**CALIFORNIA STATE BOARD OF EQUALIZATION**

**APPEALS DIVISION BOARD HEARING SUMMARY**

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| In the Matter of the Claim for Refund Under the Sales and Use Tax Law of:<br><br>FIDELITY ASSET MANAGEMENT, INC.<br><br>Claimant | Account Number: SR S OHA 100-652931<br>Case ID 358657<br><br>Jacksonville, FL |

Type of Business: Lessor of computer hardware

Claim Period: 07/01/02 – 06/30/05

| Item | Claimed Refund |
|---|---|
| Sales tax paid on leases to an insurance company | $246,357.78 |

This matter was scheduled for Board hearing in July 2011 and again in October 2011 but was postponed at claimant's request each time, first because of scheduling conflicts and so that the hearing could be scheduled for Culver City, and then to allow additional time to submit an opening brief.

**UNRESOLVED ISSUE**

**Issue:** Whether claimant is entitled to a refund of sales tax it paid on leases of tangible personal property to an insurance company. We find it is not.

Claimant purchased computers and other equipment without payment of tax or tax reimbursement and, as relevant here, leased that tangible personal property to an insurance company without reporting or paying tax. After the claim period, claimant registered with the Board under the voluntary disclosure program (Rev. & Tax. Code, § 6487.05), and filed returns reporting and paying sales tax measured by the rentals payable from the subject leases during the claim period. Claimant thereafter filed this claim for refund of the sales tax it paid on the subject leases.

When tax is due on the rentals payable under a lease of tangible personal property because it is a continuing sale and purchase, that tax is generally a use tax imposed on the lessee which the lessor must collect and remit to the Board. (Cal. Code Regs., tit. 18, § 1660, subd. (c)(1).) Where, however, a lease that is a continuing sale and purchase is made to a lessee that is exempt from use tax, such as an insurance company paying the in lieu insurance tax (Cal. Const., art. XIII, § 28, subd. (b); Rev. & Tax

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Code, § 12201, subd. (a)), the tax on the rentals payable from the lease is a sales tax imposed on the lessor. (Cal. Code Regs., tit. 18, § 1660, subd. (c)(1).) Claimant contends it is unlawful to shift the tax from a use tax to a sales tax because the lessee is exempt from use tax, and thus asserts it is entitled to a refund of the sales tax it paid on its leases to an insurance company. Claimant asserts that shifting the tax from a use tax imposed on the lessee to a sales tax imposed on the lessor when the lessee is an insurance company undercuts the constitutionally granted tax limitations granted by the California Constitution to insurance companies, and violates the Equal Protection Clause of the United States Constitution because it amounts to an arbitrary and invidious classification.

A retailer owes sales tax on its gross receipts from the retail *sale* of tangible personal property in California. (Rev. & Tax. Code, § 6051.) A purchaser owes use tax on its use of tangible personal property *purchased* from a retailer for use in California. (Rev. & Tax. Code, §§ 6201, 6202.) The use of property purchased from a retailer for use in California is exempt from use tax where the sale to that purchaser was subject to sales tax. (Rev. & Tax. Code, § 6401.) Thus, unless the sale *and* use of property purchased for use in California are both exempt from tax, either sales tax or use tax will be applicable (but not both). Where a lessor leases tangible personal property in California without having paid California sales tax reimbursement or use tax, that lease is a continuing *sale*. (Rev. & Tax. Code, §§ 6006, subd. (g)(5), 6006.1.) Such a lease is also a continuing *purchase*. (Rev. & Tax. Code, §§ 6010, subd. (e)(5), 6010.1.) Thus, based on the Sales and Use Tax Law alone, the tax applicable to a lease that is a continuing *sale and purchase* in this state could be either sales tax or use tax (but both taxes will not be imposed on the same lease). Since taxable leases are both continuing sales and continuing purchases under the Sales and Use Tax Law, there is nothing in the Sales and Use Tax Law that would have precluded treating the tax applicable to such leases as sales tax, with the applicable tax being treated as use tax only if the sales tax were inapplicable. Nor is there anything in the Sales and Use Tax Law that precludes treating the tax applicable to such leases as use tax, with the applicable tax being treated as sales tax only if the use tax is inapplicable.

We find that there was nothing unlawful or unconstitutional in the Board's decision to generally treat such leases as subject to use tax, rather than sales tax, unless the lease is exempt from use tax. (See also *Newco Leasing, Incorporated v. State Board of Equalization*, (1983) 143

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Cal.App.3d 120, 124 (the Board must be faithful to its own regulations).) Here, since the subject leases were not exempt from both sales tax and use tax, we find that the tax reported and paid by claimant was properly due, and thus that the claim for refund should be denied.

**OTHER DEVELOPMENTS**

None.

Summary prepared by David H. Levine, Tax Counsel IV

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