

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION BOARD HEARING SUMMARY

In the Matter of the Petition for Redetermination)
Under the Sales and Use Tax Law of:)
THE WAKEFIELD COMPANY, INC.) Account Number SR S EA 24-782127
Petitioner) Case ID 608341
Lake Forest, Orange County

Type of Business: Sales of park furnishings
Audit period: 04/01/08 – 03/31/11

<u>Item</u>	<u>Disputed Amount</u>
Unreported taxable sales	\$1,304,138
Tax as determined and protested	\$107,390.78
Interest through 02/28/15	<u>38,432.77</u>
Total tax and interest	\$145,823.55
Payments	<u>- 29.51</u>
Balance Due	<u>\$145,794.04</u>
Monthly interest beginning 03/01/15	<u>\$ 536.81</u>

UNRESOLVED ISSUES

Issue 1: Whether adjustments are warranted to the amount of unreported taxable sales. We find no adjustment is warranted.

Petitioner has held a seller’s permit since October 1981, and it is an authorized dealer for Dumor, Inc., an out-of-state manufacturer of pre-manufactured park furnishings, such as benches, tables, and receptacles. Petitioner sells Dumor products to cities and private developers in California. Petitioner issues a sales invoice to its customer for a lump sum amount, including tax and delivery charges. It then places the order with Dumor, who ships the product by common carrier to the customer’s job site. Petitioner did not pay sales tax reimbursement on its purchases from Dumor.

Petitioner provided reasonably complete records for audit. In its examination of the sales summary spreadsheets, the Sales and Use Tax Department (Department) discovered that petitioner’s reported taxable sales did not include transportation charges of \$473,467 or the gross margin (the amount of the selling price in excess of the cost of petitioner’s purchases) of \$829,543. In other words,

1 petitioner had been reporting tax on the cost of its merchandise purchases.¹ The Department concluded
2 that petitioner was making retail sales of park furnishings and that tax applies to the entire selling
3 price, including the cost of purchases, the gross margin, and the transportation charges, which totaled
4 \$3,969,692. The Department compared that amount to reported taxable sales to establish the amount
5 of unreported taxable sales of \$1,304,138 (\$3,969,692 - \$2,665,554).

6 Petitioner states that it is a licensed contractor and contends that its transfers of tangible
7 personal property were construction contracts. On that basis, petitioner argues that it owes tax on the
8 cost of tangible personal property transferred.² Further, petitioner states that it used to sell and install
9 playground equipment and park furnishings and that, during the liability period, it was in the process of
10 transitioning its business to include sales only (without installation) of park furnishings. Petitioner
11 asserts that 10- to 15-percent of its sales during the audit period were construction contracts since they
12 involved installation. As evidence, petitioner has provided a sales invoice to Adame Landscape, Inc.,
13 dated August 1, 2008. That invoice includes boilerplate language which explicitly states that assembly
14 and installation are not included. However, petitioner also provided a subsequent letter to Adame
15 Landscape, Inc., dated February 26, 2009, stating that it would perform the necessary repair work to
16 achieve proper installation of the tree grates sold on August 1, 2008.

17 The records provided for audit indicate that petitioner's transfers of tangible personal property
18 during the audit period did not include installation of the property. Thus, absent evidence that
19 petitioner performed installation labor, the mere fact that petitioner is a licensed contractor does not
20 establish that its sales of park furnishings were construction contracts within the meaning of the sales
21 and use tax law. Further, petitioner has not shown that 10- to 15- percent of its sales of park
22 furnishings during the audit period included installation. With respect to the sale to Adame Landscape,
23 Inc., we note that the invoice specifically states that there was to be no assembly or installation.
24 Although the later letter showed that petitioner subsequently installed shims, new frames, and altered

26 ¹ Petitioner reported taxable measure of \$2,665,554, while the recorded cost of goods sold was \$2,666,682. Petitioner
27 states that the difference of \$1,128 was the result of an inadvertent recording oversight.

28 ² We note that, if we found that the transactions were construction contracts, petitioner would be the consumer of materials,
with tax due on cost, and the retailer of fixtures. For fixtures, under certain circumstances, the cost of the fixture to the
contractor is regarded as the selling price subject to tax.

1 cut-outs, there is no evidence indicating that petitioner billed its customer for labor or was
2 contractually obligated to perform this work as a condition of the original sale. Thus, the letter does
3 not establish that the sale to Adame Landscaping, Inc. was a construction contract and does not offer
4 support for petitioner's assertion that 10- to 15- percent of its sales during the audit period involved
5 installation. Accordingly, we find that petitioner was making retail sales of tangible personal property,
6 that it is liable for tax on the retail selling price, and that no adjustments are warranted.

7 **Issue 2:** Whether relief is warranted on the basis that petitioner's failure to report the proper
8 amount of tax was the result of its reasonable reliance on erroneous advice from the Board during a
9 prior audit. We find relief is not warranted.

10 Petitioner was previously audited for the period October 1, 1987, through September 30, 1990,
11 and the Department waived an audit of the period January 1, 1993, through December 31, 1993, after a
12 brief review of petitioner's records. The full audit workpapers are not available because they were sent
13 to headquarters for consolidation and scanning, and were not retained. However, the available audit-
14 related documents indicate that, during the first audit period, petitioner was a construction contractor
15 and that, during the second audit period, petitioner was both a construction contractor and a retailer of
16 playground equipment and park furnishings. For the second audit period, the Department performed a
17 cost accountability test and concluded that petitioner had property reported the retail selling price of its
18 sales of equipment and furnishings and had reported the cost of materials included in its construction
19 contracts. From the available documents regarding the second audit period, there is no evidence that
20 the Department informed petitioner that it should not report the full selling price (including any
21 markup) of tangible personal property it sold at retail. Nor do we find it plausible that the Department
22 would have advised petitioner to change its correct reporting method with respect to retail sales, since
23 neither of the prior audits found material errors with respect to the reporting of those sales. Moreover,
24 while the Department found that petitioner was correctly reporting tax with respect to its transfers of
25 materials and fixtures included in construction contracts during the prior audit periods, there is no
26 indication that the Department informed petitioner that all of its sales were construction contracts.
27 Accordingly, we find petitioner has not established that it received erroneous advice from the Board in
28 a prior audit or that its failure to report tax correctly in this period was the result of erroneous advice.

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OTHER MATTERS

None.

Summary prepared by Deborah A. Cumins, Business Taxes Specialist III