

**CALIFORNIA STATE BOARD OF EQUALIZATION**  
**APPEALS DIVISION SUMMARY FOR BOARD HEARING**

In the Matter of the Petition for Redetermination )  
Under the Sales and Use Tax Law of: )  
JAMES ALAN LABARGE, dba ) Account Number: SB G UT 84-091577  
Tutto Bene Charters ) Case ID 422110  
Petitioner )  
Pasadena, Los Angeles County

Type of Transaction: Purchase of a vessel

Date of Transaction: 07/13/05

<u>Item</u>	<u>Disputed Amount</u>		
Purchase of vessel	\$280,000		
		<u>Tax</u>	<u>Penalty</u>
As determined:		\$22,214.94	\$2,221.49
Adjustment - Sales and Use Tax Department		+ 885.06	+ 88.51
- Appeals Division		<u>- 3,066.22</u>	<u>-2,310.00</u>
Proposed redetermination, protested		<u>\$20,033.78</u>	<u>\$ 0.00</u>
Proposed tax redetermination		\$20,033.78	
Interest through 6/30/11		<u>9,110.22</u>	
Total tax and interest		<u>\$29,144.00</u>	
Monthly interest beginning 7/1/11		<u>\$ 100.17</u>	

This matter was previously scheduled for Board hearing on October 21, 2010, but was postponed at petitioner's request due to a scheduling conflict. It was rescheduled on March 24, 2011, but was postponed at the Department's request to allow additional time to investigate a possible tax offset.

**UNRESOLVED ISSUE**

**Issue 1:** Whether use tax is due on the purchase price of the vessel. We find that it is.

Petitioner, a California resident, purchased a vessel, took delivery in the British Virgin Islands on July 13, 2005, and brought it to California on or before September 12, 2005. Since the purchase occurred outside California, if any tax is due on this transaction, it will be use tax for which petitioner

1 is liable. On June 22, 2006, petitioner applied for a seller's permit, with a start date of June 13, 2006,  
2 to lease charter boats in Marina Del Rey (SR AS 100-753588). Petitioner filed quarterly sales and use  
3 tax returns under that permit for the period July 1, 2006, through December 31, 2007, on which he  
4 deducted all of his reported gross sales as "consignment" or "consignment account," resulting in zero  
5 measure of tax. Petitioner sold the vessel on January 4, 2008, and the seller's permit was closed  
6 effective December 31, 2008.

7 Since petitioner did not respond when the Sales and Use Tax Department (Department) sent  
8 him a Combined State and Local Consumer Use Tax Return for Vessels, the Department issued a  
9 Notice of Determination for tax due on an estimated purchase price of \$269,272. That amount was  
10 subsequently increased to \$280,000 based on the Closing Statement related to the purchase. Petitioner  
11 states that he believed he did not owe any use tax because use tax was being collected and remitted to  
12 the Board by the company that chartered the vessel on petitioner's behalf, Seamist Skippers of Marina,  
13 LLC (SR AS 100-009960), which did business as Blue Pacific Boating. Petitioner also states that the  
14 vessel was not put into immediate charter service because it required repairs. The Department  
15 concluded that the vessel constitutes mobile transportation equipment (MTE) because it is longer than  
16 30 feet. The Department concluded that, since petitioner's use of the vessel was not limited to leasing  
17 it, and in any event since petitioner failed to make a timely election to pay use tax on the fair rental  
18 value of the MTE, petitioner was liable for use tax on the purchase price of the vessel.

19 Petitioner contends that Blue Pacific Boating collected and remitted use tax to the Board, and  
20 he has provided copies of Boat Owner Statements obtained from Blue Pacific Boating, each of which  
21 states that a specific amount of California sales tax had been collected and would be remitted.  
22 Regarding his personal use of the vessel, petitioner concedes that he used the vessel on three occasions  
23 but asserts that, each time, the vessel was used less than three hours. Petitioner argues that the use was  
24 insignificant and should not impact the analysis of the application of tax. Petitioner also states that he  
25 believed Blue Pacific Boating was charging him for the personal use.

26 The parties agree that the vessel constituted MTE, and petitioner does not dispute that use tax is  
27 applicable. The only question is whether petitioner owes use tax measured by the purchase price of the  
28 vessel or by its fair rental value. A lease of MTE is not a sale, and thus the sale to the lessor is the

1 retail sale, with the lessor being the consumer of the MTE. (Rev. & Tax. Code, §§ 6006, subd. (g)(4),  
2 6010, subd. (e)(4); Cal. Code Regs., tit. 18, § 1661, subd. (b)(1).) Although the lease of MTE is not a  
3 sale, if a purchaser's use of MTE will be limited to leasing for transportation of persons or property,  
4 the lessor may elect to report and pay use tax measured by the fair rental value of the MTE. (Rev. &  
5 Tax. Code, § 6244, subd. (d); Cal. Code Regs., tit. 18, § 1661, subd. (b)(2).) This election must be  
6 made by the lessor by reporting and paying tax measured by the fair rental value with his or her timely  
7 return for the period during which the MTE is first leased or the period in which the MTE first enters  
8 California, whichever is later. Where a purchaser of MTE does not make a timely election to pay tax  
9 measured by fair rental value, or where a purchaser's use is not limited to leasing the MTE, the  
10 purchaser owes tax measured by the purchase price of the MTE.

11 We reject petitioner's assertion that three uses of up to three hours each were merely incidental  
12 uses that should be ignored. Even if three uses of up to three hours each could be considered incidental  
13 (which is doubtful), the law allows the election to pay tax measured by fair rental value only when the  
14 use of the MTE is *limited* to leasing, and it does not establish an exception for incidental use. Thus,  
15 since petitioner's use was not limited to leasing the MTE, the election was not available to him.  
16 Rather, he incurred tax on the cost of the MTE. Furthermore, even if petitioner's use had been limited  
17 to leasing, petitioner failed to make a timely election to pay tax on the fair rental value, and thus owes  
18 tax measured by cost on this basis as well. We reject petitioner's contention that Blue Pacific Boating  
19 paid tax on its rental receipts and thus made a timely election on petitioner's behalf to report use tax  
20 measured by fair rental value. A lessor of MTE is the consumer of the MTE and owes tax on the  
21 purchase price unless *he or she* makes a timely election to pay tax on the fair rental value. A lessor  
22 who does not make such timely election is not relieved of liability for the tax *it* owes on the purchase  
23 price because a lessee or a sublessor reported tax on sublease proceeds. We conclude that petitioner  
24 owes use tax on the purchase price of the vessel.

### 25 **RESOLVED ISSUE**

26 Since petitioner did not file a return to report his purchase and use of the vessel, a failure-to-file  
27 penalty was added to the determination. Petitioner submitted a request for relief of the penalty on the  
28 basis that he thought Blue Pacific Boating was collecting and remitting the use tax to the Board. We

1 find that petitioner sincerely believed his use tax liability was being paid by Blue Pacific Boating, and  
2 that his failure to file a return was the result of that mistaken understanding of the law. Accordingly,  
3 we find petitioner's failure to file a return was due to reasonable cause.

4 **OTHER DEVELOPMENTS**

5 After the issuance of the D&R, the Department recommended a tax offset of \$3,066.22 for  
6 taxes collected and remitted by Seamist Skippers of Marina, LLC, for lease of petitioner's vessel.  
7 Based on our review of the information, we concur, and we recommend that offset.

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9 Summary prepared by Thea Etheridge, Business Taxes Specialist II

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