

# INITIAL DISCUSSION PAPER

## Application of Tax to Leases of Chemical Toilets

### Regulation 1660, “Leases of Tangible Personal Property – In General”

#### Issue

Should Regulation 1660, *Leases of Tangible Personal Property – In General*, be amended to clarify the application of tax with respect to charges related to leases of chemical toilets?

#### Background

The California Sales and Use Tax Law imposes a sales tax upon retailers for the privilege of selling tangible personal property at retail in the State of California. The use tax is complementary (and mutually exclusive) to the sales tax and is imposed upon the consumer for the storage, use, or other consumption of tangible personal property in the State of California. Either the sales tax or the use tax applies to all retail sales of tangible personal property to customers in California, unless specifically exempted by statute or type of transaction.

The granting of possession of tangible personal property by a lessor to a lessee is a continuing sale in this state, and the possession of such property by a lessee is a continuing purchase for use in this state. With respect to chemical toilets, the use tax is due on the gross receipts derived from the lease of chemical toilets irrespective of whether or not tax was paid on the purchase price.

Revenue and Taxation Code section 6006(g) defines the term “sale” to specifically include “any lease of tangible personal property in any manner or by any means whatsoever, for a consideration...” Additionally, section 6011(b)(1) includes “any services that are a part of the sale” within the definition of the “sales price,” the amount upon which the tax is computed.

Regulation 1546, *Installing, Repairing, Reconditioning In General*, provides the definition and application of tax regarding mandatory and optional maintenance contracts in subdivision (b)(3). A maintenance contract is considered to be mandatory, and thus included in the gross receipts which are subject to tax, when the buyer (lessee), as a condition of the sale, is required to purchase the maintenance contract from the seller. A maintenance contract is considered to be optional, and thus excluded from the measure of tax, when the buyer (lessee) is not required to purchase the maintenance contract from the seller, i.e., the buyer (lessee) is free to contract with anyone the buyer (lessee) so chooses.

#### Current Application of Tax

Regulation 1660, *Leases of Tangible Personal Property – In General*, (Exhibit 1) provides the following explanation of the application of tax with respect to leases of chemical toilets in subdivision (d)(1):

# INITIAL DISCUSSION PAPER

## Application of Tax to Leases of Chemical Toilets

### Regulation 1660, “Leases of Tangible Personal Property – In General”

“A lease of a chemical toilet unit is a sale or purchase and tax applies measured by the lease or rental price regardless of whether the unit is leased in substantially the same form as acquired and regardless of whether sales tax reimbursement or use tax has been paid.”

This application of tax was first expressed as an interpretation of statute (Stats. 1968, p. 1954) as an amendment to Sales and Use Tax Ruling 70, *Leases of Tangible Personal Property*, effective October 1, 1968. This ruling was subsequently incorporated into Regulation 1660 as adopted by the Board November 3, 1969 and has remained unchanged.

### Discussion

Within the chemical toilet industry, it is common practice to offer cleaning services in addition to the lease of the chemical toilets. Although such services may or may not be required as part of the terms of the lease, such services are almost always performed by the lessor. Persons engaged in the business of servicing chemical toilets need specialized equipment and are required to be specially licensed to dispose of hazardous waste. Most companies engaged in the business of leasing chemical toilets provide such services to their customers as a matter of convenience. In fact, it is rare for a company to lease chemical toilets without also providing maintenance services since charges for these services account for a substantial portion of their revenue.

There have been a number of recent audit cases involving the lease of chemical toilets and the application of tax with respect to maintenance charges. Many of these cases have substantially the same underlying fact pattern. The retailer is of the opinion that the maintenance charges related to the lease of the chemical toilet are clearly optional, and therefore not a part of gross receipts subject to tax. However, in many cases, documentary evidence to support the lessor's contentions that the maintenance charges are optional is lacking, and sometimes refuted by evidence to the contrary. In one particular case, it was noted that each chemical toilet was labeled with a sticker that stated that the lease of the unit includes all related maintenance services. In other cases, in various attempts to substantiate taxpayers' contentions that such charges were optional, customer surveys were performed with mixed results. The Board has held that the burden of proof that such charges are optional is upon the taxpayer.

Regulation 1660 provides clear guidance with respect to the application of tax to the lease of chemical toilets. However, this regulation does not include similar guidance regarding the application of tax to chemical toilet maintenance charges and other fees. While the Revenue and Taxation Code places the burden of proving the validity of an exemption upon the taxpayer, clear guidance regarding the required documentation to support an assertion of non-taxable services is not set forth in the current language of Regulation 1660. It has been suggested that uncertainty in this matter could be resolved by incorporating into Regulation 1660 a rebuttable presumption that, if maintenance services are provided by a lessor of chemical toilets, the maintenance service is mandatory, and thus included in gross receipts.

# **INITIAL DISCUSSION PAPER**

## **Application of Tax to Leases of Chemical Toilets**

### **Regulation 1660, “Leases of Tangible Personal Property – In General”**

#### **Summary**

Staff intends to amend Regulation 1660 to clarify the application of tax to services related to the lease of chemical toilets to ensure that the law is administered in an equitable manner. Staff welcomes any comments, suggestions, and input from interested parties regarding this issue.

Prepared by the Program Planning Division, Sales and Use Tax Department

Current as of 02/06/2001

Reg 1660 IDP.doc

Regulation 1660. Leases of Tangible Personal Property - In General

(a) Definitions.

(1) Lease. The term “lease” includes rental, hire, and license. It includes a contract under which a person secures for a consideration the temporary use of tangible personal property which, although not on his or her premises, is operated by, or under the direction and control of, the person or his or her employees. “Lease,” however, does not include a use of tangible personal property for a period of less than one day for a charge of less than twenty dollars (\$20) when the privilege to use the property is restricted to use thereof on the premises or at a business location of the grantor of the privilege (see (e) below).

(2) Sale Under a Security Agreement.

(A) Where a contract designated as a lease binds the “lessee” for a fixed term and the “lessee” is to obtain title at the end of the term upon completion of the required payments or has the option to purchase the property for a nominal amount, the contract will be regarded as a sale under a security agreement from its inception and not as a lease. The option price will be regarded as nominal if it does not exceed \$100 or 1 percent of the total contract price, whichever is the lesser amount.

(B) In the case of a contract designated as a lease with any state or local government, the governmental agency designated as a lessee shall be treated as bound for a fixed term notwithstanding any right it may have to terminate the contract to the extent that sufficient funds are not appropriated to pay amounts due under the contract. Such transactions are subject to tax as sales under a security agreement at their inception.

(3) Sale and Leaseback Transactions.

(A) General. Transactions structured as sales and leasebacks will be treated as financing transactions if (1) the “lease” transaction would be regarded as a sale at inception under paragraph (a)(2) of this regulation, (2) the purchaser/lessor does not claim any deduction, credit or exemption with respect to the property for federal or state income tax purposes, and (3) the amount which would be attributable to interest, had the transaction been structured originally as a financing agreement, is not usurious under California law. Transactions treated as financing transactions are not subject to sales or use tax.

(B) Special Application. Transactions structured as sales and leasebacks will also be treated as financing transactions if all of the following requirements are met:

1. The initial purchase price of the property has not been completely paid by the seller/lessee to the equipment vendor.

2. The seller/lessee assigns to the purchaser/lessor all of its right, title and interest in the purchase order and invoice with the equipment vendor.

Regulation 1660. Leases of Tangible Personal Property - In General

3. The purchaser/lessor pays the balance of the original purchase obligation to the equipment vendor on behalf of the seller/lessee.

4. The purchaser/lessor does not claim any deduction, credit or exemption with respect to the property for federal or state income tax purposes.

5. The amount which would be attributable to interest, had the transaction been structured originally as a financing agreement, is not usurious under California law.

6. The seller/lessee has an option to purchase the property at the end of the lease term, and the option price is fair market value or less.

(C) Tax Benefit Transactions. Tax does not apply to sale and leaseback transactions entered into in accordance with former Internal Revenue Code Section 168(f)(8), as enacted by the Economic Recovery Tax Act of 1981 (Public Law 97-34).

(D) Acquisition Sale and Leaseback Transactions. No sales or use tax applies to the transfer of title to, or the lease of, tangible personal property pursuant to an acquisition sale and leaseback, which is a transaction satisfying all of the following conditions:

1. The seller/lessee has paid California sales tax reimbursement or use tax with respect to that person's purchase of the property.

2. The acquisition sale and leaseback is consummated within 90 days of the seller/lessee's first functional use of the property. (This 90 day period does not begin to run until the first functional use of the property; a period of storage after purchase, but before the first functional use, is not used to calculate the 90 day period).

3. The acquisition sale and leaseback transaction is consummated on or after January 1, 1991.

The sale of the property at the end of the lease term is subject to sales or use tax. Any lease of the property by the purchaser/lessor to any person other than the seller/lessee would be subject to use tax measured by rentals payable. A lease to the seller/lessee at the end of the original lease term is subject to use tax measured by rentals payable unless such lease is pursuant to an election to exercise an option to extend the lease term, which option was contained in the original lease agreement.

(b) Leases as Sales or Purchases.

(1) In General. Any lease of tangible personal property in any manner whatsoever for a consideration is a "sale" as defined in section 6006 of the Revenue and Taxation Code, and a "purchase" as defined in section 6010 of the Revenue and Taxation Code, except a lease of:

Regulation 1660. Leases of Tangible Personal Property - In General

(A) Motion picture films and video tapes, including television films and video tapes, whether or not they are productions complete in themselves. See, however, subdivision (d)(2) below for application of tax for periods on and after September 1, 1983, to leases of video cassettes, videotapes, and videodiscs for private use under which the lessee or renter does not obtain or acquire the right to license, broadcast, exhibit, or reproduce the video cassette, videotape, or videodisc.

(B) Linen supplies and similar articles, including such items as towels, uniforms, coveralls, shop coats, dust cloths, caps and gowns, etc., when an essential part of the lease is the furnishing of the recurring service of laundering or cleaning of the articles leased.

(C) Household furnishings with a lease of the living quarters in which they are to be used. The lessor of the household furnishings must also be the lessor of the living quarters. The living quarters must be real property rather than tangible personal property.

(D) Mobile transportation equipment for use in transportation of persons or property (see Regulation 1661 (18 CCR 1661)).

(E) Tangible personal property leased in substantially the same form as acquired by the lessor or leased in substantially the same form as acquired by a transferor as to which the lessor or his or her transferor acquired the property in a transaction that was a retail sale with respect to which the lessor or the transferor has paid sales tax reimbursement or as to which the lessor or the transferor has timely paid use tax measured by the purchase price of the property.

As used herein, “transferor” means:

1. A person from whom the lessor acquired the property in a transaction described in section 6006.5(b) of the Revenue and Taxation Code, or
2. A decedent from whom the lessor acquired the property by will or by law of succession.

For purposes of 1. above, the transaction will qualify if the property is acquired in a transfer of all or substantially all of the tangible personal property held or used by the transferor in all of his or her activities requiring the holding of a seller’s permit or permits or in an activity or activities not requiring the holding of a seller’s permit or permits, and the ownership of the tangible personal property is substantially similar after the transfer.

(F) Tangible personal property occurring on or after January 1, 1997 described in sections 17053.49 or 23649 of the Revenue and Taxation Code by the manufacturer of that property when leased to a qualified person, as described in sections 17053.49 or 23649 of the Revenue and Taxation Code, in a form not substantially the same as acquired as to which the manufacturer made a timely election to report and pay tax measured by the cost price of that property as defined in section 6244.5 of the Revenue and Taxation Code and Regulation 1525.3.

Regulation 1660. Leases of Tangible Personal Property - In General

(G) A mobilehome, as defined in sections 18008(a) and 18211 of the Health and Safety Code, other than a mobilehome originally sold new prior to July 1, 1980 and not subject to local property taxation.

(2) Leases as Continuing Sales and Purchases. In the case of any lease that is a “sale” and “purchase” under subdivision (b)(1) above, the granting of possession by the lessor to the lessee, or to another person at the direction of the lessee, is a continuing sale in this state by the lessor, and the possession of the property by a lessee, or by another person at the direction of the lessee, is a continuing purchase for use in this state by the lessee, as respects any period of time the leased property is situated in this state, irrespective of the time or place of delivery of the property to the lessee or such other persons. The application of tax to such leases is set forth below.

(c) General Application of Tax.

(1) Nature of Tax. In the case of a lease that is a “sale” and “purchase” the tax is measured by the rentals payable. Generally, the applicable tax is a use tax upon the use in this state of the property by the lessee. The lessor must collect the tax from the lessee at the time rentals are paid by the lessee and give him or her a receipt of the kind called for in Regulation 1686 (18 CCR 1686). The lessee is not relieved from liability for the tax until he or she is given such a receipt or the tax is paid to the state.

When the lessee is not subject to use tax (for example, insurance companies), the sales tax applies. The sales tax is upon the lessor and is measured by the rentals payable.

Neither the sales tax nor the use tax applies to leases to the United States and its instrumentalities unless federal law permits taxing the instrumentality. For a more complete explanation regarding sales to the United States and its instrumentalities see Regulation 1614 (18 CCR 1614).

The “rentals” subject to the tax include any payments required by the lease, including amounts paid for personal property taxes on the leased property, whether assessed directly against the lessee or against the lessor, but does not include amounts paid to the lessor for:

(A) Collection costs, including attorney’s fees, court costs, repossession charges, and storage fees; but tax does apply to any delinquent rental payments, including those collected by court action;

(B) Insuring, repairing or refurbishing the leased property following a default;

(C) Cost incurred in defending a court action or paying a tort judgment arising out of the lessee’s operation of the leased property, or any premiums paid on insurance policies covering such court actions or tort judgments;

(D) Cost incurred in disposing of the leased property at expiration or earlier termination of the lease;

Regulation 1660. Leases of Tangible Personal Property - In General

(E) Late charges and interest thereon for failing to pay the rentals timely;

(F) Separately stated optional insurance charges, maintenance or warranty contracts.

(G) Personal property taxes assessed against personal property where a bank or financial corporation is the lessor.

(2) **Property Leased in Form Acquired.** No sales or use tax is due with respect to the rentals charged for tangible personal property leased in substantially the same form as acquired by the lessor, or by his or her transferor, as to which the lessor or transferor has paid sales tax reimbursement or has paid use tax measured by the purchase price. If such tax has not been so paid, and the lessor desires to pay tax measured by the purchase price, it must be reported and paid timely with the return of the lessor for the period during which the property is first placed in rental service. A timely return is a return filed within the time prescribed by sections 6452 or 6455 of the Revenue and Taxation Code, whichever is applicable.

(3) **Property Purchased Tax Paid.** In the case of property ultimately leased in substantially the same form as acquired, payment of tax or tax reimbursement measured by the purchase price at the time the property is acquired constituted an irrevocable election not to pay tax measured by rental receipts. The lessor may not change his or her election by reporting tax on rental receipts and claiming a tax-paid-purchase-resold deduction.

(4) **Property Acquired in Exempt Transactions.**

(A) A purchaser of tangible personal property acquired in a transaction defined as an occasional sale in section 6006.5(a) of the Revenue and Taxation Code and leased in substantially the same form as acquired by him or her, may elect to pay use tax measured by the purchase price of the property in lieu of tax measured by rental receipts.

(B) A purchaser of tangible personal property acquired in a transaction which qualifies under section 6006.5(b) of the Revenue and Taxation Code and leased in substantially the same form as acquired by his or her transferor may elect to pay use tax measured by his or her transferor's purchase price of the property in lieu of tax on rental receipts. This provision has application where the transferor did not pay tax or tax reimbursement when he or she acquired the property.

For purposes of this provision, the transaction will qualify if the property is acquired in a transfer of all or substantially all of the tangible personal property held or used by the transferor in all of his or her activities requiring the holding of a seller's permit or permits or in an activity or activities not requiring the holding of a seller's permit or permits and the ownership of the tangible personal property is substantially similar after the transfer (see also (b)(1)(E) above).

(C) The election provided for in subdivisions (c)(4)(A) and (c)(4)(B) above shall be exercised by the lessor in a timely return filed for the period in which the property is first leased by him or her.

Regulation 1660. Leases of Tangible Personal Property - In General

(5) Property Subleased. Tax does not apply to receipts from subleases of tangible personal property which is leased in substantially the same form as acquired by the prime lessor where the prime lessor has paid sales tax reimbursement or use tax measured by his or her purchase price. Also, tax does not apply to subleases of tangible personal property if the tax is paid on rental receipts derived under the prime lease, or any prior sublease.

(6) Use of Property by Lessor. If a lessor, after leasing property and collecting and paying use tax, or paying sales tax, measured by rental receipts, makes any use of the property in this state, other than incidental use, he or she is liable for use tax measured by the purchase price of the property. He or she may, however, apply as a credit against the tax so computed, the amount of tax previously paid to the Board with respect to rentals of the property. If the credit is less than the tax, he or she must pay the difference with his or her return, but may apply the amount of such payment against his or her liability for tax on subsequent rentals of the property. Effective January 1, 1973, through December 31, 1978, any amount collected as tax or tax reimbursement by the lessor from the lessee on such subsequent rentals will be regarded as excess tax reimbursement to the extent that the lessor is permitted by the foregoing provisions to apply the amount of his or her payment for use tax against his or her liability for tax on subsequent rentals of the property. An incidental use, e.g., a brief loan of property which otherwise is leased by the lessor pursuant to leases which are continuing sales, subjects the lessor to liability for use tax measured by the fair rental value of the property during the period of the incidental use. (See Regulation 1669.5(b)(7)(18 CCR 1669.5(b)(7)).)

(7) Options to Purchase. An agreement providing for the lease of tangible personal property and granting the lessee an option to purchase the property results in a sale when the option is exercised. The tax applies to the amount required to be paid by the purchaser upon the exercise of the option.

(8) Tax Paid to Another State. A lessor who leases property in substantially the same form as acquired and who has paid a retail sales or use tax, or reimbursement therefor, imposed with respect to that property by any other state, political subdivision thereof or the District of Columbia prior to leasing the property in this state may credit the payment against any use tax imposed on him or her by this state because of such lease. However, to be entitled to the credit the lessor must make a timely election to measure any tax liability for the property by its purchase price, unless the out-of-state tax equals or exceeds the tax imposed on him or her by this state. If the out-of-state tax equals or exceeds the tax imposed on him or her by this state, the lessor will be deemed to have made a timely election and the rental receipts will not be subject to tax provided the property is leased in substantially the same form as acquired. If a timely election is not made, no credit will be allowed because the tax due will be a use tax measured by rental receipts and imposed directly against the lessee, a person other than the one who paid the out-of-state tax or tax reimbursement. If the lessee is not subject to use tax and the lessor does not make a timely election to pay tax measured by his or her purchase price, he or she may not credit the amount of the out-of-state tax against the tax due on the rental receipts because the tax due is a sales tax rather than a use tax.

Regulation 1660. Leases of Tangible Personal Property - In General

A credit otherwise permitted by the foregoing provisions shall not be allowed against taxes which are measured by periodic payments made under a lease, to the extent that taxes imposed by any other state, political subdivision or the District of Columbia were also measured by periodic payments made under a lease prior to the lease of the property in this state.

(9) Assignment of Leases.

(A) In General-Status of Assigned Leases. The situations described in (B), (C), and (D) below involve existing leases which are “sales” and “purchases” subject to tax measured by rental payments. When such a lease is assigned, whether or not title to the leased property is transferred, the rental payments remain subject to tax, without any option to measure tax by the purchase price. An assignee/purchaser who uses the property after termination of the lease is subject to use tax measured by the purchase price as provided in subdivision (c)(6) above.

Generally, when an existing lease that is not a “sale” and “purchase” is assigned, whether or not title to the leased property is transferred, the rental payments are not subject to tax. If title is transferred, tax applies measured by the sales price.

For rules relating to the assignment of leases of mobile transportation equipment coming within the exclusions provided in sections 6006(g)(4) and 6010(e)(4) of the Revenue and Taxation Code, see Regulation 1661 (18 CCR 1661).

(B) Assignment of a Right and Creation of a Security Interest. This type of assignment is an assignment by the lessor of the right to receive the rental payments together with the creation of a security interest in the leased property which is designated as such. The assignee has recourse against the assignor.

The assignee in this situation does not have the rights of a lessor and is not obligated to collect or pay the tax measured by the rental payments. The lessor remains subject to the obligation of collecting and reporting the tax even if he or she does not receive the rental payments directly from the lessee. The assignee, however, is obligated to remit to the Board any amounts paid to him or her by the lessee as tax.

If the assignee enforces the security agreement and takes title to the property, the assignee as lessor becomes responsible for collecting and reporting the tax.

(C) Assignment of Contract with Transfer of Right, Title, and Interest for Security Purposes. This type of assignment is an assignment by the lessor of the lease contract together with the transfer of the right, title, and interest in the leased property for security purposes. After the termination of the lease, the property usually reverts to the original lessor. The assignment contract may specify that the transfer is for security purposes, or the circumstances may otherwise demonstrate it (e.g., a separate agreement that the property will be returned to the assignor at the termination of the lease). The assignee has recourse against the assignor.

Regulation 1660. Leases of Tangible Personal Property - In General

In this situation, the assignee has assumed the position of a lessor. He or she is required to hold a seller's permit and is obligated to collect, report and pay the tax to the Board. The assignor should obtain a resale certificate, covering the property in question, from the assignee.

(D) Assignment of Contract and All Right, Title, and Interest. This type of assignment is an assignment by the lessor of the lease contract together with the transfer of all right, title, and interest in the leased property. The assignment is not for security purposes, and the assignor does not retain any substantial ownership rights in the contract or the property. The assignee has no recourse against the assignor.

In this situation, the assignee has assumed the position of a lessor. He or she is required to hold a seller's permit and is obligated to collect, report and pay the tax to the Board. The assignor should obtain a resale certificate, covering the property in question, from the assignee.

(d) Particular Applications.

(1) Chemical Toilets. A lease of a chemical toilet unit is a sale or purchase and tax applies measured by the lease or rental price regardless of whether the unit is leased in substantially the same form as acquired and regardless of whether sales tax reimbursement or use tax has been paid.

(2) Video Cassettes, Videotapes, Videodiscs. On and after September 1, 1983, the rental or lease of a video cassette, videotape, or videodisc for private use under which the lessee or renter does not obtain or acquire the right to license, broadcast, exhibit, or reproduce the video cassette, videotape, or videodisc is a sale or purchase and tax applies measured by rental receipts. Tax applies measured by rental receipts regardless of whether the property is leased in substantially the same form as acquired and regardless of whether sales tax reimbursement or use tax has been paid by the lessor with respect to the purchase price of the video cassette, videotape, or videodisc. If the property was rented, leased or otherwise used prior to September 1, 1983, no refund, credit, or offset for any sales tax reimbursement or use tax paid on the purchase price will be allowed against the tax measured by the lease or rental price after September 1, 1983.

(3) Lease of an Animal. A lease of any form of animal life of a kind the products of which ordinarily constitute food for human consumption is not subject to tax.

(4) Composed Type, Reproduction Proofs, Impressed Mats. Tax does not apply to leases of composed type or reproduction proofs thereof by a typographer to another person for use in the preparation of printed matter or to leases of such reproduction proofs or impressed mats to a printer or publisher for use in printing, except when the reproduction proof is a component part of a "paste-up," "mechanical" or "assembly."

(5) Repair Parts. Sales tax does not apply to sales of repair parts to a lessor which are used by him or her in maintaining the leased equipment pursuant to a mandatory maintenance contract where the rental receipts are subject to tax. Such repair parts are regarded as being part of the

Regulation 1660. Leases of Tangible Personal Property - In General

sale of the leased item and may be purchased for resale. The amount paid by the lessee under the mandatory maintenance contract is regarded as part of the rental payments.

(6) Neon Signs. A lease of a neon sign that is personal property is subject to the provisions of the Sales and Use Tax Law as any other lease of personal property.

(7) Property Affixed to Realty. For the purpose of this regulation, “tangible personal property” includes any leased fixture affixed to realty if the lessor has the right to remove the fixture upon breach or termination of the lease agreement, unless the lessor of the fixture is also the lessor of the realty to which the fixture is affixed. The term fixture as used herein has the same meaning as the term “fixture” in Regulation 1521 (18 CCR 1521).

Leases of structures together with the component parts of such structures, e.g., plumbing fixtures, air conditioners, water heaters, etc., will be treated as leases of real property. Accordingly, tax applies to contracts to construct such structures and the attached components in accordance with Regulation 1521 (18 CCR 1521).

On and after September 26, 1989, leases of factory-built school buildings (relocatable classrooms) as defined in paragraph (c)(4)(B) of Regulation 1521 (18 CCR 1521), “Construction Contractors”, will be treated as leases of real property with the lessor to the school or school district as the consumer. If the lessor is the manufacturer, tax applies to the manufacturer’s costs of all tangible personal property used in constructing the factory-built school building. If the lessor is other than the manufacturer, tax applies to 40% of the sales price of the factory-built school buildings to such lessor.

For purposes of this section, “structure” does not include any prefabricated mobile homes or similar items which are registered with the Department of Motor Vehicles. It also does not include a portable building, such as a shed or kiosk, which is moveable as a unit from its site of installation, unless the building is physically attached to the realty, upon a concrete foundation or otherwise. Such a building resting in place by its own weight, whether upon the ground, a concrete slab, or sills or piers, is not a “structure.” A prefabricated or modular building similar in size to, but which is not, a factory-built school building (relocatable classroom) is a “structure” whether the building rests in place by its own weight or is physically attached to realty.

Those fixtures which are essential to the structure such as heating and air conditioning units, sinks, toilets, and faucets, which are leased by the lessor of the structure to which they are attached are considered part of the structure and therefore improvements to real property.

On the other hand, those fixtures which although being a component part of the structure are leased by other than the lessor of the structure, will be considered tangible personal property. Accordingly, the tax consequences with respect to such fixtures will be the same as with respect to any other lease of tangible personal property.

(8) Mobilehomes.

Regulation 1660. Leases of Tangible Personal Property - In General

(A) The leasing of any mobilehome purchased by a retailer without payment of sales tax reimbursement or use tax and first leased prior to July 1, 1980, is a continuing sale and tax is due measured by the periodic lease payments unless the mobilehome becomes subject to local property taxation, in which event the lease of the property is thereafter exempt from the sales and use tax.

(B) The lease of a new mobilehome purchased by a retailer without payment of sales tax reimbursement or use tax and first leased on or after July 1, 1980, is excluded from classification as a continuing sale and the lessor's use of such property by leasing is subject to the use tax.

If the use of the property is for occupancy as a residence then the tax is measured by an amount equivalent to 75 percent of the purchase price paid by the lessor's vendor. In the absence of satisfactory evidence of the vendor's purchase price it shall be presumed that the measure of use tax is an amount equivalent to 60 percent of the sales price of the mobilehome to the lessor unless the vendor is also the manufacturer. If such mobilehome is purchased by the lessor from the manufacturer, the measure of the use tax liability is 75 percent of the purchase price of the mobilehome to the lessor.

If the use of the property is not for occupancy as a residence, then the tax is measured by the full retail sales price to the lessor.

(C) The subsequent lease of a used mobilehome which was first sold new in this state after July 1, 1980, is exempt from the sales and use tax.

(e) Grant of Privilege to Use Which is Not a Lease.

(1) In General. Certain restricted grants of a privilege to use property are excluded from the term "lease." To fall within the exclusion, the use must be for a period of less than one continuous 24-hour period, the charge must be less than \$20, and the use of the property must be restricted to use on the premises or at a business location of the grantor of the privilege to use the property.

(2) Definitions.

(A) "Grantor of the privilege" means a person who allows another person to use the personal property.

(B) "Use" includes the possession of, or the exercise of any right or power over personal property by a grantee of a privilege to use the property.

(C) "Premises" or "business location" means a building or specific area owned or leased by a grantor or to which a grantor has an exclusive right of use or a space occupied by the personal property which a grantor allows other persons to use in place. For example:

Regulation 1660. Leases of Tangible Personal Property - In General

1. A place in a depot at which a grantor places a coin-operated amusement device pursuant to a contract with the management of the depot.
2. An area in an apartment house or motel where a grantor has a right to place coin-operated washing machines and dryers for use by occupants of the apartment house or motel.
3. A laundromat owned or leased by a person who places therein coin-operated washing machines and dryers for use by customers.
4. A riding stable at which horses are furnished to the public at an hourly rate with a restriction that the horses be ridden within a specific area owned or leased by a grantor of the privilege. The "specific area" might be an enclosed arena or other place the exterior boundaries of which are defined by walls, fences or otherwise in such a manner that the area readily can be recognized and distinguished from adjoining or surrounding property.
5. A golf course owned or leased by a golf club which owns or leases golf carts that it furnishes to persons for use in playing the course, or a golf course under the supervision and control of a golf professional who owns or leases golf carts that he or she furnishes to persons for use in playing the course.

(3) Examples of Situations Which Do Not Qualify for Exclusion from the Term "Lease".

(A) One of several rental firms permitted by a hospital to do so rents a portable television set and stand to a hospital patient for a charge of \$4.00 per day for a period of six days.

This situation does not qualify for the exclusion because the period of "use" is not for less than one day, the total rental is not less than \$20 and the place of use is not the "premises" or "business location" of the rental firm since it does not have "exclusive right of use" of the hospital as regards the placing of its rental units therein nor is the space regularly occupied by it for use in place.

(B) Rental of a canoe for a period of eight hours for a total charge of \$4 when the customer will use the canoe on the Russian River.

This situation does not qualify for the exclusion because the river is not the premises or business location of the grantor of the privilege.

(C) Rental of tools to be used on the premises of the owner of the tools for a period of eight hours invoiced as follows:

1 Portable lamp .....	\$4
1 Wheel pulley .....	4
1 Portable hoist .....	4
1 Sander .....	4
1 Spray gun .....	<u>5</u>

Regulation 1660. Leases of Tangible Personal Property - In General

Total rental ..... \$21

This situation does not qualify for the exclusion because the agreement for rental of the property is a single agreement involving rental charges of \$21 and does not meet the requirement that the charge be less than \$20.

(D) An equipment rental firm rents a cement mixer to a customer who takes the mixer to his or her home and uses it for less than one day. The rental charge is \$9. The mixer is of a type which must be firmly “in place” during the cement mixing operation.

This situation does not qualify for the exclusion because although the mixer is firmly “in place” during the mixing operation, it is not in a space regularly occupied by it for use in place by customers of the grantor.

(4) Application of Tax to Situations Qualifying for Exclusion from the Term “Lease”. The grantor of the privilege to use property under the conditions described in (e)(1) above is the consumer of the property. Accordingly, charges by him or her for the privilege to use the property are not subject to tax. Tax applies to the sale of the property to him or her by a retailer or to his or her use of the property, measured by his or her purchase price, when the property is purchased from a retailer in California under a resale certificate or from a retailer at an out-of-state location. If the property is acquired through an “occasional sale” as defined in section 6006.5 of the Revenue and Taxation Code, or other exempt transaction, no tax applies to the acquisition or use of the property by the grantor nor to his or her charges for the privilege to use the property.

*History:* Amended November 3, 1969, applicable on and after November 10, 1969.

Amended November 5, 1970, effective December 10, 1970.

Amended and renumbered November 3, 1971, effective December 3, 1971.

Amended December 15, 1971, applicable on and after December 15, 1971.

Amended February 16, 1972, effective March 25, 1972.

Amended November 15, 1972, effective December 21, 1972.

Amended June 24, 1976, effective July 30, 1976. In (c)(7) added and defined “incidental use.”

Amended August 17, 1976, effective September 19, 1976. Noted that sales tax on United States or its instrumentalities is legal only when permitted by federal law.

Amended August 17, 1976, effective October 23, 1976. Added part of (c)(1) previously deleted in error.

Amended December 7, 1978, effective January 28, 1979. Deletes language pertaining to excess tax reimbursement; amends subsection (b)(1)(E) which provides when leases of tangible personal property are not considered sales; and amends subsection (c)(1) to provide that after 1/1/79 leases of tangible personal property to the United States are subject to sales tax.

Amended March 7, 1979, effective May 16, 1979. Altered definition of “lease”, operative 1/1/79.

Amended February 6, 1980, effective March 29, 1980. Added Sections 6092.1, 6243.1 and 6381.5 to references. In (c)(1) deleted “state and national banks,” and substituted “a federally-

## Regulation 1660. Leases of Tangible Personal Property - In General

chartered bank exempt from direct state taxation under federal law,” and added four conditions for exemption from sales tax; in (c)(8) deleted “bank” and substituted “federally-chartered bank exempt from direct state taxation under federal law.”; in (c)(9)(A) deleted sentences referring to Section 6094(d) and 6244(d); added final paragraph.

Amended August 1, 1980, effective August 22, 1980, operative July 1, 1980. In (b), added (1)(F); in (d), added (8).

Amended November 19, 1980, effective January 16, 1981. In (d)(8)(B) added provisions regarding manufacturer; added paragraph re measure when property not used as residence.

Amended April 1, 1981, effective August 19, 1981. In (b)(1)(E) deleted requirement that lessors prove that retailer paid tax to the Board; substituted “lessor or the transferor has paid sales tax reimbursement.” In (c)(2) added “has paid sales tax reimbursement”; deleted “or their vendor has paid sales tax measured by gross receipts.”

Amended October 26, 1983, effective November 17, 1983. Added last sentence to subparagraph (b)(1)(A) and new subparagraph (2) to subdivision (d), and renumbered former subparagraphs (2) through (8) to (3) through (9).

Amended May 9, 1985, effective September 22, 1985. In Subdivision (c)(1), deleted references indicating that sales tax applies to leases to the United States and its tax-exempt instrumentalities. In subdivision (c)(1), added definitions of “rentals subject to tax” and provided for the exclusion of certain other charges by the lessor which are not part of rentals. In subdivision (c)(8), deleted references to the United States and its tax-exempt instrumentalities and added reference to the lessee who is “not subject to use tax”.

Amended May 10, 1989, effective July 26, 1989. Amended to include changes necessitated by AB 4417, Chapter 825, Statutes of 1986, and by the holding in *Cedars-Sinai Medical Center v. State Board of Equalization*, 162 Cal.App.3d 1182 (1984). See subdivisions (a)(2)(B) and (a)(3)(A), (B) and (C). Also amended subdivisions (d)(1), (d)(3) and (e) to delete unnecessary language and subdivision (d)(8) to correct a typographical error.

Amended June 5, 1991, effective August 22, 1991. Deleted explanation of the application of tax to leases of certain structures which were entered into prior to 1971. Amended paragraph (b)(1)(F) to limit definition of “mobilehome” for purposes of this regulation to paragraph (a) of Section 18008 and to paragraph 18211, Health and Safety Code. Amended paragraph (d)(8) to delete outdated information and to clarify treatment of leases of factory-built school buildings.

Amended August 1, 1991, effective August 27, 1991.

Amended pursuant to Chapter 85, Statutes of 1991, and Chapter 88, Statutes of 1991, to repeal an exemption from sales and use tax for tax on the sale or use of a photograph when possession but not title of the photograph is transferred for the purpose of being reproduced one time only in a newspaper regularly issued at average intervals not exceeding three months. Subparagraphs of paragraph (b) were renumbered.

Amended May 3, 1994, effective July 30, 1994. Added subdivision (a)(3)(D) to define acquisition sale and leaseback, the period of time the provision will be used, and interprets its application to various post-lease transactions.

Amended June 22, 1995, effective July 22, 1995. Deleted subparagraph (a)(3)(D)4. as provided in Statutes of 1994, Chapter 286.

Amended November 5, 1997, effective December 5, 1997. Added new subdivision (b)(1)(F) to incorporate provisions of Chapter 954, Statutes of 1996, and renumbered the following subdivision.

Regulation 1660. Leases of Tangible Personal Property - In General

Amended February 23, 2000, effective May 25, 2000. Added subdivision (c)(1)(G).