

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

325.1475

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Claim)
for Refund Under the Sales) DECISION AND RECOMMENDATION
and Use Tax Law of:)
)
T--- I---, INC.) SR -- XX-XXXXXX-001
)
)
Claimant)

The Appeals Conference in the above-referenced matter was held on December 6, 1991, by Senior Staff Counsel W. E. Burkett in Sacramento, California

Appearing for Claimant: Mr. J--- A C---
Manager, General Accounting

Mr. R--- R. L---
President
Pacific Tax Associates

Appearing for the Sales and Use Tax Department: Mr. Robert Wils
Senior Tax Auditor

Protested Item

The protested tax liability for the period April 1, 1986 through December 31, 1987 is measured by:

<u>Item</u>	<u>State, Local and County</u>
Disallowed export sales.	\$865,822

Contentions of Claimant

1. The sales are exempt by reason of delivery to a forwarding agent under Revenue and Taxation Code Section 6387.
2. The sales qualify as exempt exports under the Federal constitution.

Summary

The claimant is an independent division of a diversified corporation that engages in the manufacture and sale of electronic equipment. This operating division was separately permitted for sales and use tax purposes on April 1, 1986.

The protested tax deficiency is measured by the sales price of certain transponders and related equipment sold to the Federal Republic of West Germany for use on fighter aircraft. The items were claimed to be exempt as exports under Article I, Section 10 of the Federal constitution. (Import-Export Clause.)

The items were sold pursuant to a license obtained by claimant which prohibited sale or use of the subject property in the United States. Copies of the licenses have been placed in the petition file.

The items were delivered by the claimant to facilities maintained by the German Military Representative (GMR) in Sun Valley, California. They were consolidated and held for periods of up to one week at which time they were transshipped to the Federal Republic of West Germany by the GMR.

Claimant contends that the export journey had begun at the time title passed upon delivery to the GMR, and that the application of the tax was prohibited under the export clause of the Federal constitution. The Board contends that, notwithstanding the license to export obtained by the claimant, the actual delivery of goods to the purchaser, occurred in California and that the tax was applicable because exportation did not occur until such time as the property was transshipped by the GMR.

The claimant has also submitted that the GMR functioned as an export packer or freight forwarder and that an exemption should also be available under the provisions of Revenue and Taxation Code Section 6387. In support of this contention, it has submitted a copy of a letter to claimant from Guenther Mantell, a legal advisor for the Federal Republic of West Germany dated February 8, 1989, which provides in pertinent part as follows:

“In completion of my telefax dated January 26, 1989 I would herewith like to assure you that our Representative in Sun Valley is a branch office of the German Military Representative USA/CA at Dulles Airport, VA., that means it is a dependent part of the GMR and not a separate legal entity. Freight-forwarder is the GMR Dulles, VA., which has delegated its duties to its Sun Valley office.”

Analysis and Conclusions

We first consider the statutory exemption granted under the following quoted provision of Revenue and Taxation Code Section 6387:

“6387. Delivery to export packers. There are exempted from the computation of the amount of the sales tax the gross receipts from sales of tangible personal property purchased for use solely outside this State and delivered to a forwarding agent, export packer, or other person engaged in the business of preparing goods for export or arranging for their exportation, and actually delivered to a port outside the continental limits of the United States prior to making any use thereof.”

This section is implemented by the provisions of Sales and Use Tax Regulation 1620, Paragraph (a)(3)(B) which provides the following relevant definition of a forwarding agent:

“...term ‘forwarding agent’ means a person or firm regularly engaged in the business of preparing property for shipment or arranging for its shipment. An individual or firm not otherwise so engaged does not become a ‘carrier’ or ‘forwarding agent’ within the meaning of this regulation simply by being designated by a purchaser to receive and ship goods to a point outside this state.”

We are also aided in our determination by the following letter rulings relating to forwarding agents and export packers:

“325.1480 Definition of a Forwarding Agent. A ‘forwarding agent’ includes only such persons or firms as are engaged in the business of arranging for the shipment of goods. Those concerns that are in the business of consolidating shipments into carload lots and performing other services in connection with the shipment of goods would constitute forwarding agents. A person who is an agent of a buyer and takes delivery of the goods in this state on behalf of the buyer is not a ‘forwarding agent’ even though he arranges for the transportation of the goods.

“It sometimes happens that the purchaser will direct the seller to deliver the goods to some third party in this state not in the business of arranging for the shipment of goods but in some other business, and the goods are delivered to him simply to be further processed or incorporated with other goods sold by such persons. In this case, there has not been a delivery to a ‘forwarding agent’.

“325.1500 Export Packer Also a Purchaser. Sales of trucks to be exported by the purchaser who is also an export packer and who takes delivery of the trucks in the state for the sole purpose of packing and crating the trucks for shipment overseas are not exempt from tax by virtue of Section 6387. 9/27/68.

“325.1510 Export Packers. Sales to a foreign purchaser, where delivery is made in California to a separate legal entity set up by the foreign purchaser to act as an export packer, will qualify as exempt within Section 6387, provided the other requirements of that section are satisfied. To be considered an export packer within Section 6387 and Regulation 1620(a)(3)(C)(1)(b), it is not necessary for a firm to hold itself out to the public as an export packer. It is sufficient if the purchaser and the packer are separate legal entities and the packer is engaged in the business of export packing for the purchaser.”

The above-cited regulation and rulings make it clear that in order for the exemption to attach under Section 6387, the person receiving the goods must at the very least be a separate legal entity engaged in the business of preparing goods for exportation or arranging for their transportation. The underlying theory is that this is sufficient to set them apart from the mass of goods in this state and yet preclude the completion of delivery of the goods to the purchaser prior to export.

In this instance the recipient of the goods is not a separate legal entity engaged in the business of exporting but merely a representative of the purchaser assigned to perform the transshipping service. We therefore conclude that the claimant is not entitled to exemption under Revenue and Taxation Code Section 6387.

It is also our conclusion that the claimant's sales are not entitled to the constitutional exemption as exports. This requires that the goods be irrevocably committed to export at the time of sale (delivery to GMR in this case) and that the goods be moved upon a continuous journey to the foreign destination. (Sales and Use Tax Regulation 1620(a)(3)(C)(2).) While there are prior appellate cases that have held that a prohibition on use of the goods in this state is sufficient to set the goods apart, it has been held that this is not sufficient to classify the goods as exempt exports unless the movement of the goods has begun at the time the taxable event occurred. (See Farmer's Rice Cooperative v. County of Yolo, 14 Ca.3d 616 disapproving prior ruling in decision of Montrose Chemical Corp. of America v. County of Los Angeles, 243 Cal.App.3d 300. Also see Kosydar v. National Cash Register Co., 417 U.S.62.)

In this case the tax is applicable because at the time of passage of title upon delivery in Sun Valley, the property had come to rest in this state and had not begun its export journey to Germany. This principal is amply demonstrated by the underlying facts in Empresa Siderurgica v. County of Merced, [1948] 337 U.S. 154. That case involved a California cement plant, which had been sold to a Columbian buyer. Title to the property had passed to the buyer and a common carrier had begun to dismantle the plant and crate it for shipment to Columbia.

At a state when 12% of the plant had been shipped out of the country, the county of Merced levied a personal property tax on the remaining 88%. This balance included about 10% of the original plant that had been dismantled and crated or prepared for shipment, but which had not yet begun its voyage to Columbia. This Court held that the tax on the 88%, including the crated portion, did not violate the Import-Export Clause. Adhering to the test announced, the Court concluded that intent to export is not sufficient. It held that actual movement must have begun at the time the taxable event occurred. Otherwise the constitutional exemption is not applicable.

Recommendation

It is recommended that the claim for refund be denied.

W. E. BURKETT, SENIOR STAFF COUNSEL

12-30-91
Date