STATE BOARD OF EQUALIZATION

CALIFORNIA STATE BOARD OF EQUALIZATION

APPEALS DIVISION FINAL ACTION SUMMARY

In the Matter of the Petition for Redetermination Under the Sales and Use Tax Law of:	)	
JAMES BASS SMITH	)	Account Number: SB G UT 84-065978 Case ID 353126
Petitioner	)	El Sobrante, Contra Costa County

Type of Transaction Purchase of a vessel

Date of Purchase: 12/4/03

Item	Measure
Purchase of a vessel	$160,000

	Tax
As determined	$13,770.00
Adjustment: Appeals Division	- 170.00
Proposed redetermination, protested	$13,600.00
Proposed tax redetermination	$13,600.00
Interest through 3/31/10	6,958.70
Total tax and interest	$20,558.70
Monthly interest beginning 4/1/10	$79.33

The Board hearing in this matter was held on September 1, 2009. The Board allowed petitioner 30 days to provide additional evidence and the Sales and Use Tax Department (Department) 30 days to respond. The discussion under "Unresolved Issue," presents the facts as of the Board hearing. The discussion under "Post Hearing Developments discusses petitioner's post-hearing submission.

UNRESOLVED ISSUE

Issue: Whether petitioner has established that his use of the subject vessel qualified for the exemption for commercial deep sea fishing. We conclude that petitioner has not done so.

Petitioner purchased the vessel "California Dawn" from California Dawn Partners (seller), a general partnership, for $160,000.[1] The sale took place in Newport Beach, California, on December 4,

[1] The Sales and Use Tax Department originally assessed tax based on $162,000 as the purchase price of the vessel at issue, but stated at the appeals conference that the purchase price should have been $160,000, as shown on the seller's statement.

2003. No tax was paid or reported on the purchase of the vessel. There is no evidence that the seller held or was required to hold a California seller's permit by reason of the number, scope, and character of its sales of vessels, and thus, if any tax is due on this transaction, it is use tax for which petitioner is liable. (Rev. & Tax. Code, §§ 6201, 6202, subd. (a), 6283, subd. (a).)

Petitioner claims that his use of the vessel is exempt from tax because he purchased the vessel for commercial deep sea fishing. Revenue and Taxation Code section 6368, subdivision (a)(2), exempts from use tax the use of watercraft purchased for use in commercial deep sea fishing operations outside the territorial waters of this state by persons who are regularly engaged in commercial deep sea fishing. The remaining issue here is whether the vessel was used principally in commercial deep sea fishing operations outside the territorial waters of this state, based on a test period of 12 consecutive months beginning with the first operational use of the vessel. (Cal. Code. Regs., tit. 18, § 1594, subds. (a)(2), (b)(2).)[2]

In support of his claim of exemption, petitioner provided copies of his 2003 and 2004 federal and California state income tax returns, 106 Department of Fish and Game (DFG) fish tickets dated between December 13, 2003, and November 20, 2004, commercial fishing licenses, business licenses, an insurance policy, a captain's license, and a Certificate of Inspection from the United States Coast Guard. The Sales and Use Tax Department (Department) also obtained a log report from the DFG.

The Department found the documentation provided by petitioner to be unreliable, noting that, according to DFG, petitioner reported only 15 fishing trips, whereas petitioner provided to the Department 106 fish tickets, each of which represented one trip. The Department also noted that some of the 106 fish tickets had block 488 (a fishing area that is inside the territorial waters of California) and block 456 (a fishing area outside the territorial waters of California) written over each other, making it impossible to tell which number was originally intended. Furthermore, in all cases where the fish ticket was included in the DFG report and both numbers appeared in the box, the DFG report shows the fishing operations were originally reported to the DFG as having been conducted in block

[2] The parties agree that the condition for exemption that the vessel be used by a person regularly engaged in commercial deep sea fishing was satisfied.

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488 (in California waters). The DFG report contained entries for two fish tickets that petitioner did not provide to the Department, and the Department noted other discrepancies, such as multiple tickets issued for the same date and dates that do not match the day of the week identified. Lastly, petitioner provided two fish tickets that indicated that the primary activity for the trips had been whale watching and two fish tickets for trips where no fish were caught.

The Department determined that a more accurate way to judge the location of petitioner's use of the vessel (as compared to relying on the blocks stated in the tickets petitioner provided) was to base that determination on the primary species caught, as indicated on each fish ticket. Using this approach, the Department concluded that 57 of the 106 fish tickets (53.77 percent) indicated the vessel was used for fishing within the territorial waters of California. Adding to these 57 trips the two trips reported to DFG for which no fish tickets were provided, the two non-fishing (whale watching) trips, and the two trips where no fish were caught, the Department determined that 63 of 108 total trips (58.33 percent) do not qualify as commercial deep sea fishing trips outside the territorial waters of California. Accordingly, the Department concluded that petitioner is not entitled to the claimed exemption.

Our D&R concluded that the evidence indicates the majority of petitioner's trips took place within California waters. Since petitioner did not provide evidence showing this determination was in error, we concluded he did not carry his burden of establishing his right to the exemption. In his RFR, petitioner argued we did not give due consideration to the fishing activity records that he was required to file with DFG. Petitioner argues that 74 of 106 fish tickets, 69.81 percent, document qualifying use outside the territorial waters of California. Petitioner also argues that, even if we remove the fish tickets that are ambiguous or have errors, 57 of the remaining fish tickets, which represent 53.77 percent of the usage of the vessel, document use outside the territorial waters of California.

The SD&R continued to find that these 106 tickets do not represent all use of the vessel during the test period, and further that these tickets are not reliable evidence of the location of petitioner's use of the vessel. We found petitioner's explanation for tickets which are marked Block 488 and Block 456 unconvincing. Petitioner contends that where Block 488 (within the territorial waters of California) was overwritten with Block 456 (outside the territorial waters of California), "488" was a carbon bleed through and that "456" was the actual block where the fish was caught. However,

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petitioner's report to DFG indicated that some of these trips where the fish tickets appear to be altered occurred primarily within Block 488. Since DFG receives the original fish tickets, those original tickets presumably showed Block 488, not Block 456.

Petitioner's argument that we should ignore the ambiguous or inaccurate fish tickets and look only at the 57 fish tickets which he claims contain no errors or ambiguities is not a satisfactory solution. Petitioner has not provided us with accurate information from which to determine the use of the vessel, and has not accounted for several fish tickets. We find that the Department's method of determining use of the commercial fishing based on fish habitat is a more reliable indicator of where the vessel was used than the method petitioner proposes. .

As with any claimed exemption, the burden is on petitioner to prove his use of the vessel qualified for exemption. Petitioner has not carried that burden, and we thus conclude that the exemption does not apply and that use tax is due on petitioner's purchase price of the vessel.

POST HEARING DEVELOPMENTS

At the Board hearing on September 1, 2009, the Board ordered petitioner to provide a federal income tax return (FITR) for 2004 and bank statements for the period December 2003 through December 2004. Petitioner provided the requested documentation on October 26, 2009, and the Department responded in a memorandum dated November 30, 2009. Petitioner stated an estimated amount of receipts for 2004, and the Department notes that the gross receipts reported on his 2004 FITR are consistent with his estimate. However, the Department is unable to determine how petitioner calculated his estimated receipts, nor can the Department verify the cost per person based on the information provided. In fact, the Department was unable to match the deposits recorded on the bank statements to individual fishing trips, which prevented a detailed comparison of bank deposits against FITR reported gross receipts. However, based on its review of the bank statements, the Department concluded that customers must have paid less per trip than the $80.00 petitioner used to compute the estimate of receipts he provided to the Board (which means that, if the amount received from each customer was less than the $80.00 used by petitioner, then, in order to reach the amount of receipts reported on the FITR, petitioner made more trips than those for which he has provided fish tickets).

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The Department also notes that there are gaps in the numerical sequence of the fish tickets provided by petitioner, while, the Department states the fish tickets are to be used in sequential order. Thus, the Department believes that there could be missing fish tickets, especially since there were no tickets at all provided for the entire month of April 2004. The Department also observed other problems with the fish tickets petitioner provided.

In addition to reviewing the fish tickets petitioner provided, the Department also reviewed an article from an industry publication that covers sport fishing and discussed these relevant circumstances with a marine biologist familiar with the sport fishing industry. The marine biologist explained that the fishing locations outside California's territorial waters indicated on several of the fish tickets were not locations one would choose to fish for the types of fish that the fish tickets indicate were caught. Based on its investigation, the Department has concluded that, for several of the fish tickets petitioner provided as evidence of out-of-state use, the fish caught are the type that are generally caught inside California's territorial limits. The Department has listed those trips as "in-state" trips and has recalculated the percentage of in-state use of the vessel as 59.65 percent, at a minimum. Moreover, the Department notes that petitioner's website states that he conducts whale watching and sight-seeing trips. Since petitioner has provided no boat logs or similar records, there is no way to determine how often the boat was used for those non-fishing trips.

Based on our review of petitioner's submission and the Department's response, along with the supporting documentation provided by both parties, our conclusion remains that petitioner has not established that his use of the vessel qualified for the exemption for commercial deep sea fishing. We recommend that the petition be denied.

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