

**STATE BOARD OF EQUALIZATION**

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July 25, 1988

F--- W---, Manager
State & Local Income Taxation
S--- T--- Corporation [S]
XXXX --- XXth St.
---, CO XXXXX-XXXX

Re: SZ OH XX XXXXXX

Dear Mr. W---:

This is in response to your letter dated July 7, 1988 regarding the application of sales tax to a sale of computer equipment made by [S] in March, 1988.

[S] was awarded a contract to supply computer equipment to the --- of ---, ---(L---) --- --- (L---). (L---) indicated that it would resell the equipment to the United States. You have sent us a copy of a resale certificate issued by (L---) dated November 13, 1978 certifying that property purchased by (L---) from [S] would be resold to the United States without prior use. (L---) required [S] to invoice a financing company, --- --- Corporation (M---) for the computer equipment. [S] therefore contracted with (M---) for the sale of the equipment to (M---). You explain that the contract "stated that the equipment was to be installed at (L---) and that title would pass upon acceptance by (M---). It was understood that (M---)'s acceptance was dependent upon (L---)'s prior acceptance." I assume your reference to title passage was title passing from [S] to (M---).

(M---) accepted the equipment and was invoiced by [S]. (M---) did not provide [S] with a timely resale certificate; however (M---) thereafter furnished a resale certificate to [S]. That resale certificate does not contain a seller's permit number for (M---) nor does it contain an explanation for that omission.

You believe "that the substance of the transaction is that it was a sale negotiated with, and made to, (L---) as a sale for resale to the United States. Only the form of the transaction indicates a sale to (M---). In either event, the ultimate consumer is United States, and the transaction should not be subject to California sales or use tax."

You have not provided us with copies of the contract documents. Your explanation indicates that the sale by [S] was actually made to (M---), and we proceed on that basis.

A retailer's retail sale of tangible personal property in California is subject to sales tax unless specifically exempt by statute. (Rev. & Tax. Code § 6051.) Sale to United States are exempt from sales tax. (Rev. & Tax. Code § 6381.) A seller claiming a transaction as exempt from tax under Section 6381 must obtain from the purchaser, and retain, a government purchase order or a government remittance advice to support that claim. (Reg. 1614(g).) [S] did not sell the equipment to the United States and presumably does not have a government purchase order or a government remittance advice with respect to the sale. The sale is therefore not exempt as a sale to the United States. Based upon the facts you have provided us, there are no other applicable exemptions; rather, the sale is subject to sales tax if at retail.

A retail sale is a sale for any purpose other than resale in the regular course of business in the form of tangible personal property. (Rev. & Tax. Code § 6007.) Gross receipts from the sale of tangible personal property are presumed to be subject to tax until the contrary is established. The burden of proving the sale is not a sale at retail is upon the person who makes the sale unless he takes from the purchaser a timely resale certificate. (Rev. & Tax. Code § 6091; Reg. 1668.) [S] did not take a timely resale certificate from (M---) and therefore has the burden of showing that the sale was a sale for resale. For your information, I note that the resale certificate taken by [S] fails to relieve [S] of that burden not only because it was not taken timely, but also because it was not a valid resale certificate under California law.

An essential element of a valid California resale certificate is that it contain the number of the seller's permit held by the purchaser, "or if the purchaser is not required to hold a permit because the purchaser sells only property of a kind the retail sale of which is not taxable, e.g., food products for human consumption, or because the purchaser makes no sales in this state, an appropriate notation to that effect in lieu of a seller's permit number." (Reg. 1668(b)(1)(C).) The resale certificate issued by (M---) is not a valid California resale certificate because it does not explain the reason for its failure to contain (M---)'s seller's permit number. Furthermore, (M---) is apparently making sales of computer equipment in California. If so, it is required to hold a California seller's permit even if all of its sales are for resale. (Rev. & Tax. Code §§ 6014, 6066.) Therefore, no resale certificate issued by (M---) would be valid unless it contained a seller's permit number for (M---).

Since [S] did not take a timely and valid resale certificate, it must establish that its sale of computer equipment was not a retail sale. As we understand your description of the transaction, [S] made a sale of computer equipment to (M---) who then sold that computer equipment to (L---) without making any use of it. Assuming [S] can establish that this understanding is accurate, [S] would be regarded as having made a sale of computer equipment for resale, which sale would not be subject to sales tax because it was not at retail.

Mr. F--- W---

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Enclosed for your information are copies of Regulations 1614 and 1668. If you have further questions, feel free to write again.

Sincerely,

David H. Levine
Tax Counsel

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Encl.