

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION PETITION FOR REHEARING SUMMARY

In the Matter of the Claim for Refund)
Under the Sales and Use Tax Law of:)
ELIZABETH SHUTTERS, INC.) Account Number SR EH 100-565493
Claimant) Case ID 538185
Colton, San Bernardino County

Type of Business: Manufacturer and installer of customer shutters
Claim Period: 10/01/05 – 09/30/08

Item Claimed Refund
Over-reported tax on construction contracts Unstated

The Board heard this matter on May 31, 2012, and ordered that the claim for refund be denied. Claimant filed a timely petition for rehearing. The petition for hearing was scheduled for consideration on the November 2012 consent calendar, but has been moved to the adjudicatory calendar because of Board Member contact by claimant.

UNRESOLVED ISSUE

Issue: Whether the petition for rehearing should be granted. We recommend that it be denied.

The issue in this appeal is whether the shutters furnished and installed by petitioner were materials as asserted by petitioner or fixtures as asserted by the Sales and Use Tax Department (Department) and upheld by the Board. In its petition for rehearing, petitioner contends that the Department presented an argument at the hearing that it had not presented in its written brief and that the Board’s decision is wrong. Claimant states that the “brief” focused on the common use of the term “accessory” in California Code of Regulations, section (Regulation) 1521, but that the Department focused on the function of the shutters at the hearing. However, the Department would have been entitled to file a brief only in reply to an opening brief filed by claimant. (Cal. Code Regs., tit. 18, § 5270, subd. (d).) Since claimant did not file such an opening brief (Cal. Code Regs., tit. 18, § 5270, subd. (c)), the Department did not have the opportunity to file a brief for the Board hearing. Claimant submitted a brief on May 29, 2012 (two days before the hearing) , which was distributed to the

1 Members that day. The Department was not entitled to file a brief in response to petitioner’s late brief,
2 and did not file any brief for the Board hearing. Rather, the Department’s first opportunity to present
3 its arguments in this appeal was at the Board hearing, and it was entitled, at that time, to make its
4 argument in support of its position to deny the claim for refund.¹

5 Claimant also asserts that staff was unaware of the use of the “cabinet rule” as a method for
6 discriminating between fixtures and materials, aside from cabinets. Contrary to claimant’s
7 presentation of what occurred, the Department was not unaware of the annotations cited by claimant.
8 The relevant issue here is not whether the cabinet rule is sometimes applied when determining whether
9 items other than cabinets are fixtures or materials since the Board’s order would be correct either way.

10 The cabinet rule applies to determine whether a cabinet, an item that is otherwise effectively a
11 fixture, should instead be regarded as materials as it is installed (and a fixture only after its installation,
12 at which time its characterization is no longer relevant for sales and use tax purposes). When 90
13 percent or more of the total direct cost of labor and material in fabricating and installing a cabinet is
14 incurred prior to affixing that cabinet to the realty, then that cabinet is installed as a fixture. (Cal. Code
15 Regs., tit. 18, § 1521, subd. (c)(2).) Where the percentage is less than 90 percent, the cabinet is
16 regarded as having been installed as materials. Where more than one cabinet is installed under a single
17 contract, each cabinet is considered separately. Thus, a single contract could include some cabinets
18 furnished and installed as fixtures, and others furnished and installed as materials. Similarly, that a
19 single contract provides for furnishing and installing cabinets and other items does not mean that the
20 cabinet rule applies to the items other than cabinets which are part of the same contract. For example,
21 if a construction contractor agreed to furnish and install cabinets extending over a counter and had to
22 build the wall to hold the cabinets, the wall would be regarded as having been installed as materials
23 without regard to the installation of the cabinets, and the cost of the labor and materials to furnish and
24 install that wall would *not* be relevant to the computation of the percentages necessary to determine
25 whether the cabinets installed under that same contract were materials or fixtures.

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28 ¹ Claimant’s reference to the Department’s brief may be to the D&R. The Department is not required to limit its arguments
in support of its position to the analysis of the Appeals Division in our D&R.

1 Here, claimant furnished and installed shutters and often also furnished and installed
2 framework into which the shutters were installed. There is no dispute that the framework constituted
3 materials. Claimant believes that cost of the labor and materials to furnish and install the framework
4 should be combined with the cost of the labor and materials to furnish and install the shutters to
5 determined the proper characterization of the entire contract as a single item for purposes of
6 Regulation 1521. However, just as the cost to furnish and install a necessary wall is not combined with
7 the cost to furnish and install a cabinet attached to that wall to determine if the cabinet is a fixture, the
8 cost to furnish and install framework is not combined with the cost to furnish and install a shutter
9 attached to that framework to determine whether the shutter is a fixture. If the cabinet rule were
10 applicable here, it would be applicable to the shutter itself, not to the shutter *and* the framework
11 combined.

12 Thus, the Board's finding that the shutters are discrete items, separate from the framework and
13 other accessory items that may have also been installed as part of the same contract, is entirely correct,
14 and if the cabinet rule were applicable, it would be the cost of labor and materials to furnish and install
15 those discrete items that would be relevant for purposes of the cabinet rule. Petitioner's shutters were
16 prefabricated prior to installation at the jobsite. Thus, even if the cabinet rule were applicable here, the
17 shutters would still be properly classified as fixtures.

18 Claimant has raised no arguments in the petition for rehearing that it did not present at the
19 hearing, and all of the arguments were thoroughly and fully considered by the Members. We find that
20 the Board correctly decided this matter, and claimant has not presented any basis for a rehearing. We
21 thus recommend that the petition for rehearing be denied.

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