

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

190.2193

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition)
for Redetermination Under the) DECISION AND RECOMMENDATION
Sales and Use Tax Law of:)
)
K--- L--- A---) No. S- -- XX-XXXXXXX-010
P---)
)
Petitioner)

The above-referenced matter came on regularly for an Appeals conference before Susan M. Wengel on March 4, 1991 in Van Nuys, California.

Appearing for Petitioner: Ms. P--- C---
Representative/Treasurer

R--- A---
Project Manager

D. M--- R---
Attorney

Appearing for the
Sales and Use Tax Department: Sue Teaman
Senior Tax Auditor

Greg McNamee
Supervising Tax Auditor

Protested Item

The protested tax liability for the period April 1, 1986 through March 31, 1989 is measured by:

<u>Item</u>	<u>State, Local and County</u>
A. Installation labor overclaimed; lump sum contracts of fixtures were claimed as labor	\$905,544

Contentions of Petitioner

- I. Petitioner's architectural sign products meet the definition of materials as set forth in Regulation 1521.
- II. The petitioner was instructed in the prior audit to report only the cost of materials used to manufacture the signs.

Summary of Petition

Petitioner is a corporation which began operations in 1982 as a manufacturer, wholesaler, retailer and installer of interior and exterior sign products. Petitioner is a licensed construction contractor and, pursuant to lump-sum contracts, furnishes and installs its products in commercial and industrial buildings.

During an audit by the Sales and Use Tax Department (Department) it was ascertained that petitioner's products were properly classified as "fixtures" pursuant to Sales and Use Tax Regulation 1521. Petitioner was held to be the retailer of these fixtures and sales tax was applied.

Petitioner contends that the sign products are "materials" and that it is the consumer of the materials which it furnishes and installs. As a consumer, petitioner would be responsible for use tax based on the cost of the materials.

In support of its position that the signs are not fixtures, petitioner asserts that the signs lose their identity and become an integral and inseparable part of the real property. The following points were also emphasized by petitioner:

- (1) Design features. These signs have unique design features which illustrate and highlight the product's integration and inseparability with the complete building structure and its essential loss of identity when installed.
- (2) Custom production. Each sign is custom made and there are no stocked or inventoried products.
- (3) Integration. The design features of K---'s products are such that the signs are designed to be architecturally integrated with, and an inseparable part of the particular building structure. The materials and colors used, the manner of installation and the overall design are all coordinated with the architect of the building.
- (4) Permanence of placement. The signs are intended to remain part of the completed building for the entire life of the building and cannot be removed without resulting in significant damage to the sign and to the building.

- (5) Nonmarketability. There is no market for the used signs.

Finally, petitioner emphasizes that the industry has changed and that now manufacturers such as petitioner make “architectural signs”. They are not like the typical sign which is transitory, attached in a manner for easy removal and tends to follow the owner. Petitioner contends that the signs produced by K--- require substantial on-site installation labor, in some cases very substantial on-site labor, and in each instance the sign products must be carefully installed to conform with the surrounding material and design of the building. Frequently, the sign is installed in recessed areas, and then affixed with some type of permanent adhesive, bolt, or cement. In each case, the installation process and the complications relating thereto confirm petitioner’s conclusion that installation of these architectural signs is not a mere ministerial task to be handled by laymen, but, rather, is one that requires expertise and special on-site installation capabilities and qualifications. Additionally, certain of the signs must be assembled, at least in part, on-site, and the entire sign product must be carefully installed to conform with the surrounding materials.

Petitioner has placed its signs into four separate classifications:

- (1) Products which are traffic control signs;
- (2) Products requiring piece-by-piece on-site construction or substantial on-site labor;
- (3) Products constituting structures in and of themselves; and
- (4) Products which must be classified as materials to be consistent with the treatment by the Board of similar items.

The first classification involves traffic control signs. Petitioner relies on Sales and Use Tax Annotations 190.2200 and 190.2260, which held that traffic control signs furnished and installed in place, either on a post or embedded in the ground or in some other manner attached to real property, are regarded as “materials”.

The second classification involves signs which require piece-by-piece on-site construction. Petitioner relies on Annotation 190.1305, which relates to cabinets and holds that where 10% or more of the direct cost of labor and materials of cabinets was incurred in fabrication and installation at the time of affirmation, such cabinets were not “pre-fabricated” and therefore were materials and not fixtures.

The third classification involves signs that petitioner contends are structures in themselves. Petitioner relies on Annotation 190.0560, which holds that a large outdoor advertising sign erected upon land is a structure and the contractor is the consumer of materials used in the sign.

The fourth classification involves a series of annotations which have held that louverdrapes, koolshade screens and permanently installed mirrors, blackboards and bulletin boards were materials. Petitioner contends that certain products must be classified as materials to be consistent with these annotations.

The Department relies on Sales and Use Tax Regulation 1521 (former Ruling No. 11) which since 1939 has specifically stated that signs are fixtures. (See Exhibit A attached.)

Because of the wide variety of sign products involved in this audit the taxability and classification of each different group of signs will be discussed separately below.

Analysis and Conclusions

I. The first issue presented in this appeal is whether petitioner's architectural sign products meet the definition of fixtures or materials as set forth in Sales and Use Tax Regulation 1521. Regulation 1521(a)(B)(4) and (5) provide:

“(4) ‘Materials’ means and includes construction materials and components, and other tangible personal property incorporated into, attached to, or affixed to, real property by contractors in the performance of a construction contract and which, when combined with other tangible personal property, loses its identity to become an integral and inseparable part of the real property. A list of typical items regarded as materials is set forth in Appendix A.

“(5) ‘Fixtures’ means and includes items which are accessory to a building or other structure and do not lose their identity as accessories when installed. A list of typical items regarded as fixtures is set forth in Appendix B.”

“Signs” are listed in Appendix B as items typically regarded as fixtures.

1. The first type of sign to be discussed is the type of sign designed to control traffic. Petitioner relies on Sales and Use Tax Annotations 190.2200 and 190.2260, which are the same letter. This letter is from Tax Counsel E. H. Stetson dated September 17, 1952, and relates to the practice of a taxpayer when he purchases lumber, metal, cement and other tangible personal property “used in the erection of road signs on posts embedded in the ground or otherwise affixed to real property.” (See Exhibit B attached.) In this letter Stetson acknowledges that the taxpayer, unlike petitioner, sold the signs for the cost of his materials and performed the installation as a public service. Stetson, in essence, informs the taxpayer that he may change his method of reporting to paying tax on his selling price and continues to explain how this conversion is to be accomplished. Because the taxpayer purchases the lumber and metal and builds the signs on the site, Stetson apparently considered the taxpayer to be a construction contractor with the measure of tax the cost of the materials.

Petitioner contends that any traffic control sign, therefore, should be classified as "materials". We cannot agree. These annotations relate to stop signs that were actually built on the site. The taxpayer bought the cement, lumber and metal and then constructed the signs from the ground up by the roadside. It is the fact that the signs were constructed on the job site and attached piece by piece which makes the items materials, not the fact that the signs were traffic control signs. This Board has held that traffic signal modules which a taxpayer purchases and installs should be regarded as fixtures rather than materials. The Board's reasoning is that each module, considered as a unit, did not lose its identity when installed. There was no piece-by-piece construction on the job site.

The audit staff has concluded that several of petitioner's stop signs qualify as materials pursuant to the above referenced annotations. (See Exhibit C.) This appeals attorney makes no findings as to these signs but it is assumed that the concrete work was done by petitioner and that the stop signs were built on the site. As to the remaining signs, it is understood that some of the signs are outside the building and are mounted on posts or concrete bases. Other signs are attached to the outside of the building or are attached inside the parking garage. These signs provide parking garage directions such as "Do Not Enter", "Keep Right", or "No Parking". (See Exhibit D attached.) Unless these signs are large outdoor signs erected upon land so as to be classified as a structure, all the signs should be classified as fixtures. These signs do not lose their identity when installed and should not be classified as materials. (See Exhibit E attached.)

2. The second type of sign petitioner manufactures and installs is the type of sign which has to be put together in pieces. Examples of these products are directories, custom metal consoles and dimensional letters. (See Exhibit F attached.)

Quite clearly, the directories all appear to be fixtures. Although they are built into a wall, mounted on a pedestal or contained in a display area on a counter, all the directories retain their identity as an accessory when installed. They do not lose their identity and become an inseparable part of the real property. Petitioner's arguments concerning the architectural integration of the directories will not affect this finding. While it is acknowledged that petitioner's efforts in making the directories esthetically pleasing and in conformity with the architecture of the building may make petitioner's products of a higher quality than its competitors, the fact remains that the directories are not built piece by piece on site. They are built at petitioner's plant and then attached in some manner to the real property so as to become accessory to the building.

Likewise, the consoles are built at the plant and then brought to the construction site in large pieces. They do not lose their identity when installed. Testimony at the Appeals conference was that the console pieces were so large the doors had to be taken off the front of the building to get the pieces into the lobby area. The large pieces of console were then secured to the floor and assembled into the designated configuration. Like the prefabricated blackboards referred to in Sales and Use Tax Annotation 190.1280 dated January 11, 1950, the consoles are fixtures. (See also Sales and Use Tax Annotation 190.1900 dated September 4, 1951, which holds that mail chutes are fixtures.) The fact that the consoles or directories require some on-site labor to get the necessary electrical power to the units will not affect this decision. The Board

has previously considered scoreboards and timers which are manufactured prior to installation to be classified as fixtures. (Sales and Use Tax Annotation 190.2115 [November 20, 1967]).

Finally, the dimensional letters must also be classified as fixtures because they are manufactured off the job site and do not lose their identity when installed. Petitioner contends that the labor costs are great when letters are installed. The on-site construction of the actual sign is what is crucial to the classification of a sign. It is not the amount of labor involved to affix letters that have already been manufactured.

3. The third type of product involved in this appeal is the type of sign which petitioner contends is a structure in itself. (See Exhibit G attached.) Petitioner relies on Sales and Use Tax Annotation 190.0560, dated November 7, 1964, which provides that a large outdoor advertising sign erected upon land is a structure and the contractor is the consumer of the materials used in the sign. Petitioner's signs will be classified as materials only if the sign is built, on the cement pad, piece by piece on the job site. If the sign is manufactured at petitioner's plant and then taken to the job site and placed on the cement foundation and secured by bolts, the sign is a fixture as it does not lose its identity and become an inseparable part of the realty. Like the traffic control modules, if the signs were identifiable as signs when they were brought to the job site and they did not lose their identity when installed, the signs are fixtures.

4. The fourth group of products which petitioner contends are materials are products which petitioner contends are similar to built-in blackboards and koolshades. Examples of these products include directories or signs which are recessed and flush with the wall surface and façade striping which is consistent with an exterior wall. (See Exhibit C, page 1, lower right-hand corner.) The same analysis applied to the three other groups of products will also apply to this group. If the signs are constructed in petitioner's plant and are identifiable as signs when they are delivered to the job site for installation the signs are fixtures. This is true even if there is some assemblage done on the site such as placing prefabricated letters in order when bolting them to a wall or placing a console which is delivered in five large parts in the proper configuration. Once the signs are affixed, they must become accessory to the building and cannot lose their identity as signs, letters or consoles. The directories and the outdoor parking facades do not appear to be materials. Façade striping may, however, be classified as materials if the construction is done on the jobsite. If the signs are completed before delivery to the jobsite and merely created in the color of the striping and set in the concrete to create the image of continuous striping, the signs will remain as fixtures.

Petitioner contends that numerous annotations are inconsistent and there is no logical rationale for various classifications. A bulletin board which is built at a factory and then hung on a wall is a fixture as it was a blackboard when it was delivered and it remained a blackboard once installed. If material that could be used as a blackboard is used to build a wall in a structure and construction of the wall is done on the job, the blackboard is a material. The key is whether the item loses its identity to become an integral and inseparable part of the real property.

It is recommended that the audit staff review the transactions in accordance with this decision and recommendation and that if the signs sold are held to be fixtures, that credit be given if any of the property purchased by petitioner to manufacture the signs was purchased tax paid.

II. Petitioner has also asserted that the manner of reporting was directed by the auditor who conducted the last audit. Revenue and Taxation Code Section 6596 provides that a person may be relieved of taxes if the Board finds that the person's failure to make a timely return or payment is due to reasonable reliance on written advice from the Board. As petitioner has been unable to provide any written evidence of the erroneous advice as required by Section 6596, no adjustment can be warranted. It is noted that this decision and recommendation relates only to the signs in issue. If petitioner wishes to submit examples of specific signs to the Sales and Use Tax Department for specific rulings, the written response by the Department would meet the requirements of Section 6596 for future audits.

Recommendation

It is recommended that a reaudit be conducted in accordance with this decision and recommendation.

Susan M. Wengel, Staff Counsel

September 11, 1991
Date

W/Exhibits A, B, C, D, E, F & G