



STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

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 Controller, Sacramento

CINDY RAMBO
 Executive Director

May 20, 1992

X-----

Gentlemen:

Re: X-----

Enclosed is a copy of the Decision and Recommendation pertaining to the petition for redetermination and claim for refund in the above-referenced matters.

It is the Appeals Review Section's recommendation to redetermine without adjustment and to deny the claim.

There are three options available to you at this point.

1. If, after reading the Decision and Recommendation, you believe that you have new evidence and/or contentions, you should file a Request for Reconsideration. No special form is required to file the Request for Reconsideration, but it must be filed within 30 days from the date of this letter and clearly set forth any new contentions. If new evidence is the basis for filing the request, the evidence must be included. Direct any such request directly to me, with a copy sent to the State Board of Equalization, P.O. Box 942879, Sacramento, CA 94279-0001, Attn: Principal Tax Auditor. I will subsequently notify you whether the request has been taken under review or whether the request is insufficient to warrant an adjustment. If I conclude that no adjustment is warranted, I will then notify you of the procedure you can follow to request an oral hearing before the Board.

2. If, after reading the Decision and Recommendation, you find that there is no basis for filing a Request for Reconsideration, but nevertheless desire to have an oral hearing before the Board, a written request must be filed within 30 days with Ms. Janice Masterton, Assistant to the Executive Director, Board of Equalization, P.O. Box 942879, Sacramento, CA 94279-0001.

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3. If neither a request for Board hearing nor a Request for Reconsideration is received within thirty (30) days from the date of this letter, the Hearing Decision and Recommendation will be presented to the Board for final consideration and action.

Very truly yours,

Stephen A. Ryan
Senior Staff Counsel

SAR:ct
Enc.

Cc: Ms. Janice Masterton
Assistant to the Executive Director (w/enclosure)

Mr. Glenn Bystrom
Principal Tax Auditor (file attached)

Sacramento – District Administrator (w/ enclosure)

STATE OF CALIFORNIA

BOARD OF EQUALIZATION

BUSINESS TAXES APPEAL REVIEW SECTION

In the Matters of the Claim for Refund and
Petition for Redetermination Under the
Sales and Use Tax Law of:

X-----
Petitioner/Claimant

DECISION AND RECOMMENDATION

No. X-----

The Appeals conference in the above-referenced matters was scheduled for March 12, 1991 by Senior Staff Counsel Stephen A. Ryan in Marysville, California.

Appearing for Petitioner/
Claimant (hereinafter "petitioner):

X-----
X-----

Appearing for the Sales and
Use Tax Department:

Mr. Aaron Phillips
Tax Auditor

Mr. Ken Troxel
Branch Office Supervisor

Protested Items

The protested tax liability for the period October 1, 1985 through March 31, 1988 is measured by:

<u>Item</u>	<u>State, Local and County</u>
A. Gross receipts from retail sales of Aerial photographs and processed film – Disallowed resale deductions	\$291,105

Petitioner's Contentions

No sales tax is due because petitioner was merely providing services with an incidental transfer of property necessary to convey data to professional engineers.

Summary

Petitioner is a partnership which has conducted business since January 1, 1985. X----- identified the type of business on the seller's permit application as retailing photographic prints used in map making, etc. This was the first Board audit.

On its sales and use tax returns, petitioner deducted \$291,107 in gross receipts on the basis of being derived from sales for resale. The auditor imposed a tax deficiency on \$291,105 of this deducted amount on the basis that no exemption or exclusion was applicable. The auditor allowed another \$11,861 in gross receipts as excluded on the basis of being from sales for resale as evidenced by resale certificates in the same types of transactions as the ones from which the \$291,107 was derived. The auditor explained that the larger total (\$291,107 plus \$11,861) of resale-issue receipts was due to petitioner's use of the cash basis rather than accrual in keeping its books. The auditor concluded that petitioner had derived the \$291,107 from retail sales of aerial photographs, negatives or processed film to consumers who then produced aerial surveys or photomaps.

At the hearing, the auditor described the Board's case as follows: He had disallowed claimed deductions for sales for resale because no resale certificates existed and because no resales by petitioner's customers had taken place. Petitioner had acted pursuant to oral agreements with engineering companies who purchased photographs and negatives from petitioner. Purchasers had asked for aerial flights and photographs with specific details provided to petitioner. Petitioner then flew an aircraft with a stereoscope camera in it to perform a "survey" and take pictures of the ground below. Petitioner invoiced the engineering companies with separate listings and prices for "Ix exposures and flight time" and "spot shots". Petitioner transferred photographs and negatives to the engineering companies who subsequently used those products to make photomaps which were sold to their own customers.

When asked to provide specific details about the actual work performed by petitioner, the auditor referred the hearing officer to petitioner for petitioner's explanation.

X----- presented petitioner's case as follows: Petitioner is a photogrammetrist. It performed aerial surveys and provided information to the engineering company customers who were each then already in the process of producing engineering maps. Petitioner does not take pictures and provide common photographs and negatives. It provides a professional service to the engineering companies who use petitioner for his expertise in the photogrammetric field. It uses a special stereoscope and aerial mapping camera which is calibrated by the U.S. Department of the Interior Geological Survey. The equipment costs approximately \$300,000. It has a special lens which allows for rectification/correction of distorted images resulting from the curvature of the earth. There is no distortion as to scale in the center of the resulting negative. In order to reach this result, the engineering companies provided to petitioner specifics about what information they needed about the particular ground area, such as elevation, contours, improvements, etc. As several examples, he indicated that clients of the engineering companies were obtaining: topographic maps to show contour/elevation lines; a type of map showing

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contours in order to estimate how much dirt had to be moved and/or removed from a site which was to be graded for development. Petitioner calculated the necessary factors needed to produce the required information on the scaled negatives to be produced. Typically, the land was marked to make certain points visible from the air. It set control points needed for the numerous fly-overs and pictures needed, altitude, time of day, shadows, wind, clouds, tilt, crabbing, etc. X----- held a commercial pilot's license which was required for these flights. X----- flew at precise altitudes and along specific lines/courses to take enough pictures to allow the negative centers to be at scale and to be overlapped to cover the area requested by the customer. Petitioner took the resulting negatives and transposed the centers thereof onto a mylar hard negative which actually conveyed to the engineering company. X-----described this process as a photogrammetric survey, or an aerial survey in more common terms. The engineering companies then used the information contained on the mylar-negatives to make whatever reports, surveys or maps they were hired to produce. The engineering companies typically returned the mylar to petitioner after they were finished. He showed some of such mylar to the hearing officer.

X----- compared the above-described process to an aerial photography process which petitioner also sometimes performed: He used other cameras to merely take pictures from the airplane, develop common photographs, and sell the photographs to a customer. He used a real estate developer as an example. The developer desired photographs for-use in a brochure. Petitioner charged tax reimbursement and paid sales tax on his charges for that type of retail sale. These aerial photographs contained distortions.

X----- held both a land surveyor license and a photogrammetric surveyor license during the audit period.

Analysis and Conclusions

Sales tax is imposed upon each retailer measured by the gross receipts derived in a set period of time from California retail sales of tangible personal property (Revenue and Taxation Code sections 6003 and 6051). A "sale" is defined to include any transfer of title or possession of tangible personal property for consideration (Rev. & Tax. Code § 6006(a)); and any transfer for consideration of title or possession of tangible personal property which has been produced, fabricated or printed to the special order of the customer (Rev. & Tax. Code § 6006(f)). "Gross receipts" is defined to mean the total amount of the sale price, including any services which were a part of the sale (Rev. & Tax. Code § 6012(a) and (b)). A "retailer" includes (a) every seller who makes retail sales of tangible personal property, and (b) every person engaged in business making sales for use (Rev. & Tax. Code § -6015). A "seller" is defined to include every person engaged in business selling tangible personal property of a kind the gross receipts from the retail sale of which are required to be included in the measure of sales. tax, irrespective of whether or not the property is actually sold at retail or is suitable for retail sale (Rev. & Tax. Code § 6014).

The Board has promulgated Regulation 1501 for application in situations involving both the transfer of tangible personal property and services by the transferor. This is the real substance of some of petitioner's feelings, although he has not cited this particular regulation. This authority generally provides that the "incidental" transfer of tangible personal property by a person to his customer as part of the performance of a service is not a sale subjecting the transferor's charges to sales tax. This regulation sets forth a test which requires us to ascertain

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whether the true/real object sought by the customer is the service per se or the property produced by the service.

If the real/true object is the services per se, then the transferor was not a seller or retailer and did not become liable for sales tax because he did not make sales but merely incidentally transferred tangible personal property in the performance of his rendering services. If the real/true object is the property produced by his services, then he is a seller and retailer who made sales of tangible personal property.

The Board has promulgated Regulation 1528 to implement these and other provisions of the Sales and Use Tax Law regarding photographers. This regulatory provision, in pertinent part, indicates that tax applies to sales of photographs, whether or not produced to the special order of the customer (subsection (a) (1)).

The Board has issued a legal ruling of counsel on the subject of "Photographers--In General--Aerial Photographs and Photomaps (controlled mosaics)" [see Business Taxes Law Guide annotation 420.0040 (9/26/72 and 12/31/73)]. This ruling reads as follows:

"Aerial photographs are photographs of objects, ground areas, highways, etc., taken from the air. Aerial photographs are produced by use of airborne equipment and the usual photographic processes and carry distortions as to scale and as to positions of objects on the photographs. They are distinguished from photomaps in that the photomap is one of the end products of an aerial survey using precise engineering procedures including the establishment or identification of control points of latitude and longitude, the computation of engineering data by stereoscopic measurements and the rectification of photographic images. The furnishing of aerial photographs is a sale of tangible personal property. The sales price of the aerial photograph would be the gross receipts for furnishing the photographs with no deduction for flight costs, photographer's time, material, etc.

"Aerial surveys are airborne surveys of ground areas for the purpose of (1) obtaining engineering data with respect to ground surfaces, contours, and improvements; (2) obtaining data with respect to magnetic fields and intensities; or (3) obtaining gravitational data. Aerial surveys are distinguished from flights made for the purpose of producing aerial photographs or mosaics (noncontrolled) in that an aerial survey is a professional undertaking employing precise engineering procedures and resulting in precise engineering reports or maps such as photomaps, magnetic maps, and gravimetric maps. Generally, receipts from aerial surveys are not taxable, as where the results of such surveys are transmitted by means of photomaps. However, where the results of such surveys are transmitted by punched cards, or by tape, disc, drwn, or similar form, or by typed or printed sheets to be used as input media in an optical character recognition system, such receipts are taxable gross receipts from the sale of tangible personal property.

"Engineering services are the services involved in a surveyor mapping project which has as its end the preparation of a map to conform with geodetic or other control and include the establishment of control points of latitude and longitude, identification of the points on photographs and computations of distances between points and elevations to precise

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engineering specifications through the use of engineering formulas and stereoscopic measurement. Persons who conduct surveys requiring engineering services are the consumers of the tangible personal property used in connection therewith including the maps, reports, and other materials furnished the client.

"Mosaics (noncontrolled) are made by assembling vertical aerial photographs of approximately the same scale representing contiguous areas, matched at common points. The composite photograph of such assemblies is called a mosaic or noncontrolled mosaic. It is distinguished from a photomap in that the mosaic is not precisely engineered and is intended as a visual representation of the area rather than a presentation of exact engineering data. Gross receipts for furnishing mosaics are receipts from the sale of tangible personal property.

"Photomaps are one of the principal end products of aerial surveys using precise engineering procedures, including the establishment of control points of latitude and longitude, the computation of engineering data by stereoscopic measurements, the exact rectification of photographic images, and the preparation of a photographic map showing geophysical data and geographic positions true within minute tolerance. They are distinguished from aerial photographs in that aerial photographs are merely visual representations not intended to present exact engineering data and not prepared by professional procedures such as would produce dependable engineering data. The aerial survey resulting in a photomap uses a substantial amount of professional engineering services and results in engineering data; the production of an aerial photograph requires the use of aircraft and crew, photographic equipment, and photographers but no professional engineers and results in a mere picture or group of pictures. Receipts from conducting an aerial survey and furnishing photomaps are considered charges for rendering professional services and the aerial surveyor is the consumer of the tangible personal property used in the survey and the reports, charts, and photomaps furnished the client in connection with the survey.

"Reproductions of maps, that is, copies printed from an original of a hand-drawn map or a photomap, are regarded as self-consumed tangible personal property only if such reproductions are furnished pursuant to an original contract involving engineering services. Receipts from the transfer of reproductions under such circumstances are not subject to the tax."

A copy of the Board memorandum and letter which form the basis for this ruling are attached hereto collectively as Exhibit 1. These documents provide more detail and also some insight into the distinctions expressed in the ruling, plus discuss photogrammetric engineering.

The Board members at oral hearing recently considered a petition for redetermination by a competitor photogrammetrist of petitioner. In December of 1991, the Board voted to treat that competitor as the retailer liable for sales tax on all its charges when it transferred glass plates to its customers in connection with its photogrammetric work. The Board concluded that such competitor did not make maps, but rather maps were made by its customers. From a review of both the Hearing Decision and Recommendation written by the Board Hearing Officer in that case and the transcript from the oral hearing, it appears that petitioner's situation is extremely similar.

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The conclusions of the Board's Business Taxes Appeals Review Section of the Legal Division are as follows:

Petitioner is liable for sales tax because it derived gross receipts from California retail sales of tangible personal property. Petitioner made sales of aerial photographs/negatives. Petitioner did not merely perform services with only incidental transfers of tangible personal property. The true object of its customers was not the information on or in the negatives produced by petitioners' services, but was the negatives themselves. Petitioner merely flew the aircraft as necessary to properly use the highly sophisticated camera and other equipment so as to perform the photographic services, and thereafter produce negatives. No engineering services were performed by it. It did not produce any final end product map. It merely produced an intermediary working product for which the gross receipts derived from the transfer thereof to a customer are taxable. The licensed engineering companies later used the negatives to make engineering computations therefrom and to produce engineered maps. The fact that petitioner's photograph negatives do not contain distortions does not result in them constituting photomaps.

Recommendation

Redetermine without adjustment. Deny the claim after the liability is paid in full.

Stephen A. Ryan, Senior Staff Counsel

5-14-92