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**STATE BOARD OF EQUALIZATION**

March 21, 1995

Re: --- --- ---  
Dear Mr. --- --- ---

Enclosed is a copy of the Decision and Recommendation pertaining to the above-referenced petition for redetermination. We have recommended that the petition be denied.

Please read the Decision and Recommendation carefully. If you accept the decision, no further action is necessary. If you disagree with the decision, you have the following two options:

**REQUEST FOR RECONSIDERATION.** If you have new evidence and/or contentions not previously considered, you should file a Request for Reconsideration. Any such request must be sent to us within 30 days from the date of this letter, at the post office box listed above, with a copy to the Principal Tax Auditor at the same box number. No special form is required, but the request must clearly set forth any new contentions; and any new evidence must be attached.

**BOARD HEARING.** If you have no new evidence and/or contentions, but wish to have an oral hearing before the Board, a written request must be filed within 30 days from the date of this letter with Mrs. Mary Ann Stumpf, Business Tax Appeals Analyst, Board Proceedings Division, at the above post office box.

If neither a request for Board hearing nor a Request for Reconsideration is received within 30 days from the date of this letter, the Decision and Recommendation will be presented to the Board for final consideration and action. Official notice of the Board's action will then be mailed to you.

Very truly yours,

Stephen A. Ryan  
Senior Staff Counsel

SAR: ljt  
Enclosure

cc: Mrs. Mary Ann Stumpf (MIC:81)  
Business Tax Appeals Analyst  
Board Proceedings Division (w/enclosure)  
Principal Tax Auditor (MIC:49) (file attached)

STATE OF CALIFORNIA  
BOARD OF EQUALIZATION  
BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition	)	
for Redetermination Under the	)	DECISION AND RECOMMENDATION
Sales and Use Tax Law of:	)	No.
	)	
	)	
	)	
<u>Petitioner</u>	)	

The Appeals conference in the above-referenced-matter was held by Senior Staff Counsel Stephen A. Ryan on February 17, 1995, in --- California.

Appearing for Petitioner:

Appearing for the  
Sales and Use Tax Department:

--- --- ---  
Supervising Tax Auditor  
  
--- --- ---  
Supervising Tax Auditor

Protested Item

The protested tax liability for the period January I, 1988 through June 30, 1991 is measured by:

<u>Item</u>	<u>State, Local and County</u>
Unreported receipts from rentals of tower cranes	\$ 13,715

Petitioner's Contentions

No use tax applies because petitioner did not receive any rental payments. Petitioner was not paid in kind.

Summary

Petitioner operated as a lessor of equipment and seller of parts. It has been audited by the Board on prior occasions.

The auditor imposed use tax on petitioner measured by the amount of required rental payments to petitioner, as lessor, for one month each under two leases of tower cranes. Petitioner had a written lease with each lessee which provided for set monthly rental payments, and that the lessee was responsible to maintain and repair the crane. The lessees had possession of their respective cranes during the lease term, including during each month for which this dispute exists.

In each case, the lessee informed petitioner that the crane needed extensive repair, and requested that petitioner pay for the repair. It appears that each lessee then owed money to petitioner. Petitioner and each lessee reached an agreement.

As to lessee --- --- ---, he wrote a January 19, 1990 letter to petitioner outlining their agreement: (1) to “split 50-50 the cost of repair, take down and re-installation”; (2) for --- pay the repairer for the repair; (3) for petitioner to “credit” ---- for “their half of the-repair”; and (4) for -- - pay petitioner the remainder owed on all debts. Petitioner issued an invoice to --- which showed a “credit” for the full monthly rent plus full use tax for the next month. Petitioner stamped the credit invoice “PAID”.

Regarding --- petitioner wrote an undated letter to that lessee evidencing their agreement: (1) to “split” fees on repairs; (2) that petitioner would “credit ... against the rental”; and (3) --- would pay petitioner on outstanding debts. On petitioner's next invoice to ---, petitioner listed one charge for the full monthly rental, the agreed credit, and use tax on the net \$785.50 rental charge difference. --- paid the repairer.

#### Analysis and Conclusion

When use tax is incurred by a lessee under a lease which constitutes a “purchase”, the lessor-retailer must collect the use tax from the lessee at the time of each rental payment (Revenue and Taxation Code sections 6203, 6201, 6010(e), and Regulation 1660 (c) (1) ). The “sales price” measure of that use tax is defined as the total amount for which the property is rented, valued in money, whether paid in money or otherwise (Rev. & Tax. Code § 6011(a)), including any amount for which credit is allowed by the seller to the purchaser (subsection (b) (2)).

The evidence shows that petitioner leased the crane to each lessee for the month in dispute in a transaction constituting a "purchase" subject to use tax without exemption or exclusion. The lessee had possession of, and the right to use, the crane under each lease. Petitioner was legally entitled to receive each monthly rental payment from the lessee. Petitioner never waived its rights to that consideration in either case.

Although the other relevant terms of each lease required the lessee to repair the crane, petitioner and each lessee subsequently and voluntarily agreed to split the repair cost. Such later agreements provided for each lessee to pay the repairer, but rather than have petitioner issue a check to the lessee for petitioner's repair share and then have the lessee issue a check to petitioner for the monthly rental, they agreed to allow a "credit" against each monthly rental charge.

Under each scenario, in substance, petitioner still received full consideration for his "purchase"/rental of a crane to each lessee. The net form of payment with a credit offset

expressly against the monthly rental charge was a procedural matter of convenience only, rather than a substantive waiver of the monthly rental consideration. That rental consideration was still subject to use tax, and thus the tax was collectible by petitioner from the lessees at the time of the credit allowance. Petitioner therefore incurred liability pursuant to section 6204 for not remitting the use tax to the Board.

Recommendation

Redetermine in accordance with the (reaudit) Report of Field Audit dated February I, 1993.

\_\_\_\_\_  
Stephen A. Ryan, Senior Staff Counsel

3/7/95

\_\_\_\_\_  
Date