



STATE BOARD OF EQUALIZATION

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March 10, 2006

Mr. Dennis Brown, Vice President
State Government Relations
Equipment Leasing Association
4301 N. Fairfax Drive, Suite 550
Arlington, VA 22203-1627

Dear Mr. Brown:

Your September 29, 2005 letter, which was addressed to Ms. Lynn Bartolo, Principal Compliance Supervisor, Electronic Waste Recycling Fee Section, was referred to me for reply. Thank you for your patience in allowing us to research your questions and consult with our legal staff.

In your letter, you explain that subdivision (a) of Public Resources Code (PRC) section 42464 imposes the California Electronic Waste Recycling Fee (CEWR Fee) on consumers of certain electronic devices and requires retailers to collect and remit the fee to the State. As a result of the passage of Assembly Bill (AB) 575 (Stats. 2005, Ch. 59), a retailer may elect to pay the fee to the retailer's vendor, on behalf of the consumer, under certain circumstances, which include the requirement that the retailer expressly state, on the invoice or other document provided to the consumer, that the fee has been paid on his or her behalf. If the retailer makes this election, the fee becomes a debt owed to the State by the vendor, and neither the consumer nor the retailer is liable for the fee. You note that, prior to the enactment of AB 575, the Board advised on its web site that sales tax did not then apply to the fee. In view of the passage of AB 575, you have requested clarification regarding the application of sales tax to different scenarios.

As a preliminary matter, please note that only the Members of the Board of Equalization (Board) can issue rulings. However, I can provide you with a staff opinion regarding your questions. Additionally, California's Revenue and Taxation Code (RTC) section 6596 (copy enclosed), affords identified taxpayers with relief from future liabilities if the under reported tax is based on incorrect written advice provided to you by the Board. Because you have not identified specific members or fee payers in your letter, my response provides only general information, which does not qualify for relief under section 6596. Should any of your members want a written opinion on which they may rely pursuant to section 6596, they may write to us, identifying themselves by name and California seller's permit, if applicable, and request a written opinion.

As you know, the California RTC imposes a sales tax upon retailers for the privilege of selling tangible personal property at retail in the State of California. The sales tax applies to the retailer's gross receipts from all retail sales of tangible personal property made in California, unless otherwise exempted. Subdivision (a)(2) of RTC section 6012 provides that gross receipts

include all amounts received with respect to the sale, with no deduction for any expense of the retailer that is passed on to the consumer.

As you noted under PRC section 42464, subdivision (a), the CEWR Fee is imposed on the consumer, not the retailer. Therefore, the fee is not an “expense of the retailer” that is “passed on” to the consumer, but is an expense of the consumer. Further, under PRC section 42464, subdivisions (d)(1) and (d)(2)-(3), only liability for the “debt” owed to the State is transferred, in the first instance, to the retailer and, in the second instance, to the vendor. In addition, under both provisions, the retailer retains the obligation to provide an express statement to the consumer, on the invoice or other document, that the retailer has paid the fee on behalf of the consumer. Based on these provisions, the imposition of the fee remains on the consumer, and subdivision (d), both as it was originally enacted and as it was amended by AB 575, does not alter that provision. Therefore, the fee is not an expense of the retailer. Thus, the fee is not included in the retailer’s gross receipts from the sale and is not subject to sales tax.

Specifically, with regard to each of your inquiries:

Scenario (1)

The Lessor does not elect to pay the CEWR Fee on behalf of the Lessee. The Lessor reports the fee on its CEWR Fee return and collects the CEWR Fee from the Lessee by including it as a separately stated item on its invoice. Is the CEWR Fee subject to sales tax in this situation?

Response

Tax does not apply to the CEWR Fee. This scenario is the original scenario contemplated by subdivisions (a), (b), (c)(1), and (e) of PRC section 42464, which were not affected by AB 575. Thus, tax does not apply to the CEWR Fee, as long as the Lessor separately states the fee on its invoice to the Lessee.

Scenario (2)

The Lessor elects to pay the CEWR Fee on behalf of the Lessee and reports the fee on its CEWR Fee return. The Lessor includes in its contract or on its invoice to the Lessee an express statement to the Lessee that it has paid the CEWR Fee. However, rather than billing the fee directly on its invoice, the Lessor finances the CEWR Fee for its lease. Is the CEWR Fee subject to sales tax in this situation?

Response

Tax does not apply to the CEWR Fee. Again, this scenario is contemplated by the original subdivision (d) provision of PRC section 42464 (which became (d)(1) under AB 575). Although liability for the debt owed to the State is placed on the retailer under this provision, the retailer is still required to expressly state on the receipt given to the consumer that the fee has been paid on the consumer’s behalf. The fee is, therefore, not an expense of the retailer that has been passed on to the consumer and is not a part of the retailer’s gross receipts that are subject to sales tax.

Scenario (3)

The Lessor elects to pay the CEWR Fee on behalf of the Lessee and pays the fee to the Vendor who supplied the equipment. The Lessor bills the Lessee for the CEWR Fee as a separately

stated item on its invoice, clearly indicating that it is a reimbursement for the CEWR Fee in its contract or other supporting documents. Is the CEWR Fee subject to sales tax in this situation?

Response

Tax does not apply to the CEWR Fee. Even though, pursuant to subdivision (d)(3), the liability for the debt owing to the state is imposed on the Vendor, if the Lessor elects to pay the fee to the Vendor on behalf of the Lessee pursuant to subdivision (d)(2), no tax applies, provided that a statement that the fee has been paid on behalf of the consumer is included on the invoice given by the Lessor to the Lessee, the fee is separately stated on the invoice given by the Vendor to the Lessor, and the rest of the requirements under subdivision (d)(2) are met. As noted above, under these circumstances the imposition of the fee remains on the consumer and does not become an expense of the retailer passed on to the consumer. Thus, the fee is not a part of the retailer's gross receipts that are subject to sales tax.

Scenario (4)

The Lessor elects to pay the CEWR Fee on behalf of the Lessee and pays the fee to the Vendor who supplied the equipment. The Lessor finances the CEWR Fee for its Lessee. Is the financed CEWR Fee subject to sales tax?

Response

Tax does not apply to the CEWR Fee. As stated in the response to Scenario (3) above, if the Lessor elects to pay the CEWR Fee on behalf of the Lessee and pays the fee to the Vendor, no sales tax applies to the CEWR Fee as long as all of the requirements listed in subsection (d)(2) are met. As explained above, the fee must be separately stated on the invoice provided by the Vendor to the Lessor and the invoice provided by the Lessor to the Lessee must expressly state that the Lessor has paid the fee on behalf of the Lessee.

I hope this information is helpful. If you have any further questions, please do not hesitate to write to us again.

Sincerely,

Vic Anderson, Supervisor
Audit & Information Section

VCA:dmt:jc

Enclosures: Section 6596