

710. 0110

2/19/92  
and 5/19/92

STATE OF CALIFORNIA  
BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition )  
for Redetermination and Claim )  
for Refund Under the Sales )  
and Use Tax Law of: )  
 )  
 )  
 )  
 )  
 )  
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 )  
Petitioner/Claimant )

DECISION AND RECOMMENDATION

The above-referenced matter came on regularly for conference before Staff Counsel Janice M. Jolley on January 6, 1992, in California.

Appearing for  
Petitioner/Claimant:

Appearing for the  
Sales and Use Tax Department:

Protested Item

The protested tax liability for the period January 1, 1987, through December 31, 1989, is measured by:

<u>Item</u>	<u>State, Local and County</u>
B. Fair market value of no-charge accommodation loans.	\$ 83,736

Petitioner/Claimant's Contention

1. The equipment loans to customers for which no rental receipts were generated were accommodation loans and exempt from tax under Sales and Use Tax Regulation 1669.

Summary

Petitioner/Claimant (hereinafter, "petitioner") purchases surveying equipment under resale certificates which it routinely resells at retail. It allocates some of this equipment to a rental pool inventory. Average taxable yearly sales approximate \$3,791,125. On or about October 12, 1990, petitioner tendered a check for \$6,618.72 to the Board as payment in full of its liabilities for tax and interest for the disputed tax period. Petitioner's claim for refund derives from this payment.

As an accommodation to purchasers who have crews in the field, petitioner gratuitously loans equipment pool rental inventory to purchasers if any equipment that petitioner previously sold breaks down and needs repair. According to the Sales and Use Tax Department (hereinafter "the Department"), petitioner owes tax measured by the fair rental value (FRV) of the loaned equipment. Petitioner contends that if phantom rental receipts are imputed to it, it will be financially injured because petitioner loaned the equipment to generate good will, but received no revenues from which to pay the tax.

Petitioner acquired the inventory ex-tax and elected to pay tax on rental receipts. Petitioner contends that Sales and Use Tax Regulation 1669(e)(1)(A) applies only to rental of ex-tax inventory purchased to be used exclusively for accommodation loans. That is, petitioner contends that tax can only be imposed on inventory if inventory used exclusively for accommodation loans is rented. Since petitioner removes this property from rental inventory that generates gross receipts, it alleges Sales and Use Tax Regulation 1669(e)(1)(A) is inapplicable. Petitioner seems to rely on its election to pay tax on rental receipts as its basis to assert that no tax is due because no rental receipts were obtained from the accommodation loans.

The Department, however, contends that tax measured by the FRV of the loaned equipment is due under Sales and Use Tax Regulation 1669(e)(1)(B) precisely because rental pool inventory was used for a purpose other than for resale, demonstration, or display.

Petitioner contends that applying the FRV calculated by the tax auditor in Exhibit A distorts the measure of tax. Petitioner's general manager admits he agreed to use the average of rental values charged in the quarter immediately following the audit period as the fair rental value for the quarters under audit. These amounts were projected into prior quarters in Exhibit A to compute the FRV and to derive the measure of tax for underreported gross receipts from accommodation loans. Petitioner alleges in retrospect, however, that because of inflation and its increased cost for the electronic equipment used in this post-audit quarter, projecting the FRV measured by the latter tax period distorted the measure of tax. Petitioner was allowed 30 days to prepare its calculation of an FRV for the first quarter of 1987 to demonstrate its increased costs and inflation so that the measure of tax could be recalculated. No such calculation was submitted by petitioner.

Finally, petitioner alleges that application of tax to rent-free accommodation loans is immoral and that petitioner will be unjustly penalized for tax with no ability to offset the expense against gross receipts actually received from the transactions generating the tax liability.

#### Analysis and Conclusion

Revenue and Taxation Code Section 6201 imposes a tax on the storage, use, or consumption in this state of tangible personal property purchased from any retailer for storage, use, or consumption in this state.

Revenue and Taxation Code Section 6009 defines a "use" to include the exercise of any right or power over tangible personal property incident to the ownership of that property, and also includes the possession of, or the exercise of any right or power over, tangible personal property by a lessee under a lease, except that it does not include the sale of the property in the regular course of business. It is a long standing Board policy to treat a gift, even temporary in nature such as a loan, as a use inconsistent with holding property exclusively for resale. [Business Taxes Law Guide Annotation 280.0820 and 280.0920.]

Petitioner acquired certain equipment ex-tax which it held as rental inventory. According to Revenue and Taxation Code Section 6006(g), any lease of tangible personal property in any manner or by any means whatsoever, for a consideration, is a sale. Revenue and Taxation Code Section 6006.1 defines a lease as a continuing sale. Property purchased for resale (lease) may be acquired ex-tax. Revenue and Taxation Code Section 6203 imposes a

duty on the retailer to collect use tax on rentals. The one exception that would have exempted rental receipts from sales tax appears at Revenue and Taxation Code Section 6006(g)(5) which states that tangible personal property leased in substantially the same form as acquired by the lessor or leased in substantially the same form as acquired by a transferor, as to which the lessor or transferor has paid sales tax reimbursement or has paid use tax measured by the purchase price of the property, would be exempt. Since petitioner stated that it paid tax measured by the gross rental receipts when it rented this equipment, I must conclude (1) that petitioner did not pay sales tax reimbursement when it acquired the rental inventory equipment and (2) that it did not pay use tax measured by its cost in the first quarter in which each piece of equipment was placed in service as rental equipment. The rental equipment was therefore held as ex-tax inventory for resale and could not be subjected to any self-consumed use, such as a loan, unless petitioner paid use tax.

Petitioner was entitled to issue a resale certificate to acquire its rental inventory ex-tax. Because petitioner did not pay use tax measured by its cost in the first quarter in which each piece of rented equipment was placed in service, it made an irrevocable election to collect use tax from its lessees on its gross rental receipts.

According to Revenue and Taxation Code Section 6201, and the aforementioned annotations supra, any use of ex-tax inventory inconsistent with holding it for resale could subject the entire cost to use tax. Nevertheless, Revenue and Taxation Code Section 6244(c) provides that when tangible personal property acquired ex-tax is used for the limited purpose of loans to customers as an accommodation while "awaiting delivery of the property purchased or while property is being repaired for customers by the lender, then the measure of (use) tax is the fair rental value of the property for the period so made." The Legislature, in its wisdom, has determined that it will allow a temporary use of ex-tax purchases held in inventory as accommodation loans and that it will subject the item so used to use tax measured only by the FRV for the period of the loan rather than taxing the entire cost of the equipment. The use tax being collected, however, is imposed directly on petitioner for exercising dominion and control by self-consumption of items held for resale. It is not use tax collected by petitioner under the duty imposed on a retailer/lessor under Revenue and Taxation Code Section 6203 to collect use tax due from the lessee measured by the rental receipts.

At the conference, petitioner's representatives appeared to be confused by the distinction between the duty to collect use

tax imposed on a retailer measured by gross rental receipts (Revenue and Taxation Code Section 6203) and a use tax which is imposed for using, storing, or consuming property acquired in this state ex-tax from a retailer (Revenue and Taxation Code Section 6201). Had petitioner actually rented the equipment and generated gross receipts, tax would be due because the lessee was making a use of the property in this state and petitioner, as the retailer/lessor, had a statutorily imposed duty to collect the use tax owed by the lessee. Under such circumstances, petitioner would have had a right to obtain reimbursement from the lessee. [Brandtjen & Kluge v. Fincher (1941) 44 Cal.App.2d 939.] Since petitioner loaned the equipment in a non-sale transaction which did not generate any gross receipts, petitioner was correctly treated as having personally used the equipment inconsistent with the purpose for which it was purchased ex-tax. This personal use subjected petitioner to use tax under Revenue and Taxation Code Sections 6201 and 6244(c) in an amount calculated to be the FRV of the equipment for the periods each piece of equipment was so used rather than the total amount petitioner paid to acquire the equipment.

Petitioner misconstrues its duty to collect use tax owed by a lessee in situations where the equipment was actually rented from its inability to recoup use tax it owes for its personal consumption of the rented equipment. So long as the rental inventory was used for resale or a continuing sale by lease (Revenue and Taxation Code Section 6006.1), petitioner did not run afoul of its stated nonpersonal use which thereby allowed it to issue the resale certificates. However, when petitioner chose not to charge rental receipts but rather to loan the equipment, it temporarily ceased to hold the rental equipment for resale (continuing sale by lease).

Revenue and Taxation Code Section 6244(b) expressly contemplates that such temporary uses of ex-tax inventories where no gross receipts are generated are taxable events. The measure of use tax due is the fair rental value.

Sales and Use Tax Regulation 1669(e)(1)(A) provides as follows:

"(A) ACCOMMODATION LOANS. If the use of property purchased under a resale certificate is limited to the loan of property to customers as an accommodation while awaiting delivery of property purchased or leased from the lender or while property is being repaired for customers by the lender, the measure of tax is the fair rental value of the property for the duration of each loan so made. The

lender must also include in the measure of the tax paid by him the gross receipts from the retail sales of such property following its loan to his customers."

The standard of judicial review where application of tax is governed by a regulation is whether it is arbitrary or capricious. Culligan Water Conditioning of Bellflower v. State Board of Equalization (1976) 17 Cal.3d 86. I find this regulation to be a clear and rational interpretation of Revenue and Taxation Code Section 6244(b).

Based on the foregoing, I find that the Department correctly determined that the loan of ex-tax rental inventory was subject to use tax under Revenue and Taxation Code Sections 6201 and 6244(c) and that the measure of tax was the fair rental value of the equipment so used. Because petitioner did not provide additional data from its own records to demonstrate that the FRV increased over the audit period, I am unable to determine that the amount projected as the FRV was incorrect since it was based on information made available by petitioner from its own books and records in the quarter immediately following the audit period.

Recommendation

Redetermine without adjustment.

Janice M. Jolley  
Janice M. Jolley, Staff Counsel  
(w/Exhibit A) JA

Feb. 19, 1992  
Date

June 26, 1990

SBOE - Leaner Summary 1990

Agreement #	Name	Loan Period	Rental Value	% TAX RATE	SALES TAX VALUE
1353		12/12/89 to 1/4/90	\$1290.00	6.25	\$80.63
1361		3/7/90 - 4/16/90	690.00	6.25	43.13
2678		4/4/90 - 4/20/90	940.00	6.25	58.75
2611		2/8/90 - 3/6/90	1300.00	6.25	81.25
2843		6/15/90 - 6/22/90	150.00	6.25	9.38
2654		3/13/90 - 4/22/90	117.00	6.25	7.31
2612		2/9/90 - 6/21/90	264.00	6.25	16.50
2634		3/28/90 - 4/9/90	795.00	6.25	49.69
1357		2/20/90 - 2/21/90	95.00	6.25	5.94
66500		3/15/90 - 6/14/90	165.00	7.25	11.96
2653		3/3/90 - 5/7/90	2400.00	6.25	150.00
2813		5/18/90 - 5/24/90	450-	6.25	28.13
2806		5/5/90 - 6/4/90	1500-	6.25	93.75
2839		6/13/90 - 6/26/90	34.50	6.25	2.16
2723		4/30/90 - 4/4/90	1475-	6.25	92.19
2711		4/20/90 - 6/20/90	760-	6.25	47.50
2712		4/20/90 - 6/20/90	480-	6.25	30.00
1363		3/23/90 - 6/22/90	1050-	0	0.00

13955.50 \$808.25

Printed & Submitted



### Analysis and Conclusion

Revenue and Taxation Code Section 6201 imposes a tax on the storage, use, or consumption in this state of tangible personal property purchased from any retailer for storage, use, or consumption in this state.

Revenue and Taxation Code Section 6009 defines a "use" to include the exercise of any right or power over tangible personal property incident to the ownership of that property, and also includes the possession of, or the exercise of any right or power over, tangible personal property by a lessee under a lease, except that it does not include the sale of that property in the regular course of business. A gift, even temporary in nature such as a loan, is a use inconsistent with holding property exclusively for resale. [Business Taxes Law Guide Annotation 280.0820 and 280.0920.] In Wallace Berrie & Co. v. State Board of Equalization (1985) 40 Cal.3d 60, 68, the court noted that a "[t]ransfer of goods other than by sale in the regular course of business is, almost by definition, a use."

Petitioner acquired certain equipment ex-tax which it held as rental inventory. With certain exceptions not relevant here, Revenue and Taxation Code Section 6010(e), defines a purchase to include any lease of tangible personal property in any manner or by any means whatsoever, for a consideration. Revenue and Taxation Code Section 6006.1 defines a lease as a continuing sale. Property purchased for resale (lease) may be acquired ex-tax if it is held for resale, but it could not be subjected to any self-consumed use, such as a loan, without petitioner incurring a personal use tax liability.

Pursuant to Revenue and Taxation Code Section 6201, Wallace Berrie, supra, and the aforementioned annotations, any personal use of ex-tax inventory inconsistent with holding it for resale could subject the entire purchase price of the item so used to tax. There is no dispute petitioner allowed others to access and use its inventory for gratuitous "loans." The Department has determined use tax measured by fair rental value is due from petitioner's self-consumption of the rental inventory for these accommodation loans. (Revenue and Taxation Code Section 6244(b).) That section provides that when tangible personal property acquired ex-tax is used for the limited purpose of loans to customers as an accommodation while "awaiting delivery of the property purchased or leased from the lender or while property is being repaired for customers by the lender, the measure of (use) tax is the fair rental value of the property for the duration of each loan so made." The Legislature has determined that a temporary use of ex-tax inventory for the limited purpose of "accommodation loans" will

be subject to use tax measured only by the fair rental value for the period of the loan rather than by the entire cost of the equipment.

Revenue and Taxation Code Section 6244(b) is addressed solely by the provisions of Sales and Use Tax Regulation 1669(f)(1)(A), which states as follows:

"(A) ACCOMMODATION LOANS. If the use of property purchased under a resale certificate is limited to the loan of property to customers as an accommodation while awaiting delivery of property purchased or leased from the lender or while property is being repaired for customers by the lender, the measure of tax is the fair rental value of the property for the duration of each loan so made. The lender must also include in the measure of the tax paid by him the gross receipts from the retail sales of such property following its loan to his customers."

Petitioner's contention that the aforementioned emphasized provisions of Sales and Use Tax Regulation 1669(f)(1)(A) were intended to limit the taxation of accommodation loans to situations where the ex-tax inventory was acquired solely for use as accommodation loans is clearly erroneous and ignores the plain meaning of the words.

First, there is no provision in the Sales and Use Tax laws that would allow a purchaser to acquire inventory ex-tax for exclusive use as loans. Only items held for resale may be acquired ex-tax. Loans of ex-tax inventory are taxable under Revenue and Taxation Code Section 6244, regardless of whether the loans were for personal purposes or for accommodation loans. Thus, the phrase in the regulation which states property "purchased under resale certificates" was unambiguously directed to acquisitions acquired for the stated purpose of resale. Gifts (loans) for which no consideration is received are excluded from the definition of a sale under Revenue and Taxation Code Section 6006(a) which requires the transfer of title or possession "for a consideration."

Second, the legislature has carved out a specific type of loan that will not trigger taxation of the ex-tax inventory at cost merely because of personal use inconsistent with holding the inventory for resale [Revenue and Taxation Code Section 6244(b)]. Petitioner's RFR addresses unfairness in taxing accommodation loans and economic disadvantages of local retailers subjected to tax on accommodation loans as opposed to out-of-state merchants. It

appears by carving out this limited use, the legislature decided to create some parity and to recognize such a limited use as merited imposition of tax at a lesser rate.

Sales and Use Tax Regulation 1669(f)(1)(A) specifically addresses the aforementioned statute and is directly applicable to accommodation loans only. Had the legislature not defined "accommodation loans" as being subject to different tax treatment, then petitioner's loans would have been subject to tax measured by the entire cost of the equipment under Revenue and Taxation Code Section 6201 unless it could bring itself within the "incidental use" exemption of Sales and Use Tax Regulation 1660(c)(6). Sales and Use Tax Regulation 1660 discusses loans in general without being limited to the definition of "accommodations loans" set forth in Revenue and Taxation Code Section 6244(b).

"(6) **USE OF PROPERTY BY LESSOR.** If a lessor, after leasing property and collecting and paying use tax, or paying sales tax, measured by rental receipts, makes any use of the property in this state, other than incidental use, he is liable for use tax measured by the purchase price of the property. He may, however, apply as a credit against the tax so computed, the amount of tax previously paid to the board with respect to rentals of the property. If the credit is less than the tax, he must pay the difference with his return, but may apply the amount of such payment against his liability for tax on subsequent rentals of the property. Effective January 1, 1973, through December 31, 1978, any amount collected as tax or tax reimbursement by the lessor from the lessee on such subsequent rentals will be regarded as excess tax reimbursement to the extent that the lessor is permitted by the foregoing provisions to apply the amount of his payment for use tax against his liability for tax on subsequent rentals of the property. An incidental use, e.g., a brief loan of property which otherwise is leased by the lessor pursuant to leases which are continuing sales, subjects the lessor to liability for use tax measured by the fair rental value of the property during the period of the incidental use. (See Regulation 1669.5(b)(7).)"

The above regulation, in defining "incidental use," refers the reader to Sales and Use Tax Regulation 1669.5(b)(7) which provides as follows:

"(7) OTHER LOANS OF VEHICLES. If a vehicle dealer or lessor removes a vehicle from resale inventory and loans it to persons other than those specified in (b)(6) above, and the vehicle is not frequently demonstrated or displayed, tax must be paid measured by the purchase price of the vehicle, unless the loan is of such short duration as to constitute only incidental use. If the loan constitutes only incidental use, preceded and followed by frequent demonstration, or display, the measure of tax is the fair rental value of the vehicle for the period of such use as fair rental value is defined in (b)(6) above. A loan for a period of 30 days or less will be considered incidental use. Periods during which a vehicle is leased, pursuant to leases which constitute continuing sales, will be regarded as periods equivalent to periods of demonstration and display." (Emphasis added.)

It is a well-recognized maxim of statutory construction that where both a general and a specific statutory provision are applicable, the specific supersedes the general one.

All equipment usage included in Audit Item B falls squarely within the statutory definition of an "accommodation" loan. Revenue and Taxation Code Section 6244(b) further provides that the measure of tax on such loans is their fair rental value. The statute treats the accommodation loan as a per se temporary or incidental use; that is, the loan is temporary in nature because the item(s) will be returned for further use as rental inventory, and it is incidental to the primary use of the item as a rental income generating asset held for resale.

The express statutory mandate in Revenue and Taxation Code Section 6244(b) requires taxes on statutorily defined "accommodation" loans to be measured by fair rental value. When these same items are again used for leasing, petitioner must pay use tax measured by rental receipts under Revenue and Taxation Code Section 6203 and Section 6204. If petitioner were to loan the equipment for purposes that did not qualify as "accommodation" loans, then petitioner would owe tax on cost, unless such loans qualified as "incidental uses" under Sales and Use Tax Regulation 1660(c)(6).

Recommendation

Redetermine without further adjustment.

Janice M. Jolley  
Janice M. Jolley, Staff Counsel  
*J.M.*

May 19, 1992  
Date