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December 10, 2015

Mr. Thomas L. Sheehy
Senior Director
Greenberg Traurig, LLP
1201 K Street, Suite 1100
Sacramento, CA 95814

Re: Tax Opinion Request 15-647
Mattress Recycling Council

Dear Mr. Sheehy:

I am writing in response to your letter to Vice Chairman George Runner dated November 6, 2015, in which you request information as to the proper application of California's Sales and Use Tax Law with regard to the mattress recycling charge collected under the Mattress Recovery and Recycling Act.

In relevant part, you state:

Are retailers who charge and collect a mattress recycling fee authorized under Chapter 388, Statutes of 2013 (SB 254 Hancock/Correa), required to charge, collect and remit sales tax, on the recycling fee, to the Board of Equalization? In other words, for purposes of calculating sales tax due the state of California on any mattress related retail sale, is the recycling fee deemed to be included in the overall price of the mattress for purposes of sales tax liability calculation?

Revenue and Taxation Code section (section) 6596 sets forth the circumstances under which a taxpayer may be relieved of liability for taxes when relying on a written response to a written request for advice from the Board. In order to come within the provisions of section 6596, all relevant facts, including the identity of the specific person for whom the advice is requested, must be disclosed in the initial request for written advice. As I understand it, the Mattress Recycling Council is not, itself, a retailer of mattresses. Accordingly, this opinion does not come within the provisions of section 6596 because it does not relate to an activity or transaction by a particular taxpayer. (See Cal. Code Regs., tit. 18, § (Regulation or Reg.) 1705, subd. (b)(1).)

Discussion

The Mattress Recovery and Recycling Act (the Act) was enacted, effective January 1, 2014, for the purpose of developing a program to recover and recycle used mattresses generated in the state. (Pub. Resources Code, § 42985 et seq.; Sen. Bill No. 254 (2013-2014 Reg. Sess.) § 1; Sen. Bill No. 1274 (2013-2014 Reg. Sess.) §§ 1-10.) The Act authorizes the establishment of a qualified industry organization (the organization) to develop, implement and administer a mattress recycling plan. (Pub. Resources Code, § 42987, 42987.1.) The Act requires the organization to establish a mattress recycling charge (the charge) sufficient to fund the

organization's requirements under the plan. (Pub. Resources Code, § 42988.) The Act further states that the organization "shall set the amount of the mattress recycling charge that shall be added to the purchase price of a mattress at the point of sale and include the charge amount in the annual budget." (Pub. Resources Code, § 42989.)

Public Resources Code section 42989.1 states:

- (a) Commencing 90 days after the date the department approves the budget pursuant to Section 42988.1, each manufacturer, renovator, retailer, or distributor that sells a mattress to a consumer or to the ultimate end user of the mattress in the state shall add the charge to the purchase price of the mattress and shall remit the charge collected to the mattress recycling organization.
- (b) In each transaction described in subdivision (a), the charge shall be clearly visible on the invoice, receipt, or functionally equivalent billing document provided by the seller to the consumer as a separate line item.
- (c) The mattress recycling organization shall develop reimbursement criteria to enable retailers to recover administrative costs associated with collecting the charge.
- (d) The mattress recycling organization shall determine the rules and procedures that are necessary and proper to implement the collection of the charge in a fair, efficient, and lawful manner.

Turning to the California Sales and Use Tax Law, as a starting point, California imposes sales tax on a retailer's gross receipts from the retail sale of tangible personal property in California unless the sale is specifically exempt from taxation by statute. (Rev. & Tax. Code, §§ 6051, 6091.) A sale means and includes any transfer of title or possession, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. (Rev. & Tax. Code, § 6006, subd. (a).) The retailer is directly liable for the sales tax but may collect sales tax reimbursement from the customer if the contract of sale so provides. (Civ. Code, § 1656.1; Reg. 1700, subd. (a)(1).) When sales tax does not apply, such as when the sale occurs outside California, use tax is imposed, measured by the sales price of tangible personal property purchased from a retailer for storage, use, or other consumption in California, unless specifically exempted or excluded from taxation by statute. (Rev. & Tax. Code, §§ 6201, 6401.) The consumer is directly liable for the use tax. (Rev. & Tax. Code, § 6202.)

"Gross receipts," for the purposes of the sales tax, and "sales price," for the purposes of the use tax, include all amounts received with respect to the sale, with no deduction for the cost of the materials used, labor or service cost, or any other expense of the retailer passed on to the purchaser. (Rev. & Tax. Code, §§ 6011, 6012.) Unlike an expense of the retailer passed on to the purchaser, a charge imposed by a government entity on the purchaser and collected by the retailer is not included in taxable gross receipts or sales price. (See, e.g., Sales and Use Tax Annotation¹

¹ Annotations are summaries of the conclusions reached in selected opinions of attorneys of the Board's Legal Department and are intended to provide guidance regarding the interpretation of Board statutes and regulations as applied by staff to specific factual situations. (See Reg. 5700.)

(Annotation or Annot.) 295.1237 (2/24/05, 2006-1).) Even if a portion of the charge may be retained by the retailer, it does not change the analysis that such a charge imposed on a purchaser is not included in taxable gross receipts. (See, e.g., Annot. 295.1302.500 (3/21/2000, Am. 2000-3).)

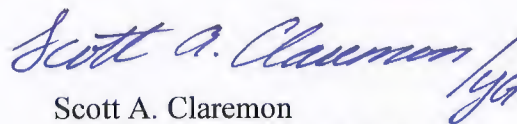
The Act states that each manufacturer, renovator, retailer, or distributor that sells a mattress of a mattress to a consumer or to the ultimate end user (seller) “shall add the charge to the purchase price” but does not expressly identify the party, seller or purchaser, upon which the charge is imposed. A close reading of the statutory language, however, would tend to indicate that the charge is imposed on the purchaser. It states that the seller shall add the charge to the “purchase price” as opposed to the sales price, and that it “shall remit the charge collected,” which indicates that the purchaser, rather than the seller, owes the charge. (Pub. Resources Code, § 42989.1, subd. (a).)

In addition, in reviewing the legislative history of the Act we note that according to the Assembly Floor Analysis of the implementing legislation, “the bill includes an advance recovery fee (ARF) to be paid by the consumer of a new mattress at the point of sale.”² (Assem. Com. on Natural Resources, Rep. on Sen. Bill No. 254 (2013-2014 Reg. Sess.) as amended September 6, 2013, p. 5.) It later states that the bill “combines a core concept of EPR [extended producer responsibility], by holding producers responsible for the management of the system, with an ARF on consumers at the point-of-sale.” (*Ibid.*) This also indicates that the charge is on the consumer, not the seller.

Finally, we note that if any seller responsible for remitting the charge violates the Act, there is no provision in the Act that would hold them liable for any uncollected charges. (Pub. Resources Code, §42993.1, subd. (a).) Rather, the entity would be subject to civil penalties. (*Ibid.*) This fact also demonstrates that the Act imposes a collection obligation on the seller, but the charge itself is imposed on the consumer.

Accordingly, we conclude that the mattress recycling charge imposed by the Act is being imposed on the consumer. Therefore, it is our conclusion, consistent with the annotations cited above, that the amount of the charge added to the purchase price of mattresses pursuant to the Act is not included in a retailer’s taxable gross receipts.

Sincerely,



Scott A. Claremon
Tax Counsel III (Specialist)

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cc: Mr. Cary Huxsoll (MIC:78)
Out-of-State District Administrator (OH)

² The most notable example of an advance recovery fee imposed in California is the covered electronic waste recycling fee, which is also imposed on purchasers and not subject to sales and use tax. (Pub. Resources Code, § 42464; see, e.g., Annot. 295.1237 (2/24/05, 2006-1).)