



STATE OF CALIFORNIA

**STATE BOARD OF EQUALIZATION**

450 N STREET, SACRAMENTO, CALIFORNIA  
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-80  
916-445-2130 • FAX 916-324-3984  
www.boe.ca.gov

SEN. GEORGE RUNNER (RET.)  
First District, Lancaster

FIONA MA, CPA  
Second District, San Francisco

JEROME E. HORTON  
Third District, Los Angeles County

DIANE L. HARKEY  
Fourth District, Orange County

BETTY T. YEE  
State Controller

CYNTHIA BRIDGES  
Executive Director

**January 8, 2016**

**To Interested Parties:**

**Notice of Proposed Regulatory Action**  
**The State Board of Equalization Proposes to Adopt**  
**Amendments to California Code of Regulations,**  
**Title 18,**  
**Section 1668, *Sales for Resale***

NOTICE IS HEREBY GIVEN that the State Board of Equalization (Board), pursuant to the authority vested in it by Revenue and Taxation Code (RTC) section 7051, proposes to adopt amendments to California Code of Regulations, title 18, section (Regulation or Reg.) 1668, *Sales for Resale*, which incorporate and implement, interpret, and make specific RTC sections 6007 and 6009.2, as amended and added by Assembly Bill No. 2681 (AB 2681) (Stat. 2014, ch. 477). The new statutory provisions now make a sale or purchase of counterfeit goods by a convicted seller or purchaser subject to sales and use tax, including sales and purchased for resale in the regular course of business. The proposed amendments add subdivision (j) to Regulation 1668 to incorporate the new provisions of RTC sections 6007 and 6009.2 by specifying that a sale or purchase of counterfeit goods by a convicted seller or purchaser is subject to tax, and that the transactions are taxable regardless of whether the sale or purchase was for resale.

**PUBLIC HEARING**

The Board will conduct a meeting in Room 207 at 5901 Green Valley Circle, Culver City, California, on February 23-25, 2016. The Board will provide notice of the meeting to any person who requests that notice in writing and make the notice, including the specific agenda for the meeting, available on the Board's Website at [www.boe.ca.gov](http://www.boe.ca.gov) at least 10 days in advance of the meeting.

A public hearing regarding the proposed regulatory action will be held at 9:30 a.m. or as soon thereafter as the matter may be heard on February 23, 24, or 25, 2016. At the hearing, any

interested person may present or submit oral or written statements, arguments, or contentions regarding the adoption of the proposed amendments to Regulation 1668.

## **AUTHORITY**

RTC section 7051

## **REFERENCE**

RTC Sections 6007, 6009.2, 6012.8, 6012.9, 6072, 6091-6095, 6241-6245, 6484, 6485, and 7153

## **INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW**

### Current Law

The Sales and Use Tax Law (RTC, § 6001 et seq.) imposes sales tax on retailers for the privilege of selling tangible personal property at retail in California and provides that sales tax is measured by the gross receipts from the retail sale of tangible personal property in this state, unless the sale is specifically exempt from taxation by statute. Although sales tax is imposed on retailers, retailers may collect sales tax reimbursement from their customers if their contracts of sale so provide. (Civ. Code, § 1656.1; Reg. 1700, subd. (a)(1).)

When sales tax does not apply, the Sales and Use Tax Law imposes use tax on the storage, use, or other consumption in this state of tangible personal property purchased from a retailer, unless specifically exempted or excluded by statute. The obligation to pay the use tax is on the consumer. However, every retailer “engaged in business” in California that makes sales subject to California use tax is required to collect the use tax from its customers and remit it to the Board, and such retailers are liable for California use tax that they fail to collect from their customers and remit to the Board. (Reg. 1684.)

RTC section 6007 defines the terms “retail sale” or “sale at retail” to mean a sale for any purpose other than resale in the regular course of business in the form of tangible personal property. RTC sections 6008 and 6009 define “storage” and “use,” respectively. “Storage” includes any keeping or retention in this state for any purpose except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased from a retailer. “Use” includes the exercise of any right or power over tangible personal property incident to the ownership of that property, and also includes the possession of, or the exercise of any right or power over, tangible personal property by a lessee under a lease, except that it does not include the sale of that property in the regular course of business.

RTC sections 6091 through 6095 (sales tax) and 6241 through 6245 (use tax) generally establish the presumption that the sale or storage, use or other consumption of tangible personal property is subject to sales or use tax, place the burden on the retailer to establish that tax does not apply,

unless the retailer takes a certificate from the purchaser to the effect that the property is purchased for resale, and impose liability on persons who purchase tangible personal property with a resale certificate and subsequently make any use of the property other than retention, demonstration, or display while holding it for resale in the regular course of business. The Board previously adopted Regulation 1668 to implement, interpret, and make specific the RTC provisions regarding sales for resale, including prescribing the form of resale certificates, prescribing the circumstances under which a retailer can overcome the presumption of taxability by timely taking a resale certificate from a purchaser in good faith, and establishing the presumption that a resale certificate is taken in good faith in the absence of evidence to the contrary.

In addition, RTC section 6094.5 generally provides that “[a]ny person, including any officer or employee of a corporation, who gives a resale certificate for property which he or she knows at the time of purchase is not to be resold by him or her or the corporation in the regular course of business is liable to the state for the amount of tax that would be due if he or she had not given such resale certificate,” and “a penalty of 10 percent of the tax or five hundred dollars (\$500) whichever is greater, for each purchase made [with a resale certificate] for personal gain or to evade the payment of taxes,” and is guilty of a misdemeanor for each purchase made with a resale certificate for the purpose of evading payment to the seller of the amount of the tax applicable to the transaction. RTC sections 6484 and 6485 alternatively provide for the imposition of a 10 percent penalty on the amount of a deficiency determination if any part of the deficiency is due to negligence or the intentional disregard of the Sales and Use Tax Law or the Board’s regulations or a 25 percent penalty on the amount of a deficiency determination if any part of the deficiency is due to fraud or an intent to evade the Sales and Use Tax Law or the Board’s regulations. And, Regulation 1668, subdivision (d), clarifies that all of these statutory provisions providing for civil and criminal penalties may apply to a person who makes an improper use of a resale certificate and thereafter fails to report the tax due as a result of such misuse.

Also, RTC sections 6012.8 and 6012.9 specify that mobilehome retailers are consumers of mobilehomes under specified circumstances. RTC sections 6012.8 and 6012.9 permit mobilehome retailers to give resale certificates for the purchase of mobilehomes under such circumstances to facilitate the reporting of their tax liabilities when they ultimately sell the mobilehomes to their customers for installation for occupancy as a residence. RTC section 6012.8 was also amended, effective September 19, 1985, to provide that a mobilehome retailer can issue a resale certificate for the purchase of a mobilehome regardless of whether the retailer installs the mobilehome on a foundation system as an improvement to realty prior to selling the mobilehome to its customer. And, the provisions of RTC sections 6012.8 and 6012.9 providing for the issuance of resale certificates by mobilehome retailers, including the effective date of the 1985 amendments to RTC section 6012.8, are implemented, interpreted, and made specific by Regulation 1668, subdivision (h).

Further, Regulation 1661, *Leases of Mobile Transportation Equipment*, explains that, under RTC sections 6006, 6010, 6094, and 6244, lessors are consumers of mobile transportation equipment

(MTE) and if they purchase MTE without the payment of tax or tax reimbursement, they may elect to pay use tax measured by the “fair rental value” of the MTE. Regulations 1661 and 1668, subdivision (i), also both specify that, under RTC sections 6092.1 and 6243.1, a lessor of MTE, other than a lessor exempt from use tax, may issue a resale certificate for the purchase of MTE for the limited purpose of reporting use tax based on fair rental value in accordance with RTC sections 6094 and 6244. And, Regulation 1668, subdivision (d), clarifies that its civil and criminal penalty provisions do not apply in the narrow circumstances where a resale certificate is issued in accordance with subdivision (h) or (i).

Furthermore, prior to September 19, 2014, counterfeit merchandise could be sold and purchased for resale for sales and use tax purposes. So, a person found guilty of selling counterfeit merchandise would not be liable for tax on sales of such merchandise for resale. Similarly, a person found guilty of possessing counterfeit merchandise in inventory could have purchased the merchandise for resale without having paid sales tax reimbursement or use tax or being liable for tax.

Effective September 19, 2014, Assembly Bill No. 2681 (AB 2681) (Stat. 2014, ch. 477) amended RTC section 6007 and enacted RTC section 6009.2 to establish that any sale by a convicted seller or purchase by a convicted purchaser of counterfeit goods is subject to tax. Specifically, it added a new subdivision (b) to RTC section 6007 to further define “retail sale” to include “any sale by a convicted seller of tangible personal property with a counterfeit mark on, or in connection with, that sale, regardless of whether the sale is for resale in the regular course of business.” Similarly, the bill added new RTC section 6009.2 to further define “storage” and “use” to include any “purchase by a convicted purchaser of tangible personal property with a counterfeit mark on, or in connection with, that purchase, regardless of whether the purchase is for resale.” RTC section 6007 defines “convicted seller” and RTC section 6009.2 defines “convicted purchaser” to mean a person convicted of a violation under section 2320 of title 18 of the United States Code or under sections 350 or 653w of the Penal Code on or after the date of the sale or purchase, respectively. Both statutes provide that “[c]ounterfeit mark” has the same meaning as that term is defined in Section 2320 of Title 18 of the United States Code” and both statutes require that a notice of deficiency determination, issued to a convicted seller or purchaser, “shall be mailed within one year after the last day of the calendar month following the date of conviction.” Therefore, AB 2681 now makes sales and purchases of counterfeit goods by a convicted seller or convicted purchaser subject to tax, including resale transactions. In addition, it does not matter if the person convicted is the manufacturer, wholesaler, distributor, or retailer of the counterfeit goods.

### **Effects, Objectives, and Benefits of the Proposed Amendments to Regulation 1668**

#### *Need for Clarification*

Regulation 1668 was last amended in 2009, which was prior to the passage of AB 2681. Therefore, the Board’s Business Taxes Committee (BTC) staff determined that there is an issue (or problem within the meaning of Gov. Code, § 11346.2, subd. (b)(1)) because Regulation 1668

does not currently indicate that AB 2681 made amendments to RTC section 6007 and add RTC section 6009.2 to change the application of sales and use tax to sales and purchases of counterfeit goods for resale. BTC staff also determined that amendments to Regulation 1668 are needed in order to have the effect and accomplish the objective of addressing the issue (or problem) by making Regulation 1668 consistent with and implementing, interpreting, and making specific the provisions of RTC section 6007, subdivision (b), and RTC section 6009.2 regarding persons convicted of selling or purchasing counterfeit goods (discussed above).

### *Interested Parties Process*

As a result of AB 2681, BTC staff drafted amendments to add a new subdivision (j), entitled “Counterfeit Goods,” to Regulation 1668 and add references to RTC sections 6007 and 6009.2 to Regulation 1668’s reference note. The new subdivision clarifies that convicted sellers’ sales of counterfeit goods are taxable and do not qualify as nontaxable sales for resale. It also clarifies that purchases of counterfeit goods by convicted purchasers are considered for storage and use and are subject to tax, regardless of whether the goods are purchased for resale.

Staff also considered whether the civil and criminal penalty provisions of Regulation 1668, subdivision (d) (discussed above), apply in instances where a seller provides a resale certificate for the purchase of counterfeit goods for resale in the regular course of business without the payment of sales tax reimbursement or use tax and the seller is subsequently convicted of purchasing counterfeit goods. It was determined that the provisions of AB 2681 effectively impose a specific penalty on such a seller by making the seller liable for tax on such purchase, and it would be inconsistent with the provisions of AB 2681 to also impose the civil and criminal penalties provided by RTC sections 6094.5, 6484, and 6485 on such a seller with regard to such a purchase. Therefore, BTC staff also drafted amendments to clarify that Regulation 1668, subdivision (d), does not apply in the narrow circumstances where a resale certificate is issued in accordance with new subdivision (j), and the exception from subdivision (d) is consistent with the existing exceptions from subdivision (d) for resale certificates issued in accordance with subdivisions (h) and (i) (discussed above).

In addition to the proposed amendments regarding convicted sellers and purchasers of counterfeit goods, staff drafted amendments that deleted the reference to the September 19, 1985, effective date of the 1985 amendments to RTC section 6012.8 (discussed above) from Regulation 1668, subdivision (h), because the reference is no longer needed. Staff also drafted non-substantive amendments to italicize the name of Regulation 1699, *Permits*, in subdivision (a), replace “State” with “state” in subdivision (b)(1)(C), delete an inadvertent space in the reference to subdivision “(b) (4)” in subdivision (b)(3), add a comma after “(\$500)” in subdivision (d)(2), insert “the” before “person” in the last sentence in subdivision (f)(1), delete an inadvertent space from before the parenthetical reference to “mobile transportation equipment” in subdivision (f)(2)(C), replace the period with a semicolon at the end of subdivision (f)(2)(F)3, delete inadvertent brackets from

subdivision (f)(3), and replace “Section” and “Sections” with “section” and “sections” throughout subdivision (h).

BTC staff subsequently made its draft amendments to Regulation 1668 available to the interested parties and one interested parties meeting was held to discuss staff’s draft amendments. At the meeting, staff’s recommendations were well received and no submissions from interested parties with alternative language were received. Because BTC staff did not receive any other inquiries or comments regarding the draft amendments during or subsequent to the first interested parties meeting and staff had no changes to its recommendation to amend Regulation 1668, BTC staff did not prepare a second discussion paper and cancelled the second interested parties meeting that was previously scheduled to discuss staff’s draft amendments.

*October 27, 2015, BTC Meeting*

Subsequently, staff prepared Formal Issue Paper 15-008 and distributed it to the Board Members for consideration at the Board’s October 27, 2015, BTC meeting. Formal Issue Paper 15-008 recommended that the Board propose to adopt the draft amendments to Regulation 1668 (discussed above) in order to incorporate the provisions of RTC sections 6007 and 6009.2, as amended and enacted by AB 2681, by:

- Adding a new subdivision (j).
- Amending subdivision (d) so that it does not apply where a resale certificate is issued in accordance with new subdivision (j).
- Adding references to RTC sections 6007 and 6009.2 to the regulation’s reference note.

Formal Issue Paper 15-008 also recommended that the Board delete the reference to the September 19, 1985, effective date of the 1985 amendments to RTC section 6012.8 (discussed above) from Regulation 1668, subdivision (h), because the reference is no longer needed, and that the Board make the non-substantive amendments to the regulation (discussed above). During the October 27, 2015, BTC meeting, the Board Members unanimously voted to propose the amendments to Regulation 1668 recommended in the formal issue paper. The Board determined that the proposed amendments to Regulation 1668 are reasonably necessary to have the effect and accomplish the objective of making the regulation consistent with and implementing, interpreting, and making specific the provisions of RTC section 6007, subdivision (b), and RTC section 6009.2, and addressing the issue (or problem) that Regulation 1668 does not currently indicate that AB 2681 added RTC section 6007, subdivision (b), and section 6009.2. The Board also determined that the proposed amendments are reasonably necessary to have the effect and accomplish the objective of updating Regulation 1668, subdivision (h), and making the regulation grammatically correct and internally consistent.

The Board anticipates that the proposed amendments to Regulation 1668 will promote fairness and benefit taxpayers, Board staff, and the Board by providing additional notice regarding and

implementing, interpreting, and making specific the amendments made to RTC section 6007 and the enactment of RTC section 6009.2, by AB 2681.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1668 are inconsistent or incompatible with existing state regulations and determined that the proposed amendments are not inconsistent or incompatible with existing state regulations because Regulation 1668 is the only state regulation that provides specific guidance regarding the amendments made to RTC section 6007 and the enactment of RTC section 6009.2, by AB 2681. **In addition**, the Board has determined that there are no comparable federal regulations or statutes to Regulation 1668 or the proposed amendments to Regulation 1668.

### **NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS**

The Board has determined that the adoption of the proposed amendments to Regulation 1668 will not impose a mandate on local agencies or school districts, including a mandate that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code.

### **NO COST OR SAVINGS TO STATE AGENCIES, LOCAL AGENCIES, AND SCHOOL DISTRICTS**

The Board has determined that the adoption of the proposed amendments to Regulation 1668 will result in no direct or indirect cost or savings to any state agency, no cost to any local agency or school district that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, no other non-discretionary cost or savings imposed on local agencies, and no cost or savings in federal funding to the State of California.

### **NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS**

The Board has made an initial determination that the adoption of the proposed amendments to Regulation 1668 will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The adoption of the proposed amendments to Regulation 1668 may affect small business.

### **NO COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES**

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

### **RESULTS OF THE ECONOMIC IMPACT ASSESSMENT REQUIRED BY GOVERNMENT CODE SECTION 11346.3, SUBDIVISION (b)**

The Board has prepared the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1), and included it in the initial statement of reasons. The Board has determined that the adoption of the proposed amendments to Regulation 1668 will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses nor create or expand business in the State of California. Furthermore, the Board has determined that the adoption of the proposed amendments to Regulation 1668 will not affect the benefits of Regulation 1668 to the health and welfare of California residents, worker safety, or the state's environment.

### **NO SIGNIFICANT EFFECT ON HOUSING COSTS**

The adoption of the proposed amendments to Regulation 1668 will not have a significant effect on housing costs.

### **DETERMINATION REGARDING ALTERNATIVES**

The Board must determine that no reasonable alternative considered by it or that has been otherwise identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law than the proposed action.

### **CONTACT PERSONS**

Questions regarding the substance of the proposed amendments should be directed to Pamela Mash, Tax Counsel, by telephone at (916) 323-3248, by e-mail at [Pamela.Mash@boe.ca.gov](mailto:Pamela.Mash@boe.ca.gov), or by mail at State Board of Equalization, Attn: Pamela Mash, MIC:82, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0082.

Written comments for the Board's consideration, notice of intent to present testimony or witnesses at the public hearing, and inquiries concerning the proposed administrative action should be directed to Mr. Rick Bennion, Regulations Coordinator, by telephone at (916) 445-2130, by fax at (916) 324-3984, by e-mail at [Richard.Bennion@boe.ca.gov](mailto:Richard.Bennion@boe.ca.gov), or by mail at State Board of Equalization, Attn: Rick Bennion, MIC:80, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0080. Mr. Bennion is the designated backup contact person to Ms. Mash.

### **WRITTEN COMMENT PERIOD**

The written comment period ends at 9:30 a.m. on February 23, 2016, or as soon thereafter as the Board begins the public hearing regarding the adoption of the proposed amendments to Regulation 1668 during the February 23-25, 2016, Board meeting. Written comments received by Mr. Rick Bennion at the postal address, email address, or fax number provided above, prior to the close of the written comment period, will be presented to the Board and the Board will consider the statements, arguments, and/or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulation 1668. The Board will only consider written comments received by that time.

### **AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATION**

The Board has prepared an underscored and strikethrough version of the text of Regulation 1668 illustrating the express terms of the proposed amendments. The Board has also prepared an initial statement of reasons for the adoption of the proposed amendments to Regulation 1668, which includes the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1). These documents and all the information on which the proposed amendments are based are available to the public upon request. The rulemaking file is available for public inspection at 450 N Street, Sacramento, California. The express terms of the proposed amendments and the initial statement of reasons are also available on the Board's Website at [www.boe.ca.gov](http://www.boe.ca.gov).

### **SUBSTANTIALLY RELATED CHANGES PURSUANT TO GOVERNMENT CODE SECTION 11346.8**

The Board may adopt the proposed amendments to Regulation 1668 with changes that are non-substantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. If a sufficiently related change is made, the Board will make the full text of the proposed regulation, with the change clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting regulation will be mailed to those interested parties who commented on the original proposed regulation orally or in writing or who asked to be informed of such changes. The text of the resulting regulation will also be available

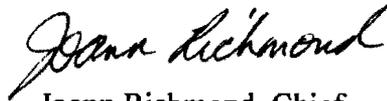
January 8, 2016

to the public from Mr. Bennion. The Board will consider written comments on the resulting regulation that are received prior to adoption.

**AVAILABILITY OF FINAL STATEMENT OF REASONS**

If the Board adopts the proposed amendments to Regulation 1668, the Board will prepare a final statement of reasons, which will be made available for inspection at 450 N Street, Sacramento, California, and available on the Board's Website at [www.boe.ca.gov](http://www.boe.ca.gov).

Sincerely,



Joann Richmond, Chief  
Board Proceedings Division

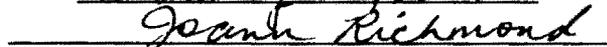
JR:reb

**STATE BOARD OF EQUALIZATION**

BOARD APPROVED



At the February 23, 2016 Board Meeting



Joann Richmond, Chief  
Board Proceedings Division

**Initial Statement of Reasons for  
Proposed Amendments to California Code of Regulations,  
Title 18, Section 1668, *Sales for Resale***

**SPECIFIC PURPOSES, PROBLEMS INTENDED TO BE ADDRESSED, NECESSITY, AND ANTICIPATED BENEFITS**

General Background

The Sales and Use Tax Law (Rev. & Tax. Code, § 6001 et seq.) imposes sales tax on retailers for the privilege of selling tangible personal property at retail in California and provides that sales tax is measured by the gross receipts from the retail sale of tangible personal property in this state, unless the sale is specifically exempt from taxation by statute. Although sales tax is imposed on retailers, retailers may collect sales tax reimbursement from their customers if their contracts of sale so provide. (Civ. Code, § 1656.1; Cal. Code Regs., tit. 18, § (Regulation or Reg.) 1700, subd. (a)(1).)

When sales tax does not apply, the Sales and Use Tax Law imposes use tax on the storage, use, or other consumption in this state of tangible personal property purchased from a retailer, unless specifically exempted or excluded by statute. The obligation to pay the use tax is on the consumer. However, every retailer “engaged in business” in California that makes sales subject to California use tax is required to collect the use tax from its customers and remit it to the State Board of Equalization (Board), and such retailers are liable for California use tax that they fail to collect from their customers and remit to the Board. (Reg. 1684.)

Revenue and Taxation Code (RTC) section 6007 defines the terms “retail sale” or “sale at retail” to mean a sale for any purpose other than resale in the regular course of business in the form of tangible personal property. RTC sections 6008 and 6009 define “storage” and “use,” respectively. “Storage” includes any keeping or retention in this state for any purpose except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased from a retailer. “Use” includes the exercise of any right or power over tangible personal property incident to the ownership of that property, and also includes the possession of, or the exercise of any right or power over, tangible personal property by a lessee under a lease, except that it does not include the sale of that property in the regular course of business.

RTC sections 6091 through 6095 (sales tax) and 6241 through 6245 (use tax) generally establish the presumption that the sale or storage, use or other consumption of tangible personal property is subject to sales or use tax, place the burden on the retailer to establish that tax does not apply, unless the retailer takes a certificate from the purchaser to the effect that the property is purchased for resale, and impose liability on persons who purchase tangible personal property with a resale certificate and subsequently make any use of the property other than retention, demonstration, or display while holding it for resale in the regular course of business. The Board previously adopted Regulation 1668, *Sales for Resale*, to implement, interpret, and make specific

the RTC provisions regarding sales for resale, including prescribing the form of resale certificates, prescribing the circumstances under which a retailer can overcome the presumption of taxability by timely taking a resale certificate from a purchaser in good faith, and establishing the presumption that a resale certificate is taken in good faith in the absence of evidence to the contrary.

In addition, RTC section 6094.5 generally provides that “[a]ny person, including any officer or employee of a corporation, who gives a resale certificate for property which he or she knows at the time of purchase is not to be resold by him or her or the corporation in the regular course of business is liable to the state for the amount of tax that would be due if he or she had not given such resale certificate,” and “a penalty of 10 percent of the tax or five hundred dollars (\$500) whichever is greater, for each purchase made [with a resale certificate] for personal gain or to evade the payment of taxes,” and is guilty of a misdemeanor for each purchase made with a resale certificate for the purpose of evading payment to the seller of the amount of the tax applicable to the transaction. RTC sections 6484 and 6485 alternatively provide for the imposition of a 10 percent penalty on the amount of a deficiency determination if any part of the deficiency is due to negligence or the intentional disregard of the Sales and Use Tax Law or the Board’s regulations or a 25 percent penalty on the amount of a deficiency determination if any part of the deficiency is due to fraud or an intent to evade the Sales and Use Tax Law or the Board’s regulations. And, Regulation 1668, subdivision (d), clarifies that all of these statutory provisions providing for civil and criminal penalties may apply to a person who makes an improper use of a resale certificate and thereafter fails to report the tax due as a result of such misuse.

Also, RTC sections 6012.8 and 6012.9 specify that mobilehome retailers are consumers of mobilehomes under specified circumstances. RTC sections 6012.8 and 6012.9 permit mobilehome retailers to give resale certificates for the purchase of mobilehomes under such circumstances to facilitate the reporting of their tax liabilities when they ultimately sell the mobilehomes to their customers for installation for occupancy as a residence. RTC section 6012.8 was also amended, effective September 19, 1985, to provide that a mobilehome retailer can issue a resale certificate for the purchase of a mobilehome regardless of whether the retailer installs the mobilehome on a foundation system as an improvement to realty prior to selling the mobilehome to its customer. And, the provisions of RTC sections 6012.8 and 6012.9 providing for the issuance of resale certificates by mobilehome retailers, including the effective date of the 1985 amendments to RTC section 6012.8, are implemented, interpreted, and made specific by Regulation 1668, subdivision (h).

Further, Regulation 1661, *Leases of Mobile Transportation Equipment*, explains that, under RTC sections 6006, 6010, 6094, and 6244, lessors are consumers of mobile transportation equipment (MTE) and if they purchase MTE without the payment of tax or tax reimbursement, they may elect to pay use tax measured by the “fair rental value” of the MTE. Regulations 1661 and 1668, subdivision (i), also both specify that, under RTC sections 6092.1 and 6243.1, a lessor of MTE, other than a lessor exempt from use tax, may issue a resale certificate for the purchase of MTE for the limited purpose of reporting use tax based on fair rental value in accordance with RTC sections 6094 and 6244. And, Regulation 1668, subdivision (d), clarifies that its civil and

criminal penalty provisions do not apply in the narrow circumstances where a resale certificate is issued in accordance with subdivision (h) or (i).

Furthermore, prior to September 19, 2014, counterfeit merchandise could be sold and purchased for resale for sales and use tax purposes. So, a person found guilty of selling counterfeit merchandise would not be liable for tax on sales of such merchandise for resale. Similarly, a person found guilty of possessing counterfeit merchandise in inventory could have purchased the merchandise for resale without having paid sales tax reimbursement or use tax or being liable for tax.

Effective September 19, 2014, Assembly Bill No. 2681 (AB 2681) (Stat. 2014, ch. 477) amended RTC section 6007 and enacted RTC section 6009.2 to establish that any sale by a convicted seller or purchase by a convicted purchaser of counterfeit goods is subject to tax. Specifically, it added a new subdivision (b) to RTC section 6007 to further define “retail sale” to include “any sale by a convicted seller of tangible personal property with a counterfeit mark on, or in connection with, that sale, regardless of whether the sale is for resale in the regular course of business.” Similarly, the bill added new RTC section 6009.2 to further define “storage” and “use” to include any “purchase by a convicted purchaser of tangible personal property with a counterfeit mark on, or in connection with, that purchase, regardless of whether the purchase is for resale.” RTC section 6007 defines “convicted seller” and RTC section 6009.2 defines “convicted purchaser” to mean a person convicted of a violation under section 2320 of title 18 of the United States Code or under sections 350 or 653w of the Penal Code on or after the date of the sale or purchase, respectively. Both statutes provide that “[c]ounterfeit mark” has the same meaning as that term is defined in Section 2320 of Title 18 of the United States Code” and both statutes require that a notice of deficiency determination, issued to a convicted seller or purchaser, “shall be mailed within one year after the last day of the calendar month following the date of conviction.” Therefore, AB 2681 now makes sales and purchases of counterfeit goods by a convicted seller or convicted purchaser subject to tax, including resale transactions. In addition, it does not matter if the person convicted is the manufacturer, wholesaler, distributor, or retailer of the counterfeit goods.

### Proposed Amendments

#### *Need for Clarification*

Regulation 1668 was last amended in 2009, which was prior to the passage of AB 2681. Therefore, the Board’s Business Taxes Committee (BTC) staff determined that there is an issue (or problem within the meaning of Gov. Code, § 11346.2, subd. (b)(1)) because Regulation 1668 does not currently indicate that AB 2681 made amendments to RTC section 6007 and add RTC section 6009.2 to change the application of sales and use tax to sales and purchases of counterfeit goods for resale. BTC staff also determined that amendments to Regulation 1668 are needed in order to specifically address the issue and make Regulation 1668 consistent with and implement, interpret, and make specific the provisions of RTC section 6007, subdivision (b), and RTC section 6009.2 regarding persons convicted of selling or purchasing counterfeit goods (discussed above).

### *Interested Parties Process*

As a result of AB 2681, BTC staff drafted amendments to add a new subdivision (j), entitled “Counterfeit Goods,” to Regulation 1668 and add references to RTC sections 6007 and 6009.2 to Regulation 1668’s reference note. The new subdivision clarifies that convicted sellers’ sales of counterfeit goods are taxable and do not qualify as nontaxable sales for resale. It also clarifies that purchases of counterfeit goods by convicted purchasers are considered for storage and use and are subject to tax, regardless of whether the goods are purchased for resale.

Staff also considered whether the civil and criminal penalty provisions of Regulation 1668, subdivision (d) (discussed above), apply in instances where a seller provides a resale certificate for the purchase of counterfeit goods for resale in the regular course of business without the payment of sales tax reimbursement or use tax and the seller is subsequently convicted of purchasing counterfeit goods. It was determined that the provisions of AB 2681 effectively impose a specific penalty on such a seller by making the seller liable for tax on such purchase, and it would be inconsistent with the provisions of AB 2681 to also impose the civil and criminal penalties provided by RTC sections 6094.5, 6484, and 6485 on such a seller with regard to such a purchase. Therefore, BTC staff also drafted amendments to clarify that Regulation 1668, subdivision (d), does not apply in the narrow circumstances where a resale certificate is issued in accordance with new subdivision (j), and the exception from subdivision (d) is consistent with the existing exceptions from subdivision (d) for resale certificates issued in accordance with subdivisions (h) and (i) (discussed above).

In addition to the proposed amendments regarding convicted sellers and purchasers of counterfeit goods, staff drafted amendments that deleted the reference to the September 19, 1985, effective date of the 1985 amendments to RTC section 6012.8 (discussed above) from Regulation 1668, subdivision (h), because the reference is no longer needed. Staff also drafted non-substantive amendments to italicize the name of Regulation 1699, *Permits*, in subdivision (a), replace “State” with “state” in subdivision (b)(1)(C), delete an inadvertent space in the reference to subdivision “(b) (4)” in subdivision (b)(3), add a comma after “(\$500)” in subdivision (d)(2), insert “the” before “person” in the last sentence in subdivision (f)(1), delete an inadvertent space from before the parenthetical reference to “mobile transportation equipment” in subdivision (f)(2)(C), replace the period with a semicolon at the end of subdivision (f)(2)(F)3, delete inadvertent brackets from subdivision (f)(3), and replace “Section” and “Sections” with “section” and “sections” throughout subdivision (h).

BTC staff subsequently made its draft amendments to Regulation 1668 available to the interested parties and one interested parties meeting was held to discuss staff’s draft amendments. At the meeting, staff’s recommendations were well received and no submissions from interested parties with alternative language were received. Because BTC staff did not receive any other inquiries or comments regarding the draft amendments during or subsequent to the first interested parties meeting and staff had no changes to its recommendation to amend Regulation 1668, BTC staff did not prepare a second discussion paper and cancelled the second interested parties meeting that was previously scheduled to discuss staff’s draft amendments.

*October 27, 2015, BTC Meeting*

Subsequently, staff prepared Formal Issue Paper 15-008 and distributed it to the Board Members for consideration at the Board's October 27, 2015, BTC meeting. Formal Issue Paper 15-008 recommended that the Board propose to adopt the draft amendments to Regulation 1668 (discussed above) in order to incorporate the provisions of RTC sections 6007 and 6009.2, as amended and enacted by AB 2681, by:

- Adding a new subdivision (j).
- Amending subdivision (d) so that it does not apply where a resale certificate is issued in accordance with new subdivision (j).
- Adding references to RTC sections 6007 and 6009.2 to the regulation's reference note.

Formal Issue Paper 15-008 also recommended that the Board delete the reference to the September 19, 1985, effective date of the 1985 amendments to RTC section 6012.8 (discussed above) from Regulation 1668, subdivision (h), because the reference is no longer needed, and that the Board make the non-substantive amendments to the regulation (discussed above). During the October 27, 2015, BTC meeting, the Board Members unanimously voted to propose the amendments to Regulation 1668 recommended in the formal issue paper.<sup>1</sup> The Board determined that the proposed amendments to Regulation 1668 are reasonably necessary for the specific purpose of making the regulation consistent with and implementing, interpreting, and making specific the provisions of RTC section 6007, subdivision (b), and RTC section 6009.2, and addressing the issue (or problem) that Regulation 1668 does not currently indicate that AB 2681 added RTC section 6007, subdivision (b), and section 6009.2. The Board also determined that the proposed amendments are reasonably necessary for the specific purpose of updating Regulation 1668, subdivision (h), and making the regulation grammatically correct and internally consistent.

The Board anticipates that the proposed amendments to Regulation 1668 will promote fairness and benefit taxpayers, Board staff, and the Board by providing additional notice regarding and implementing, interpreting, and making specific the amendments made to RTC section 6007 and the enactment of RTC section 6009.2, by AB 2681.

The adoption of the proposed amendments to Regulation 1668 is not mandated by federal law or regulations. There is no previously adopted or amended federal regulation that is identical to Regulation 1668 or the proposed amendments to Regulation 1668.

---

<sup>1</sup> The Board also added "show that" to subdivision (f) to fix an incomplete sentence, deleted the extra space in the first parenthetical in subdivision (f)(2)(C), changed the period to a semicolon at the end of subdivision (f)(2)(C), added "or" after the semicolon following subdivision (f)(2)(F)3, and changed "Title" to "title" in new subdivision (j) of the text of the amendments shown in exhibit 2 to Formal Issue Paper 15-008.

## DOCUMENTS RELIED UPON

The Board relied upon Formal Issue Paper 15-008, the exhibits to the issue paper, and the comments made during the Board's discussion of the issue paper during its October 27, 2015, BTC meeting in deciding to propose the amendments to Regulation 1668 described above.

## ALTERNATIVES CONSIDERED

The Board considered whether to begin the formal rulemaking process to adopt the proposed amendments to Regulation 1668 at this time or, alternatively, whether to take no action at this time. The Board decided to begin the formal rulemaking process to adopt the proposed amendments to Regulation 1668 at this time because the Board determined that the proposed amendments are reasonably necessary for the reasons set forth above.

The Board did not reject any reasonable alternative to the proposed amendments to Regulation 1668 that would lessen any adverse impact the proposed action may have on small business or that would be less burdensome and equally effective in achieving the purposes of the proposed action. No reasonable alternative has been identified and brought to the Board's attention that would lessen any adverse impact the proposed action may have on small business, be more effective in carrying out the purposes for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law than the proposed action.

## INFORMATION REQUIRED BY GOVERNMENT CODE SECTION 11346.2, SUBDIVISION (b)(5) AND ECONOMIC IMPACT ASSESSMENT REQUIRED BY GOVERNMENT CODE SECTION 11346.3, SUBDIVISION (b)

Prior to the passage of AB 2681, counterfeit merchandise could be sold and purchased for resale for sales and use tax purposes. So, a person found guilty of selling counterfeit merchandise would not be liable for tax on sales of such merchandise for resale. Similarly, a person found guilty of possessing counterfeit merchandise in inventory could have purchased the merchandise for resale without having paid sales tax reimbursement or use tax or being liable for tax.

As previously explained in more detail above, AB 2681 made specific amendments to RTC section 6007 and added RTC section 6009.2. The new statutory provisions now make a sale or purchase of counterfeit goods by a convicted seller or purchaser subject to tax. The substantive amendments to Regulation 1668 (discussed above) clarify that convicted sellers' sales of counterfeit goods are taxable and do not qualify as nontaxable sales for resale and clarify that purchases of counterfeit goods by convicted purchasers are considered for storage and use and are subject to tax, regardless of whether the goods are purchased for resale.

As a result, the proposed substantive amendments make Regulation 1668 consistent with the amendments made to the RTC by AB 2681, the proposed amendments do not mandate that individuals or businesses do anything that is not already required by the RTC, and there is nothing in the proposed amendments that would significantly change how individuals and

businesses would generally behave, in the absence of the proposed regulatory action, or that would impact revenue. Therefore, the Board estimates that the proposed amendments will not have a measurable economic impact on individuals and business that is in addition to whatever economic impact the amendments made to the RTC by AB 2681 have had and will have on individuals and businesses. The Board has determined that the proposed amendments to Regulation 1668 are not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000, because the Board has estimated that the proposed amendments will not have an economic impact on California business enterprises and individuals in an amount exceeding fifty million dollars (\$50,000,000) during any 12-month period. And, the Board anticipates that the proposed amendments to Regulation 1668 will promote fairness and benefit taxpayers, Board staff, and the Board by providing additional notice regarding and implementing, interpreting, and making specific the amendments made to the RTC by AB 2681.

In addition, based on these facts and all of the information in the rulemaking file, the Board has determined that the adoption of the proposed amendments to Regulation 1668 will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses nor create or expand business in the State of California.

Furthermore, Regulation 1668 does not regulate the health and welfare of California residents, worker safety, or the state's environment. Therefore, the Board has also determined that the adoption of the proposed amendments to Regulation 1668 will not affect the benefits of Regulation 1668 to the health and welfare of California residents, worker safety, or the state's environment.

The forgoing information also provides the factual basis for the Board's initial determination that the adoption of the proposed amendments to Regulation 1668 will not have a significant adverse economic impact on business.

The proposed amendments to Regulation 1668 may affect small businesses.

**Text of Proposed Amendments to  
California Code of Regulations, Title 18, Section 1668**

**1668. Sales for Resale.**

(a) Resale Certificate.

The burden of proving that a sale of tangible personal property is not at retail is upon the seller unless the seller timely takes in good faith a certificate from the purchaser that the property is purchased for resale. If timely taken in proper form as set forth in subdivision (b) and in good faith from a person who is engaged in the business of selling tangible personal property and who holds a California seller's permit as required by Regulation 1699, "~~Permits~~Permits," the certificate relieves the seller from liability for the sales tax and the duty of collecting the use tax. A certificate will be considered timely if it is taken at any time before the seller bills the purchaser for the property, or any time within the seller's normal billing and payment cycle, or any time at or prior to delivery of the property to the purchaser. A resale certificate remains in effect until revoked in writing.

(b) Form of Certificate.

(1) Any document, such as a letter or purchase order, timely provided by the purchaser to the seller will be regarded as a resale certificate with respect to the sale of the property described in the document if it contains all of the following essential elements:

(A) The signature of the purchaser, purchaser's employee, or authorized representative of the purchaser.

(B) The name and address of the purchaser.

(C) The number of the seller's permit held by the purchaser. 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~~state, the purchaser must include on the certificate a sufficient explanation as to the reason the purchaser is not required to hold a California seller's permit in lieu of a seller's permit number.

(D) A statement that the property described in the document is purchased for resale. The document must contain the phrase "for resale." The use of phrases such as "nontaxable," "exempt," or similar terminology is not acceptable. The property to be purchased under the certificate must be described either by an itemized list of the particular property to be purchased for resale, or by a general description of the kind of property to be purchased for resale.

(E) Date of execution of document. (An otherwise valid resale certificate will not be considered invalid solely on the ground that it is undated.)

(2) A document containing the essential elements described in subdivision (b)(1) is the minimum form which will be regarded as a resale certificate. However, in order to preclude

potential controversy, the seller should timely obtain from the purchaser a certificate substantially in the form shown in Appendix A of this regulation. If a purchaser operates an auto body repair and/or paint business, a specific resale certificate in substantially the same form as shown in Appendix B of this regulation should be used, rather than the general resale certificate shown in Appendix A.

(3) Blanket Resale Certificate. If a purchaser issues a general (blanket) resale certificate which provides a general description of the items to be purchased, and subsequently issues a purchase order which indicates that the transaction covered by the purchase order is taxable, the resale certificate does not apply with respect to that transaction. However, the purchaser will bear the burden of establishing either that the purchase order was sent to and received by the seller within the seller's billing cycle or prior to delivery of the property to the purchaser (whichever is the later), or that the tax or tax reimbursement was paid to the seller. The purchaser may avoid this burden by using the procedures described in subdivision (b)-(4) below.

(4) Qualified Resale Certificate. If a purchaser wishes to designate on each purchase order whether the property being purchased is for resale, the seller should obtain a qualified resale certificate, i.e., one that states "see purchase order" in the space provided for a description of the property to be purchased. Each purchase order must then specify whether or not the property covered by the order is purchased for resale. The use of the phrases "for resale," "resale = yes," "nontaxable," "taxable = no," or similar terminology on a purchase order, indicating that tax or tax reimbursement should not be added to the sales invoice will be regarded as designating that the property described is purchased for resale provided the combination of the purchase order and the qualified resale certificate contains all the essential elements provided in subdivision (b)(1). However, a purchase order where the applicable amount of tax is shown as \$0 or is left blank will not be accepted as designating that the property is purchased for resale, unless the purchase order also includes the phrase "for resale" or other terminology described above to specify that the property is purchased for resale. If each purchase order does not so specify, or is not issued timely within the meaning of subdivision (a), it will be presumed that the property covered by that purchase order was not purchased for resale and that sale or purchase is subject to tax. If the purchase order includes both items to be resold and items to be used, the purchase order must specify which items are purchased for resale and which items are purchased for use. For example, a purchase order issued for raw materials for resale and also for tooling used to process the raw materials should specify that the raw materials are purchased for resale and that the sale of the tooling is subject to tax.

The seller shall retain copies of the purchase orders along with the qualified resale certificates in order to support the sales for resale.

(5) If the seller does not timely obtain a resale certificate, the fact that the purchaser deletes the tax or tax reimbursement from the seller's billing, provides a seller's permit number to the seller, or informs the seller that the transaction is "not taxable" does not relieve the seller from liability for the tax nor from the burden of proving the sale was for resale.

(c) Good Faith. In absence of evidence to the contrary, a seller will be presumed to have taken a resale certificate in good faith if the resale certificate contains the essential elements as described in subdivision (b)(1) and otherwise appears to be valid on its face. If the purchaser insists that the purchaser is buying for resale property of a kind not normally resold in the purchaser's business, the seller should require a resale certificate containing a statement that the specific property is being purchased for resale in the regular course of business.

(d) Improper Use of Certificate. Except when a resale certificate is issued in accordance with subdivisions (h), ~~(i)~~ or (j):

(1) A purchaser, including any officer or employee of a corporation, is guilty of a misdemeanor punishable as provided in section 7153 if the purchaser, for the purpose of evading payment to the seller of tax or tax reimbursement, gives a resale certificate for property which the purchaser knows at the time of purchase will be used rather than resold.

(2) Any person, including any officer or employee of a corporation, who gives a resale certificate for property which he or she knows at the time of purchase is not to be resold by him or her or the corporation in the regular course of business is liable to the state for the amount of tax that would be due if he or she had not given such resale certificate. In addition to the tax, the person shall be liable to the state for a penalty of 10 percent of the tax or five hundred dollars (\$500), whichever is greater, for each purchase made for personal gain or to evade the payment of taxes, as provided in sections 6072 and 6094.5.

(3) In addition to the penalty of 10 percent or five hundred dollars (\$500), whichever is greater, if the person fails to report and pay the use tax due on the use of the property purchased improperly with a resale certificate, the person may be liable for the 10 percent penalty for negligence or the 25 percent penalty for fraud, as provided in sections 6484 and 6485.

(e) Other Evidence to Rebut Presumption of Taxability. A sale for resale is not subject to sales tax. A person who purchases property for resale and who subsequently uses the property owes tax on that use. A resale certificate which is not timely taken is not retroactive and will not relieve the seller of the liability for the tax. Consequently, if the seller does not timely obtain a resale certificate containing the essential elements as described in subdivision (b)(1), the seller will be relieved of liability for the tax only where the seller shows that the property:

(1) Was in fact resold by the purchaser and was not used by the purchaser for any purpose other than retention, demonstration, or display while holding it for sale in the regular course of business, or

(2) Is being held for resale by the purchaser and has not been used by the purchaser for any purpose other than retention, demonstration, or display while holding it for sale in the regular course of business, or

(3) Was consumed by the purchaser and tax was reported directly to the Board by the purchaser on the purchaser's sales and use tax return, or

(4) Was consumed by the purchaser and tax was paid to the Board by the purchaser pursuant to an assessment against or audit of the purchaser developed either on an actual basis or test basis.

(f) Use of XYZ Letters. A seller who does not timely obtain a resale certificate may use any verifiable method of establishing that it should be relieved of liability for tax under subdivision (e). One method that the Board authorizes to assist a seller in satisfying its burden to show that the sale was for resale or that tax was paid, is the use of “XYZ letters.” XYZ letters are letters in a form approved by the Board which are sent to some or all of the seller’s purchasers inquiring as to the purchaser’s disposition of the property purchased from the seller. An XYZ letter will include certain information and request responses to certain questions, set forth below. The XYZ letter may also be further customized by agreement between the Board’s staff and the seller to reflect the seller’s particular circumstances.

(1) An XYZ letter may include the following information: seller’s name and permit number, date of invoice(s), invoice number(s), purchase order number(s), amount of purchase(s), and a description of the property purchased or other identifying information. A copy of the actual invoice(s) may be attached to the XYZ letter. The XYZ letter will request the purchaser to complete the statement and include the purchaser’s name, seller’s permit number and nature of the purchaser’s business. The statement shall be signed by the purchaser, purchaser’s employee or authorized representative, and include the printed name of the person signing the certificate, title, date, telephone number and city.

(2) An XYZ letter will request that the purchaser, purchaser’s employee or authorized representative check one of the boxes provided inquiring as to whether the property in question was:

(A) Purchased for resale and resold in the form of tangible personal property, without any use other than retention, demonstration, or display while being held for sale in the regular course of business;

(B) Purchased for resale and presently in resale inventory, without having been used for any purpose other than retention, demonstration, or display while being held for sale in the regular course of business;

(C) Purchased solely for leasing and was so leased. Tax has been paid directly to the Board measured by the purchase price or rental receipts (-“tangible personal property”); or tax has been paid measured by the purchase price or fair rental value (-“mobile transportation equipment”);

(D) Purchased for resale but consumed or used (whether or not subsequently resold); or

(E) Purchased for use.

(F) When the purchaser answers either (D) or (E) affirmatively (box checked), the XYZ letter will inquire further whether:

1. The tax was paid directly to the Board on the purchaser's Sales and Use Tax Return, and if so, in what amount;
2. The tax was added to the billing of the seller and remitted to the seller, and if so, in what amount;
3. The tax was paid directly to the Board by the purchaser pursuant to an assessment against or audit of the purchaser developed either on an actual basis or test basis; or
4. The purchaser confirms that the purchase is a taxable transaction and that tax is applicable.

(3) A response to an XYZ letter is not equivalent to a timely and valid resale certificate. A purchaser responding affirmatively to questions reflected in paragraphs (A), (B), (C), or (D) of subdivision (f)(2) will be regarded as confirming the seller's belief that a sale was for resale for purposes of subdivision (g). However, the Board is not required to relieve a seller from liability for sales tax or use tax collection based on a response to an XYZ letter. The Board may, in its discretion, {verify the information provided in the response to the XYZ letter,} including making additional contact with the purchaser or other persons to determine whether the purchase was for resale or for use {or whether tax was paid by the purchaser.} When the Board accepts the purchaser's response to an XYZ letter as a valid response, the Board shall relieve the seller of liability for sales tax or use tax collection.

(4) When there is no response to an XYZ letter, the Board staff should consider whether it is appropriate to use an alternative method to ascertain whether the seller should be relieved of tax under subdivision (e) with respect to the questioned or unsupported transaction(s).

(g) Purchaser's Liability for Tax. A purchaser who issues a resale certificate containing the essential elements as described in subdivision (b)(1) and that otherwise appears valid on its face, or who otherwise purchases tangible personal property that is accepted by the Board as purchased for resale pursuant to subdivision (f) and who thereafter makes any storage or use of the property other than retention, demonstration, or display while holding it for sale in the regular course of business is liable for use tax on the cost of the property. The tax is due at the time the property is first stored or used and must be reported and paid by the purchaser with the purchaser's tax return for the period in which the property is first so stored or used. A purchaser cannot retroactively rescind or revoke a resale certificate and thereby cause the transaction to be subject to sales tax rather than use tax.

A purchaser who issues a resale certificate for property which the purchaser knows at the time of purchase is not to be resold in the regular course of business is liable for the sales tax on that purchase measured by the gross receipts from the sale to that purchaser. The tax is due as of the time the property was sold to the purchaser and must be reported and paid by the purchaser with the purchaser's tax return for the period in which the property was sold to the purchaser.

(h) Mobilehomes. A mobilehome retailer who purchases a new mobilehome for sale to a customer for installation for occupancy as a residence on a foundation system pursuant to ~~Section~~section 18551 of the Health and Safety Code, or for installation for occupancy as a residence pursuant to ~~Section~~section 18613 of the Health and Safety Code, and which mobilehome is thereafter subject to property taxation, may issue a resale certificate to the mobilehome vendor even though the retailer is classified as a consumer of the mobilehome by ~~Sections~~sections 6012.8 and 6012.9 of the Revenue and Taxation Code. Also, ~~effective September 19, 1985,~~ a mobilehome retailer, licensed as a mobilehome dealer under ~~Section~~section 18002.6 of the Health and Safety Code, who purchases a new mobilehome for sale to a customer for installation for occupancy as a residence on a foundation system pursuant to ~~Section~~section 18551 of the Health and Safety Code, may issue a resale certificate to the mobilehome vendor even though the mobilehome retailer may have the mobilehome installed on a foundation system as an improvement to realty prior to the retailer's sale of the mobilehome to the customer for occupancy as a residence.

Where the mobilehome is acquired by a mobilehome retailer, who is not licensed as a dealer pursuant to ~~Section~~section 18002.6 of the Health and Safety Code, for affixation by the retailer to a permanent foundation, or for other use or consumption (except demonstration or display while holding for sale in the regular course of business), prior to sale, the mobilehome retailer may not issue a resale certificate. The mobilehome retailer shall notify the vendor that the purchase is for consumption and not for resale. When a mobilehome manufacturer or other vendor is informed or has knowledge that the purchaser will install the mobilehome on a permanent foundation prior to its resale, the manufacturer or other vendor is not making a sale for resale. Such vendor is making a taxable retail sale and cannot accept a resale certificate in good faith.

(i) Mobile Transportation Equipment. Any person, other than a person exempt from use tax, such as under Revenue and Taxation Code section 6352, who purchases mobile transportation equipment for the sole purpose of leasing that equipment, may issue a resale certificate for the limited purpose of reporting use tax based on fair rental value as provided in Regulation 1661.

(j) Counterfeit Goods. A sale of tangible personal property with a counterfeit mark on, or in connection with, that sale by a convicted seller is included in the definition of "retail sale" per Revenue and Taxation Code section 6007, and therefore taxable. "Storage" and "use" as defined in Revenue and Taxation Code section 6009.2, includes any purchase of tangible personal property with a counterfeit mark on, or in connection with, that purchase by a convicted purchaser and is subject to tax. This is regardless of whether the counterfeit goods were sold for resale or held with the intent to be resold. A "counterfeit mark" is a spurious mark that is used in a manner described in section 2320 of title 18 of the United States Code.

Note: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Sections 6007, 6009.2, 6012.8, 6012.9, 6072, 6091-6095, 6241-6245, 6484, 6485 and 7153, Revenue and Taxation Code.

## Regulation History

**Type of Regulation:** Sales and Use Tax

Regulation: 1668

Title: *Sales for Resale*

**Preparation:** Pamela Mash

**Legal Contact:** Pamela Mash

The State Board of Equalization proposes to clarify that a sale or purchase of counterfeit goods by a convicted seller or purchaser is subject to tax, regardless of whether the sale or purchase was for resale.

### History of Proposed Regulation:

February 23-25, 2016	Public Hearing
January 8, 2016	OAL publication date; 45-day public comment period begins; Interested Parties mailing
December 23, 2015	Notice to OAL
October 27, 2015	Business Tax Committee, Board Authorized Publication (Vote 5-0)

Sponsor: NA

Support: NA

Oppose: NA