STATE OF CALIFORNIA

580.0313

BOARD OF EQUALIZATION

APPEALS SECTION

In the Matters of the Administrative Hearing on a Jeopardy Determination, the Petition for Redetermination, and Claim for Refund, under the State and Local Sales and Use Tax Law of:	)	DECISION AND RECOMMENDATION
I--- H--- E--- CORPORATION	)	SR EH XX-XXXXXX-030, -040, and -001
Petitioner/Taxpayer/Claimant	)	

The Appeals conferences in the above-referenced matters were held by Steve Ryan, Staff Counsel, on March 21, 1995 in Santa Ana.

Appearing for Petitioner/Taxpayer/ Claimant (hereinafter "claimant"): Mr. S--- W---, President; Mr. B--- K---, CPA

Appearing for the Sales and Use Tax Department: Ms. Boe Gordon, Tax Auditor; Mr. Angel Solis, Tax Auditor; Mr. Max Clark, Supervising Tax Auditor

Type of Business: Truck and trailer common carrier

Protested Items

The protested tax liabilities are measured by:

Item		State, Local and County
Petition -030 [1-1-82 to 9-30-89]		
A. Ex-tax price of capital asset equipment purchased for use in interstate commerce and claimed exempt, but disallowed		$5,501,863
	Reaudit adjustment	(2,464,573)
		$3,037,290
Jeopardy Administrative Hearing -040 [1-1-90 to 12-31-92]		
A. Ex-tax price of capital asset equipment purchased for use in interstate commerce and claimed exempt, but disallowed		$ 114,022

Claim -001 [1-1-82 to 9-30-89]

Claimant seeks a refund of amounts paid on various notices of determination.

Claimant's Contentions

1. The jeopardy status is in error.

2. The statute of limitations period bars the determination because: (i) claimant filed use tax returns with the DMV for every truck when DMV registration was made; and (ii) the Board previously audited claimant, and issued an earlier determination.

3. Exemptions apply because the trucks were used in interstate commerce. The criteria to prove interstate commerce use is the status of each trip -- PUC versus ICC. The principal use was for interstate commerce since more than 50 percent of all trips constituted ICC trips.

4. Some tax was imposed regarding trucks which claimant did not purchase or own.

5. Two use taxes are imposed on the use of some trucks leased to C--- W---.

6. Part of the measure is excessive because a federal excise tax has been included as part of the sales price upon which use tax was calculated.

Summary

Claimant operated trucks and trailers throughout the United States in interstate or in intrastate commerce. This was the first Board audit.

1. Two notices of determination were previously issued to claimant. They were each superseded by two later-issued jeopardy notices of determination. The Board's Sales and Use Tax Department ("Department") has since declined to process the petitions for redeterminations which had been filed by claimant in response to the first two regular determination notices. The Department has treated claimant as having filed a request for an administrative hearing on the two latter jeopardy determination notices, but not any petition for redetermination thereof, allegedly due to claimant not timely paying the debts in full.

The jeopardy notice in -040 was mailed on October 25, 1993, and the jeopardy notice in -030 was mailed on October 28, 1993.

Claimant's representatives allege that both debts were paid in full within 10 days of the mailings of each jeopardy notice.

The Department lists payment in full on November 7, 1993. or November 8, 1993. November 7, 1993 was a Sunday. The reaudit workpapers included a copy of a receipt and cashier's check showing a November 8, 1993 payment of $694,519.58. A copy of a letter from claimant's attorney reads that such payment was on the determination notices dated October 25, 1993 and October 28, 1993. Claimant had also paid $23,200 on March 19, 1990, in response to the first two regular notices of determination.

The Department has treated claimant as having filed a claim for refund on April 21, 1994, for the period from January 1, 1982 through September 30, 1989.

2.(a) The Department has imposed a use tax on the price of many vehicles which claimant purchased outside California for use in many states, including in California. Claimant's representatives indicated that claimant either paid some California use tax, or it did not pay any tax or tax reimbursement on the basis that it thought interstate commerce exemptions applied.

Claimant registered and licensed each vehicle on a pro-rate basis in the states of use, including with the California DMV.

Claimant contends that the paperwork it completed and submitted to the California DMV for such registration constitutes a use tax return filed with the Board through the Board's agent, the DMV. On that basis, claimant alleges that the statutory limitations period passed on the price of all purchases made prior to July 1, 1990.

It also argued that Revenue and Taxation Code section 6292(c) benefits claimant even if no tax was paid.

Mr. S--- said that the DMV paperwork is only a use tax return if use tax was also paid to the DMV at the time that paperwork was submitted to the DMV. Mr. C--- indicated that an allegation to the DMV by the purchaser that a tax exemption applies is also sufficient to start the running of the statutory limitations period.

2.(b) The Department's San Bernardino District audit staff had previously investigated claimant in 1986, and issued yet another notice of determination for $7,912.50 use tax on the $131,875 price paid for trailers purchased outside California which had not been used continuously in interstate commerce, or had been used outside California for more than 50 percent of the time during the six-month period following the first entry into California. A September 23, 1986 Field Billing Order was used to record that investigation and tax underpayment (see Exhibit 1). The period of that determination was the fourth quarter 1985. Pro-rate registration in California was indicated for the 20 trailers for which records were "evaluated". Claimant was identified as operating a trucking business hauling bulk commodities under contracts for interstate or intrastate hauling. An SN -- XX-XXXXXX number was used since claimant did not then hold a permit. Claimant paid that debt.

Mr. S--- indicated that he did not include that $131,875 in this current audit.

Claimant requests that the period from January 1, 1982 through December 31, 1985 be deleted from this deficiency due to that prior "audit", notice of determination, and Board knowledge of claimant's activities during that earlier time.

3. The Department imposed use tax on the price paid by claimant to purchase many trucks outside California for use in many states, including in California. Claimant took delivery of each truck outside California. No tax or tax reimbursement was paid. Claimant thought it was exempt due to interstate commerce use. The auditors represented that claimant claimed deductions for interstate commerce and issued exemption certificates to the dealers on the basis that each item was to be used continuously in interstate commerce.

Claimant held both ICC and PUC licenses. It obtained pro-rate registration and licensing in the states of usage, including in California.

The auditor indicated that each of these mobile transportation equipment ("MTE") items was carrying a payload of goods on an interstate commerce trip when it entered into California for the first time. Each truck entered into California within 90 days after the purchase.

According to the auditor and claimant's representatives, at least one trip in each truck/trailer was made in California in the test period for which the entire payload was picked-up, carried, and discharged solely inside California without leaving California and without also carrying any additional cargo either into or out of California on that trip.

The auditors indicated that they did not obtain all records of use, but used the available evidence to compute either a 90-day or a six-month test to ascertain if California use tax applied. The deficiency includes the price of each MTE item which did not meet the tests. The six-month test started with the date of first functional use, not the date of first entry into California if the dates were not the same. The criteria used in the six-month test was solely the state location of highway miles driven, not days, hours, storage/parking, or the status of any trip, because claimant did not submit any evidence showing locations or time in California (other than the driving time which could be estimated from mileage numbers, but that would show the same percentages as the mileage).

Claimant contends that the principal use of each of these vehicles was in interstate commerce trips, and thus the interstate commerce exemption should apply. It wants the test criteria to be the status of each trip -- ICC v. PUC.

Claimant's representatives contend that this per-trip status test basis has been allowed and used by the Board since a 1963 Board hearing report (see Exhibit 2).

The Department has written in this case that the auditors' mileage criteria is an acceptable audit method under these circumstances in which claimant provided limited documentation. The Department pointed out that more accurate results could be obtained from the missing relevant records, and asked claimant to submit them. Nothing more has been received from claimant on this subject.

The audit workpaper schedules indicate that the auditor treated some prices paid for other trucks as nontaxable due to: "statute expired"; a 90-day test exclusion ["exempt"]; a six-month test "exemption" due to less than 50 percent of the highway miles having been driven in California; reported lease receipts; tax reimbursement paid to the dealer; registration with no exemption claimed; or California DMV registration which constituted constructive notice with no tax applicable pursuant to Revenue and Taxation Code section 6293(c).

The workpapers also show that relevant use records were not submitted for many items. For some vehicles, claimant submitted merely two unsupported percentages, with one being a percentage of alleged ICC trips, and the other for alleged PUC trips (but with no supporting records of trips, miles, locations, etc.).

One audit schedule (Memo 4) contains the auditor's six-month test calculations by miles and by trip status for 25 trucks purchased in 1989 (two in the -030 period) and 1990. For 20 trucks, both the miles and trip status indicate less than 50 percent solely in California. For the other five trucks, the mileage test indicates more than 50 percent use in California, but the trip-status test shows a percentage less than 50 percent for PUC trips. The auditor treated only these latter five as taxable (on cost), including the only two -030 cases listed and the two truck trailers which constitute the $114,022 in -040. I do not see any back-up records for this test to ascertain if the "ICC mileage" and/or "ICC %" numbers are for true interstate trips, or for a combination of trips in interstate commerce and of every trip solely intrastate in another state as

appears to have been the way in which the auditor actually categorized the facts throughout this audit.

4.(a) Ms. G--- indicated that audit item A actually includes $30,000 of gross receipts subject to sales tax regarding claimant's California retail sale to C--- W--- R--- M--- Inc. on September 27, 1988 of a 266 Cat 977K Crawler Loader. The auditor concluded that claimant had acted as a principal in purchasing this loader at auction on September 27, 1988 for $30,000 from R--- B--- in ---. A R--- B--- invoice showed the ex-tax sale to claimant. Pursuant to the same invoice, claimant purchased another item ex-tax for $11,000. The invoice space for tax contains a $2,870.00 with a line drawn through it. Plus, the original typed total price of $43,870 was marked out to $41,000. Claimant also paid R--- B--- $41,000 on September 27, 1988. Claimant issued a resale certificate dated September 27, 1988, to R--- B--- for the purchase of "heavy equipment". Claimant's depreciation schedule for 1989 lists depreciation on the $30,000 price of a Cat Loader purchased on September 27, 1988.

Claimant's former president, J--- G---, signed a declaration under penalty of perjury dated January 29, 1995, wherein he explained this matter as follows: claimant never purchased or owned the item. He acted for C--- W--- to acquire the loader from R--- B--- for C--- W--- so that C--- W---'s general manager did not need to spend the time and money to go to ---, register with R--- B---, undergo a credit check with R--- B---, or obtain a buyer number with R--- B--- Claimant took delivery of the loader and delivered it to C--- W--- in --- --- on October 4, 1988.

4.(b) Ms. G--- established a use tax debt on a $20,000 price paid to C--- E--- P---, Inc. ("CEP") of Texas, for a November 1986 purchase of a Cat 966 C Loader. A November 6, 1986 invoice shows that Mr. G--- signed for claimant, as purchaser, on the FOB Fort Worth "as is" sale. The invoice also showed claimant's purchase of eight Peterbilt trucks plus some mixers for $490,000. A $5,000 deposit was shown as having been paid.

The auditor never examined claimant's records for receipts or expenses regarding this invoice or the 966 C Loader.

A November 18, 1986 Loan-Pay Proceeds Letter from A--- C---- C--- ("ACC"), ---, California, was submitted by claimant. It references a security agreement dated November 18, 1986, between claimant as debtor, and ACC as a secured party. It indicates claimant's instructions to ACC for ACC to retain $350, pay $390,000 to a Texas bank, and pay claimant $100,000. A July 10, 1994 letter to claimant from a L--- I--- of L--- I--- R---, Inc., ---, Nevada, reads that Mr. I--- bought the Cat 966 C Loader from CEP, took delivery in 1986 in Texas, brought it to Nevada, and that it has never "gone through" California.

Mr. G---'s declaration indicates as follows about this matter: He acted for claimant who acted for L--- I--- R---, Inc. to purchase this loader. L--- I--- R---, Inc. paid CEP the $20,000 directly. The remaining $490,000 for that invoice was paid with claimant's $5,000 deposit on November 6, 1986, $390,000 from ACC under the security agreement, and $95,000 by claimant to CEP “from the additional funds available under the security agreement.”

4.(c) Claimant wants a total of $630,991 purchase price deficiency measure deleted on the grounds that claimant never purchased or owned the 11 Freightliner trucks, and never paid the $630,991 or any other amount.

The auditors pointed out that only $463,381 for only eight of the trucks remains in the deficiency after the reaudit. A total $167,610 for three trucks was deleted in the reaudit. Also in the reaudit, the originally-established $446,232 total price for the other eight trucks was adjusted to the $463,381. At the Appeals conference, the auditors attempted to explain as follows: various records provided the information on these eight trucks, such as DMV documents, Board files, and/or claimant's records. Claimant issued fuel tax clearances for these trucks. Claimant's records showed that it had purchased other vehicles and traded-in to the sellers these vehicles in question. Mr. S--- had estimated the purchase prices. Claimant's asset list showed these trucks. [At another time they said that claimant's asset list did not show these trucks.]

Audit schedule 12A-1 C1 contains the auditor's comments that the eight vehicles had been traded in to F--- T--- on a specific date. For two of them, a specific truck was identified as having been purchased then from F--- T---. A $55,779 price was listed for each as the price subject to tax. That amount was calculated as the average purchase price of other trucks purchased by claimant. More information, including mostly different cost amounts, is on reaudit schedule R-12A-1 C1.

I asked the auditors to submit to claimant and me copies of all relevant records. No records were received. Mr. S--- wrote that seven trucks were shown on tax clearance certificates, none of which are now available. He added that four had been traded in to F--- T---. He further represented that Ms. G--- and Mr. K---' accountant had traced three trucks to asset depreciation schedule lists.

5. Claimant's representatives contend that the Board is improperly imposing use tax on claimant's purchase price of ten items even though claimant timely reported and paid use tax on rental receipts. They claim the items were purchased and delivered in Texas, which was followed by leases to C--- W--- with use tax collected and paid for the second quarter 1987.

The auditor found that claimant had reported as taxable only the lease receipts it derived as a lessor of ex-tax equipment and cement mixer trucks, and that not all lease receipts had been reported.

The auditors indicated that a $100,000 use tax deficiency was imposed on the two $50,000 prices which claimant paid each to purchase two 1986 Peterbilt cement mixers. They reported that the eight Peterbilt truck prices were not included in any deficiency. They identified the asset numbers as 60 and 65 under a 1987 depreciation schedule showing an April 3, 1987 purchase date. They stated that they knew claimant leased these mixers to lessees, but indicated never seeing any other records.

Petitioner submitted copies of two 1987 California DMV commercial registration cards for two vehicles. Petitioner was listed as the registered owner and A--- C--- C--- as the lienholder. The use tax lines are blank. The audit schedules shows the auditor found that petitioner had provided purchase documentation for January 1, 1987 purchases, with $1,333.33 ex-tax lease receipts. California DMV registration records were included for 1987, but with no use tax identified. Petitioner also submitted two May 3, 1987 leases evidenced petitioner's leases to C--- W--- of two different cement mixers. The audit lists these two as having been purchased on May 7, 1987 and May 7, 1988, respectively, with ex-tax lease payments of $2,894.10, but with no support for the allegation that tax was paid at source. No registration records were included. Petitioner also submitted numerous pages, apparently recently prepared for the Appeals conference, which allege that petitioner reported $14,222.25 taxable measure from more than eight leases on its sales tax returns from December 1986 through September 1989 (with several exceptions of higher amounts). The eight specific 1984 Peterbilt mixers mentioned were not further identified.

6. Claimant desires that any deficiency measure not include the amount of federal excise tax ("FET") charged to claimant on its purchases of trucks, trailers, etc. Mr. K--- has cited to us FET of $43,651.20 paid to F--- T--- C--- on the total $394,560 price for eight new 1988 Freightliner Tractors delivered in Nevada pursuant to an April 20, 1988 invoice. He also identified $17,582.40 FET paid to the same dealer on three 1991 Freightliner trailers purchased and delivered in Nevada pursuant to a December 13, 1990 invoice.

The Department auditors gave different and possibly conflicting stories on both what FET is, and how the audit had treated FET.

Mr. S--- alleged that there are two types of FET relating to the items purchased by claimant, with the one imposed on sellers or buyers not included in the use tax measure, and the other imposed on manufacturers which is included in the use tax measure. He indicated that it was assumed the FET involved was a manufacturer’s excise tax so that no relief was available. He also mentioned that the FET charged was not calculated at the exact percentage allegedly required for a non-manufacturer’s FET.

Mr. S--- also alleged that claimant had provided a FET waiver form to the sellers to avoid the first type of FET. Claimant's representatives adamantly denied that. Mr. S--- could not locate any such waiver. Sales tax exemption certificates had been issued by claimant, and it is possible that Mr. S--- thought the sales tax exemption certificates were for FET.

The audit workpapers also contain many sales invoices from F--- T--- C--- to claimant for sales of heavy trucks with separately stated FET. It is not expressly indicated on any invoice whether the FET charged was a manufacturer’s excise tax, reimbursement for a manufacturer’s excise tax, or an excise tax imposed upon or with respect to retail sales.

Claimant's representatives alleged that such "FET" was a tax on the retail sale pursuant to IRC section 4051, but they rely upon post-audit period provisions and a declaration from an employee of an equipment manager solely about the 1988 sales of trailers in a different case.

Analysis and Conclusions

1. Since the tenth day from the -030 jeopardy determination notice was Sunday, November 7, 1993, claimant had until Monday, November 8, 1993, to make timely payment in full (Revenue and Taxation Code §§ 6536 - 6539; and Civil Code §§ 7, 9, 10 and 11). Claimant made payment in full on November 8, 1993 for -030.

Thus, whatever letter the Department has been treating as a request for an administrative hearing in -030 is a valid petition for redetermination of the alleged October 28, 1993 jeopardy notice of determination for the period from January 1, 1982 through September 30, 1989.

The payment in -040 was made beyond ten days after the October 25, 1993 jeopardy notice. Thus, -040 is a case of an administrative hearing on a jeopardy notice of determination. It is our policy that the Appeals Section does not consider any dispute as to whether or not a jeopardy status was appropriate substantively over a regular non-jeopardy status.

2.(a) The DMV is the Board's statutory agent (Veh. Code § 4750.5; Rev. & Tax. Code § 6292; Regulation 1610(c)(1)). The Board and DMV have created various forms for use by people in handling vehicle registration, licensing and related fees, plus for the related use tax and use tax exemptions. Many people pay use tax to the DMV rather than to the Board. That use tax is incurred on the price paid to purchase vehicles for use in California (Rev. & Tax. Code §§ 6201-6202).

When a person files with the DMV a Board and/or DMV form which identifies either use tax ("UT" is one method) or a tax exemption, then a use tax return has been filed. The Board has represented this to the public in its January 1992 pamphlet 75 which reads that DMV registration is equivalent to filing a use tax return. This applies even when the space for the tax amount is left blank, because a blank on such a Board form means a zero (see People v. Universal Film Exchanges (1950) 34 Cal.2d 649).

Thus, in such cases, the three-year statutory limitations period started at the time of such filing (Rev. & Tax. Code § 6487 (a)). We do not see any lack of good faith in claimant's actions regarding such filings.

Since we do not possess copies of the actual paperwork filed by claimant with the DMV for many items, we cannot render a specific recommendation other than that it appears some reduction in this deficiency measure will be needed to be made by the Department during a reaudit. If the Department hereinafter contends that the actual forms were not tax returns, claimant will need to supply us with at least some samples for review.

2.(b) As to the items for which no DMV registration has been shown to have been obtained, and/or for those items for which DMV registration was handled but at a time still within the statutory limitations period, we conclude that this deficiency can apply irrespective of the September 23, 1986 Field Billing Order which covered the fourth quarter 1985. The current audit apparently excludes the trailer prices for which a deficiency was established in that 1986 Field Billing Order. It is apparent that either claimant did not provide evidence in 1986 to the auditor about its other vehicles, or that it did but also then submitted proof of exemption. Since the total trailers for which claimant submitted evidence to the auditor in 1986 was only 20, and it appears they all related only to the fourth quarter 1985, there is no reason to delete any deficiencies for January 1, 1982 through September 30, 1985.

3. Absent a constitutional prohibition, an exemption or an exclusion, use tax measured by the sales price is imposed upon a person who uses, stores or consumes in California tangible personal property which was purchased from a retailer for use, storage or consumption in California (Rev. & Tax. Code §§ 6201 and 6202). This liability arises at the time of the first California use (ibid.). It is rebuttably presumed that when tangible personal property is delivered outside California to a purchaser known by the retailer to be a California resident, that property was purchased for use, storage or consumption in California (Rev. & Tax. Code § 6247). If no prohibition, exemption or exclusion applies, use tax can be imposed on the California use which occurs following the transportation into California of tangible personal property which was purchased outside California without sales tax application but for use that included a California location (Scripto v. Carson 362 U.S. 207 (1960); Western Pacific R.R. Co. v. State Board of Equalization (1963) 213 Cal.App.2d 20, 26; and American Airlines Inc. v. State Board of Equalization (1963) 216 Cal.App.2d 180, 193).

Congress has the power to regulate commerce. Interstate commerce "must pay its own way", and is not wholly immune from state taxation (Richfield Oil Corp. v. State Board of Equalization 329 U.S. 69 (1946). A state tax which either discriminates against or unreasonably burdens interstate commerce is unconstitutional and thus invalid (McGoldrick v. Berwind-White Coal Mining Co. 309 U.S. 33 (1940)). The California legislature has added a use tax exemption for the use, storage or consumption of property in this state when tax imposition is prohibited under the U.S. Constitution (Rev. & Tax. Code § 6352).

The Board does not impose use tax on the price paid for property purchased for use and actually used in interstate commerce prior to the first entry into California if thereafter used continuously in interstate commerce both within and without California, but not exclusively in California (Reg. 1620(b)(2)(B)).

It is our conclusion that there is no interstate commerce prohibition regarding California taxation on prices paid for any of the trucks, trailers or other items herein at issue because no item was used continuously in interstate commerce. The reason is that each such item was used in California on at least one trip solely between two California points (departure and destination) for which all cargo carried on-board was initially loaded at such California departure point and all cargo was unloaded at such California destination. No cargo on such trips was in the process of being carried either into California from an out-of-state point, or from California to an out-of-

state point. That break in the interstate use for a purely California intrastate use is sufficient to break the protection of Regulation 1620(b)(2)(B) to allow application of the California use tax. For this interstate commerce protection test, the character of use or the status of each trip (ICC v. PUC) is relevant.

The Board also will not impose a use tax on property purchased and first functionally used outside California but brought here within 90 days after the purchase, if that property is "used or stored outside California one-half or more of the time during the six-month period immediately following its entry into this state" (Reg. 1620(b)(3), second paragraph). This has sometimes been referred to as the "principal use" test. This is not directly related to the interstate commerce prohibition. Rather, the purpose of this test is to ascertain whether or not the property was purchased for use in California. The subject sought to be learned by this test is the location of the use, including storage, during the test period. The status of each trip or character of the trip usage, as to interstate versus intrastate trips, is irrelevant for purposes of this test. Please keep in mind that the interstate commerce protection has already been lost, as explained, supra. We also point out that with the possible exception of the five disputed trucks, claimant has not submitted satisfactory evidence to even meet its own misplaced (unsupported) allegation that more than 50 percent of its trips constituted interstate commerce trips.

Claimant has not submitted sufficient evidence of actual use during the relevant six-month principal use test period for most items, and thus it has failed to rebut the section 6247 presumption of purchase for use in California for those items. Since claimant was based in California and significantly used each item here with no sales or use tax imposed against it by any other state, the California use is thus taxable against claimant measured by the purchase prices of those vehicles.

As to the disputed items for which actual use evidence was submitted, we recommend that use tax applies based upon the available evidence. The best available relevant evidence is the mileage driven. In all of those cases, the California miles amount was higher than the out-of-state miles amount for the test period. [We note, however, that the auditors used the incorrect starting point for the six-month principal use test in those cases when the date of first entry of the item into California was not on the date of purchase. It is the date of first entry of the item into California which starts that six-month computation, not a different date of purchase (Reg. 1620(b)(3)). Any adjustment of test calculations will be claimant's responsibility to prove this exclusion.] The nature of each trip, ICC versus PUC, is irrelevant. Each item was purchased for use in California sufficient for the Board to impose use tax on the later actual California use. If claimant has other evidence of use and storage such that we could compute a principal use test measured by days, hours, and/or nights, it needs to submit the evidence. A highway miles subject is only one factor of use to be considered, but it is all that we have to consider at this stage. We do not know where the trucks were stored/parked when not being driven, or the time of such non-functional use.

The July 22, 1963 report does not require any different result. First, it concerned solely the interstate commerce prohibition "used continuously" in interstate commerce, not the Regulation 1620(b)(3) principal use test for location of the property. Second, the September 1986 Field Billing Order notified claimant that it was subject to use tax regarding trailers purchased for use in interstate commerce, but which were not used "continuously in interstate commerce", or out-of-state more than one-half of the time during the first six months following the initial entry into California. It has not been shown that the Board informed claimant that all it needed to do to avoid tax was to use a vehicle in interstate commerce for at least 50 percent of its trips. No relief is warranted.

4.(a) The evidence shows that R--- B--- sold the loader solely to claimant in exchange for claimant's $30,000. Claimant took title, ownership and possession of the loader. R--- B--- relied upon claimant and claimant's resale certificate to not charge the $2,870 sales tax reimbursement and to not pay sales tax to the Board. R--- B--- may not have even known about C--- W---.

Although claimant alleges that, in substance, it acted solely as an agent for C--- W---, we find and conclude that claimant did not act solely as an agent. An agent would not have purchased the loader ex-tax for resale. Claimant should not have allowed the deletion of the $2,870 tax reimbursement for R--- B---' express reliance on claimant's resale certificate if claimant was acting solely as an agent. Claimant could not have used its resale certificate containing its seller's permit number if it was acting solely as an agent. Further, there apparently was a reason which involved C--- W---'s credit status which may have caused R--- B--- to not allow C--- W--- credit to make a purchase at auction. Claimant had several purposes to act as a principal. Further, claimant would not have listed any such item as being purchased and depreciated off the $30,000 price if it had only been an agent. Claimant's argument is misplaced.

Claimant's purchase and use were thus non-taxable since the loader was acquired for resale. The $30,000 income to claimant on its sale to C--- W--- is subject to sales tax.

4.(b) During the reaudit, the auditor needs to examine claimant's records to see what funds were expended and what income was derived, including the explanations therefor, if any, regarding the CEP invoice, and Mr. I--- or his ranch. If the computations do not show the $20,000 was paid to CEP by claimant or someone on claimant's behalf, and if claimant did not record $20,000 or more income from Mr. I--- or his ranch, then delete the $20,000 use tax and do not impose a sales tax. There would then be satisfactory evidence that claimant did not act as a principal in making the purchase from CEP. However, if at least one of such recordings occurred, impose the use tax or a sales tax, as appropriate, since claimant would have verified its status as a principal.

4.(c) We recommend upholding the $463,381 total price for the eight trucks. Although the auditor did not retain copies of claimant's records from which this matter was established, it is apparent that he saw and examined records which showed that claimant owned and sold those eight trucks.

5. Claimant will need to submit more detailed evidence to support its mere allegation that a tax has already been paid. In the absence of such verification, no adjustment is recommended.

6. The evidence submitted by claimant shows that the audit includes some type of FET or FET reimbursement in the deficiency measure. If that FET was imposed upon or with respect to the retail sale, then it is not includible in the use tax measure (Rev. & Tax. Code § 6011(c)(4)(A); Reg. 1617(a); and annotation 235.0070 [1-10-89]). If that FET is a manufacturer's excise tax or reimbursement therefor, it is includible in the use tax measure (Rev. & Tax. Code § 6011(c)(4)(A); and Reg. 1617(b)). From a review of IRC §§ 4051 and 4052 in effect during the relevant portions of the time periods involved herein, it appears most likely that the FET charged was an excise tax upon or with respect to the first retail sales of these heavy trucks to claimant. That FET is not imposed upon amounts attributable to tires and rims, so that the FET amount would not necessarily compute to an even percentage of the total truck price as expected by the auditors. The auditors have an obligation to verify the type of FET involved so as to apply the proper use tax treatment to claimant rather than to guess in a manner which probably includes in the measure of this use tax deficiency some retail sale-FET amounts which should be excluded.

Recommendation

Reaudit to: change the status of -030; delete prices barred by the statute of limitations; verify the type of FET charged, and to make any appropriate adjustments; and to allow claimant to submit evidence on any other audit item to prove prohibition, exemption, or exclusion regarding the use of the trucks.

_____ January 10, 1996
Steve Ryan, Staff Counsel Date
ironhors.jd
(w/Exhibits 1 and 2)