

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION BOARD HEARING SUMMARY

In the Matter of the Petition for)
 Redetermination and Claim for Refund)
 Under the Sales and Use Tax Law of:)
) Account Number SR Y JH 27-643615
) Case ID's 516087, 470475
 THE KELLEHER CORPORATION)
)
) Petitioner/claimant)
) San Rafael, Marin County

Type of Business: Sales of lumber and wood molding

Audit period: 07/01/04 – 06/30/07 (516087)

Claim period: 07/01/04 – 09/30/08 (470475)

<u>Item</u>	<u>Disputed Amount</u>
Disallowed sales for resale	\$451,361
Tax as determined and proposed to be redetermined	\$102,403.62
Less concurred	- 67,268.89
Balance, protested	<u>\$ 35,134.73</u>
Proposed tax redetermination	\$102,403.62
Interest	<u>37,366.98</u>
Total tax and interest	\$139,770.60
Payments	- 139,770.60
Balance Due	<u>\$ 00.00</u>

UNRESOLVED ISSUE

Issue: Whether adjustments are warranted to the disallowed claimed nontaxable sales for resale. We find no adjustment is warranted.

Petitioner distributes lumber and wood molding. The Sales and Use Tax Department (Department) used stratified statistical sampling to test petitioner's claimed nontaxable sales for resale. It found eight errors for stratum 1 and three errors for stratum 2, and it computed percentages of error of 2.15 percent and 0.63 percent, respectively. For stratum 3, the Department reviewed all claimed nontaxable sales on an actual basis and found one error. Petitioner disputes the Department's findings with respect to stratum 2 only. Petitioner contends that one disallowed sale, to Crest Trim & Door (Crest), was a valid nontaxable sale. If petitioner prevailed in that argument, then the understatement

1 for that stratum would be the total of the two remaining disallowed sales (with no projection of a
2 percent of error).

3 The disputed sale to Crest was made on December 1, 2004, for \$4,013.76 for wood molding
4 and particle board shelving. Petitioner did not provide a resale certificate for Crest and it received no
5 reply to the XYZ letter to Crest because Crest is no longer in business (Crest held a seller's permit
6 from July 1, 1996, through December 31, 2008). Based on confidential records related to Crest's
7 business operations, the Department found it probable that Crest had consumed the materials in the
8 performance of lump sum construction contracts and therefore disallowed the claimed sales for resale.

9 Petitioner concedes that it has not provided a resale certificate or other documentation to show
10 that Crest resold the products or paid tax to the Board with respect to the purchase. However,
11 petitioner argues that the sale should be considered a sale of resale. Petitioner relies primarily on the
12 Sales and Use Tax Department Audit Manual section 0409.51, which states that, if a taxpayer is unable
13 to obtain a response to an XYZ letter because the purchaser is no longer in business, then the sale will
14 be considered a sale for resale if the property purchased is consistent with the type of sales the
15 purchaser makes. Petitioner asserts this special rule is applicable to its sale to Crest since the
16 Department has stated it is *possible* that Crest resold the subject products. Petitioner also argues that
17 the Board considered Crest an active retailer, as evidenced by the fact that it issued a seller's permit to
18 Crest. In addition petitioner asserts it is clear that Crest was not on a tax-paid basis because petitioner
19 did not charge tax on the disputed sale. In short, petitioner asserts that the disputed sale was a
20 nontaxable sale for resale and that Crest did not consume the products in question (or, if it did, it
21 reported the tax due), based on several inferences petitioner draws from the available evidence.
22 Further, petitioner argues, if Crest did not purchase the materials for resale and failed to report the tax
23 due, the tax would have been captured by a materials cost accountability test in a Board audit.

24 Since petitioner does not have a timely resale certificate, the gross receipts from the sale are
25 presumed subject to tax unless petitioner can meet its burden to prove otherwise, which it has not done.
26 (See Rev. & Tax. Code, § 6091.) The Audit Manual section relied on by petitioner is not applicable:
27 the *possibility* that a particular sale could have been for resale is not evidence that a particular sale was
28 for resale. The provisions of section 0409.51 mean that, in situations where a finding that a sale was

1 for resale is consistent with our knowledge of a closed-out purchaser's business, such sale will
2 generally be accepted as a valid sale for resale even if the seller cannot produce the specific evidence
3 we generally require. That is not the case here. In the Board's records, we have actual evidence that
4 Crest was primarily a construction contractor, it only made infrequent, incidental retail sales of doors
5 and door frames without installation, and the products in question are types that Crest would ordinarily
6 consume in performing construction contracts. As a result, we do not rely on supposition or on an
7 attempt to apply the meaning of section 0409.51 here, but instead conclude, based on the available
8 evidence, that Crest did, indeed, make the disputed purchase as a consumer and not for resale. Further,
9 we reject petitioner's arguments that the sale must have been a sale for resale because Crest held a
10 seller's permit, and because petitioner did not collect sales tax reimbursement. The fact that a
11 purchaser holds a seller's permit does not mean that it resells all tangible personal property it
12 purchases, and petitioner cannot use its own error (omitting the collection of tax reimbursement), as
13 evidence to support its argument. Accordingly, we find that petitioner's sale to Crest was subject to
14 tax. Thus, since the Department identified three errors in its review of the sales in stratum 2, the
15 Department properly projected the percentage of error. We conclude that no adjustment is warranted.

16 **RESOLVED ISSUES**

17 In its petition for redetermination, petitioner requested relief of interest for the period June 1,
18 2010, through December 31, 2010. However, petitioner paid the liability in full on November 24,
19 2009, so there was no interest charged during 2010. Thus, the request for relief is moot.

20 Petitioner filed four claims for refund for overpayments of tax related to tax-paid purchases
21 resold totaling \$15,503.84 for the audit period and \$16,146.14 for the period July 1, 2007, through
22 September 30, 2008. A refund of \$16,146.14 has been issued for the post-audit period, and the
23 overpayment of \$15,503.84 has been allowed as a credit item in the audit. Accordingly, the claims for
24 refund have been fully resolved.

25 **OTHER MATTERS**

26 None.

27
28 Summary prepared by Deborah A. Cumins, Business Taxes Specialist III

Statistical Sample

Transactions Examined	Sales for resale
Confidence level	80%
Confidence interval	48.059%
Total number of items in the population	120,391 – Stratum 1 20,586 – Stratum 2 380 – Stratum 3
Number of items randomly selected for the test	360 – Stratum 1 360 – Stratum 2 380 – Stratum 3
Number of errors found	8 – Stratum 1 3 – Stratum 2 1 – Stratum 3
Whether stratification was used, and if so what was stratified	Less than \$1,600 – Stratum 1 \$1,600 - \$14,999.99 – Stratum 2 \$15,000 and greater – Stratum 3
Average dollar value of population	\$ 372.43 – Stratum 1 \$ 3,525.81 – Stratum 2 \$22,890.68 – Stratum 3
Dollar value of remaining errors	\$ 3,052 – Stratum 1 \$ 7,670 – Stratum 2 \$16,365 – Stratum 3
Dollar value of sample	\$ 142,058 – Stratum 1 \$1,223,628 – Stratum 2 \$8,698,458 – Stratum 3
Percentage of error	2.15% - Stratum 1 0.63% - Stratum 3
Were XYZ letters sent	Yes
Number of XYZ letters sent and responses received	Unknown*

* The details of the XYZ letters (the number sent, the responses received, and the percentages of the responses received that were regarded as taxable) are unknown because those details are not recorded in the audit workpapers.