STATE OF CALIFORNIA

330.3019

BOARD OF EQUALIZATION

APPEALS SECTION

In the Matter of the Petition for Redetermination Under the Sales and Use Tax Law of:	)	DECISION AND RECOMMENDATION
W--- F--- E---, INC.	)	No. SY --- XX-XXXXXX-010
Petitioner	)	

The Appeals conference in the above-referenced matter was held by Staff Counsel Michele F. Hicks on March 2, 1995 in Oakland, California.

Appearing for Petitioner:	Mr. A--- B--- Attorney at Law
	Mr. V--- I--- CEO
	Mr. P--- A---
Appearing for the Sales and Use Tax Department:	Mr. John Grgurina Supervising Tax Auditor
	Mr. Joseph Santos Senior Tax Auditor
Type of Business:	Tuxedo rentals and sales

Protested Items

The protested tax liability for the period January 1, 1989 through December 31, 1991 is measured by:

Item	State, Local and County
B. Taxable rentals of ex-tax inventory from corporate locations	$3,347,907
C. Taxable rentals of ex-tax inventory from franchise locations	$2,048,920

Petitioner's Contentions

1. Petitioner contends that when it began doing business it contacted the Board and was told that if it acquired property for rental purposes and ultimately sold it, no tax was due until the property was sold.

2. Petitioner should be allowed to retroactively pay tax on the purchase price of the tuxedos, together with applicable interest.

Summary

During the audit period, petitioner was a corporation engaged in the business of tuxedo rentals with the sale of used tuxedos. It operated corporate tuxedo rental stores doing business as "P--- T---". This was petitioner's first audit.

Petitioner was the master franchisee in California of the P--- T--- (hereafter "PT") formal wear rental/retail chain. Petitioner owned all rights to the PT name in California. The PT headquarters is located in M---.

On December 31, 1991, petitioner entered into an agreement with two other corporations, A--- F--- A--- W---, Inc., and A--- - H---, Inc., to form F--- V---, Inc. (SY --- XX-XXXXXX-010).

Petitioner acquired its tuxedos ex-tax, mostly from out-of-state vendors.

In addition to providing rental tuxedos to its corporate stores, petitioner provided tuxedos to franchise and bridal stores. Franchise and bridal stores paid petitioner a percentage, usually 35 percent to 50 percent for providing the tuxedo.

All locations used identical rental tickets with the name P--- T--- supplied by the petitioner. The only distinction between tickets is the store address listed. Rental prices and policies were established by the petitioner and were identical at all locations. It is impossible to differentiate between a corporate or franchise location upon a visit to a store. All stores, except for bridal stores, use almost identical window displays and signs. There is much less P--- T--- paraphernalia in the bridal stores because tuxedo rentals are not the majority of the business.

Radio and print advertising do not make a distinction between corporate, franchise or bridal store locations and stress the total of locations available.

Franchise and bridal stores have their own employees. They collect the rental receipts and deposit them to their bank accounts. Franchises are billed weekly by the petitioner for its share of the rental receipts. Petitioner's chairman stated that there are no written agreements

between the petitioner and the franchise/bridal stores. All deals are on a "handshake" basis.

Rentals are handled in the following manner:

The customer goes to a store and picks a style from the PT sample book. Measurements are taken and a rental ticket is completed. The customer tells the employee at which store he would like to pick up the tuxedo. The customer can pick up the tuxedo at any location: corporate, franchise or bridal store. The employee will phone the tuxedo style, measurements, due date, and location to the administrative office/warehouse. The order is key punched into a computerized rental and inventory system and later matched with a copy of the written rental ticket as a control procedure. The tuxedo is pulled from the petitioner's inventory and delivered by petitioner's truck to the appropriate store location. The truck returns on a given date to retrieve the tuxedo after which it is returned to the warehouse for cleaning and then placed back into inventory.

Petitioner did not report tax on the rental receipts from the rental of its tuxedos from the corporate stores, the franchise stores, or the bridal stores. The franchise and bridal stores also did not report tax on the rental receipts from the rental of the tuxedos.

It is the audit staff's position that the franchise and the bridal stores were acting as agents of petitioner and receiving a commission for services rendered. The audit staff contends that petitioner should be held liable for the entire rental fee collected by the franchise and bridal stores as well as rental fees collected from the corporate stores.

Petitioner contends that it should be relieved of the tax because it received erroneous information from the Board. Petitioner contends that when it began doing business, it contacted the Board and was told that if it acquired property for rental purposes and ultimately sold it, no tax was due until the property was sold. Petitioner does not know who it spoke to at the Board.

Petitioner also contends that it should be allowed to retroactively pay tax on the purchase price of the tuxedos, as well as applicable interest, and not have to pay tax on the rental receipts.

Analysis & Conclusions

A rental is a lease which is a continuing sale. (Sales and Use Tax Regulation 1660(b)(2).) The tax is measured by the rentals payable. (Sales and Use Tax Regulation 1660(c)(1).)

For the rental receipts to be nontaxable, the transactions must comply with Regulation 1660(c)(2), which states as follows:

"No sales or use tax is due with respect to the rentals charged for tangible

> personal property leased in substantially the same form as acquired by the lessor, or by his or her transferor, as to which the lessor or transferor has paid sales tax reimbursement or has paid use tax measured by the purchase price. If such tax has not been so paid, and the lessor desires to pay tax measured by the purchase price, it must be reported and paid timely with the return of the lessor for the period during which the property is first placed in rental service. A timely return is a return filed within the time prescribed by Sections 6452 or 6455 of the Revenue and Taxation Code, whichever is applicable."

The vendors did not charge sales or use tax on the tuxedos purchased by petitioner. Further, petitioner did not report the cost of the tuxedos in a timely manner under Regulation 1660(c)(2). Since there is no allowance in the regulations for retroactive application of Regulation 1660(c)(2), we conclude that the petitioner did not make a timely election to report tax on the cost of the tuxedos. Therefore, the rental receipts are subject to tax.

Petitioner argues that Tetra Pak, Inc. v. State Board of Equalization (1991) 234 Cal.App.3d 1751, is authority which allows petitioner to retroactively elect to pay use tax on the purchase of the tuxedos. However, that case only applies under an amnesty program that is no longer in effect. (Stats. 1984, Ch. 1490, Section 12, p. 5220). Petitioner does not fall under any amnesty program. This appeal falls squarely under Action Trailer Sales, Inc. v. State Board of Equalization (1975) 54 Cal.App.3d 125, which upheld Regulation 1660 and its requirement that a taxpayer make a timely election to report and pay tax on the purchase price.

We also conclude that petitioner is liable for tax due on the rental receipts of the franchise and bridal stores.

Sales and Use Tax Regulation 1660(c)(5) provides that tax does not apply to subleases of tangible personal property which is leased in substantially the same form as acquired by the prime lessor where the prime lessor has paid sales tax reimbursement or use tax measured by rental receipts derived under the prime lease or any prior sublease. Therefore, if petitioner sublet these tuxedos to the franchise and bridal stores and paid tax on the rental receipts, the franchise and bridal stores are not liable for tax. However, if there was a sublease, and if petitioner did not pay tax on the rental receipts, then the franchise and bridal stores would be liable for the tax.

In the present appeal, petitioner did not pay sales or use tax on the purchase price and also paid no use tax on rental receipts. Therefore, the issue is whether petitioner sublet the tuxedos to the franchise and bridal stores thereby making them liable for the tax as the retailers, or whether the franchise and bridal shops were serving as petitioner's agents, thereby making petitioner the ultimate retailer liable for the tax.

An agent is one who represents another, called the principal, in dealings with third persons. (Civil Code Section 2295).

According to the facts in this appeal, petitioner set the rental price, the orders were made on petitioner's forms, and the franchise and bridal stores had to telephone the orders to petitioner's warehouse. Petitioner delivered and picked up the tuxedos. Petitioner never relinquished control of the tuxedos. There was never a separate "sublease". The entire transaction was recorded on one form, the terms of which were dictated by petitioner. There was no lease and subsequent sublease. There was one transaction with petitioner leasing the tuxedos to the customers and the franchise and bridal stores acting as the petitioner's agents. The franchise and bridal stores did not set their own "sublease" price: they received a flat, prior agreed to, 35 percent to 50 percent commission.

Petitioner contends that it should not be liable for tax on the rental receipts because it received erroneous advice from the Board.

Section 6596 provides that if a person's failure to make a timely return or payment is due to the person's reasonable reliance upon written advice from the Board, the person may be relieved from the sales or use taxes imposed and any penalty or interest added thereto. However, one of the conditions which must be satisfied in order to seek relief under this statute is a request in writing to the Board for advice on whether a particular activity or transaction is subject to the sales or use tax.

Here, there is no evidence of a written request for advice by petitioner. The alleged discussion at a Board office took place long ago. We do not know an exact date. We do not know the name of the Board employee who was involved in the alleged conversation. We do not know if someone misunderstood a question or an answer. We have no evidence of written misinformation provided by the Board. Therefore, we cannot use Section 6596 to grant relief to petitioner.

Recommendation

Redetermine without adjustment.

_____ June 8, 1995
MICHELE F. HICKS, STAFF COUNSEL DATE