

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition)	
for Redetermination and the)	DECISION AND RECOMMENDATION
Claim for Refund Under the)	
Sales and Use Tax Law of:)	
)	
D. L. & E. H. F---)	Nos. SR -- XX XXXXXX-010,
)	-001
)	
<u>Petitioners/Claimants</u>)	

The Appeals conference in the above-referenced matters was held by Senior Staff Counsel H. L. Cohen on September 8, 19XX in Van Nuys, California.

Appearing for Petitioners/Claimants (hereinafter petitioner):	Mr. E. F---, Partner
	Ms. D. F---

Appearing for the Sales and Use Tax Department:	Mr. S. Lau Supervising Tax Auditor
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Protested Item

The protested tax liability for the period April 1, 1988 through March 31, 1991 is measured by:

<u>Item</u>	<u>State, Local and County</u>
C. Taxable equipment rentals and sales of chemicals claimed as exempt labor	\$470,557

Petitioner's Contentions

1. Petitioner is providing service which is not subject to tax.

2. The equipment in question is loaned to customers free of charge; thus, if petitioner is liable for tax, the tax is due only on the chemicals and brushes provided to the customers.

Summary

Petitioner is a partnership which is engaged in providing cleaning and sterilization equipment and chemicals to restaurants and bars. It began in business in January 1988. There has been no prior Board audit.

Petitioner manufactures and distributes dispensers for use in cleaning and sterilizing eating utensils. The dispensers mix or blend detergent and germicides with water. The mixture is used in washing dishes, glasses, and so forth which are used in serving meals. Petitioner also provides the detergent and the germicide. Petitioner retains ownership of the dispensers. Petitioner also provides electric bar brushes to its customers.

Petitioner enters into agreements with bars and restaurants whereby petitioner furnishes dispensers in return for the promise of the customers to purchase all detergent, germicide and brushes from petitioner for a period of one year. The agreement states that the dispensers are not for sale, but are loaned only.

Petitioner's employees deliver the chemicals and cleaners, and calibrate and repair the dispensers. If necessary, petitioner's employees replace the dispensers if they cannot be repaired readily. Customers are visited regularly at one-month intervals to deliver the chemicals and to service the dispensers. If repairs or chemicals are needed other than at the time of the regular visit, petitioner's employees will make special trips to the customer.

Petitioner makes a lump-sum charge of \$19.95 per month which covers delivery of the chemicals, maintenance of the dispensers, and providing of the bar brushes. Some customers who have higher than average consumption of chemicals are charged an additional amount. All chemicals are purchased tax- paid by petitioner. Petitioner did not separately charge sales tax reimbursement to its customers or report or pay tax on the amounts received from the customers.

The auditor regarded petitioner as leasing the dispensers and selling the bar brushes and chemicals. Tax was applied to all of petitioner's charges on the basis that any charges for labor were related to the leases or sales. A credit was allowed for tax-paid materials resold.

Petitioner contends that it provides a sterilization service to its customers. Petitioner contends that the dispensers are loaned to the customers; thus, there are no rentals. Petitioner also contends that if tax is due on the dispensers, it should be based on petitioner's

cost. In addition, petitioner's owner states that in an audit of his prior and similar business, he was told that tax does not apply to the equipment.

The claim for refund is a protective claim covering the same period and transactions as the petition.

Analysis and Conclusions

Sales and Use Tax Regulation 1501 provides that persons who are engaged in the business of rendering service are consumers, not retailers, of tangible personal property which they use incidentally in rendering the service.

The regulation goes on to provide that the basic distinction in determining whether a particular transaction involves a sale of tangible personal property or the transfer of tangible personal property incidental to the performance of a service is one of the true object of the contract. That is, is the real object sought by the buyer the service per se or the property produced by the service. Here, petitioner's customers wanted to have the use and control of a functional and operational dispenser in their place of business. The service of maintenance and adjustment is incidental. The transactions are sales, not the rendering of services. See Bar Master, Inc. v. State Board of Equalization (1976) 65 Cal.App.3d 408, which deals with beverage dispensers furnished to bars under similar conditions as those here. The recitation that petitioner only loans the dispensers does not affect the actual legal conclusion that a rental occurs.

Section 6012 of the Revenue and Taxation Code provides that gross receipts, which is the amount subject to tax, includes charges for any services related to the sale of tangible personal property. Petitioner's maintenance and delivery activities are services related to the sale of the tangible personal property and are thus subject to tax.

Petitioner argues that it should be allowed to pay tax only on the cost of the dispensers. Section 6006 provides in subdivision (g) that, with specified exceptions, "sale" includes leases. The only exception with possible application here is that of subdivision (g)(5). Tangible personal property leased in substantially the same form as acquired by the lessor as to which the lessor has paid sales tax reimbursement or use tax is not regarded as being sold. The evidence here is that petitioner manufactured the dispensers. Thus, petitioner was not leasing them in the form in which petitioner acquired them. Further, under Regulation 1660, if property which is purchased ex-tax is leased in the form in which it was acquired, tax must be reported and paid with the return of the lessor for the period in which the property was first leased. See also Action Trailer Sales v. State Board of Equalization (1975) 54 Cal.App.3d 125. Petitioner did not pay tax on the equipment in the period in which it was first leased; therefore, the tax is due based on rental receipts.

Petitioner's owner states that he received advice from the auditor of a prior business that tax did not apply to this type of activity. The general rule is that erroneous advice from an employee of the Board does not relieve a taxpayer of liability for tax. Such advice cannot create an exemption which is not authorized by law. See Market Street Railway Company v. State Board of Equalization (1955) 137 Cal.App.2d 87 and Fischbach & Moore, Inc. v. State Board of Equalization (1981) 117 Cal.App.3d 627.

Section 6596 provides a basis for relief from tax if there has been reliance on written advice from the Board which is given in response to a written request for advice. There is no evidence of either written advice or a written request for advice. This section thus forms no basis for relief for petitioner.

Recommendation

Deny the petition and the claim.

H. L. Cohen, Senior Staff Counsel

Date