

STATE BOARD OF EQUALIZATION

June 11, 1991

Dear ---

Your letter of April 18, 1991, to the Legal Division has been assigned to me for a response. You have requested an opinion as to the sales tax rate applicable to purchases made by the XX school districts in --- County.

You set forth the factual background of your problem as follows:

“Our office instructed districts to pay sales tax using the rate which was in effect as of the date their order was placed. ... One of the school districts was contacted by a vendor who insisted that the appropriate sales tax to be charged is the rate which is in effect at the time of shipment.”

I assume for the context of your question that your districts' vendors are located in --- County and that the question arises due to the imposition of the --- County Transportation Authority (---) transactions and use taxes on April 1, 1991. I also assume that this problem has arisen with regard to contracts in which the order was placed prior to, and the goods were shipped after, that date.

OPINIONA. Transactions and Use Tax1. Generally

In California, there is a statewide tax rate of 6%. This rate is made up from the California Sales and Use Tax (§§ 6051, et. seq., and 6201, et. seq.), and the Bradley-Burns Uniform Local Sales and use Tax (§§ 7200 –7212). In 1969, the Legislature enacted the Transactions and Use (hereinafter “District”) Tax Law. (Rev. & Tax. Code §§ 7251 et. seq.). Pursuant to various

enabling statutes, a number of counties have established county-wide taxing districts. To support such districts, transactions and use taxes are imposed at rates of 0.25% or 0.5% of the gross receipts from the sales within the district of tangible personal property sold at retail or of the sales price of property whose use, storage, or consumption within the district is otherwise subject to tax. (§§ 7261(a)(1), 7262(a), 7285, 7285.5).

2. “Fixed-Price Contracts” Exemption

There are some exceptions to the District tax. One such exemption is found in Section 7261(a)(7) and 7262(a)(6), implemented by Regulation 1823, sub-divisions (a)(2)(C) and (b)(2)(C), which provide that a sale, storage, use or other consumption of tangible personal property is exempt from the tax if the seller is obligated to furnish or the purchaser is obligated to purchase the property for a fixed price prior to the operative date of the ordinance imposing the tax (hereinafter, generally, “the ordinance”. (Regulations are Board rulings that have the force and effect of law).

In determining whether a contract is a “fixed-price” contract for the purpose of the district tax, we have consistently required that it satisfy the following criteria: (1) it be binding prior to the operative date of the ordinance; (2) neither party has an unconditional right to terminate the contract; and (3) the agreement must include a provision which fixes the tax obligation on a tax-included basis or sets forth either the amount or the rate of tax and does not provide for an increase in the amount of tax.

B. Tax Consequence

A contract is not binding until the seller accepts the buyer’s offer to purchase. A purchase order is not a contract but an offer to purchase goods. An offer to purchase may be accepted by any reasonable means, and the normal method of accepting a purchase-order offer is to ship the goods. (Cal. U. Comm. Code §2206(a).) Therefore, in such contracts, the agreement is not binding until the date of shipment. The buyer acquires title to the goods when delivery is completed. (Cal. U. Comm. Code §2401(2).)

If the order were merely a purchase order with payment on receipt of the goods, the proper sales tax rate would be that in effect on the date when the contract became binding – the shipment date. If however, the order required some specific mode of acceptance to form a binding contract, such as payment included or a written acceptance, then the contract would become binding on the date the seller negotiated the payment or issued the written acceptance. These latter dates may not be the same as the order dates but are presumably prior to the shipment date. If the contract became binding after April 1, 1991, it would be subject to the --- tax, and the total tax rate would be 6.5%. If, however, the contract became binding prior to that date, and it met the second and third criteria set forth above, it would be considered as being for a fixed price prior to the effective date of the tax. The total tax rate would then be 6%.

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For your information, I have enclosed copies of Board of Equalization Pamphlets No. 44, "District Taxes," which includes Regulation 1823, and 44-A, "Questions and Answers on District Taxes". I hope the above discussion has answered your question. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid
Tax Counsel

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Encs: Pamphlets 44 & 44-A