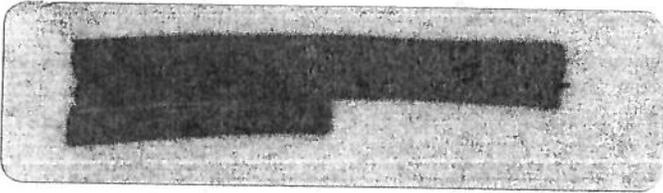


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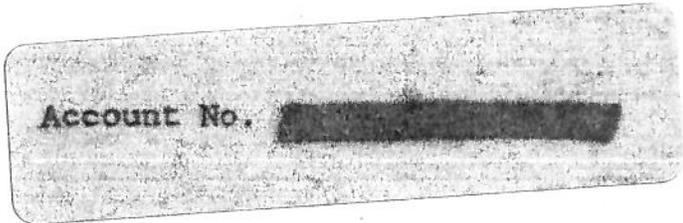
STATE OF CALIFORNIA
BOARD OF EQUALIZATION

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

DECISION AND RECOMMENDATION
OF HEARING OFFICER

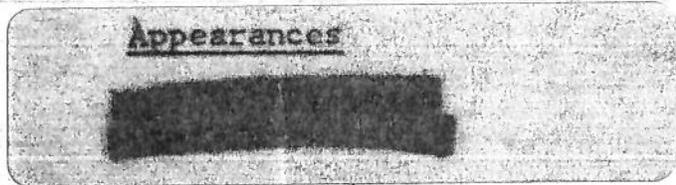


Petitioner



Account No.

This matter came on regularly for hearing on June 3, 1976, in San Francisco, California, before W. E. Burkett, Hearing Officer.



Appearances

For the Taxpayer:

For the Board:

Mr. M. K. Nelson
Auditor

Protested Items
(Period 3-1-73 to 12-31-73)

- | | |
|--|----------|
| 1. Sales of equipment and fixtures subject to tax. | \$24,000 |
| 2. Sales of other products for the 3rd quarter 1973. | 5,208 |

Contentions of Taxpayer

1. The transfer of the equipment and fixtures was made pursuant to a court ordered rescission and was not the result of a sale.
2. The estimated amount is excessive.

Summary of Petition

The taxpayers, husband and wife, briefly operated a pizza parlor which they acquired from _____

The first protested item consists of the audited sales price of fixtures and equipment determined to have been resold to _____

The taxpayers entered an action for rescission and restitution and for fraud and general damages based upon alleged misrepresentations as to the anticipated volume of business.

_____ generally denied the allegations of the complaint and entered a cross action for rents, etc.

Thereafter, on September 30, 1974, the parties entered into a Stipulation for Judgment granting rescission to the taxpayers, conditioned upon their delivery of title to the property within six months free and clear of liens and encumbrances and certain other performances.

The taxpayers were unable to clear up all of the outstanding debts and obligations. _____ then undertook payment of the balances owed and reassumed possession and operation of the business. _____ ultimately received a bill of sale for the fixtures and equipment executed by the taxpayers' attorney on their behalf.

The taxpayers also protest the application of taxes determined on estimated retail sales of pizza made for the third calendar quarter of 1973. The representative did not present any information to support an adjustment of the amount estimated.

Analysis and Conclusions

A rescission and return of property to its original owner does not result in a second sale of the property (see Annotated Ruling No. 490.0080, 1 Business Taxes Law Guide 3364).

In this matter the parties conditionally stipulated judgment for rescission which was not carried out according to its precise terms. Nevertheless, it is apparent that the other contracting party, _____, waived the taxpayers' default and accepted return of the business with only a partial performance. We have confirmed this by discussion with the taxpayers' attorney and with the attorney for _____.

In view of the above, we conclude that no taxes were due by reason of the return of the fixtures and equipment to _____.

We conclude that no adjustment is due for the taxes determined on estimated sales for the third quarter of 1973, in view of the failure to present evidence to prove that the amount was incorrect (see Revenue and Taxation Code section 6481).

Recommendation

A reaudit should be conducted deleting the audited sales price of the fixtures and equipment from the taxes proposed for redetermination. Reaudit adjustment to be initiated by

M. E. Burkett

W. E. BURKETT, HEARING OFFICER

9-24-76

Date

Reviewed for Audit:

Principal Tax Auditor

Date