

BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

In the Matters of the Claims for Refund  
Under the Sales and Use Tax Law of:

Hewlett Packard Company  
SY GH 98-039144-003; -004  
89002094240; 89002094250

Appearances:

For Claimant: Mr. Joseph A. Vinatieri  
Attorney At Law

Mr. Jason C. DeMille  
Attorney at Law

For Appeals Section: Mr. John Abbott  
Supervising Tax Counsel

For Sales and Use  
Tax Department: Mr. David H. Levine  
Acting Assistant Chief Counsel

Ms. Janice Thurston  
Senior Tax Counsel

MEMORANDUM OPINION

This opinion considers the merits of claims for refund under the Sales and Use Tax Law for the period January 1, 1989, through October 31, 1991, for unspecified amounts. The Board heard this matter on March 15, 2000.

Claimant, a manufacturer of computers, makes donations of electronic equipment and software to educational institutions and other qualified nonprofit organizations located both in California and out of state. Typically, claimant receives a request from a professor of an out-of-state university for sophisticated computers or scientific equipment. The request is reviewed by a committee of scientists and engineers before a decision is made to approve the grant on its merits. Once approved, the professor signs the "Terms and Conditions of Gift" (Terms) and the order is processed. These donations are not the type of gift that are given just to enhance sales, rather the gifts support education and research. The donated equipment is removed from inventory in California and shipped to the universities. The claims for refund of the use tax

relate to taxes paid for donated scientific equipment shipped via common carrier to out-of-state educational institutions.

Claimant contends that the gift is given outside of California and that there is no use of the donated property in this state. In support of its position, claimant states that it self insures its products during delivery and that it does not transfer title of the donated property to the donee until the common carrier delivers the equipment to the donee. Claimant states it has numerous business reasons for making the gift out of state.

Claimant states that the gift is governed by a document (Terms) which provides that "title to hardware products and risk of loss and damage will pass to Recipient at destination. However, when products are shipped under Recipient's shipping instructions, title and risk of loss and damage shall pass to Recipient at HP's plant." Claimant's purpose in retaining title until the common carrier delivers the property includes claimant's ability to recall the property before it reaches the donee. Claimant also points out that since title to the donated property does not vest in the donee until after delivery, claimant does not take an income tax deduction until the date the gift is completed.

Claimant states that its contracts include warranties against defects in materials and workmanship. Claimant further contends that because the computers and instruments are scientific in nature, they are often tested and calibrated after delivery so that they are working properly before they are accepted. With respect to claimant's donated products, the warranty period begins either on the date of delivery or on the date of installation if claimant installed the product.

An excise tax is imposed on the storage, use or other consumption of the property in California purchased from a retailer (Rev. & Tax. Code, §§ 6201 and 6202). "Use" is defined as exercising any right or power incident to ownership, except sales in the regular course of business or subsequent use solely outside the state. (Rev. & Tax. Code, §§ 6008 and 6009.)

"Storage" and "use" do not include the keeping, retaining, or exercising any right or power over tangible personal property for the purpose of transporting it outside the state for use thereafter solely outside the state (Rev. & Tax. Code § 6009.1). Claimant's withdrawals of inventory items purchased for resale, but donated to out-of-state donees, will not be subject to California use tax if the gift is completed outside of California.

In order for us to find that the gift was made outside of California, claimant must demonstrate that the gifts at issue were not completed until delivery to the donee out of state. In coming to our conclusion that the gifts in this case were completed out of state we gave the following facts significant weight:

- (1) The gift documents include a provision which states that title does not pass to the out-of-state donee until delivery by common carrier and that claimant retains the ability to recall the gift before it reaches the out-of-state destination;
- (2) The agreement between claimant and its donees includes warranties which become effective upon delivery to, and acceptance by, the donee; and
- (3) Claimant does not take an income tax deduction until the donee receives the gift.

We also considered other factors that indicated the intent was to complete the gift outside California, including the fact that the gifts required the donor's personnel to install, test or calibrate the equipment at the donee's out-of-state location.

It is our opinion that claimant demonstrated that the gift was completed out of state and that the gifts claimant made to out-of-state universities are not subject to the use tax pursuant to section 6009.1 of the Revenue and Taxation Code.

This case can be distinguished from Yamaha Corp. of America v. State Bd. of Equalization (1999) 73 Cal.App.4<sup>th</sup> 338. In Yamaha the court found that Yamaha intended to make the gift when it delivered the property to the common carrier. There was no written agreement between the parties as to when title to the goods given away was to pass, and there were no business reasons to indicate that Yamaha's gifts were made on delivery to the out-of-state location.

Not all of claimant's gifts meet the requirements of Revenue and Taxation Code section 6009.1. When claimant ships products under the donee's shipping instructions, the "Terms and Conditions of Gift" provide that title and risk of loss and damage shall pass to the donee at claimant's California plant. In those cases, claimant's donations are made in California when it places the property in the hands of the common carrier. Therefore, a taxable use is made in this state and the use tax applies with respect to those donations. (Cal. Code Regs., tit. 18, § 1670.)

#### OPINION

We conclude that, pursuant to Revenue and Taxation Code section 6009.1, a gift is not subject to use tax when claimant demonstrates that the gift was in fact made outside California in the manner described in this opinion, or in a manner substantially similar to that described in this opinion.

Done at Sacramento, California this 15th day of June, 2000.

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Dean Andal , Chairman

Claude Parrish , Member

John Chiang , Member

Marcy Jo Mandel\* , Member

\*For Kathleen Connell, per Government Code section 7.9.