

**CALIFORNIA STATE BOARD OF EQUALIZATION**  
**APPEALS DIVISION SUMMARY FOR BOARD HEARING**

In the Matter of the Petition for Redetermination )  
Under the Sales and Use Tax Law of: )  
A.B.C. LUMBER JACK'S INC. ) Account Number: SR Y EH 97-197964  
Petitioner ) Case ID 351536  
San Bernardino, San Bernardino County

Type of Business: Furniture sales

Audit period: 10/01/99 – 12/31/04

<u>Item</u>	<u>Disputed Amount</u>
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Unreported ex-tax purchases of capital assets	\$ 7,997
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Disallowed exempt sales to Indians	\$52,413
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Amnesty interest penalty	\$10,005
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	<u>Tax</u>	<u>Penalty</u>
As determined:	\$360,197.47	\$48,512.70
Adjustments - Department	- 262,228.92	<u>-48,512.70</u>
- Appeals Division	- 215.25	
Proposed redetermination	\$ 97,753.30	<u>\$ 00.00</u>
Less concurred	<u>93,132.02</u>	
Balance, protested	<u>\$ 4,621.28</u>	
Proposed tax redetermination	\$ 97,753.30	
Interest through 1/31/09	51,436.52	
Amnesty interest penalty	<u>10,005.27</u>	
Total tax, interest, and penalty	\$159,195.09	
Payments	<u>37,461.00</u>	
Balance Due	<u>\$121,734.09</u>	

Monthly interest beginning 2/1/09	<u>\$ 552.68</u>
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**UNRESOLVED ISSUES**

**Issue 1:** Whether petitioner has established that its purchase of a Dell computer was not subject to use tax. We find that it has not.

Petitioner was a corporation with multiple locations in California that sold furniture. The Sales and Use Tax Department (Department) examined petitioner's purchases of capital assets on an actual

1 basis. Where petitioner failed to produce evidence to the contrary, the Department assumed that all  
2 purchases of capital assets were from out-of-state retailers and that petitioner paid no use tax or sales  
3 tax reimbursement on the purchases. After the reaudit prepared before the D&R, only two purchases  
4 were in dispute. The D&R recommends that one of those purchases be deleted from the audited  
5 understatement because, in the original audit, the purchase was listed as tax-paid, and the Department  
6 was unable to explain why the same transaction was listed as an ex-tax purchase in the reaudit.

7 The remaining issue in dispute is the purchase of a Dell computer. Petitioner contends that the  
8 purchase should be treated as a sales tax transaction on the basis that petitioner believed Dell had retail  
9 locations within California and held a seller's permit at the time of the purchase.

10 According to the Department's records, Dell did not maintain any place of business in  
11 California at the time of the sale. In addition, petitioner has offered no evidence of participation in the  
12 sale by any Dell office or employee located in California. In fact, petitioner has not even alleged that  
13 such participation occurred. Further, petitioner has not denied that the computer was shipped to it in  
14 California from a place outside this state and has not provided any evidence that title passed at the time  
15 the computer was delivered to petitioner in California as opposed to having passed at the time of  
16 shipment, as is usually the case. Therefore, we conclude that the sale occurred outside California, and  
17 the use tax, rather than the sales tax, applies.

18 Petitioner has not produced a receipt showing that Dell collected the use tax. Accordingly, we  
19 find that the cost of the Dell computer was subject to use tax and should remain in the audit measure.

20 **Issue 2:** Whether adjustments are warranted to the disallowed exempt sales to Indians. We  
21 recommend no adjustment.

22 Petitioner claimed all of its sales to Indians as exempt. Records of sales to Indians were  
23 available for the period May 1, 2004, through December 31, 2004, only. Using the records for that  
24 period, the Department calculated that .074392 percent of petitioner's total sales were sales to Indians.  
25 The Department applied that percentage to total recorded sales to establish that petitioner made sales of  
26 \$89,644 to Indians during the audit period.

27 The Department then examined petitioner's transportation charges for 2003, the only year for  
28 which petitioner segregated charges for transportation by petitioner's own trucks and by common

1 carrier. The Department calculated that 48.26 percent of petitioner's deliveries were made by  
2 petitioner's own trucks until 2004, when all of its deliveries were made by common carrier. The  
3 Department applied 48.26 percent to the audited amount of sales to Indians prior to 2004 to establish  
4 the allowable amount of exempt sales to Indians, and disallowed the remainder. Petitioner contends  
5 that, when deliveries of tangible personal property were made by common carrier to Indians on a  
6 reservation, title passed after delivery occurred and that the sales thus qualified for exemption.

7 Title passes no later than when the seller completes its duties with reference to physical  
8 delivery of the property. (Cal. UCC, § 2401, subd. (2).) Where a seller delivers tangible personal  
9 property in its own trucks, it does not complete its duties with reference to physical delivery until  
10 delivering the property to the purchaser. Unless the parties agree that title passes before that time, title  
11 passes, and the sale occurs, upon delivery to the purchaser. Thus, unless the contracts of sale  
12 transferred title before delivery, where petitioner delivered the purchased tangible personal property to  
13 Indian purchasers on a reservation in petitioner's own trucks, the sales qualified for the exemption.  
14 Where, however, the seller ships the property by common carrier, it completes its duties with reference  
15 to physical delivery of the property upon delivering the property to the common carrier for shipment,  
16 unless the contract of sale includes an express provision requiring the seller to deliver the property to  
17 the purchaser at the destination, such as an express F.O.B. destination provision (simply stating a  
18 delivery address is *not* sufficient). Thus, even where the property was shipped to the Indian purchaser  
19 on a reservation, if shipped by common carrier, the sale could not qualify for the exemption unless  
20 there was an explicit provision requiring delivery at destination (e.g., F.O.B. destination) and the  
21 contract did not explicitly pass title prior to delivery.

22 Petitioner has provided no evidence that the contracts for its sales delivered to Indians by  
23 common carrier included a provision requiring delivery on the reservation, such as an F.O.B.  
24 reservation provision. In the absence of that evidence, we find that title passed, and the sale occurred,  
25 at the time and place the property was delivered by petitioner to the common carrier. Thus, we find  
26 that the disallowed sales were not qualifying exempt sales to Indians, and no adjustment is warranted.

#### 27 AMNESTY

28 Petitioner did not apply for amnesty, and an amnesty interest penalty of \$10,005.27 will be

1 added when the liability becomes final. In a post-conference letter, we explained to petitioner that  
2 relief from the amnesty interest penalty may be granted if petitioner's failure to participate in the  
3 amnesty program was due to reasonable cause and circumstances beyond its control. We enclosed a  
4 form that petitioner could use to request relief of the penalty.

5 Although petitioner has expressed disagreement with the amnesty interest penalty on various  
6 occasions, it did not return the form or otherwise submit a request for relief signed under penalty of  
7 perjury. Accordingly, we have no basis to consider recommending relief from this penalty.

8 **RESOLVED ISSUES**

9 Petitioner provided a significant amount of documents at the appeals conference, which the  
10 Department utilized to conduct a reaudit before the D&R was prepared. In the reaudit, the audited  
11 amount of unreported taxable transportation charges was reduced by \$899,585 (\$1,548,919 -  
12 \$649,334), and the amount of disallowed nontaxable sales for resale was reduced by \$2,258,737  
13 (\$2,290,525 - \$32,788). The Department also concluded that petitioner had not been negligent, and it  
14 therefore removed the negligence and amnesty-doubled negligence penalties..

15 **OTHER DEVELOPMENTS**

16 None.

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