STATE OF CALIFORNIA

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January 20, 1994

Mr. -. S--- B---
Attorney at Law
XXXX West --- --- Avenue, Suite D
---, CA XXXXX

Dear Mr. B---:

This is in response to your letter dated December 9, 1993 in which you ask how tax applies to your client's business. You state:

> "My client provides profession[al] engineering services under various state engineering licenses in the heating and air conditioning industry. As part of the professional service provided, my client also provides computerized control system components. Consistent with construction industry standard practice, lump sum quotations, including all taxes are requested.
>
> "In general, the control systems involve sensors, actuators, computer systems and software to control the environment in large commercial and industrial buildings. My client provides engineering services and control components to the installing mechanical contractor. The installing mechanical/air conditioning contractor lacks the technical expertise to select and design the appropriate control system elements or to program the system for the operation desired by the owner's architect.
>
> "By using my client's engineering expertise and access to control system components, the control system can be designed and installed at a lower cost to the owner than if a specialty contractor, with in-house engineering staff, provided the full service and installation.

> "....
>
> "My client selects and assembles the control units. He programs the units, supervises the installation and is onsite to start up and troubleshoot the installation. At the present time, my client does not have a contractor's license, but could easily obtain one."

You believe your client may be a construction contractor within the meaning of Regulation 1521 which provides that a construction contractor is any person who for himself, in conjunction with, or by or through others agrees to perform and does perform a construction contract. (Reg. 1521(a)(2).)

Subdivision (a)(1)(A)1 of Regulation 1521 defines a construction contract to include a contract to erect, construct, alter, or repair any building or other structure. Subdivision (a)(1)(B)2 excludes from the definition of construction contract:

> "The furnishing of tangible personal property under what is otherwise a construction contract if the person furnishing the property is not responsible under the construction contract for the final affixation or installation of the property finished."

This provision is clear, a person who contracts to furnish tangible personal property to be installed onto real property is not performing a construction contract unless that person is also contractually responsible for the final affixation or installation of the property furnished. Here, you state your client selects and assembles the control units, furnishes them, and then "supervises" their installation. As noted above, a construction contractor is a person who contracts to furnish <u>and</u> install property becoming an improvement to real property. Although your client performs some supervision, it does not appear to be contractually obligated to install the property in question. Thus, it is our opinion your client is not performing a construction contract, and is not a construction contractor within the meaning of Regulation 1521.

You also ask if your client is selling tangible personal property (which is taxable) to its customers or transferring tangible personal property incidental to a service (which is not taxable). The basic distinction in determining whether a particular transaction involves a sale of tangible personal property or the transfer of tangible personal property incidental to the performance of a service is one of the true object of the contract; that is, is the real object sought by the buyer the service per se or the property produced by the service. (Reg. 1501).)

The true object test was applied in <u>Albers v. State Board of Equalization</u> (1965) 237 Cal.App. 2d 494 in which the Court held that the sale of a draftsman's drawing of construction plans was taxable because the true object of the transaction was the drawing itself rather than the architectural or engineering services. The same analysis would apply to your client's contract. We assume the control systems is similar to a thermostat, thereby controlling

usage of the cooling and/or heating system. Although your client may design the control system, it is our opinion your client's customer seeks that control system. Thus, it is our opinion your client is making a sale of tangible personal property. The taxability of that sale is provided for in section 1501:

> "When a transaction is regarded as a sale of tangible personal property, tax applies to the gross receipts from the furnishing thereof, without any deduction on account of the work, labor, skill, thought, time spent, or other expense of producing the property."

If we can be of further assistance, please feel free to contact us.

Sincerely,

Rachel M. Aragon
Staff Counsel

RMA:ljt
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bc: --- - District Administrator