STATE OF CALIFORNIA

190.2501

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition for Redetermination Under the Sales and Use Tax Law of: G--- S--- I--- S--- Petitioner	))))))))	DECISION AND RECOMMENDATION No. SY -- XX XXXXXX-010

The Appeals conference in the above-referenced matter was held by Staff Counsel Lucian Khan on September 27, 1993 in Sacramento, California.

Appearing for Petitioner: No appearance.

Appearing for the
Sales and Use Tax Department
(SUTD): David Hofer
Senior Tax Auditor

Leon Adams
District Principal Auditor

Protested Item

The protested tax liability for the period January 1, 1989 through March 31, 1992 is measured by $130,071.

Petitioner's Contention

The adjustment in the reaudit should be $175,893 rather than $45,822. All the construction contracts qualify as lump sum; therefore, petitioner is a consumer and not a retailer of materials.

Summary

The issue presented is whether petitioner was a retailer of irrigation system parts (materials) where it separately stated the sales price of the materials, and billed the customer sales tax.

Petitioner is a corporation involved in sales, installation and rentals of agricultural irrigation systems. In June 1992, SUTD completed an audit covering the period January 1, 1989 through March 31, 1992. In that audit, SUTD assessed tax on the difference between total sales reported on petitioner's income tax returns as compared to the amounts reported to the Board.

Petitioner disagreed with the audit findings, and a reaudit was completed in November 1992. Adjustments were made for materials reported at retail on lump-sum construction contracts to furnish and install irrigation systems underground. The remaining contracts for which adjustments were not made consisted of transactions where petitioner separately stated the sales price of materials, and separately stated the amount of tax. These transactions were either handled by invoice, or separate statements appearing within written construction contracts which did not explicitly provide for transfer of title to materials, prior to installation.

Petitioner argues all its contracts qualify as lump sum; therefore, it is a consumer of all materials used.

SUTD argues that unless petitioner can provide additional lump-sum contracts to support its position, no further adjustment is warranted.

SUTD submitted a copy of an invoice dated February 1, 1991 (Exhibit 1), and a copy of a written contract (Exhibit 2) as illustrative of the manner in which petitioner billed its customers for the remaining contracts in question.

Shortly after concluding the conference, I received a phone call from Mr. J--- D---. He stated they had inadvertently overlooked the conference notice and wished to have additional time in which to present further arguments and/or documentation.

In a letter dated October 5, 1993, Mr. J--- C--- (corporate president) states his position remains that petitioner correctly classified each contract and collected and paid the appropriate amount of sales tax due. He argues that the auditor disallowed oral agreements as non-contractual even when supported by quotations and other written evidence. The auditor's understanding of what constitutes a contract is contrary to the legal definition of a contractual agreement. The accounting software does not allow a lump-sum invoice. Therefore, petitioner is obligated to produce an itemized invoice, adjust the selling price to conform to bid numbers, and make final sales tax adjustments at month-end and year-end. They are currently involved in a law suit with the software supplier for this reason. Contracts or bids which were subsidized by the soil conservation arm of U.S.D.A. require itemized numbers, and at least two invoices per job. While these agreements are clearly contractual in nature and lump sum, they appear to be a time and material sales, as the government does not allow certain material to appear on its invoice of record.

Analysis and Conclusions

"Sale" means and includes any transfer of title or possession of tangible personal property for a consideration. (Revenue and Taxation Code Section 6006.) Every seller who makes a retail sale of tangible personal property is defined as a retailer. (Rev. & Tax. Code § 6015.)

Revenue and Taxation Code Section 6051 provides for the imposition of sales tax for the privilege of selling tangible personal property in this state.

"Construction contractor" means any person who agrees to perform and does perform a construction contract. "Construction contract" means and includes a contract, whether it is lump sum, time and material, or cost plus. The term "time and material contract" includes a contract under which the contractor agrees to furnish and install materials and which sets forth separately, a charge for the materials and a charge for the installation. If the contractor bills his customer an amount for "sales tax" computed upon his marked-up billing for the materials, it will be assumed in the absence of convincing evidence to the contrary, that he is a retailer of the materials. (Sales and Use Tax Regulation 1521(a), (b).)

In my review of Exhibits 1 and 2, I note that each contains a separate listing for parts or materials, as well as a separate statement for taxes. Since the billing to the customer separately states the selling price of materials, and sales tax, petitioner is deemed to be the retailer of the materials under Regulation 1521(b). The fact petitioner's software program does not allow for a lump-sum invoice, or contracts subsidized by a U.S. Government agency require itemized billings does not change this result. No unconstitutionality arises from the fact that tax consequences may vary according to the forms of transactions that nonetheless accomplish substantially the same result. (Simplicity Pattern Co. v. State Board of Equalization 27 Cal.3d 900.) If petitioner can provide documentary evidence showing that any of the remaining contracts are lump sum, this evidence may be reconsidered in a Request for Reconsideration.

Recommendation

Deny the petition.

_____ _____
Lucian Khan, Staff Counsel Date

Attachments: Exhibits 1 and 2