

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

DECISION OF THE BOARD

*In the Matter of the Petition for Redetermination under the Sales and Use Tax Law of
LONG BEACH CONTAINER TERMINAL INC. Petitioner*

Appearances:

For Petitioner: Bernard Mintz
Certified Public Accountant

Eric P. Lerner
Certified Public Accountant

William Vande Wettering
Certified Public Accountant

*For Business Taxes
Appeals Review Section:* Donald J. Hennessy
Assistant Chief Counsel

*For Sales and Use Tax
Department:* Robert Nunes
Deputy Director

John Waid
Staff Counsel

This Decision deals with the application of tax to container cranes purchased from an out-of-state retailer for use in California. Tax was asserted in a Notice of Determination issued June 13, 1991, which was based on an audit covering the period from January 1, 1988 through March 31, 1990. The Board heard the matter at the regular meeting of the Board on September 8, 1993, in Torrance, California and denied the petition at the regular meeting of the Board on June 30, 1994, in Sacramento, California.

Petitioner purchased the container cranes from an Italian corporation. The contract provided that the price included all taxes, however, the seller was not authorized by the Board to collect use tax, and in fact no tax was paid to the Board. The seller was obligated under the contract to erect (install) the cranes at petitioner's Long Beach location and maintained a construction site there for that purpose during the installation. The customs documents consigned the cranes to the seller at the construction site and the seller made all arrangements for processing the cranes through customs. The seller hired local subcontractors to perform some portions of the installation work.

The issue is whether the transaction was subject to sales tax or to use tax. If sales tax was due, the Italian corporation would be liable for the tax, and petitioner would have no liability. If use tax was due, petitioner would be liable for the tax because it did not hold a receipt for the tax from a person authorized by the Board to collect the tax.

Subdivision (a) (2) of Sales and Use Tax Regulation 1620, as it read at the time of this sale, provided:

“(A) Sales tax applies when the order for the property is sent by the purchaser to, or delivery of the property is made by, any local branch, office, outlet or other place of business of the retailer in this state and the sale occurs in this state. . . . Participation in the transaction in any way by the local office, branch, outlet or other place of business is sufficient to sustain the tax.

“(B) Sales tax does not apply when the order is sent by the purchaser directly to the retailer at a point outside this state, or to an agent of the retailer in this state, and the property is shipped to the purchaser, pursuant to the contract of sale, from a point outside this state directly to the purchaser in this state, or the retailer’s agent in this state for delivery to the purchaser in this state, provided there is no participation whatever in the transaction by any local branch, office, outlet or other place of business of the retailer”

These provisions are derived directly from the decision of the United States Supreme Court in *Norton v. Illinois*, 340 U.S. 534. For sales tax to apply, there are two conditions: (1) the sale (title passage) must take place in California and (2) a California office of the retailer must participate in the transaction.

There was contradictory evidence as to where title passed. If title passed outside California, sales tax could not apply and the buyer would without question be liable for use tax. If title passed inside California, it is still necessary for the second condition, a California office, to have been met.

The seller maintained no permanent office in this state. The temporary construction site in this state was established after the parties entered into the contract in question, and was solely for the purpose of installing the cranes pursuant to that contract. This construction site was on real property controlled by petitioner, and the seller was there only as a result of a license to use for installation granted by petitioner.

Given the above, we conclude that the sale (title passage) did occur in California, but that the second requirement, of a California office, was not met. There is a difference in the constitutional nexus requirements for purposes of liability for collection of use tax owed by a customer and for purposes of direct liability for sales tax. Nexus, for purposes

of sales tax liability, required that a California office of the seller participate in the sale. We conclude that establishment by a vendor of a temporary construction site in California, solely for the purpose of installing the property sold pursuant to a contract entered into prior to the establishment of the site, does not create the required constitutional nexus for imposition of a sales tax.

Adopted at Sacramento, California this 17th day of November, 1994.

Matthew K. Fong, Member
Ernest J. Dronenburg, Jr., Member
Attested by: Burton W. Oliver, Executive Director