explicit

agreement of title passage at an earlier time. Consistent with section 2401 is Revenue and Taxation Code Section 6010.5, which states that the place of sale is the place where the goods are physically located at the time the act constituting the sale takes place.

Regulation 1630 (copy enclosed), with which your letter indicates you are familiar, embodies the foregoing legal principles in providing the conditions under which packers, loaders, and shippers are considered consumers or retailers of containers or container materials. The regulation provides in pertinent part:

“(2) PROPERTY USED AS CONTAINERS OR PARTS OF CONTAINERS OF GOODS SHIPPED. When the shipper is not the seller of the contents, the sale of the containers or container materials or parts to the shipper is a taxable retail sale unless the shipper expressly contracts with his customer for the sale to his customer of the container or container material, making a separate charge therefore, with title passing from the shipper to his customer before any use of the material is made, and without any understanding or trade custom that the property will be returned to the shipper for reuse. When all of these conditions exist, the shipper may purchase the property for resale by giving a resale certificate to the supplier of the property. The sale of the property by the shipper is taxable unless exempt as a sale to the United States, as a sale in interstate or foreign commerce, or exempt for any other reason.”

As can be seen, the regulation requires that three conditions must exist in order for a sale of containers and container materials to the carriers be considered a non-taxable sale for resale with the subsequent exempt retail sale occurring upon the sale of these items to [M]. Those conditions are: (1) the carrier expressly contracts with [M] for the sale to [M] of the container or container materials with title passing from the carrier to [M] prior to any use of the items; (2) the carrier makes a separate charge for the materials, and; (3) there is no understanding or trade custom that the container or container materials will be returned to the shipper for reuse. The California Appellate Court has upheld the validity of these provisions of the regulation (*Sternoff v. State Board of Equalization*, 103 C.A. 3d 828).

Your letter did not include any of the carrier contracts so we cannot comment on whether or not pursuant to them the carriers are to be treated as consumers or retailers of the items in question. However, our experience in the past with similarly situated taxpayers has indicated that, although the second and third requirements of Regulation 1630(b)(2) have been met, the first requirement has not. Our understanding is that the U. S. Government, for reasons not known to us, does not wish to accept title to the containers and container material prior to use by the carriers in packing and shipping the goods.

Absent an express title-passing provision in the contract which passes title prior to usage, a taxable retail sale occurs upon sale of the containers and container materials to the carriers. Their utilization of these items in packing and shipping the DOD employees' goods constitutes a use by the carriers inconsistent with a mere holding of the items for resale in the regular course

of business. Without a title-passage clause, title to the items in question would not transfer to [M] until the carrier completed its performance with reference to the physical delivery of the goods, i.e., when the DOD employees' household goods were delivered at destination. Such transfer is never considered to be taxable (whether to the U.S. Government or any other entity) since we view the true object of the carrier/ contract to be for moving services, not for the sale of tangible personal property. Pursuant to Regulation 1501 (copy enclosed), property transferred incidental to such services is deemed to be consumed by the service provider in rendering its services.

Turning now to your specific question, it would seem that the items in question generally would become identified to the contract at the time the carrier commits them to the contract by withdrawing them from inventory for utilization on that particular job, notwithstanding the pricing mechanism used by the parties (e.g., price based on hundred-weight). Such withdrawal, in our view, satisfies the Uniform Commercial Code identification requirements (See UCC 2501) and, assuming the three requirements of Regulation 1630 were met, the sale to the carrier would be for resale and the sale to [M] would be an exempt retail sale to the U. S. Government. The carrier would not have to tally every single container and all packing material used on a particular job.

Finally, we note that the following language contained in contract documentation executed prior to the packing operation has been accepted by us as sufficient to convey title prior to usage by the carrier:

“Customer agrees that title to all packing material passes to customer before any use of such material is made.”

We hope this has answered your questions. If it has not, or if additional information is needed, feel free to contact us again.

Sincerely,

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Senior Tax Counsel

ELS:jb

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