

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

*In the Matter of the Petition for Redetermination under the Sales and Use Tax Law of
MARK PULVERS Petitioner*

Appearances:

For Petitioner: Mark Pulvers
Petitioner

Elizabeth Insko Reifler
Attorney at Law

Steve Thompson
Business Consultant

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

*For Sales and
Use Tax Department:* Gary Jugum
Assistant Chief Counsel

John L. Waid
Staff Counsel

Glenn Bystrom
Deputy Director

MEMORANDUM OPINION

This opinion considers the merits of a petition for redetermination of sales and use taxes in the amount of \$6,154.95 and 10 percent penalty of \$615.51 filed by Mark Pulvers on November 27, 1991.

The issues are: (1) whether petitioner is a retailer, and (2) whether petitioner's delivery charges for the delivery of food and videos are includible in the measure of tax.

On or about August 1, 1989, petitioner Mark Pulvers, dba Room Service of Marin, began the delivery of food, beverages, and videos to the public by a "Restaurant/Room Service Agreement" (agreement) with various restaurants and stores. The agreements provided in relevant part that each restaurant would prepare and package food ordered through petitioner; that each restaurant was solely responsible for its menu and prices, and would give petitioner timely notice of any menu or price changes; that each restaurant was responsible for the freshness and quality of its food; that only

petitioner would be engaged for the delivery of the restaurant's food; and that petitioner would be responsible for advertising and marketing the restaurant's products by production of a brochure, and its distribution to potential customers.

Petitioner bulk-mailed his brochures to homes and businesses within specified areas. Each brochure advertised the menus of the restaurants, as well as the delivery and pickup of videos, and instructed customers to place their order with petitioner by store/restaurant and item number. The brochure also stated the amount of the delivery charge.

When a customer called petitioner with a food order, petitioner phoned in the order to the restaurant or restaurants chosen by the customer. The restaurant prepared and packaged the food, which was picked-up and delivered by petitioner's driver. If a video was ordered the customer was required to have an account with the store and to call and reserve the video. The customer then called petitioner to pick up the video and deliver it along with the customer's food order. When petitioner's driver picked up the food from a restaurant, the driver signed a receipt acknowledging the items picked-up and their sales price.

Upon delivery, the driver prepared a receipt stating the cost of the food, and video, if any, applicable sales tax reimbursement (computed only on the price of the food and video), and the \$5 delivery charge. The customer paid petitioner's driver. All checks and credit card charges were made payable to petitioner. Petitioner then deducted an agreed percentage of the menu price and his delivery fee, and remitted the balance to the restaurant or restaurants. Thereafter, the restaurant (or video store, if petitioner delivered a video) reported the sales in their respective tax returns and paid the applicable tax due on the food and video rentals. Neither the restaurant nor the video store included the delivery charges in their measure of tax, nor was tax reimbursement collected on the delivery charges. Petitioner contends that, at all times during the period in question, he held himself out as providing a service as an agent of the restaurants and stores for which he delivered food or videos.

Revenue and Taxation Code section 6012 provides in relevant part that the term "gross receipts" means the total amount of the sale price, of the retail sale of retailers, without any deduction for the cost of transportation of the property, except as excluded by other provisions. Section 6015 provides in relevant part that a "retailer" includes every seller who makes any retail sale or sales of tangible personal property; and every person engaged in the business of making sales for storage, use, or other consumption. The term "agent" is defined as one who represents another, called the principal, in dealings with third persons. (See Civil Code, § 2295; see also *Workman v. City of San Diego* (1968) 267 Cal.App.2d 36, 38.)

Whether an agency relationship exists is determined by the relationship of the parties as they in fact exist under their agreement or acts. (*Rezos v. Zahn & Nagel Co.* (1926) 78 Cal.App. 728; see also *Nizuk v. Georges* (1960) 180 Cal.App.2d 699.) In

determining the existence of an agency relationship, an examination of the agreement as a whole and the supporting facts and circumstances is necessary. (See *Anderson v. Badger* (1948) 84 Cal.App.2d 736, 742.)

Petitioner argues that he always acts on behalf of a specified principal when food or a video is ordered, and this fact is always understood by all parties to the transaction. While this is not evidence of disclosure to a customer of an agency agreement between petitioner and the restaurants and video stores (clients), we nonetheless find from the facts and circumstances herein that petitioner held himself out as providing a pick-up and delivery service on behalf of his clients under the dba Room Service of Marin, and not as the retailer of the items delivered.

Petitioner entered into “Restaurant/Room Service Agreements” with his clients that fully set forth the duties and obligations of the parties to the agreement. The clients being solely responsible for such activities as the preparation and packaging of the food, the timely notice of any menu or price changes, and the freshness and quality of its food, placed the control of an exceedingly important item of the transaction in the hands of the clients. Petitioner’s responsibility was limited to such activities as the advertising and marketing of the client’s products by production of a brochure and its distribution to potential customers, and the delivery of the food or video to the customer. As set forth above, petitioner could not pick up a video for a customer that did not have an account with the store. Even though all checks and credit card charges were made payable to petitioner, nevertheless petitioner was acting on behalf of the restaurants in delivering the food.

We conclude that an agency relationship existed between petitioner and his clients, and that such clients were the retailers of the products. Although the agreements did not specify petitioner was acting as an agent, petitioner’s advertising made it sufficiently apparent to customers that they were ordering food from a specific restaurant, and petitioner was merely delivering the food, not reselling it.

We further conclude that petitioner’s delivery charges are services not subject to sales and use taxes. Petitioner’s customers paid petitioner for the service of delivering the food. The retailers did not charge or collect the delivery fee. We believe petitioner operated a delivery service, paid for by the customers, and the charge is not part of the restaurants’ gross receipts.

Although we find the existence of an agency relationship between petitioner and its clients from the facts and circumstances herein, petitioner and similarly situated taxpayers should prepare written agreements that adequately describe the responsibilities of the parties, and make it clear that they are acting as the agent of their clients in the marketing and delivery of their products.

For the reasons expressed in this opinion, the petition for redetermination was granted.

Adopted at Culver City, California, this 13th day of December, 1994.

Brad Sherman, Chairman

Ernest J. Dronenburg, Jr., Member

Winnie Scott, Member

Attested by: Burton W. Oliver, Executive Director