STATE OF CALIFORNIA

BOARD OF EQUALIZATION

190.1286

In the Matter of the Petition for Redetermination Under the Sales and Use Tax Law of: M--- D--- CO. Petitioner	)))))))	DECISION AND RECOMMENDATION No. SR -- XX XXXXXX-010

The preliminary hearing on the above taxpayer's petition for redetermination was held on August 27, 1987, in Culver City, California.

Hearing Officer:	H. L. Cohen
Appearing for Petitioner:	Mr. P--- A---, CPA Mr. T--- B---, CPA Mr. M--- F---, CPA Mr. G--- H---, CPA Mr. M--- P--- Controller Mr. D--- S---, CPA Mr. P---T--- Executive Director, --- --- --- of --- ---, Inc.
Appearing for the Board.	Mr. J. Macias Tax Auditor Culver City District

Protested Items

A petition for redetermination was filed by letter dated January 9, 1986. The petition contained arguments and authorities supporting petitioner's position.

The protested tax liability for the period April 1, 1981, through December 31, 1984, is measured by:

	Items	State, Local and County	Transit District
A.	Markup on standard appliances included in lump-sum sales of realty	$450,843	$144,721
B.	Markup of upgraded appliances included in lump-sum sales of realty	25,730	8,894
	Totals	$476,573	$153,615

Contentions

Petitioner contends that:

1. The tax on the sales of the property in question should be based on petitioner's cost.

2. Even if tax is to be based on a marked-up cost, the percentage used by the auditor is excessive.

Summary

Petitioner is a corporation which is engaged in business as a construction contractor and land developer. It began in business in 1976. There has been no prior audit.

Petitioner purchases appliances tax-paid for installation in homes. Petitioner regards these appliances as fixtures which are subject to tax on cost. The houses which petitioner builds and sells are sold at lump-sum prices. Charges over the base price for the houses are made for upgraded appliances. Since petitioner regards the appliances as fixtures, no tax is reported or paid with respect to any imputed markup on the cost of the appliances.

The auditor concluded that only appliances which were firmly affixed to the structure by bolts, screws, or nails and which are also intended to remain as a permanent part of the structure constituted fixtures. Appliances such as dishwashers and trash compactors were regarded as fixtures under these criteria. Appliances which are attached to the structure by gas or water pipes and which are fitted into pre-built compartments in the wall or counters and not otherwise attached except by their own weight or by clips were regarded as ordinary tangible personal property subject to tax on the amount charged to the buyer, rather than on cost. Appliances such as ranges, ovens, oven hoods, and microwave ovens were regarded not to be fixtures under these criteria. Both the auditor and petitioner agreed that free-standing appliances such as refrigerators, clothes washers and clothes dryers are not fixtures and are subject to tax based on selling price rather than on cost.

Since the houses were sold on a lump-sum basis, there was no stated selling price for the appliances. The auditor analyzed charges made by petitioner for upgraded appliances and arrived at an average markup of 63.1% over petitioner's cost. This factor was applied to both standard fixtures (Audit Item A) and to upgraded fixtures (Audit Item B). Credit was allowed for tax reimbursement paid by petitioner to its vendors.

Petitioner states that it is true that in the past, appliances were not fixtures. House buyers purchased the appliances separately from the realty and took the appliances with them when they moved. Petitioner states that nowadays, house buyers want built-in appliances and treat them as part of the realty. With the exception of refrigerators, clothes washers, and clothes dryers (not at issue here), house owners do not expect to take the appliances with them when they move. The appliances are in essence fixtures. Prior Board rulings holding the contrary should be regarded as obsolete. Petitioner states that a statewide survey of construction contractors shows that all construction contractors view built-in appliances as fixtures and pay tax accordingly. The appliance must be installed by plumbers and electricians. They are not designed to be portable or to operate free standing. Accordingly, tax should apply to cost. Since the appliances were purchased tax paid, no further tax is due.

Petitioner contends that if the appliances are not regarded as fixtures, the markup should be the same as that achieved on the entire house. There is no reason to find a higher markup on the appliances than on the rest of the house. Petitioner states that the achieved gross profit after administrative and overhead expenses is 10.8% which corresponds to a markup of 12.1% Petitioner contends that this is the maximum markup which should be subject to tax.

Analysis and Conclusions

Section 6051 of the Revenue and Taxation Code imposes the sales tax upon retailers based on the gross receipts from the sale of tangible personal property in California. Section 6012 defines "gross receipts" to include the total amount of the sale price. Sales and Use Tax Regulation 1521 provides in subdivision (b)(2)(B) that construction contractors, other than United States construction contractors, are retailers of fixtures which they furnish and install. If the contract does not state the sale price of the fixture, the sale price is deemed to be the cost price of the fixture to the contractor. Thus, the additional tax asserted here depends upon whether or not the property in question constitutes fixtures.

We have previously concluded that appliances sold with realty are not fixtures. See Business Taxes Law Guide, Annotations 150.0020, July 10, 1958 (refrigerator, gas range, and washing machine); 150.0080, July 15, 1957 (refrigerator, stove, washer, or other equipment not built in); and 150.0160, August 26, 1953 (range and refrigerator). Although these conclusions are relatively old, they were affirmed by a memorandum dated March 19, 1980, from the then Principal Tax Auditor, Donald Brady. These opinions, however, deal with free-standing appliances. We are of the opinion that where appliances are installed into compartments specifically designed to accommodate them and are intended to remain in these spaces for the life of the appliance, they should be regarded as fixtures. This is especially true where the appliance is not functionally or aesthetically suitable for operation outside the predesigned space

and would not in any normal situation be taken by the owner of the house if the owner changed his or her residence.

Since we have concluded that the appliances here constitute fixtures, tax applies to cost. It is not necessary to determine what the markup was. Since petitioner bought the appliances tax-paid, no further tax is due.

Recommendation

Grant petition.

_____ 11-6-87

H. L. Cohen, Hearing Officer Date