

STATE OF CALIFORNIA  
BOARD OF EQUALIZATION

400.0170

In the Matter of the Petition )  
for Redetermination Under the )  
Sales and Use Tax Law )  
)  
[XYZ] )  
) Account No. -- -- XX-XXXXX  
Petitioner )

This matter came on regularly for hearing in San Jose, California, on May 20, 1975.

Mr. [X], president, appeared for the taxpayer. Mr. Rosenblum appeared for the board.

Protested Item  
(Period 1-1-70 to 12-31-72)

Packing materials, crates, and containers  
used in moving and storage operations. \$261,155

Contentions of Taxpayer

1. The property was sold to the U. S. Government prior to use.
2. The provisions of Sales and Use Tax Regulation 1630 are not applicable to the taxpayer's operations.

Summary of Petition

The taxpayer is a corporation engaged in the business of packing and crating and otherwise preparing property (chiefly household goods of military personnel) for shipment pursuant to contracts entered into with the various branches of the United States Armed Forces.

The contracts, a representative copy of which has been made a part of the audit report, generally provide for payment on the basis of a specified unit price per CWT without breakdown for labor or supplies.

Item C111 listed on page 10 of the contract generally defines the "SCOPE OF CONTRACT" as follows:

"SCOPE OF CONTRACT (1970 MAY)

"The contractor shall furnish services and materials for the preparation of personal property (including servicing of appliances) for movement or storage, drayage and related services. Unless otherwise indicated in the schedule, the contractor shall (i) furnish all materials, except Government-owned containers (Type II, CONEX and Air Cargo), all equipment, plant and labor, and (ii) perform all work in accomplishing containerization of personal property from overseas or domestic movement or storage; stenciling; recooperage; drayage of personal property in connection with other services; and decontainerization of inbound shipments of personal property. Excluded from the scope of this contract is the furnishing of like services or material which are provided incident to complete movement of personal property when purchased by the Through Government Bill of Lading method."

Schedule I, item 1, listed at page 23 of the contract, contains a description of the type of services that are involved in the transactions here considered. It reads as follows:

"Item 1. Complete Service - Outbound (HUGs). Services shall include premove survey, servicing of appliances, disassembly of furniture if required, preliminary packing, inventorying, tagging, wrapping, padding, packing and bracing of household goods in Government-owned and furnished shipping containers (Type II, CONEX or Air Cargo) at owner's residence, or at contractor's facility when ordered by the Contracting Officer, properly securing and sealing for shipment, weighing, obliterating old markings, marking, strapping, and drayage of the container within area of performance. Service shall include loading of shipments on line-haul carrier's equipment at the contractor's facility. When containers will not accommodate all articles of any one lot, loose articles shall be packed in the said containers before any over packed articles are placed therein. Overflow articles which require packing and containerization shall be paid for under Item 3."

The contract does not provide for an express passage of title to the property utilized in the packing and loading of the goods. However, the contract does incorporate the provisions of Armed Service Procurement Regulation Clause No. 7-104.24(a) entitled "Government Property (Fixed Price)", a true photocopy of which is attached hereto as Exhibit A and incorporated herein by reference.

On occasion the taxpayer will construct and provide the government with a Type II container for use in the shipment for which a separate charge is authorized. The taxpayer's representative indicated that the corporation may have provided the government agency with as many as ten of these containers. He was unable to state whether any of the transactions occurred within the period covered by the determination.

Unused cardboard containers are sometimes obtained from incoming shipments. However, with the exception of the Type II containers the taxpayer was not required to account to the government for the property.

The auditor classified the taxpayer as the consumer of the materials and supplies that it acquired without payment of sales tax reimbursement or use tax and utilized in the performance or the packing and loading. (Per Sales and Use Taxes Regulation 1630.)

The taxpayer contends that the property in question qualifies for exemption as property sold to the U.S. Government.

As a second and separate ground for exemption, it contends that the provisions of Regulation 1630 are not applicable to the taxpayer's operation because it does not perform any of the "shipping".

#### Analysis and Conclusions

We first conclude that the contention that the provisions of Regulation 1630 are inapplicable because the taxpayer does not perform shipping is without merit. While the regulation is headed "packers, loaders and shippers" and collectively refers to them as "shippers", its provisions are directed to certain performances which do not necessarily require shipment as a condition for the particular application of the tax. Summarily, we find no basis for a finding that the regulation is not applicable to the taxpayer's packaging operation.

Secondly, we conclude that the taxes have been properly applied in accordance with the provisions of Sales and Use Taxes Regulation 1630. The regulation authorizes the board to classify the person performing the packaging as the consumer and user of the property where the property is purchased for the purpose of conditioning, preserving or protecting the goods during shipment or where the person supplying a container does not expressly contract for a sale of the container and make a separate charge therefor.

The parties' contract does not provide for the passage of title to the property in question. The cited title provision relates to "government furnished property" which is not included in the items subjected to the tax.

None of the taxpayer's charges qualify for exemption under the provisions of Regulation 1630.

The regulation was regularly adopted, and is presumptively valid as an authorized exercise of the board's rule-making power to promulgate rules and regulations relating to the enforcement and administration of the tax law (Revenue and Taxation Code section 7051).

Finally, the classification is in accordance with the standard prescribed by Sales and Use Taxes Regulation 1501, for distinguishing between a sale of property and utilization of property in the performance of a service activity. It seems clear that the "true object" of the contract, insofar as the government purchaser was concerned, was the service of packaging and loading, and not the purchase of unlisted supplies for which no inventory or accounting was maintained.

#### Recommendation

It is recommended that the taxpayer be afforded a period of thirty days to submit evidence of sales of Type II containers for which a separate charge was rendered. If no additional evidence is received during the allotted period, then the taxes should be redetermined without adjustment.

W. E. Burkett, Hearing Officer

7-11-75