330.2988

Date: 12/22/89

STATE OF CALIFORNIA

BOARD OF EQUALIZATION

APPEALS UNIT

In the Matter of the Petition for Redetermination and the Claim for Refund Under the Sales and Use Tax Law of:	HEARING DECISION AND RECOMMENDATION

The above-referenced matters came on regularly for hearing before Hearing Officer H. L. Cohen on October 26, 1989, in Sacramento, California.

Appearing for Petitioner/
Claimant (hereinafter
Petitioner):

Appearing for the Department
of Business Taxes:

Observers:

Appeals Unit

Protested Item

The protested tax liability under the petition is for the period October 1, 1984, through December 31, 1986, and is measured by:

Item	State, Local and County
A. Unreported delivery and pick-up charges related to rentals	$189,479
B. Unreported rentals	135,049
Total	$324,528

The claim for refund is for the period from January 1, 1984, through December 31, 1984, and is for $1,963.68.

Petitioner's Contentions

Petitioner contends that the leases are not subject to tax because they are not leases of tangible personal property. Petitioner further contends that if the leases are subject to tax, the charges for delivery and pickup of the leased property are not subject to tax because the leases begin before delivery of the property and end before pickup of the property.

Summary

Petitioner is the sole proprietor of a business which is engaged in the rental of power poles, tool sheds, and chemical toilets. He began in business on September 1, 1980. There has been no prior audit.

Construction businesses which need electrical power at a construction site enter into contracts with petitioner. Under these contracts, petitioner obtains permits as necessary from governmental regulatory bodies and from electric utility companies to hook into the power grid of the utility and to install poles and wiring at the construction site. Petitioner then rents the poles and wiring to the construction businesses. The poles are wooden and petitioner embeds them in the ground. Petitioner purchases wood from which it manufactures the poles. A single separate charge is made for delivery, installation, and removal. Petitioner charges tax on the rental charges for the poles but does not charge tax on the charge for delivery, installation, and removal. Petitioner

was unable, at the hearing, to state whether or not the poles and wire were purchased tax-paid.

The auditor regarded the pole leases as leases of tangible personal property which were subject to tax. The auditor regarded the delivery, installation, and removal charge as partially taxable. An allowance of 60% was made for installation, which is not subject to tax, but the remainder was regarded as taxable charges for services related to the lease of tangible personal property. The delivery portion of the charge was regarded as taxable because delivery occurred prior to the start of the lease and because the charge for delivery was not separately stated.

The auditor did not regard the leases as leases of real property because the poles were not intended to remain permanently in place. Most leases were for periods of 60 to 90 days; a few were for three or six months. In some instances, the only charge made by petitioner was for delivery, installation, and removal.

Petitioner contends that the rentals are not taxable rentals because Section 6016.5 of the Revenue and Taxation Code excludes power poles from the definition of tangible personal property. If there is no rental of tangible personal property, none of the associated charges are subject to tax. The claim for refund is based on this contention.

Petitioner contends additionally that while leased fixtures may be subject to tax under certain conditions as set out in Section 6016.3, there is no provision for lease of construction materials. Under Sales and Use Tax Regulation 1521, power poles are defined as materials, not fixtures.

Petitioner further contends that even if tax applies to the rental charges, tax does not apply to the charges for delivery and pickup because these charges are for services which are performed before and after the lease period.

Petitioner argues that the installation is temporary only in the sense that the poles will ultimately be removed. While in place, the poles are realty. The utilities set no time limits on how long the poles can remain in place.

Analysis and Conclusions

Section 6051 of the Revenue and Taxation Code imposes the sales tax on retailers based on the gross receipts from the retail sale in California of tangible personal property. Section 6006 defines sales to include most types of leases of tangible personal property. Section 6016.5 provides that "tangible personal property" for purposes of the Sales and Use Tax Law does not include electrical transmission and distribution lines and the poles, towers, or conduit by which they are supported Under these statutes, petitioner's leases are sales but they are not sales of tangible personal property. The sales (and the "purchases" by the lessees) are not subject to tax.

The auditor contends that the temporary nature of the installations removes the transactions from the ambit of Section 6016.5. We disagree. The statute does not speak in terms of duration or of making improvements to realty. However, even looking at the transactions from the standpoint of improvements to realty, we would not find the rentals taxable. The poles are in fact attached to the realty and are intended to remain for whatever time is necessary to accomplish the lessees' purposes.

We conclude that the petition should be granted since the basis for the determination is that the delivery and pick-up charges are charges for services related to taxable leases. Since the leases are not taxable, the related services are not taxable either.

Since petitioner is not selling the poles and wire, either directly or by way of leasing, petitioner should not have collected tax or tax reimbursement from its customers. The proper tax is either sales tax on the sale of the lumber and wire to petitioner or use tax on the use of the property by petitioner. See Section 6094. If petitioner paid sales tax reimbursement to its vendors with respect to the lumber and wire, or if petitioner purchased these items ex-tax and self-reported use tax, no further tax was due. If petitioner did not pay use tax or sales tax reimbursement, it was still incorrect to collect "tax" from its customers, since no tax was due on the rentals. Any amounts labelled "tax" which were collected by petitioner from customers constitute excess tax reimbursement since no tax was due on the rentals. See Sales and Use Tax Regulation 1700, subdivision (b). Under the regulation, petitioner may receive an unrestricted refund equal to the amount of tax or tax reimbursement actually paid by petitioner with respect to the materials. Any further refund would have to be returned by petitioner

to its customers. See Decorative Carpets, Inc. v. State Board of Equalization (1962), 58 Cal.2d 252.

Recommendation

Grant petition. Grant claim to the extent that petitioner has paid tax or tax reimbursement with respect to purchases of materials and to the extent that petitioner agrees to return the remainder to its customers.

H. L. Cohen, Hearing Officer
12-26-89

12-22-87
Date