

CALIFORNIA STATE BOARD OF EQUALIZATION

APPEALS DIVISION FINAL ACTION SUMMARY

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4 In the Matter of the Petition for Reallocation)
5 of Local Tax Under the Uniform Local Sales)
6 and Use Tax Law of:)
7 CITY OF SANTA CLARA) Case ID 436735
8 Petitioner)
9 _____)

10 Retailer: Manufacturer and seller of orthodontic devices

11 Date of Knowledge: December 23, 2004

12 Disputed allocation period: January 1, 2004 – June 30, 2010

13 Amount in Dispute: \$2,426,418

14 Notification required: Cities of Los Angeles, San Diego, and San Jose
15 City and County of San Francisco

16 An oral hearing on this petition was scheduled for March 21, 2012. However, the parties
17 responding to the hearing notice have now waived their appearance. Thus, the Board Proceedings
18 Division has informed the parties that the appeal will be presented to the Board for decision as a
19 nonappearance item.

UNRESOLVED ISSUE

20 Whether local sales tax should be directly allocated to petitioner for orders that were taken at
21 the retailer’s Santa Clara office even though the goods were shipped to California purchasers from out
22 of state. We conclude that these sales occurred outside California and were thus subject to local use
23 tax, which was correctly allocated to the countywide pools of the place of use.

24 The retailer whose local taxes are the subject of this petition took orders for orthodontic devices
25 at its California office located in Santa Clara and shipped these devices directly to California
26 purchasers by common carrier, F.O.B. shipping point, from a stock of goods located in Mexico.
27 Retailer reported the subject local tax to the countywide pools of the place of use.

1 The Department contends that the sales occurred outside California because title passed outside
2 California at the time of shipment, meaning that the applicable tax was use tax. (Rev. & Tax. Code, §
3 6010.5; Cal. Code Regs., tit. 18, § 1628, subd. (b)(3)(D).) Petitioner contends that the sales were
4 subject to sales tax because the transactions were not regular order sales under Revenue and Taxation
5 Code section 6006, subdivision (a), but were instead special order sales (i.e., based on the unique
6 configuration of the patient's teeth) under section 6006, subdivision (f). While petitioner concedes that
7 such special order sales occurred upon transfer of either title or possession, it argues that even though
8 title had already passed to the purchasers outside California, these sales did not occur until later, when
9 retailer's purchasers received the goods inside California. Petitioner asserts that a special order sale
10 occurs at the time whichever transfer (title or possession) occurs inside California, apparently believing
11 here that possession transfers after title transfers, and that transfer of possession trumps the earlier
12 transfer of title for sales subject to subdivision (f). Petitioner acknowledges that its argument would
13 fail if special order sales were subject to the provisions of subdivision (a) because, unlike the wording
14 of subdivision (f), under subdivision (a) transfer of possession is the test only when such transfer is in
15 lieu of transfer of title. Petitioner argues that the plain language of subdivision (f) means something
16 different than subdivision (a) because, where the legislature creates a separate rule, it has a reason for
17 doing so, and if the wording of subdivision (f) yields the same result as the wording of subdivision (a),
18 the different wording in the latter would be surplusage.

19 We find petitioner's contention wholly unsupported in law or common sense. Like regular
20 order sales under section 6006, subdivision (a), special orders sales under section 6006, subdivision (f),
21 occur upon transfer of title or possession for a consideration. Under section 6010.5, a sale occurs at
22 the place where the tangible personal property is located at the time of such transfer. Applying the
23 rules set forth in the Uniform Commercial Code section 2401 and interpreting section 6010.5,
24 California Code of Regulations, title 18, section 1628, subdivision (b)(3)(D) explains that a sale occurs
25 when and where the retailer completes its performance with reference to the physical delivery of the
26 goods, without regard to any reservation by the retailer of a security interest in the property, unless the
27 parties explicitly agree to pass title earlier (except that title cannot pass prior to the property's
28 identification to the contract). That is, a sale occurs, whether by passage of title or possession, no later

1 than when the retailer completes its performance with respect to physical delivery of the property. For
2 these purposes, possession is *not* regarded as transferred to the purchaser at the time it receives the
3 goods. Rather, the retailer relinquishes possession to the purchaser when it delivers the goods to the
4 common carrier for shipment to the purchaser and the sale occurs no later than that time, unless the
5 retailer is required to deliver the goods at destination. (Cal. U. Com. Code, § 2401, subd. (2)(a).)

6 The reference to “title or possession” in subdivision (f) of section 6006 does not mean, as
7 petitioner apparently contends, whichever best suits the desired goal. Rather, it means the sale occurs
8 upon transfer of title or possession, *whichever occurs first*: if title is transferred prior to possession, the
9 sale occurs at that time; if possession is transferred prior to transfer of title, then the sale occurs when
10 possession is transferred, with retention of title being solely for security purposes. There is nothing in
11 either the wording of subdivision (f) or in the Sales and Use Tax Law that requires or permits a later
12 event occurring inside California to control the timing of a sale that had already occurred outside
13 California upon the occurrence of an earlier event. Nor is there anything in the Sales and Use Tax Law
14 that indicates the definitions in subdivision (a) and subdivision (f) are mutually exclusive. The
15 controlling statutes and regulations clearly indicate that if the property (whether regular or special
16 order) is located outside California when transfer of title or possession passes to the purchaser, then the
17 sale does not occur in California, and use tax rather than sales tax applies. (Rev. & Tax. Code, §§
18 6006, subds. (a) & (f), 6010, subds. (a) & (d), 6010.5, 6051, 6201, 6401; Cal. U. Com. Code, § 2401;
19 Cal. Code Regs., tit. 18, §§ 1620, subd. (a)(2)(A), 1628, subd. (b)(3)(D).)

20 We find that the sales made by retailer are subject to use tax because the sales occurred at the
21 time and place of shipment outside California. (Cal. U. Com. Code, § 2401; Cal. Code Regs., tit. 18, §
22 1628, subd. (b)(3)(D).) We conclude that the local tax was correctly reported to the countywide pools
23 of the place of use and that there is no basis for reallocation of the local tax as sales tax. Accordingly,
24 we recommend that the petition be denied.

25 **RESOLVED ISSUE**

26 Santa Clara did not request a Board hearing as to the Decision and Recommendation’s finding
27 that the period July 1, 2002, through March 31, 2003, is barred. Accordingly, this issue is resolved.

OTHER DEVELOPMENTS

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None.

Summary prepared by Trecia M. Nienow, Tax Counsel IV