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

KEY EVENTS, INC., dba USA Hosts/Key Events

Petitioner

Account Number SR BH 101-181045
Case ID 953675

City and County of San Francisco

Type of Business: Destination management company

Audit period: 04/01/10 – 07/31/14

<table>
<thead>
<tr>
<th>Item</th>
<th>Disputed Amount</th>
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<tbody>
<tr>
<td>Disallowed claimed nontaxable sales</td>
<td>$469,751</td>
</tr>
<tr>
<td>Tax, as determined</td>
<td>$54,339.84</td>
</tr>
<tr>
<td>Less concurred</td>
<td>-13,724.08</td>
</tr>
<tr>
<td>Balance protested</td>
<td>$40,615.76</td>
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<td>Proposed tax redetermination</td>
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<td>Interest through 08/31/17</td>
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<td>Total tax and interest</td>
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<tr>
<td>Monthly interest beginning 09/01/17</td>
<td>$ 316.98</td>
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</table>

UNRESOLVED ISSUE

**Issue:** Whether adjustments to the measure of disallowed claimed nontaxable sales are warranted. We conclude that no adjustments are warranted.

Petitioner operated as a destination management company (DMC) from July 2001 through July 2014, when it sold the business. As a DMC, petitioner arranged various activities desired by its customers, including corporate getaways, meetings, seminars, dining, and tours, and made reservations at hotels, restaurants, transportation companies, and other businesses to provide services, products, venue rental, and transportation. The restaurants and caterers that petitioner used in its dining program billed petitioner for the food and beverages served to petitioner’s customers, applied mandatory gratuities to the total food and beverage charges, and added sales tax reimbursement to the total bills.

Petitioner paid the restaurants for the food, beverages, gratuities, and tax, and billed those same amounts in its final invoicing to its customers upon the completion of the DMC events. In addition to
those charges, petitioner billed its customers a 20-percent management fee or a 20-percent beverage
gratuity fee, but did not add sales tax reimbursement to any of its fees. The Business Tax and Fee
Department (Department) of the California Department of Tax and Fee Administration, formerly the
Business Tax and Fee Department of the Board of Equalization, found that petitioner, rather than the
restaurants, was the retailer of the food and beverages, and also found that the 20-percent fees that
petitioner billed to its customers were taxable when those fees were a part of petitioner’s gross receipts
from taxable sales of food and beverages, or other tangible personal property.

The Department examined petitioner’s contracts with its customers, and found that the
contracts with two of petitioner’s customers stated that petitioner was the customers’ agent. Since the
Department found that petitioner did not mark up the items sold to those two customers, the
Department determined that petitioner was those two customers’ agent. However, because those were
the only two transactions in which the contract contained an agency statement and in which petitioner
did not mark up the items sold, the Department found that petitioner was not the customer’s agent in
the other transactions it examined, and instead, was a retailer in transactions involving transfers of
tangible personal property.

To establish petitioner’s taxable sales, the Department performed a test of sales contracts and
vendor invoices for the second quarter of 2011 (2Q11), 3Q12, and 1Q13. Petitioner agreed that the
transactions in those three quarters were representative of all of its transactions for the audit period.
For the test period, the Department compiled total recorded nontaxable sales of $3,691,444, of which it
found $167,955 to be taxable, representing an error rate of 4.55 percent. The Department applied the
error rate to petitioner’s claimed nontaxable sales for the audit period to establish disallowed claimed
nontaxable sales of $469,751.

Petitioner argues that it should be treated as a consumer and not a retailer of tangible personal
property. According to petitioner, the true object of its contracts with its customers was the services it
provided in creating, planning, and coordinating events. Petitioner contends that although meals and
other incidental goods were provided as part of some of the events, they were not the true object of the
transactions. Petitioner also points to Albers v. State Board of Equalization (1965) 237 Cal.App.2d
494 (Albers), in which the court considered whether or not the drawings prepared by a taxpayer were
the true object of the transaction, or if the tangible drawings were incidental to the service of creating the drawings. In concluding in Albers that tax applied to the transactions because the true object of the transactions was the tangible drawings, the court pointed out that the taxpayer’s customers provided the details needed to prepare the drawings, and that the taxpayer did not conceive the ideas, concepts or designs. Petitioner asserts that by contrast, it used its own knowledge, expertise, and concepts to create, plan, and coordinate events for its customers, and because of its skills, its customers sought its services, and not the meals and other tangible personal property that petitioner furnished incidentally.

If it is concluded that the true object of its contracts was not a service per se, petitioner contends that it should be treated as an agent of all of its customers. Even though petitioner did not expressly state in all of its agreements that it was acting as an agent, petitioner argues that its customers and the third-party vendors all understood that petitioner was acting as an agent on behalf of its customers. Petitioner states that under the present circumstances, and pursuant to the Board’s Memorandum Opinion in Mark Pulvers (adopted 12/31/1994), petitioner should be considered an agent of its customers and a consumer of any tangible personal property it transferred during the events.

Additionally, petitioner points to the fact that the Board granted the petition of Fun is First, Inc. (Fun is First), a California DMC, which involved similar facts and issues, and argues that by granting Fun is First’s petition, the Board Members effectively accepted the taxpayer’s argument that tax did not apply to the provision of food and drinks. Petitioner states that the Board Members further directed BTFD to engage in a formal process to establish rules for the DMC industry. However, instead of conducting a formal rulemaking process, BTFD restated its internally-created directives in a pamphlet, which petitioner asserts constitutes enforcement of an underground regulation.

While petitioner argues that it only provided nontaxable services to its customers, petitioner contracted with its customers for transfers of food, beverages, and other tangible personal property in

1 In Pulvers, the Board determined that the taxpayer was acting as the agent of restaurants while delivering meals from the restaurant to the customers because the facts and circumstances clearly indicated that the taxpayer was operating a delivery service for the restaurants. Since the taxpayer in Pulvers was acting as an agent of the restaurant, he was not selling the food.
exchange for consideration. It is undisputed that the transactions at issue involve patently identifiable transfers of food, beverages, and other miscellaneous items, which were separately stated on petitioner’s invoices. Pursuant to Revenue and Taxation Code section 6006, subdivision (a), petitioner’s transfers of tangible personal property for consideration were sales at retail and are subject to tax. Regarding the 20-percent fees that petitioner charged its customers, we note that petitioner’s customers did not have an option to decline the fees, and find that mandatory fees were part of petitioner’s gross receipts from its sales of tangible personal property, and thus, are also subject to tax.

We find that petitioner’s reliance on Albers is misplaced because Albers distinguishes between a draftsman, who is made to make drawings based upon the specifications provided by the draftsman’s customer, and an architect who is paid for the design or conception of an architectural idea. Without regard to the level of services petitioner may have provided in making its arrangements, we find it is beyond reasonable dispute that the primary purpose of petitioner’s customers in contracting with petitioner for tangible personal property was that tangible personal property.

Regarding petitioner’s assertion that it was acting as an agent of its customers, we first note that an agency relationship requires that the agent and the principal consent that the agent will act on behalf of the principal, subject to the principal’s control. (See, e.g., Edwards v. Freeman (1949) 34 Cal.2d 589, 592; see also St. Paul Ins. Co. v. Industrial Underwriters Ins. Co. (1989) 214 Cal.App.3d 117, 122.) An agent is the fiduciary of his or her principal, and must disclose all information the agent has relevant to the subject matter of the agency. (Chodur v. Edmonds (1985) 174 Cal.App. 3d 565, 572; Orfanos v. California Insurance Co. (1938) 29 Cal.App.2d 75, 80.) Here, we note that petitioner marked up its costs, and would have been required to disclose this information to its customers if it were acting as the agent (i.e., fiduciary) of those customers. However, there is no evidence that petitioner conveyed this information to its customers, and the mere fact that petitioner marked up its costs indicates that petitioner was the retailer rather than the customer’s agent. Additionally, petitioner has not presented any evidence establishing that it had the authority to act as its customer’s agent (i.e., that petitioner could have contractually obligated its customers to third parties without the customers’
We find the lack of evidence establishing that petitioner had the authority to act for the principal (its customers) indicates that there was no agency relationship. Further, petitioner contracted with third parties on its own behalf and there is no indication that the alleged principals (the customers) had the power to control the conduct of petitioner with those third parties or that petitioner’s customers were contractually obligated to third parties. Therefore, we find that petitioner was not the agent of its customers for the transactions in dispute but was acting on its own behalf.

As for petitioner’s citation to the Board’s memorandum opinion in the matter of Mark Pulvers (adopted December 31, 1994), petitioner does not explain how it believes this opinion applies. The Pulvers opinion considers whether a person making deliveries of food sold by restaurants was the agent of those restaurants. Under the unique facts of that appeal, the Board held that Mr. Pulvers was acting as the agent of the restaurants. That finding has no relevance to the facts here.

Lastly, with regard to petitioner’s argument that the Board’s decision in Fun is First should be treated as precedent in the case at issue, we note that Fun is First is another DMC, an appeal from whom the Board heard on October 31, 2013. The Board granted the appeal but did not issue a written precedential opinion, or any written opinion at all. When the Board does issue a written opinion, that opinion may be issued as a precedential opinion or as a nonprecedential opinion; if the former, the opinion may be cited as precedent in any matter or other proceeding before the Board (unless thereafter depublished, overruled, or superseded), but a nonprecedential opinion may not be cited as precedent in any matter or other proceeding before the Board. (Cal. Code Regs., tit. 18, § 5551, subd. (b)(4).)

Where the Board does not issue any written opinion at all, then, of course, the decision, for which the Board had not adopted a written explanation, cannot be cited as precedent in any other proceeding before the Board.

Since the Board did not issue a precedential written opinion in the Fun is First appeal, the Board’s decision in that matter cannot be cited as precedent in any appeal, including in the present appeal. Although we cannot rely on the Board’s action in the Fun is First appeal to guide the resolution of the appeal before us now, there were Board member comments that are particularly telling. Former Member Betty Yee (now Controller), who eventually made the motion to grant the petition, explained that she had worked with a legislator to pass legislation that would have reclassified...
DMCs such as Fun is First to be consumers, and that such legislation had failed to pass. While indicating how she believed the law *should* treat DMCs, she also went on to state, “I will say, having said all that, that the statutes are not on the side of the Petitioner at this point in time.” She repeated this belief twice more during the Board hearing. Despite these misgivings, Ms. Yee later made the motion to grant, indicating the possibility of pursuing a formal process to clarify the Board’s authority in this area, referencing the Business Taxes Committee.

After the Board’s decision in Fun is First, appeals by DMCs, including petitioner’s appeal, were held in abeyance. Thereafter, the deferrals were lifted and the appeals moved forward with no change to the rules applicable to DMCs. We do not know why no formal action was taken, whether because it was determined that there was no room for interpretation or because such change in interpretation would have been unwise, or for some other reason. It may be that the abeyance was actually to give DMCs time to advance their attempts to obtain a legislative solution. In any event, what we do know is: that the Board decided the Fun is First appeal based on the very specific facts before it; that such decision cannot be relied on in any other appeal; that as a result of the Board’s consideration of that appeal, additional review of the DMC situation was conducted; and that the additional review did not result in any changes to the authority under which we must decide this appeal. Accordingly, under the authorities on which we are required to base our decision in this appeal, we conclude that petitioner was the retailer of the meals, beverages, and other tangible personal property that were furnished to its customers pursuant to its contracts with those customers.

Regarding petitioner’s argument that the “Tax Guide for Destination Management Companies” constitutes an underground regulation, we find that the guidelines at issue are simply restatements of prior agency decisions, and do not violate the Administrative Procedures Act.

**OTHER MATTERS**

None.

Summary prepared by Lisa Burke, Business Taxes Specialist III

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2 There have been at least four similar bills introduced on this subject, SB 700 introduced in 2007, SB 1628 introduced in 2008, AB 676 introduced in 2009, and AB 1687 introduced in 2010, all of which have failed to pass (petitioner was identified as a sponsor in a bill analysis for at least one of the bills).