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August 5, 1994

Mr. E--- D. O---
E--- D. O--- & A---
XXXXX --- Drive
---, California XXXXX

BURTON W. OLIVER
Executive Director

Re: San Diego Justice Facilities
Financing Agency (SDJF)
Rider Refunds
Construction Contractors

Dear Mr. O---:

I am answering your letters to me dated June 7, 17, and 28, 1994, following up on mine to you of June 14, 1994 and our earlier telephone conversations and correspondence on this matter. You describe our position in the June 7th letter on this subject as follows:

"It appears that you contend that a construction contractor installing a fixture is a retailer who has in every case reimbursed himself for the amount of tax he is compelled to pay to his vendor or the Board of the purchased or manufactured article. It further appears to be your further contention that the contractor installer of the fixture is not entitled to recover any amount of tax that was improperly paid under the conditions set forth in Senate Bill 263."

The other letters contain follow-up argument.

OPINION

Unfortunately, you misunderstand our position. Perhaps I have not communicated it effectively. Concisely put, we are of the opinion that a construction contractor installing fixtures is the retailer of those fixtures. Where he has collected sales tax reimbursement from the property owner (included in the term "owner" for the purposes of this discussion is the owner's agent, the general contractor), the contractor is not eligible to file a claim for refund under Section 7277(a). In other words, if the contractor separately states sales tax reimbursement to the owner or quotes a price that is specifically on a tax-included basis, the contractor is not eligible to file a claim under SB 263.

Regulation 1521(a) defines a lump-sum contract for the sale and installation of fixtures as follows:

"(8) LUMP SUM CONTRACT. 'Lump sum contract' means a contract under which the contractor for a stated lump sum agrees to furnish and install materials or fixtures, or both. A lump sum contract does not become a time and material contract when the amounts attributable to materials, fixtures, labor, or tax are separately stated in the invoice."

Sub-division (b)(2) discusses the application of tax to the furnishing and installation of fixtures as follows:

"1. In General. Construction contractors are retailers of fixtures which they furnish and install in the performance of construction contracts and tax applies to their sales of the fixtures.

"2. Measure of Tax.

"a. In General. If the contract states the sale price at which the fixture is sold, tax applies to that price. If the contract does not state the sale price of the fixture, the sale price shall be deemed to be the cost price of the fixture to the contractor."

As you know, tax on lump-sum construction contracts as set forth above has been repeatedly validated by the courts. (Montgomery Elevator Co. v. S.B.E. (1981) 111 Cal.App.3d 887, 890-891.)

We may take it as settled, then, that, under Regulation 1521, a construction contractor furnishing and installing a fixture is the retailer of that fixture, and tax applies to its sales price. Whether or not the contract is for a lump sum affects only the measure of tax and how that measure is figured.

We agree with your assertion in the June 7th letter that the collection of sales tax reimbursement is permissive. Under Civil Code Section 1656.1, a retailer may collect tax reimbursement by agreement of the parties, but he is by no means required to do so in every case or even at all. It does not follow, however, that because the contractor quotes a single price to the owner, he can not collect sales tax reimbursement. The very definition of "lump-sum contract" contained in Regulation 1521(a)(8) contemplates that sales tax reimbursement may be collected even though the customer is quoted a lump-sum price. While collection of tax reimbursement does not, under the regulation, affect the nature of the contract as being for a lump sum, it does bear on whether or not the contractor may get a refund of transactions tax under Section 7277.

As I pointed out in my June 14 letter, the Kuykendall case found that SB 263 is valid and controls refunds of transactions tax when the tax has been declared unconstitutional and the revenue impounded (See, Section 7275(a)). (Kuykendall v. S.B.E. (1994) 22 Cal.App.4th 1194.) Therefore,

the provisions of Section 7277 operate to prohibit construction contractors who in fact collect sales tax reimbursement from the owner from submitting a claim for refund of SDJF transactions tax. There is no deprivation of any constitutional right to obtain a refund. SB 263 merely transfers that right, under the limited conditions described in the statute, from the retailer, where it would normally be, to the consumer. (Ibid. at 1212-1214.) Contrary to what you suggest in your June 17th letter, no re-evaluation of our assessment of the Kuykendall case appears necessary.

As an illustration of our position, take the case where a contractor performs two lump-sum contracts to install widgets for a lump-sum price of \$100, buying the widgets in Sacramento County at the contractor-discount price of \$20.00. In one, the bill is itemized so: cost (\$20.00), tax (\$1.55), and labor and profit of \$78.45. (If the bill is not itemized, the figures may be recovered by reference to the contractor's bid sheets, price lists, or other records. (Montgomery Elevator, supra., 118 Cal.App.3d at 891.)) In the second there is no itemization and only the final price is quoted. Both contracts qualify as being for a lump sum under the regulation, but in the first the contractor has collected tax reimbursement from the customer and so may not apply for a refund of SDJF tax under SB 263. In the second the contractor absorbs the tax; he may apply for the refund. We understand that many of the lump-sum contracts supporting claims for refund of SDJF tax which we have already received separately state tax reimbursement in the bills to the customers.

You indicate in your June 28th letter that had the court in the Honeywell cases been advised that Honeywell was the consumer, the outcome of the cases could have been different. While we agree that if things were different things would be different, things are not different. They are as they are. Honeywell was determined to be the retailer under the facts of those cases, as you know.

In sum, our position is of long standing and has not changed. One contracting with a property owner to furnish and install a fixture is the retailer of that fixture. That the contract is for a lump sum does not automatically mean that the contractor did not actually collect sales tax reimbursement from the property owner, either by separate statement or through a specifically tax-included price. If he did, then the owner, and not the contractor, must file the claim for refund of transactions tax under SB 263. Whether or not tax reimbursement was collected or the tax was absorbed is a matter of fact to be determined on a case by case basis.

Sincerely,

John L. Waid
Tax Counsel

JLW:es

cc: Mr. Phillip Bishop (MIC:39)