

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

In the Matter of the petition)
for Redetermination Under the) DECISION AND RECOMMENDATION
Sales and Use Tax Law of:)
)
)
)
Petitioner)

The above-entitled matter came on regularly for hearing on November 19, 1984, in Downey, California, before Stephen A. Ryan, Hearing Officer.

Appearing for Petitioner: REDACTED TEXT
President/Attorney

Appearing for Board: Ms. Vilma Estrada
Tax Auditor

Protested Item

The petitioner has filed a petition for redetermination of a tax deficiency determination issued on July 22, 1983, for the period October 1, 1979, through December 31, 1982. The protest involves tax determined on the following revised audit item:

	State, Local & County	<u>LCAT</u>
B. Unreported taxable receipts	\$20,049	\$5,873

Petitioner's Contentions

1. The sales of checks by petitioner to the restaurants are exempt from sales tax because the restaurants resell them to their customers along with the meals.
2. The Board should be stopped from collecting tax on the sale of these items because it changed its prior policy on non-taxability to one of taxability without notifying petitioner so that it could have been provided with the opportunity to collect sales tax reimbursement from the restaurants in order to remit it to the Board.

Summary

Petitioner sells food and supplies to restaurants. It began business in 1973. Several prior audits were conducted for previous periods.

One of the items sold by petitioner was the "guest checks". These are the checks that a restaurant employee (waiter, waitress, etc.) delivers to their customers to show the charges for the meal. The customer pays the listed price and delivers the check back to the restaurant employee upon payment. The restaurants did not list a separate charge to any of its customers for these checks.

Petitioner has never collected sales tax reimbursement from any of its restaurant-customers or reported and paid sales tax to the Board on any of its sales of these guest checks either during this audit period or previous periods. No resale certificates were taken by petitioner from any of its customers for the guest checks.

The auditor discovered that petitioner was paying sales tax reimbursement to one supplier of these guest checks during this audit period until Mr. REDACTED TEXT issued a blanket resale certificate. Mr. REDACTED TEXT claimed at the preliminary hearing that he had not paid sales tax reimbursement to any supplier on these purchases until the beginning of this audit period. He believed that a mistake by an employee of the supplier caused this change to require sales tax reimbursement.

The auditor concluded that restaurants did not sell the guest checks to their customers and issued a deficiency determination against petitioner on all of these ex-tax sales to the restaurants. No restaurants reported sales or use tax to the Board in connection with these checks.

REDACTED TEXT stated that both auditors in the previous two audits, Messrs. Irving Barfield and Larry Rothman, specifically told him that these guest checks were resold by the restaurants to their customers with the meal and the sales to the restaurants by petitioner were not subject to tax. Neither petitioner nor the Board possesses any written evidence of these alleged conversations.

REDACTED TEXT contends that the Board previously had a policy that the guest checks were sold with the meal but recently changed such policy without notifying the people in this industry. The hearing officer has examined past Board records on this subject and has not discovered any change in its prior taxable treatment of these guest checks.

Analysis and Conclusion

The question is whether petitioner's sales of guest checks to the restaurants were subject to the imposition of sales tax upon petitioner.

California sales tax is imposed upon the gross receipts generated from the sale of property sold at retail (see Revenue and Taxation Code Section 5051). A retail sale is defined as a sale for any purpose other than resale in the regular course of business (RTC §6007). Section 6091 provides for a presumption that all gross receipts are subject to the sales tax until proven otherwise. It is clear that the burden of proving an exemption or exclusion from sales tax is upon

the taxpayer (see Section 6091 and H. J. Heinz Co. v. State Board of Equalization (1962) 209 Cal.App.2d 1, 25 Cal.Rptr. 685).

Petitioner contends that it made sales for resale to the restaurants and they, in turn, made retail sales of these guest checks to their customers. However, petitioner did not obtain a resale certificate from any of its restaurant customers at the time of any of the sales in question which, if taken (in good faith), would have relieved it of this liability (see RTC §6091 and 6092). Therefore, petitioner will only be relieved of sales tax liability on these sales if it presents satisfactory evidence that the guest checks sold:

“(1) [Were] in fact resold by the purchaser [restaurant] and [were] not used by the purchaser for any purpose other than retention, demonstration, or display while holding [them] for sale in the regular course of business, or

(2) [Are] being held for resale by the purchaser and [have] not been used by the purchaser for any purpose other than retention, demonstration, or display while holding [them] for sale in the regular course of business, or

(3) [Have] been used or consumed by the purchaser and the purchaser has paid the use tax directly to this State.” (Regulation 1668 (c)).

Apparently, all the guest checks have been functionally used for the purpose for which they were intended with no sales or use tax paid by the restaurants. Thus, the critical point to be examined is whether or not the restaurants sold guest checks to their customers with the meals prior to this use of them by the restaurants for any purpose other than retention, demonstration or display while held for resale in the regular course of their business.

As to the resale issue, it appears on first examination the guest checks were not sold by the restaurants to their customers. The checks were not listed as an item sold and no separate charge was made for them. Possession of the checks was always given by the restaurants to its customers as a billing statement to get the customers to pay for the meals. However, each check was only temporarily conveyed to each customer as notice of the charges with possession always returned to the restaurants and permanently retained by them for bookkeeping/accounting purposes. This temporary transfer of possession to the customer was not in lieu of a transfer of title within the meaning of Revenue and Taxation Code Section 6006(a).

The Board has enacted Regulation 1603(a), to establish guidelines on sales of certain items, non-reusable in character, which are furnished with meals to restaurant customers and determined to be sold with the meals. Souffle-cups, straws, paper napkins, toothpicks and like items are listed. The first three items are actually used by the eater of the meals during the process of consuming food although not actually eaten and swallowed. These checks were not so used by the restaurant customers during the consumption of their meals. The customers only came in contact with the checks after the food had been consumed in order to pay the bill so that they could leave the restaurant. The subsequent timing of the use of toothpicks is similar to that of the guest checks as stated by REDACTED TEXT but a critical distinction exists. The toothpicks were used by the patrons directly related to their consumption of their food -- i.e., to clean their teeth.

It is, therefore, the conclusion of the hearing officer that a guest check is not a component of a meal and is not resold by a restaurant to its patron. The temporary transfer of possession of the checks is solely in the process of the already-initiated usage of them by the restaurant. No permanent transfer of possession ownership of these checks occurred or was intended. The restaurant employee initially used each check to write down the items ordered by the customer. It was delivered to the cook who used it as a guide to prepare the requested food and then further used to get the customer to pay the proper charges for the food. It is then subsequently used by the restaurant as an internal accounting control. The customers were not entitled to take a check with them. They received a cash register receipt or a credit card charge slip and possible a check stub to evidence their purchase. Although patrons had the right to take a check stub upon completion of a meal, it is the opinion of the hearing officer that, since no specific evidence has been submitted by petitioner other than Mr. REDACTED TEXT general statement about check stubs, a small percentage of such patrons actually took the stubs. Additionally, since the size of a typical check stub is about one-tenth of the entire check to which it was attached, it will be treated as part of the guest check rather than as a separate item.

Assuming arguendo, that somehow a restaurant sale of a check might have occurred, the restaurants made a prior intervening use of them for purposes other than retention, demonstration or display which resulted in it being the consumer of such items. Since the restaurants did not issue resale certificates to petitioner on the purchase of these checks, petitioner, as the retailer, is not relieved of sales tax liability on these retail sales to such restaurants.

REDACTED TEXT is correct in stating that petitioner did not report and pay sales tax to the Board on these sales in the prior audit periods. An examination of those prior audit files shows no mention of the sales of checks. Resale certificates from petitioner's customers were not mentioned. It is unknown if petitioner acquired the checks from its vendors tax-paid or ex-tax with the issuance by it of resale certificates as with the one identified supplier in 1982.

It appears that petitioner's prior sales of the checks were subject to sales tax. Since the statute of limitations has run, the Board cannot now assess a new deficiency. No relief can be granted to petitioner in this present period because the auditors failed to assess the tax deficiencies in the prior periods (see Fischbach & Moore, Inc., v. State Board of Equalization (1981) 117 Cal.App.3d 627, 172 Cal.Rptr. 923).

Recommendation

Redetermine without adjustment.

Stephen A. Ryan, Hearing Officer

1-23-85
Date