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February 13, 2013

Ms. Marjaneh Zarreparvar
Executive Director
PaintCare, Inc.
1500 Rhode Island Avenue, Northwest
Washington, DC 20005

Re: Tax Opinion Request 13-070
California PaintCare Recovery Fee
Unidentified Taxpayer

Dear Ms. Zarreparvar:

This letter is in response to your email request of November 19, 2012 (which was forwarded to me on December 2, 2012), and your follow-up request of February 12, 2013, for a written opinion from the California Board of Equalization (BOE) regarding the application of the Sales and Use Tax Law to California's recently enacted "architectural paint stewardship assessment," also known as the "PaintCare Recovery Fee." (Pub. Resources Code (PRC), § 48703, subd. (b); www.paintcare.org/california/index.php, 12/18/2012, § 1.) As we have previously stated informally, it is our opinion that the PaintCare Recovery Fee is included in the measure of sales and use tax.

Initially, I note that, since your request for a written opinion is on behalf of PaintCare, Inc., a stewardship organization associated with the architectural paint industry, and not on behalf of a specified taxpayer, this opinion provides only general information, and no individual taxpayer may rely on it as a basis for relief from sales or use tax with respect to this fee under Revenue and Taxation Code (R&TC) section 6596.¹ This opinion does, however, represent the position of the BOE's Legal Department with respect to the application of sales and use tax to the fee and may be shared with others who are interested in our position.²

¹ See Cal. Code Regs., tit. 18, § 1705, subd. (b)(1).

² It should be noted that the BOE has not been granted any authority or responsibilities with respect to the administration of the Architectural Paint Recovery Program or collection of the architectural paint stewardship assessment. This opinion addresses only the application of sales and use tax to the assessment.

BACKGROUND

In 2010, the California Legislature enacted Assembly Bill No. (AB) 1343 (ch. 420) to establish the Architectural Paint Recovery Program (Program).³ The purpose of this legislation was to “require paint manufacturers to develop and implement a program to collect, transport, and process postconsumer paint to reduce the costs and environmental impacts of the disposal of postconsumer paint in [California].” (PRC, § 48700.) An architectural paint manufacturer or designated stewardship organization was directed to submit an architectural paint stewardship plan to the California Department of Resources Recycling and Recovery (CalRecycle) by April 1, 2012. (PRC, § 48703, subd. (a).)

The plan was to include sufficient funding for the Program by means of a funding mechanism that was to provide for an architectural paint stewardship assessment (Assessment) for each container of architectural paint sold by paint manufacturers in this state. (PRC, § 48703, subd. (b)(1) & (2).) The Assessment is to be remitted by the manufacturers to the stewardship organization, if one is so designated by the manufacturers. (PRC, § 48703, subd. (b)(2).) The Assessment had to be approved by CalRecycle and was required to “be sufficient to recover, but not exceed, the cost of the [Program].” (PRC, § 48703, subd. (b)(4).) Further, and most relevant here, the Assessment is to “be added to the cost of all architectural paint sold to California retailers and distributors, and each California retailer or distributor shall add the assessment to the purchase price of all architectural paint sold in this state.” (PRC, § 48703, subd. (b)(3) [emphasis added].) The stewardship organization is required to pay an annual fee to CalRecycle that is sufficient to cover, and may only be used to cover, CalRecycle’s full costs of administering and enforcing the Program. (PRC, § 48703, subd. (e).) “On or before July 1, 2012, or three months after a plan is approved . . . , whichever date is later, the manufacturer or stewardship organization shall implement the [Program] described in the approved plan.” (PRC, § 48703, subd. (c).)

According to its Web site, PaintCare, Inc. (PaintCare), a non-profit organization, has been created by the American Coatings Association to implement California’s paint stewardship program for the architectural paint industry. (www.paintcare.org/about.php, 12/18/2012.) Presumably PaintCare’s plan was approved by CalRecycle on or about July 19, 2012, because the Program was implemented beginning October 19, 2012. (www.paintcare.org/california/index.php, § 1, 12/18/2012.) The products included in the Program “include interior and exterior architectural coatings sold in containers of 5 gallons or less.” (*Ibid.*) PaintCare states:

To fund this program, PaintCare Recovery Fees are added to the purchase price of architectural paints and coatings sold in California. The fees are paid to PaintCare by paint manufacturers, then passed down to retailers and eventually consumers. When you buy paint in California, you will probably see a line item called “PaintCare Recovery Fee” on your receipt or invoice for each container. (*Ibid.*)

The question that has arisen is whether the separately-stated “PaintCare Recovery Fee” is to be included in the calculation of the sales or use tax applicable to the retail transaction.

³ Chapter 5 (commencing with section 48700) of part 7 of division 30 of the Public Resources Code.

DISCUSSION

Applicable Law

To begin, pursuant to the Sales and Use Tax Law,⁴ California imposes a sales tax measured by a retailer's gross receipts from the retail sale of tangible personal property (TPP) in this state, unless the sale is specifically exempted from taxation by statute. (R&TC, § 6051.) The sales tax is imposed on the retailer who may collect reimbursement from its customer if the contract of sale so provides. (Civ. Code, § 1656.1; Cal. Code Regs., tit. 18, § 1700.) When sales tax does not apply, use tax is imposed, measured by the sales price of TPP purchased from a retailer for the storage, use, or other consumption of TPP in California, unless specifically exempted or excluded from taxation by statute. (R&TC, §§ 6201, 6401.)

With respect to the question here, "gross receipts" include, as relevant here, "the total amount of the sale . . . without any deduction on account of . . . : (1) The cost of the property sold." (R&TC, § 6012, subd. (a) [emphasis added].)⁵ None of the exclusions from the definition apply to the situation at issue here. (See R&TC, § 6012, subd. (c) [listing the exclusions from the definition of "gross receipts"].)

Here, the Assessment is paid by the paint manufacturer to PaintCare, and the manufacturer includes the amount of the Assessment⁶ in the wholesale cost of each container of paint sold to California retailers and distributors. (www.paintcare.org/california/index.php, § 2, 12/18/2012 ["[m]anufacturers must add the PaintCare Recovery Fees . . . to their wholesale price of each container of paint"].) In other words, the Assessment is included in the "cost [to the retailer] of the property sold" and is, consequently, included in the retailer's gross receipts from the retail sale of the paint, or in the sales price of the paint if use tax applies. Since the Assessment is included in the gross receipts from the retail sale, it is presumed to be taxable, unless proven otherwise.

There are several situations where a tax or fee is excluded from the definition of "gross receipts" or "sales price," such as certain taxes imposed by the United States and by a city, county, city and county, or rapid transit district in the state and, more specifically, the diesel fuel tax imposed under the Diesel Fuel Tax Law.⁷ (R&TC, §§ 6011, subd. (c)(4)-(6), (11) & 6012, subd. (c)(4)-(6), (11).) As previously stated, these exclusions do not apply to the Assessment in question. Accordingly, it is apparent that the Legislature knows how to exclude a tax or fee from sales and use tax when it chooses to, but it chose not to do so with respect to the paint stewardship assessment.

⁴ Part 1 (commencing with section 6001) of division 2 of the Revenue and Taxation Code.

⁵ The definition of "sales price," for purposes of the use tax, is similar: "the total amount for which [TPP] is sold . . . without any deduction on account of . . . : (1) The cost of the property sold." (R&TC, § 6011.) None of the exclusions from the definition of "sales price" apply here. (See R&TC, § 6011, subd. (c).)

⁶ Currently, the assessment is: zero for containers of one-half pint or less; \$0.35 for containers of more than a half pint to less than 1 gallon; \$0.75 for 1-gallon containers; and \$1.60 for containers of more than 1 gallon to 5 gallons.

⁷ Part 31 (commencing with section 60001) of division 2 of the Revenue and Taxation Code.

For the foregoing reasons, it is our opinion that the Assessment (aka PaintCare Recovery Fee) established under the Architectural Paint Recovery Program is included in the retailer's gross receipts from the retail sale of the paint and in the sales price of the paint purchased for use in this state. Accordingly, sales or use tax, as appropriate, applies.

Please let me know if you have any questions regarding this opinion.

Sincerely,



Carolee D. Johnstone
Tax Counsel III (Specialist)

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cc: Cynthia Dunn, Department of Resources Recovery and Recycling (via email)
Emily Wang, Department of Resources Recovery and Recycling (via email)
Susanne Buehler (MIC:92)