

395.1924

3/30/76 joint Venture

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

In the Matter of the Petition)
for Redetermination Under the)
Sales and Use Tax Law)

DECISION AND RECOMMENDATION
OF HEARING OFFICER

_____)
_____)

Acct. No. _____

Petitioner)

This matter came on regularly for hearing on February 23, 1976
before W. E. Burkett, Hearing Officer, in Long Beach, California.

Appearances:

For the Petitioner:

For the Board:

Mr. Jerald Buch
Supervising Auditor

Protested Item

The petitioner has protested the application
of the sales tax on the difference between
the tax-paid cost and the gross selling price
(net markup) on its billing to _____

Measure

\$270,026

Contention of Petitioner

The billings amounted to contributions to a joint adventure.

Summary

The petitioner is a corporation engaged in the business of manu-
facturing and selling precast concrete products.

The protested measure of tax consists of the difference between
the tax-paid cost and the audited retail sales price (actual bill-
ings) of precast concrete siding provided to _____
_____ a sister corporation. _____ had contracted to furnish
and install the property for the _____
on a building installation in Pasadena, California. The peti-
tioner corporation and _____ are wholly owned subsidiaries of
the _____ division of this par-
ent corporation.

It is the petitioner's contention that the precast concrete was furnished as a contribution to a joint adventure with _____

The contract between the petitioner and _____ was an oral agreement. However, the contract between _____ and _____ was a written agreement. It did not mention the petitioner or make any reference to _____ agreement with the petitioner.

The petitioner made periodic billings to _____ for the precast concrete. The entries made in its books and records did not indicate the existence of a joint venture. No division of profits was made upon completion of the contract.

It appears that the petitioner corporation was created in February of 1972 and the construction job in question began in April of 1972. The petitioner continues in existence and now generally handles the precast concrete work in Southern California. _____ is based in Santa Rosa, California.

It further appears that the decision to incorporate involved the appointment of a certain individual with expertise in precast concrete as a corporate officer.

Analysis and Conclusions

Except for certain reorganization transfers qualifying as occasional sales under the provisions of Revenue and Taxation Code Section 6006.5(b), all transfers between commonly owned corporations are treated in the same manner as transfers between strangers for sales tax purposes (see, for example, *Northwestern Pacific Railroad v. State Board of Equalization*; *Pacific Pipeline Construction Co. v. State Board of Equalization*, 49 Cal. 2d 720). It follows that in absence of proof that the petitioner was a joint adventure in _____ construction contract with _____ it must be regarded as the retailer of the property and subject to the sales tax measured by its gross receipts.

A joint adventure is an undertaking by two or more persons jointly to carry out a single business enterprise for profit (*Nelson v. Abraham*, 29 Cal. 2d 745). In order to constitute a joint adventure, the parties must each have a community of interest in the enterprise; the right to share in profits; the obligation to bear the losses and there must exist a right to participate in the conduct of the business undertaking (*Martter v. Byers*, 75 Cal. App. 2d 375; *Spier v. Lang*, 4 Cal. 2d 711).

It is our conclusion that the following factors preclude a finding that the parties were engaged in a joint adventure for the performance of the construction contract.

1. There was no formal joint adventure agreement.
2. The parties did not share profits or losses.
3. The accounting and business entries were not otherwise consistent with the existence of a joint adventure.
4. The petitioner did not actually contract with the general contractor, _____
5. The actual participation of the petitioner was limited to providing the materials.
6. The petitioner was not created for the purpose of engaging in a joint adventure.

Recommendation

It is recommended that the taxes be redetermined without adjustment.

W. E. Burkett
W. E. Burkett, Hearing Officer

3-30-76
Date

REVIEWED FOR AUDIT:

Principal Tax Auditor

Date