STATE OF CALIFORNIA

105.0010

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition for Redetermination Under the Sales and Use Tax Law of:	)	DECISION AND RECOMMENDATION
F--- E. E---	)	No. SP UT XX XXXXXX-010
Petitioner	)	

The Appeals Conference in the above-referenced matter was held by Senior Staff Counsel Stephen A. Ryan on April 27, 1993 in San Bernardino, California.

Appearing for Petitioner: Mr. E---

Appearing for the Sales and Use Tax Department: Mr. Carl Herth, District Principal Auditor

Protested Item

The protested tax liability involves the $55,025 cost paid to purchase an aircraft.

Petitioner's Contention

There is no liability for the sales tax determined. Petitioner is not a California resident. He relied upon Board advice to believe no tax was incurred. The aircraft was immediately flown to Oregon where it was used only outside California until 1988. It was then sold to a related corporation as originally intended. Due to petitioner's unforeseen illness, the aircraft was used only for a few flights by petitioner and the corporation.

Summary

The Board issued a notice of determination to petitioner for a tax measured by the $55,025 cost paid to purchase (ex-tax) a 1985 Cessna 172 (N XXXXX) on February 23, 1986 from S---A---, Inc., of [city 1], California. The Department alleges that petitioner owes sales tax on his purchase and California use of this aircraft on the basis that the Department assumes petitioner issued an exemption certificate to the seller-dealer on this California sale. Petitioner took delivery of the aircraft in [city 1] on February 23, 1986 and immediately flew it to Oregon. The sales contract listed petitioner at an Oregon address, but required him to base the aircraft at Brown Field in San Diego for financing security purposes.

The Department contends that petitioner was then a resident of California and Oregon. Petitioner owned residential, commercial and investment realty in these and other states, and spent time in Oregon, California, and Arizona. He claimed a homeowner's tax exemption for his trust realty in Riverside County at the time of this purchase. In 1987, he certified under penalty of perjury that he had occupied such property since 1981. He filed California resident personal income tax returns for 1986 and 1987. At the time of this aircraft purchase, petitioner owned a truck licensed and registered to him with the California Department of Motor Vehicles showing a Riverside County address. In November 1986, petitioner obtained a seller's permit for a family retail business in Riverside County. The Department discovered from the County of Riverside that this aircraft was seen in California in 1988. Petitioner held an Oregon driver's license in 1986 and 1987. The Department's position is that petitioner has not proven any exemption from the sales tax.

At the conference, petitioner stated as follows:

He had issued several documents to the seller at the time of the purchase so that the seller was not liable for tax on the basis of petitioner being a non-resident of California. Petitioner had previously called the Board's San Bernardino office and spoken to an employee to verify that his purchase was not subject to any California tax on the basis that he was not a California resident. He told the Board employee that he was a non-resident.

He now considers himself to have been only an Oregon resident in 1986 and 1987 because he lived in Brookings, Oregon, as he had since 1979. Although he was born, raised, and worked in California until his retirement in 1972, still owned realty in California, was part owner in a California business, and stayed in California occasionally, he was not a California resident in 1986 or 1987. He filed California income tax returns only because he had earned income from California investment realty.

He purchased this aircraft for investment and eventual resale for a profit since they were no longer being manufactured. He had previously owned and sold other aircraft. He did not like to fly or ride in smaller aircraft, especially since a serious 1969 accident in which he was almost killed. He did not intend to fly this aircraft very often. His initial intent was to immediately transfer title to one of his corporations, O--- F--- I--- Corp.

He flew the aircraft to [city 1], Oregon, on the date of his purchase. It was parked at a small landing strip there for free. He flew it to [city 2], Oregon, several months later where it was parked for free. These were small strips where parking fees were not charged. He only flew the aircraft for several short flights all in Oregon until he lost his pilot's medical certificate in late spring 1986 due to colon cancer. He never flew the aircraft again due to the lack of a pilot's medical certificate. The aircraft was registered with the Oregon Aeronautics Division.

He did not use this aircraft to travel to or in California. He always drove a car between the two states.

Sometime in 1988, he listed the aircraft for sale with a broker in [city 2], California. The broker traveled to Oregon, and then flew this aircraft to [city 2] for sale. It was sold to a Japanese purchaser, and was shipped to Japan. Petitioner never kept a log and is not aware of the total hours accumulated while he was owner.

The available FAA records show: Petitioner took title from the seller. In August 1988, petitioner transferred title to O--- F--- I--- Corp. However, in February 1989, petitioner filed a letter indicating that the August 1988 transfer was in error and that he retained title. In July 1989, petitioner, as president of that corporation, conveyed title to a Riverside County aircraft dealer.

Analysis and Conclusions

Is petitioner liable for sales tax on this California sale of an aircraft to him?

Sales tax is normally imposed upon retailers for the privilege of selling tangible personal property at retail (Revenue and Taxation Code section 6003 and 6051). The measure of the sales tax is the retailer's gross receipts derived from California retail sales (Rev. & Tax. Code § 6012). The place of the sale is the place where the property is physically located at the time the act constituting the sale takes place (Rev. & Tax. Code § 6010.5). The retailer may add sales tax reimbursement to the gross receipts amount, but it is a matter of contract of sale (Civil Code § 1656.1(a)). It is presumed that sales tax reimbursement was added if certain factors existed, none of which has been shown to be applicable here (ibid.). It is presumed that all gross receipts are subject to tax until the contrary is established by the retailer (Rev. & Tax. Code § 6091). The taxpayer has the burden to prove an exemption from sales tax (ibid.; McDonnell Douglas Corp. v. State Board of Equalization (1992) 10 Cal.App.4th 1413, 1420).

There is a sales tax exemption for a retailer on gross receipts derived from the California sale of an aircraft sold to persons who are not residents of California and who will not use such aircraft in California other than in the removal of the aircraft from this State (Rev. & Tax. Code § 6366; and Reg. 1593(a)(3), and (b)(3)). If a purchaser certifies in writing to a seller that some property purchased will be used in a manner or for a purpose entitling the seller to treat the gross receipts from that sale as exempt from sales tax, but then otherwise uses the property, the purchaser is liable for sales tax as if he were a retailer making a California retail sale measured by the cost (Rev. & Tax. Code § 6421(a); and Reg. 1667(a)). The seller is relieved of sales tax liability by taking an exemption certificate (Rev. & Tax Code § 6421(a), and Reg. 1667(b)(1)).

It is our conclusion that on this [city 1] sale, the seller was relieved of the sales tax liability which was shifted to petitioner (absent an exemption or exclusion available to him) due to petitioner's issuance of an exemption certificate based upon the belief of petitioner and the seller that petitioner was not a resident of California (Rev. & Tax. Code § 6421(a); Reg. 1667(a)). Although we do not possess the exemption certificate, petitioner's explanation supports a finding that he issued one. He had conceded issuing it, and that action followed his discussion with the Board on the subject of that exemption. During that conversation, it was accepted as fact that petitioner was a non-resident of California based upon his representation.

It is our conclusion that petitioner was a California resident as well as probably an Oregon resident on the date of his purchase. The available evidence fairly clearly shows his California residency. He conceded this by filing California resident income tax returns, rather than California non-resident returns. Any actual belief, then or now, of petitioner that he was not a California resident was his mistake.

Consequently, petitioner is not exempt from California sales tax based upon Revenue and Taxation Code section 6366 and Regulation 1593(a)(3).

There is no interstate commerce exemption applicable in this case because the sale and delivery to petitioner occurred in California with petitioner then functionally using the aircraft in California on his flight to Oregon. The transportation of this aircraft to Oregon would have been contractually required to occur, and have actually occurred, via the seller or a carrier in order for such an exemption to apply (Rev. & Tax. Code § 6396; and Reg. 1620(a)(3)). Revenue and Taxation Code section 6009.1 is not applicable since it only applies to use tax cases.

There is no exemption or exclusion available to petitioner regarding any subsequent sale to O--- F--- I--- Corp. Petitioner did not issue a resale certificate. There was no resale to this corporation within a reasonable time after petitioner's purchase. Petitioner owned the aircraft for several years as an investment, which is an intervening use. Furthermore, there was some intervening functional use other than retention, demonstration or display (See Reg. 1668).

Recommendation

Redetermine without adjustment.

_____ May 23, 1993
Stephen A. Ryan, Senior Staff Counsel Date