



1 (i.e., the earliest on June 30, 1990, and the latest on September 25, 1998) and are part of a large group  
2 of petitions filed by petitioners' representative, MuniServices, LLC, which are commonly called the  
3 "Mass Appeals."<sup>3</sup> The allegations of the petitions are that the sales were subject to sales tax, and that  
4 sales tax should have been directly allocated to petitioners. An appeals conference for these petitions,  
5 and others, was held by the Local Tax Appeals Auditor within the Sales and Use Tax Department  
6 (Department),<sup>4</sup> and he issued a Decision and Recommendation on April 19, 2001 (D&R). The D&R  
7 recommends that the subject petitions be denied because the sales occurred outside California and the  
8 applicable tax was use tax. Petitioners timely appealed that decision to Board Management on June  
9 18, 2001. Board Management's decision was held in abeyance pending development of a better  
10 process for reviewing these petitions, with definite time schedules and procedures. Part of this process  
11 was the initial adoption of California Code of Regulations, title 18, section (Regulation) 1807 in 2002,  
12 effective in 2003, which superseded, subject to a transition rule applicable to the subject petitions, the  
13 "Process for Reviewing Local Tax Allocations" that was adopted in June 1996, and amended in  
14 October 1998. Petitioners' appeal was thereafter denied by Board Management on January 14, 2004.  
15 On April 12, 2004, in accordance with the transition rule, petitioners submitted their election to  
16 proceed under the provisions of Regulation 1807, and timely perfected their right to a Board hearing.

17       Thereafter, hearings were held up while the Business Taxes Committee considered changes to  
18 some local tax regulations, for example, whether to adopt a proposal by petitioners' representative to  
19 make an amendment to Regulation 1803 that would have reclassified transactions involving goods  
20 shipped into California from outside the state as subject to local sales tax, not use tax, when the out-of-  
21 state taxpayer's place of business in California participates in the transaction, the circumstances that  
22 petitioners assert are applicable to the subject petitions. On May 31, 2007, the Business Taxes  
23 Committee unanimously rejected the proposal, and the Board approved this recommendation on June

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25 <sup>3</sup> Of the 52 petitions originally noticed for the Board's decision in this proceeding, four petitions were withdrawn (Case IDs  
26 495387 and 495388 filed by the City of La Habra and Case IDs 510758 and 510760 filed by the City of Vacaville) and thus  
27 have been closed. Of the 48 petitions remaining for Board decision, three petitions are included in a lawsuit that was filed  
28 on February 20, 2009, in the Superior Court of San Francisco: *Cities of Alameda, Irvine, Newport Beach, Roseville, San  
Ramon and Santa Fe Springs v. State Board of Equalization*, San Francisco Superior Court No. CPF-09-509234.

<sup>4</sup> The duties of the Local Tax Appeals Auditor were transferred to the Appeals Division in 2005, and the responsibilities of  
the Appeals Division in resolving local tax reallocation appeals were formalized in 2008 by amendment to California Code  
of Regulations, title 18, section 1807.

1 1, 2007.<sup>5</sup> Accordingly, the rule remains that the local use tax applies, and not the local sales tax, if the  
2 sale does not occur inside this state, without regard to any participation by a location of the taxpayer  
3 inside this state. (Cal. Code Regs., tit. 18, §§ 1620, subd. (a)(1), 1803, subd. (a)(1).)

4 An oral hearing in these petitions was scheduled for July 14, 2010, with notices sent to  
5 petitioners, all jurisdictions for whom the Board administers their local sales and use tax ordinances,  
6 and all surviving taxpayers. Petitioners did not return the response form, but their representative  
7 confirmed by email to the Board Proceedings Division that petitioners want a decision on the record  
8 without oral hearing. No taxpayer responded that it wanted to participate in the hearing, and although  
9 a few responses were submitted by notified jurisdictions, those jurisdictions all thereafter indicated that  
10 they do not wish to participate in a hearing if petitioners are not requiring the holding of a hearing  
11 (though they may want to make a public comment). Thus, this appeal is being presented to the Board  
12 for decision on its nonappearance calendar.

### 13 UNRESOLVED ISSUE

14 Whether the disputed sales were negotiated at the taxpayers' California places of business and  
15 were thus subject to the local sales tax even though the goods were shipped to California customers  
16 from outside this state. We find that petitioners have not established that these sales were negotiated in  
17 California and that, even if they had, such sales occurred outside this state when the taxpayers  
18 completed their responsibilities outside California with respect to physical delivery of the goods. We  
19 thus conclude that there is no basis for reallocation of the local tax.

20 We note, to start, that petitioners have established no facts regarding the disputed sales. Thus,  
21 even if petitioners' contentions about how the law applies were valid, we would have no basis for  
22 recommending reallocation of the tax. Petitioners contend that a California place of business of each  
23 taxpayer participated in all of the subject transactions and that this participation is sufficient for sales  
24 tax to apply, even though petitioners have not disputed that, for the subject transactions, the goods

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26 <sup>5</sup> A final delay occurred when it was discovered in November, 2007, that the mass appeal files were inadvertently  
27 misplaced or destroyed. Petitioners' representative offered to make its files available for Board staff to replicate and this  
28 was done in May, 2009, which included photocopying over 1,200 petitions involving over 450 taxpayers and other related  
documents. During the remainder of 2009, files were created, indexed and assigned case identifications.

1 were shipped from outside California to the customers in this state. Petitioners further assert that the  
2 tax was sales tax, based on the participation of a location of the taxpayer within each petitioner's  
3 jurisdiction, and that such sales tax should be reallocated directly to the respective jurisdictions of the  
4 taxpayer locations that participated in the transactions. The Department contends that the transactions  
5 occurred outside California, meaning that the applicable tax was use tax because title passed outside  
6 California at the time of shipment.

7 In order for a sale to be subject to sales tax, the sale must have occurred in California *and* there  
8 must be some local participation in the transaction by a California office of the retailer. (Cal. Code  
9 Regs., tit. 18, §§ 1620, subd. (a)(1).) Otherwise, the use tax applies. That is, when title passes and the  
10 sale occurs outside California, the state sales tax does not apply, without regard to any participation in  
11 the transaction by the retailer within California. (Rev. & Tax. Code, §§ 6010.5, 6051 (sales tax  
12 applicable only to retail sales "in this state"); Cal. Code Regs., tit. 18, § 1620, subd. (a)(2)(A).) The  
13 same rules are applicable to determine whether the local tax is sales tax or use tax. (Rev. & Tax. Code,  
14 §§ 7202, 7303; Cal. Code Regs., tit. 18, § 1803, subd. (a)(1).) Furthermore, contrary to petitioners'  
15 belief, Revenue and Taxation Code section 7205 is not determinative of whether local sales tax  
16 applies, but rather to where the local sales tax is allocated *if* the local tax is sales tax. That is, section  
17 7205 is wholly irrelevant to circumstances where the local tax is use tax: the provisions of section 7205  
18 do not transmute a local use tax into a local sales tax.

19 Since the Board did not amend the regulations on which the D&R relied, the only basis for  
20 overturning the D&R would be to establish that the sales actually occurred in California (i.e., title  
21 passed inside this state). Regulation 1628, subdivision (b)(3)(D), explains that title passes and the sale  
22 occurs when and where the retailer completes its performance with reference to the physical delivery  
23 of the goods, unless the contract provides for earlier passage of title. If the retailer is required to send  
24 the goods to the customer but is not required to deliver them at destination, the retailer completes its  
25 performance with respect to physical delivery at the time and place of shipment. (Cal. Code Regs., tit.  
26 18, § 1628, subd. (b)(3)(D).) For example, where shipment is by common carrier, the retailer generally  
27 completes its performance with respect to physical delivery of the property at the time the retailer  
28 tenders the goods to the carrier for shipment. Thus, where the retailer tenders the goods to a common

1 carrier at a point outside California, title generally passes and the sale occurs at that time. This is  
2 entirely consistent with, and required by, the provisions of the Uniform Commercial Code, and has  
3 been applied for many years to all transactions subject to the Sales and Use Tax Law, not just to issues  
4 related to allocation of local tax. Furthermore, a petition for reallocation of local tax may be granted  
5 only if there is a finding of misallocation supported by a preponderance of the evidence, and if the  
6 preponderance of evidence does not show that a misallocation occurred, the petition must be denied.  
7 (Cal. Code Regs., tit. 18, § 1807, subds. (b)(2), (d)(5).)

8 Here, not only has there been no evidence submitted to establish that the disputed sales  
9 occurred in California (i.e., title passed inside this state), but most of the petitions do not even assert  
10 such facts (i.e., most petitions only assert local participation occurs inside this state). Petitioners have  
11 not provided evidence to support their position and the petitions are supported only by ambiguous and  
12 unsupported assertions. An example of the type of “information” included in the subject petitions is an  
13 allegation without any support that, “Salespeople officing at this location sell tangible personal  
14 property . . . which is delivered to end users in California in transactions that are subject to local sales  
15 and use tax” and a cite to the provisions of Regulation 1802, subdivisions (a)(1) or (2). While the  
16 D&R indicates that the Department and petitioners, in general, agree that there was local participation,  
17 there was no documentation provided by petitioners for the disputed sales to support such fact.  
18 Nevertheless, even if we were to accept petitioners’ contention that there was local participation with  
19 respect to every transaction at issue, petitioners would have still failed to establish that sales tax was  
20 applicable to the subject transactions because they have not provided evidence to show that the  
21 disputed sales occurred in California. Thus, we find that petitioners have not shown that there was a  
22 misallocation, and conclude that there is no basis for a reallocation. Accordingly, we recommend that  
23 all of these petitions be denied.

#### 24 **OTHER DEVELOPMENTS**

25 None.

26  
27 Attachment: Summary exhibit A

28 Summary prepared by Trecia M. Nienow, Tax Counsel IV

# OF PETITIONS	CASES ID	PETITIONER	DOK	MUNISERVICES #
1	510244	Sacramento	6/30/1990	12891
2	510244	San Jose	6/30/1990	12926
3	505121	Torrance	9/28/1990	13464
4	510466	Sacramento County	9/28/1990	13395
5	493248	San Diego	6/28/1991	15055
6	496315	San Diego	9/30/1991	15489
7	504845	San Diego	9/30/1991	15560
8	492073	Irvine	3/29/1994	24109
9	495390	Sacramento County	3/29/1994	24893
10	495733	Santa Ana	6/17/1994	25130
11	496077	Los Angeles	6/27/1994	25699
12	496077	Redwood City	6/27/1994	25697
13	496077	San Diego	6/27/1994	25698
14	506449	San Jose	6/27/1994	25572
15	507277	Anaheim	12/22/1994	26891
16	507277	San Leandro	12/22/1994	26890
17	509321	Walnut Creek	3/29/1995	27414
18	510488	Cupertino	3/29/1995	27591
19	492075	Irvine	11/21/1995	40585
20	493264	Fresno	11/21/1995	40628
21	493264	Santa Ana	11/21/1995	40631
22	493264	Sacramento County	11/21/1995	40630
23	493264	San Diego	11/21/1995	40629
24	493264	Union City	11/21/1995	40627
25	494436	Carlsbad	11/21/1995	40506
26	495391	Sacramento County	11/21/1995	40043
27	495734	Santa Ana	11/21/1995	40317
28	496080	Los Angeles	11/21/1995	40535
29	496080	Redwood City	11/21/1995	40536
30	496080	San Diego	11/21/1995	40534
31	496316	Hayward	11/21/1995	40410
32	496316	San Diego	11/21/1995	40615
33	496951	Los Angeles	11/21/1995	40665
34	504846	Los Angeles	11/21/1995	40247
35	504846	San Diego	11/21/1995	40246
36	505125	Torrance	11/21/1995	40146
37	506450	San Jose	11/21/1995	40110
38	509322	Walnut Creek	11/21/1995	40341
39	509700	Sacramento County	11/21/1995	40589
40	510246	Fresno	11/21/1995	40635
41	510246	Sacramento	11/21/1995	40455
42	510246	San Jose	11/21/1995	40641
43	492329	Irvine	12/21/1995	29306
44	494438	Laguna Beach	12/21/1995	29172
45	494459	El Segundo	12/21/1995	29177
46	495774	San Jose	12/21/1995	29152
47	510489	Cupertino	12/21/1995	29345
48	495775	San Jose	9/25/1998	56456