

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

*In the Matter of the Claim of PRATT NORTH PLAZA ASSOCIATES AND NORTH
PLAZA ASSOCIATES dba MAXIM'S DE PARIS for Refund under the Sales and Use
Tax Law*

Appearances:

For Claimant: Mr. Paul Frederic Marx
Attorney at Law

For Business Taxes

Appeals Review

Section: Mr. Donald J. Hennessy
Assistant Chief Counsel

For Sales and Use

Tax Department: Mr. David Levine
Senior Staff Counsel

MEMORANDUM OPINION

This opinion considers the merits of a claim for refund in the amount of \$57,018.58 in tax for the period October 1, 1989 to November 13, 1989. The Board heard and denied this claim on January 27, 1993.

Claimant's business consisted of a resort hotel, restaurant, and bar. Claimant sold the entire property for \$25,950,000 on November 13, 1989. Claimant reported the gross receipts attributable to the sale of furniture and equipment in the restaurant and bar, but not the hotel.

During the twelve month period preceding the final sale, claimant made at least nineteen separate sales of hotel furniture and equipment to employees and others. Claimant refunded a total of \$1,355 to nine employees on November 10, 1989, in an attempt to rescind nine sales to employees of mattresses and box springs made on November 15, 1988. The Appeals attorney ruled that these nine sales were not rescinded, noting that claimant unilaterally refunded the proceeds of sale, but the purchasers did not return the property sold.

The Department relying on *Hotel Del Coronado v. State Board of Equalization* (1971) 15 Cal.App.3d 612 and Sales and Use Tax Regulation 1595(a)(4)¹, concluded that the sales made were sufficient in number, scope, and character to require claimant to hold a seller's permit for the purposes of selling its hotel fixtures and equipment. Tax was determined on the final sale of the hotel's furniture and equipment. Claimant paid the tax under protest and filed a claim for refund.

¹All further references to Regulations are to Sales and Use Tax Regulations.

Claimant asserts that the sales made were incidental to the hotel service business and argues that, although these sales satisfy the three sale rule set forth in Regulation 1595(a)(4)(A), they were not “substantial” in amount as required by Regulation 1595(a)(5)(A)(2). Claimant argues that the \$2,897 received for the nineteen sales is not “substantial” when compared to the \$820,815 attributable to the final sale of the hotel’s furniture and equipment (plus an additional \$56,394 for the hotel’s linen). Relying on *Ontario Community Foundation Inc. v. State Board of Equalization* (1984) 35 Cal.3d 811, claimant contends that the Court struck down former Regulation 1595(a)(3) upon which the *Hotel Del Coronado* decision was based.

There is no dispute that claimant made three or more sales within the twelve month period immediately preceding the sale of the business. Nor is there any dispute that the property sold is of a type regularly used in hotel operations. Claimant states that, since the dollar amount of proceeds from sales of used linens, towels, bedding, and furniture during the twelve month period preceding the sale of the hotel business was not “substantial”, the Department erred in denying claimant the benefit of the “occasional sale” exemption. Claimant construes Regulation 1595(a)(5)(A)(2) as focusing exclusively on the dollar amounts of sales, with no concern for the number or frequency of sales once three sales for a substantial amount have been made.

OPINION

The Board concludes that the second paragraph of Regulation 1595(a)(1) applies to the service enterprises discussed in Regulation 1595(a)(5)(A)(2), and that, therefore, an operator of a service enterprise is required to hold a seller’s permit when, in any twelve month period, more than two sales for substantial amounts are made of tangible personal property used in the service enterprise, or a substantial number of sales for relatively small amounts are made of tangible personal property used in the service enterprise. The Board further concludes that \$400 is a “substantial” amount for purposes of Regulation 1595, but leaves for another day the question of whether amounts less than \$400 are “substantial”.

The Board also finds that the similar “character” of the sales made before the sale of the business, as discussed in Regulation 1595(a)(4)(C) and in *Northwestern Pacific Railroad Company v. State Board of Equalization* (1943) 21 Cal.2d 524, is satisfied as all the sales were sales of beds, mattresses, box springs, linens, and other hotel furnishings.

Claimant’s reliance on *Ontario Community Foundation* is misplaced because therein the court held that there had only been a single sale of the hospital equipment and furnishings, not a series of such sales. The court went on to explain that the taxable result in *Hotel Del Coronado* was based on there being a series of twelve sales prior to the final liquidation sale.

Under the above facts, the claimant, in liquidating the hotel fixtures and equipment, made three sales in substantial amounts during the relevant twelve month

period, i.e., there were two sales in excess of \$400 plus the final sale of the business. Therefore, claimant was required to hold the seller's permit for its activities in selling the hotel fixtures and equipment, and the claim for refund is denied.

Done at Sacramento, California, this 28th day of October, 1993.

Brad Sharman, Chairman

Ernest J. Dronenburg, Jr., Member

Winnie Scott, Member

Attested by: Burton W. Oliver, Executive Director