

(916) 323-7712

April 10, 1990

Mr. REDACTED TEXT
REDACTED TEXT, Inc.

Dear Mr. REDACTED TEXT:

Re: REDACTED TEXT

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

I have recommended that the Board staff perform a reaudit in accordance with the views expressed in the Decision and Recommendation. No action is required of you at this time, except that you are requested to cooperate with the audit staff during the course of the reaudit.

The audit staff will provide you with a copy of the reaudit report. A copy of that report will also be sent to me. That time, I will write to you informing you of your options for appeal in the event that you disagree with the reaudit results.

Very truly yours,

H. L. Cohen
Hearing Officer

HLC:ct

Enc.

Cc: Ms. Janice Masterton
Assistant to the Executive Director
With Copy of Hearing Decision and Recommendation

Mr. Glenn Bystrom
Principal Tax Auditor (file attached)

Orange County – District Administrator
With Copy of Hearing Decision and Recommendation

STATE OF CALIFORNIA
 BOARD OF EQUALIZATION
 APPEALS UNIT

In the Matter of the petition)	HEARING
for Redetermination Under the)	DECISION AND RECOMMENDATION
Sales and Use Tax Law of:)	
)	
REDACTED TEXT)	No. REDACTED TEXT
)	
<u>Petitioner</u>)	

The above-referenced matter came on regularly for hearing before Hearing Officer H. L. Cohen on January 23, 1990, in Santa Ana, California.

Appearing for Petitioner: Mr. REDACTED TEXT

Appearing for the Department of Business Taxes

Mr. R. Sayles
 Supervising Tax Auditor
 Orange County District

Mr. D. Sniezko
 Senior Tax Auditor
 Orange County District

Protested Items

The protested tax liability for the period January 1, 1984 through December 31, 1986 is measured by:

<u>Item</u>	<u>State, Local and County</u>	<u>LACT</u>
B. Unreported sales within the transit district		REDACTED TEXT
C. Unreported taxable Delivery charges	<u>REDACTED TEXT</u>	<u>REDACTED TEXT</u>
Totals	REDACTED TEXT	REDACTED TEXT

Contentions

Petitioner contends that title to the property in question passed prior to transportation; thus, the tax does not apply to the transportation charges and petitioner is not liable for the transit district tax. If tax is due, relief should be granted because no tax was imposed on another business in a similar situation.

Summary

Petitioner is a corporation which is engaged in selling doors, doorframes, and related hardware. Petitioner also performs some lump-sum construction contracts. It began in business in October 1983. There has been no prior audit.

Petitioner generally receives requests for bids by telephone and makes quotes by telephone. Petitioner states that the quotes include separate amounts for materials, tax on the materials, and freight from petitioner's place of business. Written confirmations are provided for lump-sum amounts. Invoices are also lump sum and state that the price is for merchandise. Petitioner states that the customers are always informed over the telephone that the point of sale is petitioner's place of business. Sales tax is reported and paid based only on the charge made for the doors.

Petitioner states that most of its contracts are with office building construction contractors. Doors normally are not in petitioner's stock and must be specially ordered. In addition, the doors must be painted and specifically machined to accept the hardware selected by the contractors. Since the doors are in essence purchased and machined to the special order of the customer, they are not returnable to petitioner. Petitioner requires 50% payment before any non-inventory items are ordered. The remaining 50% is paid to petitioner when the painting and machining are finished.

Petitioner states that once finished, the doors are stored in petitioner's warehouse until they are required by the customer. The customer usually does not know in advance exactly when the doors will be required and will notify petitioner one or two days in advance of delivery needs. Doors may be stored as long as two years in petitioner's warehouse. The average storage time is about one month.

Petitioner states that some customers pick up doors with their own trucks. Some doors are shipped via common carrier. Petitioner does have transportation facilities and makes some deliveries via its own facilities. Petitioner submitted an analysis showing that during the audit period, payments to common carriers totaled \$53,003.34 while freight income was \$200,255.56.

The auditor concluded that the evidence did not show that title to the doors passed prior to transportation. Tax was applied to the transportation charges (Audit Item C). The auditor based this conclusion on the fact that the written confirmations issued by petitioner do not separately list transportation charges but show a delivered price, as do the invoices. The confirmations specifically state "All items are material, tax, and delivery included."

Petitioner contends that the contracts are formed over the telephone; therefore, there are separately stated prices for transportation. It is always understood that materials in petitioner's

warehouse belong to the customer. Petitioner also states that where customers issue purchase orders, transportation charges are separately stated. Petitioner states that the auditor made no allowance for those contracts in which petitioner did not provide transportation. Petitioner also states that no transportation is charged to the customer until the transportation is performed.

Petitioner states that in an audit of REDACTED TEXT, Account No. REDACTED TEXT, which was completed in 1980, the auditor accepted the exclusion of tax on transportation charges in circumstances similar to petitioner's. Petitioner contends that it should be relieved of liability similarly.

The auditor states that the REDACTED TEXT audit contained no reference to transportation charges. Further, when petitioner applied for a seller's permit in 1983, a copy of Pamphlet No. 9, Tax Tips for Construction and Building Contractors, was furnished to petitioner. The pamphlet outlines the application of tax to transportation charges.

The auditor examined petitioner's records for two months and found that 45.11% of petitioner's sales were for jobs in Los Angeles County. Petitioner had not charged tax reimbursement for or paid the Los Angeles County Transit District Tax (LACT) on these transactions. The auditor applied tax to these transactions (Audit Item B) on the basis that petitioner's frequent deliveries into Los Angeles County constituted being engaged in business in the county to an extent sufficient to require petitioner to collect the tax.

Petitioner contends that it has no liability for the LACT tax because its sales do not take place in that county.

Analysis and Conclusions

Section 6012 of the Revenue and Taxation Code provides in subdivision (c)(7) that gross receipts, which is the amount subject to sales tax, do not include:

"Separately stated charges for transportation from the retailer's place of business or other point from which shipment is made directly to the purchaser, but the exclusion shall not exceed a reasonable charge for transportation by facilities of the retailer or the cost to the retailer of transportation by other than facilities of the retailer; provided, that if the transportation is by facilities of the retailer, or the property is sold for a delivered price, this exclusion shall be applicable solely with respect to transportation which occurs after the sale of the property is made to the purchaser."

Although petitioner may, as alleged, separately quote transportation charges over the telephone, that action represents an offer to sell. Petitioner could not legally require a customer to buy doors based on the telephone conversation. Petitioner has stated that no special orders are accepted without a 50% down payment. The contract does not come into effect at the time of the telephone conversation. Under contract rules of construction, the last transmission is assumed to contain the contract terms. The written confirmations issued by petitioner are issued after the telephone conversations and supersede the telephone conversations. The written confirmations constitute delivered price bids without separate statements of transportation charges. The

transportation charges are therefore subject to tax unless petitioner can produce evidence of agreements entered into after the confirmations were issued. Petitioner states that purchase orders were issued in some cases. If the purchase orders contain a separate amount for transportation, that would meet the requirements of the statute for a separately stated charge.

I believe that title to the doors passes when petitioner finishes work on the doors. At that point, the doors are completed custom-fabricated property. The only remaining obligations are for the customer to complete payment and, possibly for petitioner to deliver to the job site. This conclusion is based on the fact that the doors remain in petitioner's possession for extended periods of time for the convenience of the customers, but the customers are nevertheless required to complete payment.

If petitioner can produce purchase orders as described above, a reaudit should be made to delete those transactions covered by the purchase orders. Petitioner should be allowed time in which to present the documentation to the auditor.

Transactions and Use Tax Regulation 1827 provides in subdivision (b)(1) that retailers engaged in business in a transit tax district may be required to collect use tax from the purchaser of tangible personal property if the retailer delivers the property into the district. "Retailer engaged in business in the district" is defined in subdivision (c)(2) of the regulation to include any retailer having any representative operation in the district under the authority of the retailer for the purpose of delivering orders for any tangible personal property. The criteria are the same as those for establishing nexus of an out-of-state retailer making retail sales to California consumers. A single delivery, or a few occasional deliveries will not establish nexus nor create the conditions for requiring an out-of-district retailer to collect the district tax from consumers located within the district. Petitioner, however, makes substantial sales within the LACT District and makes frequent deliveries to customers within the district. Petitioner is required to collect the district transactions (use) tax on sales where it ships or delivers the property to a point within the district.

Petitioner is not required to collect the transactions (use) tax on transactions in which the customer picks up the property at petitioner's place of business, even if the job site is known by petitioner to be within the district. The auditor should review petitioner's records to ascertain whether transactions of this type have been included within the amount subject to tax. If such sales have been included, they should be deleted.

Recommendation

Reaudit in accordance with the above discussion.

H. L. Cohen, Hearing Officer

3/20/90

Date