

**CALIFORNIA STATE BOARD OF EQUALIZATION**  
**APPEALS DIVISION SUMMARY FOR BOARD REHEARING**

In the Matter of the Petition for Reallocation )  
of Local Tax Under the Uniform Local Sales )  
and Use Tax Law of: )  
)  
CITY OF FILLMORE ) Case ID 466375  
)  
Petitioner )

Taxpayer: Seller of uniforms and other related items  
Date of Knowledge: 3/27/08  
Allocation period: 4/1/07 – 12/31/12  
Amount in Dispute: \$1,006,188<sup>1</sup>  
Notification required: Cities of Burbank, Fresno and Los Angeles

This is an appeal that is covered by Revenue and Taxation Code section 40. Therefore, after the Board has made a determination in this matter, a written opinion that, among other things, sets forth the relevant factual findings and the legal analysis on which that determination is based must be published on the Board’s website within 120 days from the date the Board renders a final decision in this matter. Accordingly, the Board may wish to consider the following two options:

(1) The Board could follow its usual practice in business tax appeals, in which it typically votes to resolve the appeal on the day of the hearing. Under the usual practice, a notice of the Board’s determination will be mailed within 45 days of the date of the Board’s vote, and the 30-day period for the filing of a Petition for Rehearing (PFR) would begin on the date the notice is mailed. If a PFR is not filed, the Board’s determination will become final and its decision will be rendered at the expiration of the 30-day PFR period. Unless the Board specifically directs that it desires to issue a precedential (Memorandum Opinion) decision in this matter, staff would then expeditiously bring

<sup>1</sup> This is the amount that Taxpayer reported from April 1, 2007, through December 31, 2012 (i.e., to petitioner from April 1, 2007, through September 30, 2011, to Burbank from October 1, 2011, through December 31, 2011, and to petitioner through the Ventura countywide pool from January 1, 2012, through December 31, 2012). The amounts reported from April 1, 2007, through December 31, 2007 (\$146,293), were distributed to petitioner; amounts reported from January 1, 2008, through December 31, 2012 (\$859,895), have been held in suspense until this matter is resolved. This means that if the petition is denied, petitioner loses \$146,293, and that amount plus \$859,895 will be distributed to the following countywide pools: Alameda (\$225,776), Contra Costa (\$195), Fresno (\$156,504), Los Angeles (\$366,638), Orange (\$10,858), Riverside (\$95,864), Sacramento (\$140,182), San Diego (\$524), San Mateo (\$79), Santa Clara (\$463), Shasta (\$8,601), and Stanislaus (\$504). However, if the petition is granted, petitioner keeps the \$146,293 and receives the \$859,895 held in suspense.

1 back a proposed (nonprecedential) Summary Decision that complies with section 40 for  
2 the Board's approval on a later calendar. The adopted decision will be published timely  
3 on the Board's website. If a PFR is filed, no decision will be rendered until the  
4 conclusion of the petition for rehearing process.

5 (2) The Board could inform staff of its tentative determination and direct staff to prepare  
6 a proposed Summary Decision (or Memorandum Opinion) that reflects the tentative  
7 determination for Board approval as soon as practicable. Under this option, the Board  
8 would hold any determination of the appeal in abeyance until it has the opportunity to  
9 consider the proposed decision. The Board's later vote to adopt the decision would also  
10 constitute its vote to resolve the appeal, and within 45 days a notice of determination  
11 would be mailed. The 30-day PFR period would begin on the date the notice is mailed.  
12 If no PFR is filed, the Summary Decision (or Memorandum Opinion) would then be  
13 timely posted on the Board's website pursuant to section 40.

14 We also note that petitioner could request during the oral hearing that the Board take Option 2  
15 above and defer its vote to determine the appeal until it adopts a Summary Decision (or Memorandum  
16 Opinion). On the other hand, petitioner may prefer that the Board follow its usual practice in business  
17 tax appeals, which typically would result in a vote to resolve the appeal on the day of the hearing, thus  
18 accelerating the resolution process, but potentially requiring petitioner to file a PFR before it sees the  
19 content of the Summary Decision (or Memorandum Opinion) adopted by the Board.

## 20 BACKGROUND

21 Taxpayer reported the subject sales as sales tax and for most of the periods at issue, directly  
22 allocated the local tax to petitioner. Upon investigation, the Sales and Use Tax Department  
23 (Department) determined that was incorrect and informed petitioner of Taxpayer's mistake. Petitioner  
24 disputed that finding by filing the present petition. The Board held the oral hearing in this matter on  
25 November 16, 2011, after which the Board denied the petition. Petitioner then filed a petition for  
26 rehearing, which the Board granted on May 30, 2012. An oral rehearing was scheduled for September  
27 13, 2012, but when neither petitioner nor Taxpayer responded to the rehearing notice, the matter was  
28 scheduled for decision on the nonappearance calendar. Subsequently, Taxpayer's representative  
requested that the matter be rescheduled for oral rehearing. The oral rehearing was rescheduled for  
December 19, 2012. Taxpayer's representative then requested a postponement. The oral rehearing  
was rescheduled for January 15, 2013, and again, neither petitioner nor Taxpayer responded to the

1 rehearing notice so the matter was scheduled for decision on the nonappearance calendar.

2 Subsequently, Taxpayer's representative requested that the matter be rescheduled for oral hearing.

### 3 UNRESOLVED ISSUE

4 Whether Taxpayer incorrectly reported the local tax as sales tax to the office located in  
5 Fillmore. We conclude that Taxpayer incorrectly reported the local tax as sales tax since the sales  
6 occurred outside California, and that all amounts reported by Taxpayer should therefore be reallocated  
7 as local use tax to the countywide pools of the places of use.

8 Taxpayer sells items such as uniforms to its parent, Taxpayer's sole customer. Parent rents and  
9 cleans such items for its California customers.<sup>2</sup> Taxpayer entered into a Master Sale Agreement with  
10 Parent which obligates Parent to make purchases of at least \$10,000, but not more than \$3,000,000, per  
11 month. Taxpayer receives orders and maintains inventory sold to Parent outside the state, from which  
12 goods are shipped by common carrier to Parent's California facilities. Taxpayer shares staff with  
13 Parent at a headquarters location in Burbank, California. Taxpayer subleases office space in Fillmore  
14 from an unrelated third party (UTP), which office petitioner asserts is where the Master Sale  
15 Agreement was principally negotiated and should be regarded as a place of business of Taxpayer for  
16 purposes of allocating local sales tax to petitioner. In conjunction with that sublease, Taxpayer entered  
17 into an Agency Agreement with UTP on December 1, 2003. The Agency Agreement was entered into  
18 in connection with an Economic Development Agreement that UTP had previously entered into with  
19 petitioner on March 2, 2003. Under these agreements, petitioner pays UTP 85 percent of the local  
20 sales tax it receives from Taxpayer and retains only 15 percent. From its 85 percent share, UTP pays  
21 Taxpayer between 30 and 50 percent of the local sales tax Taxpayer reports to petitioner, and UTP  
22 retains the remainder (i.e., 35 to 55 percent).

23 The Department and Burbank contend that the sales made by Taxpayer are subject to use tax  
24 because the sales occurred outside California when Taxpayer tendered the goods to the common carrier  
25 for shipment to Parent's California facilities. (Cal. U. Com. Code, § 2401; Cal. Code Regs., tit. 18, §  
26

---

27 <sup>2</sup> Parent is a consumer of the items it purchases from Taxpayer under California Code of Regulations, title 18, section 1506,  
28 subdivision (c)(1) and (2). Thus, Parent's purchases from Taxpayer are subject to tax.

1 1628, subd. (b)(3)(D).) Thus, the Department and Burbank conclude that the local tax should be  
2 reallocated as local use tax to the countywide pools of the places of use. Petitioner contends that the  
3 sales made by Taxpayer to Parent are subject to sales tax because such sales occurred inside California  
4 in accordance with the terms of the Master Sale Agreement, asserting that the Master Sale Agreement  
5 says no sale occurs until title passes and that title does not pass until the goods are delivered at Parent's  
6 California facilities. Petitioner argues that such statements effectively require that Taxpayer deliver  
7 goods to Parent at its California facilities and, as such, expressly requires delivery at destination in  
8 accordance with California Code of Regulations, title 18, section (Regulation) 1628, subdivision  
9 (b)(3)(D). Thus, petitioner asserts that the local tax should be allocated to it as local sales tax.

10 A sale is subject to sales tax only if that sale occurs in California and there is some participation  
11 in the sale by a California location of the seller. (Cal. Code Regs., tit. 18, § 1620, subd. (a)(2)(A).)  
12 Where either or both of these conditions are not satisfied, the applicable tax is use tax. Thus, without  
13 regard to any participation in the transaction by the seller within California, if the sale occurs outside  
14 California, the sales tax cannot apply. (Rev. & Tax. Code, §§ 6006, subd. (a), 6010, subd. (a), 6010.5,  
15 6051, 6201; Cal Code Regs., tit. 18, §1620, subd. (a)(2)(A).) The same rules are applicable to  
16 determine whether the local tax is sales tax or use tax. (Rev. & Tax. Code, §§ 7202, 7303; Cal. Code  
17 Regs., tit. 18, § 1803, subd. (a)(1).) In order to show that the local sales tax applied to the subject  
18 sales, petitioner must establish that the sales occurred in California. If it cannot make this showing, the  
19 applicable tax is use tax and reallocation is warranted.

20 Regulation 1628, subdivision (b)(3)(D) explains that title to goods can pass and the sale can  
21 occur *prior* to delivery if the contract explicitly so provides, but cannot pass any later than when the  
22 seller completes its performance with respect to physical delivery of the goods, any retention or  
23 reservation by the seller of title after that point being limited in effect to a security interest. (Cal. U.  
24 Com. Code, § 2401.<sup>3</sup>) That is, the parties are free to expressly agree when title passes (and the sale  
25 occurs) up to the time the seller completes its duties with reference to physical delivery of the goods.

---

27 <sup>3</sup> The Uniform Commercial Code separated risk of loss from title, meaning that a statement regarding risk of loss is not a  
28 statement regarding passage of title. (See Business Taxes Law Guide annot. 557.0490 (10/22/90).)

1 If the seller is required to send the goods to the purchaser but the contract does not *expressly* require  
2 delivery at destination, usually pursuant to a F.O.B. destination provision, the seller completes its  
3 performance with respect to physical delivery at the time and place the seller delivers the goods to the  
4 common carrier for shipment. (Cal. Code Regs., tit. 18, § 1628, subd. (b)(3)(D).) For example, if a  
5 contract that is silent on the seller's delivery obligations provides for passage of title at destination,  
6 title passes at the time of shipment and the retention of title after that time is merely as security. (Cal.  
7 U. Com. Code, § 2401; Cal. Code Regs., tit. 18, § 1628, subd. (b)(3)(D).)

8 Here, while the Master Sale Agreement provides for shipment of the goods to California, it  
9 does not *expressly* require Taxpayer to deliver the goods at destination. (See Cal. U. Com. Code, §  
10 2401, subd. (2)(a).) Therefore, title to the goods passed, and the sales occurred, at the out-of-state  
11 shipping point. (Rev. & Tax. Code, § 6010, subd. (a); Cal. U. Com. Code, § 2401; Cal. Code Regs.,  
12 tit. 18, § 1628, subd. (b)(3)(D) (since the Master Sale Agreement states that title passed upon delivery,  
13 Taxpayer retained a security interest in the goods until that time, but the holding of a security interest  
14 is not relevant to the proper allocation of local tax).) Therefore, all sales occurred at the time and place  
15 of shipment outside California, and the applicable tax is use tax, meaning that no local tax can be  
16 directly allocated to Fillmore. (Rev. & Tax. Code, §§ 6201, 7203; Cal. Code Regs., tit. 18, § 1803.)  
17 Furthermore, even if the sales had occurred inside California, petitioner would still not be entitled to  
18 direct allocation of the disputed local tax because petitioner failed to establish that during the period at  
19 issue, the Fillmore office was a business location of Taxpayer that participated in the sales,<sup>4</sup> and that

---

21  
22 <sup>4</sup> There was no evidence that during the period at issue (beginning April 1, 2007) Taxpayer itself ever used the Fillmore  
23 office to conduct negotiations or to take orders. There was also no evidence that UTP ever had any direct contact with  
24 Parent from the Fillmore office for purposes of processing the actual orders. The monthly review activity (reminding  
25 Parent of the purchase limits and that Parent must pay Taxpayer \$10,000 even when it ordered no goods from Taxpayer)  
26 performed by UTP on behalf of Taxpayer at UTP's office in Fillmore does not constitute negotiation or participation in the  
27 sales by a California place of business of Taxpayer, nor does it serve any real purpose other than to make it appear that UTP  
28 was using the Fillmore office on Taxpayer's behalf in connection with Taxpayer's sales. Further, UTP's use of its own  
office on Taxpayer's behalf does not automatically transmute UTP's office into the office of Taxpayer. While Taxpayer  
has supplied declarations of an officer and of an agent of Taxpayer in which they assert they used the Fillmore office on  
November 24, 2003, to negotiate Taxpayer's only contract (the Master Sale Agreement), we find that the assertions do not  
withstand scrutiny: they were not made contemporaneous with the meeting date (an alleged one-time use almost four years  
prior to the beginning of the period at issue) and documentary evidence such as travel or meal receipts were not provided to  
support their assertions. We also note that neither the officer nor the agent are disinterested parties since Taxpayer and  
UTP have a financial incentive in supporting petitioner's appeal, and the agent's declaration included two documents that  
were clearly altered.

1 was required to hold a seller's permit.<sup>5</sup> (Rev. & Tax. Code, §§ 6066, 6072, 7205, Cal. Code Regs., tit.  
2 18, §§ 1620, subd. (a)(2)(A), 1699, 1802, subd. (a).)

3 Accordingly, we recommend that the Board's decision be re-affirmed, denying the petition and  
4 ordering that the local tax reported as sales tax to petitioner be reallocated as use tax through the  
5 countywide pools of the places of use.

6 **OTHER DEVELOPMENTS**

7 None.

8  
9 Summary prepared by Trecia M. Nienow, Tax Counsel IV  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20

---

21  
22 <sup>5</sup> Since Taxpayer has not conducted negotiations or taken orders at the Fillmore office during the period at issue, Taxpayer  
23 has conducted no activities at that office supporting the issuance of a seller's permit to that location. Accordingly, the  
24 Fillmore office was not properly issued a seller's permit. That is, while Taxpayer is a buying company not formed for the  
25 purpose of redirecting local sales tax under Regulation 1699, subdivision (h), Taxpayer qualifies for a seller's permit only if  
26 it meets the requirements for issuance of a seller's permit under Regulation 1699, subdivision (a). Subdivision (h) is not an  
27 exception to the general rule set forth in section 6066, as interpreted by subdivision (a) of Regulation 1699. Rather,  
28 subdivision (h) provides for issuance of a seller's permit to a "buying company" as defined in that subdivision, provided the  
usual legal requirements for issuance of a seller's permit are satisfied. (*Cities of Agoura Hills, et al.* (Board memorandum  
opinion) 11/14/12.) For example, if a buying company makes only sales subject to use tax (or had no in-state place of  
business or stock of goods), it would not properly be issued a seller's permit even if it is required to collect that use tax  
from its California purchasers. Rather, such a seller should hold a Certificate of Registration Use Tax. (Compliance Policy  
and Procedures Manual, § 205.110; BTLG annot. 175.0153 (5/6/76).) Section 6072, interpreted by subdivision (f) of  
Regulation 1699, specifically indicates that a permit can be held only by persons actively engaging in or conducting a  
business (in this state) as a seller of tangible personal property. There can be no lower standard applied to buying  
companies. (*Cities of Agoura Hills, et al.*)