

STATE OF CALIFORNIA

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the petition)	
for Redetermination Under the)	DECISION AND RECOMMENDATION
Sales and Use Tax Law of:)	
)	
)	
<u>Petitioner</u>)	

The above-referenced matter came on regularly for hearing before H. L. Cohen on July 17, 1991, in Oakland, California.

Appearing for Petitioner: REDACTED TEXT

Appearing for the	
Sales and Use Tax Department:	Mr. J. Toste
	Senior Tax Auditor

Protested Item

The protested tax liability for the period April 1, 1987 through February 28, 1989 is measured by:

<u>Item</u>	<u>State, Local and County</u>
Unreported Transportation Charges	REDACTED TEXT

Contentions

Petitioner contends that the transportation charges were separately stated and thus not subject to tax.

Summary

Petitioner is a corporation engaged in making mail order sales of wine within California. The last prior audit was for the period through March 31, 1987.

The auditor examined petitioner's sales invoices and found that many stated that freight and tax were included in the lump sum selling price. Internal accounting records segregated selling price of the wine, shipping charges and tax reimbursement. Other invoices showed a

separate charge for shipping, but the charge was a standard amount depending on the type of wine and type of packaging as well as the point to which shipment was made.

The standard amount was in some cases more than the actual cost of transportation and in other cases was less than the transportation cost. The auditor applied tax to all transportation charges related to invoices which showed a lump sum price for wine, transportation and tax. The auditor also applied tax to all transportation charges related to invoices on which the itemized transportation charge exceeded the actual transportation cost. The auditor made no allowance or offset for transportation charges related to invoices on which the transportation charge was less than the actual transportation cost.

Petitioner stated that it uses standard charges for freight. There is one schedule for northern California and another for southern California. There are also variations in the two schedules based on the type of bottle and type of container. Shipments are made via United Parcel Service or similar carrier. Petitioner pays the carriers as billed by them. Petitioner also stated that it paid tax on its excess charges for freight, and there were instances where the customer picked up the wine at petitioner's premises and reduction in price is made for freight.

Petitioner contends that the customers can tell the freight charges from the documentation which accompany shipments. Petitioner also contends that excess shipping charges should be offset against the below cost shipping charges.

Analysis and Conclusion

Section 6012 of the Revenue and Taxation Code provides in subdivision (c) (7) that gross receipts, which is the amount subject to tax, does 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."

Subdivision (a) of Sales and Use Tax Regulation 1628 provides in pertinent part:

"Except as provided in paragraph (c) below, in the case of a sale, whether by lease or otherwise, tax does not apply to 'separately stated' charges for transportation of property from the retailer's place of business or other point from which shipment is made 'directly to the purchaser,' provided the transportation is by other than facilities of the retailer, i.e., by United States mail, independent contract or common carrier. The place where the sale occurs, i.e., title passes to the customer or the lease begins, is immaterial, except when the property is sold for a delivered price or the transportation is by facilities of the retailer, as explained in (b) below. The amount of transportation charges excluded from the measure of tax shall not exceed the cost of the transportation to the retailer.

"Transportation charges will be regarded as 'separately stated' only if they are separately set forth in the contract for sale or in a document reflecting that contract, issued contemporaneously with the sale, such as the retailer's invoice. The fact that the transportation charges can be computed from the information contained on the face of the invoice or other document will not suffice as a separate statement. If a separately stated charge is made designated 'postage and handling' only that portion of the charge which represents actual postage may be excluded from the measure of tax."

Business Taxes Law Guide Annotation 557.0450 reads:

"Postage and Handling vs. Handling. Where a charge is designated 'postage and handling', Regulation 1628 allows an exclusion from the measure of tax to the extent of the amount of postage paid. We have considered the designation 'postage and handling' coupled with the actual amount of postage placed on the package mailed to a customer to constitute a separate statement of transportation charges excludable from the measure of tax. On the other hand, the designation 'handling charge' is too general to form the basis for a separate statement of the postage charge within the language of Regulation 1628. 9/16/74"

Under the statute, as interpreted by the Regulation, in order for a shipping charge to be excluded from the gross receipts which are subject to tax, it must be separately stated to the buyer. The fact that the shipping charge can be computed from available information is insufficient. The Regulation and the Annotation permit the use of the amount of postage on a package to establish a separately stated shipping charge. United Parcel Service places the equivalent of a postage stamp on packaging. This accomplishes the same thing as placing postage stamps on a package sent through the United States Postal Service. Where petitioner's invoices show a lump sum price for wine and transportation, and shipment was via the United Parcel Service, the United Parcel Service stamp should be regarded as a separately stated transportation charge. For those sales no tax is due on the actual transportation cost. A reaudit should be conducted to delete these charges from the amount subject to tax.

The regulation provides that the amount of transportation charges excluded from the measure of tax shall not exceed the cost of the transportation to the retailer. The amount which can be excluded from tax is thus the lesser of cost or the amount charged on the invoice. If petitioner paid tax with respect to the overcharges, then no further tax is due on those sales. The regulation also denies any basis for offsetting overcharges against undercharges.

Recommendation

Reaudit in accordance with the above discussion.

H. L. Cohen, Senior Staff Counsel

9-4-91
Date