STATE BOARD OF EQUALIZATION
UNIFORM LOCAL SALES AND USE TAX APPEAL

CALIFORNIA STATE BOARD OF EQUALIZATION

APPEALS DIVISION FINAL ACTION SUMMARY

In the Matter of the Petition for Reallocation of Local Tax Under the Uniform Local Sales and Use Tax Law of:	)	
CITY OF LOS ANGELES[1]	)	Case ID 469251
Petitioner	)	

Taxpayer:	Oil Company
Date of Knowledge:	June 30, 1992
Allocation period:	July 1, 1991 – December 31, 2007[2]
Estimated amount in dispute:	$670,612[3]
Notification required:	None

BACKGROUND

The petition in this appeal was filed on June 30, 1992. An appeals conference was held by the Local Tax Appeals Auditor within the Sales and Use Tax Department (Department), and his Decision and Recommendation denying the appeal was issued on August 3, 1999. Petitioner timely appealed

[1] This appeal originally included a petition filed by the City of Torrance on March 27, 1992. However, Torrance withdrew its request for hearing on April 1, 2011, and its petition has thus been closed.

[2] The allocation period ends on December 31, 2007, which is when the rules for allocating local tax on sales of jet fuel changed to the point of delivery of the jet fuel to the aircraft (i.e., wing tip). (Cal. Code Regs., tit. 18, § 1802, subd. (b)(6)(B).) We understand that there is no dispute regarding sales made beginning January 1, 2008.

[3] Petitioner estimates that the local tax distributed through the Los Angeles countywide pool during the reallocation period for sales of jet fuel the taxpayer delivered from its Torrance refinery to customers at the Los Angeles International Airport (LAX) totals $1,030,676, although the taxpayer confirmed the local tax reported to the Los Angeles countywide pool was for consumption of goods purchased out of state. Petitioner based this estimate on gallons identified in the taxpayer jet fuel tax returns for the periods February 1998, through March 2005, although petitioner acknowledges that these returns do not necessarily represent taxable sales and that they do not indicate to which location the gallons went. Petitioner applied pricing for the relevant periods obtained from the U.S. Energy Information Administration to the gallons identified to estimate total sales and then attributed 50 percent of the local tax amount (1 percent of total sales) to domestic flights at LAX. However, if the Board were to grant this petition based on petitioner's position that the sales were subject to tax and a temporary storage location at LAX is the place of sale under California Code of Regulations, title 18, section (Regulation) 1802, subdivision (c), the amounts at issue prior to October 1, 1993 (i.e., $25,009), should be excluded from the amount listed in the table above because the operative date which was added to Regulation 1802, former subdivision (b)(5) (now subdivision (c)(1)), in 1993 continues to apply, meaning that current subdivision (c) thus does not apply to periods prior to October 1, 1993. In addition, petitioner would have already received about $335,055 as its share of any Los Angeles county pool distribution. Thus, if petitioner were to prevail, the Department estimates the net redistribution to petitioner would be $670,612.

that decision to Board Management, who issued its decision denying the appeal on July 24, 2000. On December 17, 2008, the Board granted petitioner's request for hearing. On February 3, 2010, we prepared an Appeals Division Analysis recommending that the petition be denied, as discussed below under "Unresolved Issue." The discussion under "Other Developments" addresses arguments raised by petitioner in response to our Analysis. An oral hearing on this petition was scheduled for July 26, 2011. However, petitioner did not respond to the hearing notice.[4] Thus, this appeal is being presented to the Board for decision on its nonappearance calendar.

UNRESOLVED ISSUE

Issue: Whether local tax from sales negotiated outside California and delivered by the Torrance refinery is properly allocable to petitioner. We conclude no local tax is allocable to petitioner because the taxpayer reported no tax on the subject sales.

The taxpayer whose local tax is the subject of this petition sells oil with a refinery in Torrance. Pursuant to contracts negotiated outside California, the taxpayer delivered jet fuel from its Torrance refinery to customers by dedicated pipeline to a meter located at Los Angeles International Airport (LAX). The taxpayer indicates that these sales were made to its customers for resale.

Retail sales that are subject to sales tax must be allocated to the "place of sale." (Rev. & Tax. Code, § 7205.) A retail sale is a sale for any purposes other than resale in the regular course of business. (Rev. & Tax. Code, § 6007.) A sale for resale is not subject to tax. (Rev. & Tax. Code, § 6051.) A petition for reallocation of local tax may be granted only if there is a finding of misallocation supported by a preponderance of the evidence, and if the preponderance of evidence does not show that a misallocation occurred, the petition must be denied. (Cal. Code Regs., tit. 18, § 1807, subds. (b)(2), (d)(5) (burden of proof rules set forth in Revenue and Taxation Code section 6091 and California Code of Regulations, title 18, section 5541 do not apply to local tax appeals).)

Here, since the subject sales were sales for resale and not subject to tax, no local tax was reported by the taxpayer. As such, there could have been no misallocation since there was no

[4] The taxpayer is not a party in a local tax reallocation appeal unless it chooses to actively participate in the hearing process. (Cal. Code Regs., tit. 18, § 1807, subd. (d)(3).) The taxpayer here indicated that it does not wish to participate.

allocation or distribution of tax with respect to the disputed sales. Accordingly, we recommend that the petition be denied.

OTHER DEVELOPMENTS

MuniServices, LLC, representing petitioner, filed a response to our Analysis on April 2, 2010, disputing our recommendation. Significant issues raised in that response are identified below, along with our response. MuniServices contends that the taxpayer did engage in retail sales at LAX. In support of its position, MuniServices submitted: (1) a MuniServices Analyst Follow-Up which apparently documents a telephone conversation on February 2, 2010, between MuniServices's Senior Sales and Use Tax Analyst, Ms. Jessica Sato, and an employee of LAXFUEL Corporation/ASIG (LAXFUEL); and (2) emails sent on February 10, 2010, between LAXFUEL and Ms. Sato, in which Ms. Sato summarizes the conversation on February 2, 2010, with LAXFUEL and asks LAXFUEL to confirm its accuracy. Ms. Sato's summarization states that,

> "[LAXFUEL] verified that [the taxpayer] no longer is a position holder with Lax Fuel. They became inactive as of June 30, 2007. A position holder holds a stock of goods with Lax Fuel. Prior to that date they sold fuel to the end user and collected sales tax. [The taxpayer] just sells fuel to position holders. Their sales are all for resale now. Once their fuel enters the pipeline the position holder takes the title of the fuel and it belongs to the position holders stock. The position holder will then sell the fuel to the end user."

LAXFUEL responded by stating that,

> "You summarized everything accurately except the sentence about any taxes/fees. I suggest the following statement instead:
>
> "'Prior to that date they sold fuel to the end user, [the taxpayer] was responsible for all applicable federal, state and local taxes and fees (such as the $0.03 per gallon LAX Airport Fuel Delivery Fee).'
>
> "ASIG, operator of the LAXFUEL terminal, can not attest to the fact that any position holder is in compliance with any such taxes and fees. LAXFUEL/ASIG is only responsible to report the fuel volumes by position holder to the applicable federal, state, and local agencies, not including any computations for taxes and fees or payments thereof."

Contrary to MuniServices belief, this evidence clearly does not support its view that the taxpayer engaged in retail sales at LAX. While LAXFUEL apparently thinks that the taxpayer was making sales to end users until June 30, 2007, it confirmed that it could not state that the taxpayer collected

sales tax. We think this means that LAXFUEL has no way of knowing whether sales made to the so-called end users are at retail or for resale or whether these end users actually use or resell the fuel purchased from the taxpayer. For example, it is quite possible that the taxpayer sells to a buying company related to an airline and that such a sale appears to LAXFUEL as occurring between the taxpayer and the airline using the fuel when in fact, the taxpayer is merely drop shipping the goods on behalf of the buying company.

Thereafter, LAXFUEL sent an email to me dated May 4, 2010, apparently to address my April 5, 2010 response to MuniServices, in which I indicated that the information MuniServices provided on April 2, 2010, was neither proof that the subject sales were retail sales nor as credible as that provided by the taxpayer. In LAXFUEL's email, it now claims that the taxpayer was making retail sales of jet fuel until May 18, 2005. LAXFUEL also claims that it received monthly instructions from the taxpayer that show who its customers are, and that LAXFUEL files a Terminal Operator Information Report (BOE-506-PO) with the Board on a monthly basis that shows fuel receipts and disbursements for its customers, however, no such reports were provided nor did LAXFUEL explain why it thought these reports might show that the subject sales were retail sales.[5] While LAXFUEL's email did attach various documents, those documents did not indicate that the subject sales were retail sales. For example, one document was a copy of an email dated February 23, 2010, that simply confirmed the taxpayer would be shipping jet fuel to another oil company (i.e., a reseller) and another was the corresponding delivery ticket dated March 2, 2010. Other documents apparently show deliveries by the taxpayer to airlines. However, while LAXFUEL appears to believe these documents indicate that the taxpayer was making retail sales to these airlines, we have no evidence that this is in fact the case. In fact, our review of the taxpayer's Sales and Use Tax Return provided by MuniServices for the second quarter of 1994 indicates that, in addition to its nontaxable sales for resale, other nontaxable sales were made (e.g., sales in interstate or foreign commerce, sales to the United States Government),

[5] At my request, the Department reviewed LAXFUEL's electronically filed reports on form BOE-506-PO for the periods January 1, 2004, through December 31, 2007, and confirmed that the only report that listed the taxpayer as having been a position holder at LAXFUEL was for the month of September 2004. This information is contrary to LAXFUEL's initial claim that until June 30, 3007, the taxpayer had been a position holder and its later claim that until July 19, 2007, the taxpayer had been a position holder. We also note that the disbursements shown on Schedule 15B of form BOE-506-PO are those made by position holders (i.e., LAXFUEL's customers), not disbursements made to customers of position holders.

STATE BOARD OF EQUALIZATION
UNIFORM LOCAL SALES AND USE TAX APPEAL

and that almost 88 percent of the taxpayer's total sales (e.g., jet fuel, diesel fuel, motor vehicle fuel), were nontaxable sales.

In an October 1, 2010 email, MuniServices contends that the information provided by LAXFUEL shows: (1) it has knowledge of who has inventory in its storage facility and the amounts of fuel stored there; and (2) information on deliveries from the taxpayer's inventory at LAX to airlines. While LAXFUEL appears very knowledgeable about information pertaining to how the fuel is stored, inventoried, and delivered, as explained above, none of the information it provided addresses the relevant issue of how the taxpayer reported the sales at issue on its sales and use tax returns, that is, whether they were reported as retail sales or sales for resale. In fact, LAXFUEL indicates that it is only responsible for reporting fuel volumes by position holder, and not taxes and fees associated with such position holders. MuniServices also contends that its review of the taxpayer's Aircraft Jet Fuel Dealer Tax Returns (BOE-501-MJ) for the periods from February 1998, through March 2005, show gallons of jet fuel being sold to air common carriers, asserting that means that the taxpayer made retail sales and thus collected tax on the subject sales. While we agree that a review of these returns appears to indicate that jet fuel is being sold to air common carriers, these returns report fuel tax due under the Motor Vehicle Fuel Tax Law and not sales or use tax (or local tax) under the Sales and Use Tax Law. In fact, our review of the taxpayer's Schedule G, Fuel Seller's Supplement to Sales and Use Tax Return, (BOE-531-G) attached to the taxpayer's second quarter 2002 Sales and Use Tax Return (which we think is representative of the periods at issue) indicates that no credit was taken for any prepaid sales tax paid on retail sales of jet fuel, meaning that the taxpayer reported no retail sales of jet fuel.

Our review of Schedule A attached to the taxpayer's monthly returns for Prepayment of Sales Tax on Fuel Sales (BOE-401-DB) for April, May, and June of 2002, indicates that all sales of jet fuel were reported as sales for resale. In addition, we note that the taxpayer was audited by the Board for all periods at issue here and if it were not properly reporting its sales and use tax transactions, the taxpayer would have been issued a notice of deficiency. Upon review, the Department confirmed that none of the reports of field audit for the periods at issue indicate that any deficiency was assessed for unreported taxable sales of jet fuel made by the taxpayer. Furthermore, a *reallocation* of local tax can be ordered only where local tax was remitted to the Board and distributed to the wrong local

jurisdiction. Where no tax was reported and paid at all, *even if it should have been*, there can be no allocation or reallocation in the absence of collecting the tax. Here, even if the taxpayer should have reported and paid sales tax (which the evidence does not support), it is too late to assess such tax. Thus, there is no tax to reallocate.

Summary prepared by Trecia M. Nienow, Tax Counsel IV