STATE OF CALIFORNIA

BOARD OF EQUALIZATION

168.0225

APPEALS UNIT

In the Matter of the Petition for Redetermination Under the Sales and Use Tax Law of:	)	HEARING DECISION AND RECOMMENDATION
[M]	)	No. S- -- XX XXXXXX-010
Petitioner	)	

The above-referenced matter came on regularly for hearing before Hearing Officer H. L. Cohen on April 13, 1990 in San Diego, California.

Appearing for Petitioner: Mr. [M]

Mr. [L], CPA

Appearing for the Department of Business Taxes: Mr. T. Bingham
Senior Tax Auditor
San Diego District

Observers: Ms. J. Saunders
Hearing Officer
Appeals Unit

Mr. A. Nevarez
Hearing Officer
Appeals Unit

Protested Items

The protested tax liability for the period July 1, 1983, through June 30, 1986, is measured by:

	Item	State, Local and County
A	Claimed exempt sales disallowed	$1,449,782
C.	Differences between reported sales And financial statements	272,551
	Total	$1,722,333

Contentions

Petitioner contends that:

1. The claimed exempt sales were in fact sales for resale which are not subject to tax.

2. The difference between the sales shown on financial statements and sales reported consist of receipts from exempt sales in interstate commerce.

Summary

Petitioner is an individual engaged in selling various types of tangible personal property. At issue in this audit are sales of dental gold and pharmaceuticals. He began in business in August 1983. There has been no prior audit.

The auditor found that petitioner had made sales of "crown casting units" to dentists but had not charged tax reimbursement or paid tax with respect to these sales. Crown casting units are gold alloy which is used to fill patients' teeth. The alloy contains gold, silver, and copper. The auditor initially held petitioner liable for tax on all sales of crown casting units. Petitioner contended that some of these sales qualified as exempt sales of bullion. The auditor accepted this contention and deleted from the amount subject to tax all sales of crown casting units over $1,000. Petitioner did not contest the application of tax to sales under $1,000.

Subsequent to the reaudit of August 4, 1988, in which the sales of crown casting units of over $1,000 were allowed as exempt, the question was reviewed by the Petition Unit of the Department of Business Taxes. The Petition Unit contended that the crown casting units were fabricated gold, to which the exemption does not apply. The Petition Unit cited as support Business Taxes Law Guide, Annotation 168.0260 (May 20, 1987).

The auditor found that petitioner had claimed as sales for resale numerous sales of pharmaceuticals to [F]. No resale certificate had been taken from [F]. An inquiry was sent to [F]. [F] replied that the property had all been resold to [F2] because it was not longer in business and its president was in prison. The auditor noted that [F] had stated on its application for its seller's permit that it was in the business of selling perfume. Because [F] was not shown as being in the business of selling pharmaceuticals and because the auditor did not accept the statements of [F] that the pharmaceuticals purchased from petitioner had been resold, the auditor applied tax to petitioner's receipts from [F] (Audit Item A).

At the hearing, petitioner submitted copies of invoices issued to [F], invoices from [F] to customers, and checks from customers to [F]. Petitioner contended that this evidence demonstrated that its sales to [F] were sales for resale.

The auditor found that petitioner's financial statement showed more sales than had been reported to the Board for sales tax purposes. Identified exempt sales and sales not subject to tax were subtracted from the financial statement figures, but the amount was still larger than the amount reported. Tax was applied to the difference (Audit Item C).

At the hearing, petitioner stated that the auditor had failed to subtract exempt sales in interstate commerce from the financial statement figures. Petitioner stated that he had documentation to support the interstate commerce sales and could show that the auditor had not considered these sales.

Analysis and Conclusions

Section 6355 of the Revenue and Taxation Code provides:

"(a) There are exempted from the taxes imposed by this part the gross receipts from the sales in bulk of monetized bullion, nonmonetized gold or silver bullion, and numismatic coins which are substantially equivalent to transactions in securities or commodities through a national securities or commodities exchange and the storage, use, or other consumption in this state of monetized bullion, nonmonetized gold or silver bullion, and numismatic coins so sold.

"(b) A sale in bulk, for purposes of this section, shall be deemed to have occurred if the amount of monetized bullion, nonmonetized gold or silver bullion, and numismatic coins sold in the transaction totals, in market value, the sum of one thousand dollars ($1,000) or more, or its equivalent.

"(c) 'Monetized bullion,' for purposes of this section, means coins or other forms of money manufactured of gold, silver, or other metal and heretofore, now, or hereafter used as a medium of exchange under the laws of this state, the United States, or any foreign nation. 'Monetized bullion," for purposes of this section, also means gold medallions struck under the authority of the American Arts Gold Medallion Act (Title IV of Public Law 95-630).

"(d) A sale of monetized bullion, nonmonetized gold or silver bullion, or numismatic coins, for purposes of this section, shall be deemed to be substantially equivalent to a transaction in securities or commodities through a national securities or commodities exchange, if the sale is by or through a person registered pursuant to the Commodity Exchange Act (7 U.S.C. Sec. 1 et seq.) or not required to be registered under the Commodity Exchange Act."

To qualify for exemption, the sale must be of bullion, in an amount of $1,000 or more, and be substantially equivalent to a transaction in securities or commodities through a national securities or commodities exchange. Annotation 168.0260, which was cited by the Petition Unit, states that "fabricated gold" is excluded from the definition of "gold bullion." "Fabricated gold" is defined as any processed or manufactured gold having a gold content not exceeding 90%. The description of the crown casting units in the audit workpapers indicates that they contain only 79.9% gold. They do not qualify, therefore, as nonmonetized gold bullion. Further, the sales were not substantially equivalent to security or commodity transactions through a national exchange. I conclude that the auditor incorrectly excluded these sales from the amount subject to tax. Tax should be applied to these sales.

Section 6091 of the Revenue and Taxation Code provides that it shall be presumed that all gross receipts are subject to tax until the contrary is established. The burden of showing that a sale is not at retail is upon the seller unless a resale certificate is taken from the buyer. Petitioner does not hold a timely resale certificate from [F]. It is therefore petitioner's burden to show that [F] actually resold the property.

The fact that [F] is listed as a seller of perfume is certainly a basis for questioning whether that firm was actually reselling the pharmaceuticals which it purchased from petitioner. That is no basis, however, for rejecting evidence of resale out of hand. [F] purchases were too large to assume consumption. Further, [F] furnished the name of its customer. At the hearing, invoices and cancelled checks were furnished. We conclude that petitioner has amply demonstrated that the property which it sold to [F] was resold by [F] in the course of its business. Audit Item A should be deleted from the amount subject to tax.

With respect to Audit Item C, petitioner provided some evidence at the hearing that the auditor had not taken into account petitioner's documented sales in interstate commerce. The auditor should review petitioner's evidence and make any adjustment warranted.

Recommendation

Reaudit in accordance with the above discussion.

5/29/90

H. L. Cohen, Hearing Officer Date