State of California

Board of Equalization
Legal Division-MIC: 82

M e m o r a n d u m

325.0574

To : Ms. Leila Khabbaz
Audit Evaluation and Planning

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Subject: Section 6247

A question has arisen regarding whether a statement under section 6247 must be taken timely. The answer is, of course, obvious. Such a statement not taken timely is no different than, for example, an xyz letter taken in connection with claimed sales for resale. A section 6247 statement that is not taken timely does not automatically overcome the section 6247 presumption that the retailer sold the property for use in California. Similar to an xyz letter, if the Board believes that the facts claimed in the statement are accurate, then the Board's conclusion would be that the property was not, in fact, purchased for use in California. On the other hand, if the Board did not believe the claims in the statement, or felt that such claims were insufficient to establish that the property was not purchased for use in California, the retailer would not have overcome the section 6247 presumption and would have to present additional evidence to overcome it.

It appears that this fact is so obvious that no one has raised the issue since it does not appear that we have anything squarely on point. I must confess that I am partly to blame. When I drafted changes to Regulation 1620, I included language in subdivision (b)(3) to clarify that the section 6247 statement is relevant only to the retailer's potential liability for use tax collection and not to the purchaser's potential liability for use tax. I should have also included a reference to the timeliness and good faith requirements. Since I was not aware that anyone had questioned that a section 6247 statement must be timely to have the desired prophylactic effect, I did not notice that the regulation did not make this clear. Nevertheless, this omission is not significant and does not warrant amending the regulation since we have always administered the statute in this manner and this is consistent with the requirements for the other prophylactic certificates and statements that retailers may accept. We should, however, at least have an annotation on point.

Perhaps the annotation that most closely addresses this is Annotation 220.0241 (3/21/86). It includes the following statement:

> "Section 6247 provides that tangible personal property delivered outside California, to a purchaser known by the retailer to be a resident of this state, will be presumed to have been purchased for use in California. Since the bidders submit their successful bids in California, it would be self-evident that the sellers should be aware that some, if not most, of these purchasers are California residents. In those cases where the sellers know, or should be aware, that a purchaser is a California resident, the sellers will be responsible to collect the use tax unless they in good faith accept a statement from the purchaser to the effect that the property has been purchased for use outside California."

Thus, if a retailer does not take a section 6247 statement, it is responsible to collect the use tax. The retailer is generally responsible to collect the use tax at the time the sale is made. (Rev. & Tax. Code § 6203.) This means that the retailer must generally take a section 6247 when the sale is made or it must collect the tax. Once the time for the retailer to have collected the use tax has passed, the section 6247 statement can no longer be considered timely and will not protect the retailer from its debt for having failed to collect and remit use tax unless the Board concludes that the claim that the item was not purchased for use in California is accurate. That is, such a late statement is equivalent to an xyz letter trying to establish a sale was for resale.

I note that the wording of section 6247 also confirms this interpretation. It says that the statement must be "retained by the vendor." That is, the vendor must take it, and then retain it. There would be no reason for this language if the vendor could take it anytime. Rather, the language would be to "present" the statement, that is, take it whenever you want as long as you present it to the Board when so required. Finally, I note that Regulation 1667 is further support for this view. When there is no specific exemption certificate specified for a particular exemption, we advise vendors to take exemption certificates under the guidance of Regulation 1667. That regulation provides that such exemption certificates are valid only if taken timely and in good faith. However, the regulation does not actually cover transactions subject to use tax, only those subject to sales tax. Nevertheless, we apply the same guidelines: the certificate must include the necessary information, must be taken in good faith, and must be timely. *All* such certificates or statements that would serve to relieve a seller from liability for sales tax or for use tax collection without the need to otherwise prove that tax does not apply *must be taken timely*, unless the law or regulations specifically provide otherwise. For example, subdivision (b)(2) of Regulation 1667 provides a specific exception to this rule, referencing subdivision (c)(2) of Regulation 1621. But for these provisions, the exemption certificates they cover would not be valid unless taken timely.

Section 6247 also lacks a reference to "good faith." However, no one would argue that a retailer who takes a section 6247 statement knowing it to be false is excused from the duty to collect use tax. That is, good faith is obviously required for any statement or certificate that serves to relieve a retailer from tax or tax collection without the need to establish that the transaction is actually not subject to tax. That such a statement or certificate must be timely to

have the desired effect is equally obvious. Please annotate this opinion that a section 6247 statement must be taken timely and in good faith to have the desired effect.

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