

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

110.0370

In the Matter of the Petition)
for Redetermination Under the) DECISION AND RECOMMENDATION
Sales and Use Tax Law)
)
H--- H--- & F---) No. SR --- XX-XXXXXX-010
)
)
Petitioner)

The above-entitled matter came on regularly for hearing on Tuesday, June 16, 1981 in San Jose, California before Susan M. Wengel, Hearing Officer.

Appearing for Petitioner:

R--- Z---, Treasurer of petitioner
A--- P. M---, Attorney at Law

Appearing for the Board:

Frank Kwok, Tax Auditor II

Protested Item

The petitioner has filed a petition for redetermination of a tax deficiency issued on October 20, 1980, for the period January 1, 1977 through March 31, 1980. The protest involves tax determined on the following audit item:

- A. Claimed exempt feed sales overstated based on a 13.15% of error as found in test of sales invoices in August of 1979

\$82,534

Contentions of Petitioner

1. Regulation 1587 cannot be interpreted to find the sales in question taxable.

Summary of Petition

The petitioner is a corporation which makes sales of animal life and feed. This is the petitioner's first audit.

The staff found that the petitioner was making sales of feed which could be used both to feed animals of a kind the products of which ordinarily constitute food for human consumption (exempt) and to feed animals not of this kind (not exempt). No exemption certificates were available to support the exemptions claimed by the petitioner. A sample was made of August 1979. The petitioner was allowed to contact as many of his customers as he was able to contact and determine if the feed was used in an exempt manner. In some situations the names of the purchasers were not recorded. A 13.15% of error was computed using sales invoices. A deficiency was assessed.

The petitioner contends that the sales in question are exempt and presented the following in support of this position:

1. There are three types of feed:
 - a. Feed to animals for human consumption
 - b. Feed to animals not for human consumption
 - c. Feed that could be used for either
2. As to the third type of feed, which is in issue by this petition, the industry recognizes that 80% of this type of feed is actually used in an exempt manner.
3. The petitioner contends he charged tax when he knew the feed was to be used to feed animals not for human consumption.
4. Therefore, as the petitioner did charge tax as described above, it should be presumed that he properly did not charge tax on the audit items in question. Reference is made to Regulation 1587(c)(1) [now Regulation 1587(d)] which says, "In the absence of evidence to the contrary it will be presumed that all such feeds are to be used in producing meat, dairy, or poultry products for human consumption."
5. The petitioner's competitors are not charging sales tax reimbursement so he is losing business.

Analysis and Conclusion

Revenue and Taxation Code § 6358 exempts from sales or use tax the sales of any form of animal life or feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption. This exemption is further classified and described in Sales and Use Tax Regulation 1587 which was adopted by the Board pursuant to the authority given by Revenue and Taxation Code § 7051. This regulation provides in part:

“Sellers of feed should secure feed exemption certificates with respect to sales of feed of a kind customarily used both to feed animal life of a kind the products of which ordinarily constitute food for human consumption, and to feed animal life not of this kind. The following form of certificate is suggested:

‘I hereby certify that I am engaged in the production of products of animal life which are food for human consumption, and that all of the feeds which I shall purchase from

_____ will be purchased for use in the production of such products. This certificate shall be considered a part of each order which I give unless such order shall otherwise specify. This certificate shall be good until revoked in writing.

Signature _____
Address _____
Occupation _____
Seller’s Permit No. (if any) _____

Sellers of feed need not secure feed exemption certificates with respect to sales of feed of a kind ordinarily used only in the production of meat, dairy or poultry products for human consumption or with respect to sales in small units (less than one standard sack of grain and less than one bale of hay), of feeds of a kind customarily used either for food production or other purposes (feeding work stock). In the absence of evidence to the contrary, it will be presumed that all such feeds are to be used in producing meat, dairy or poultry products for human consumption.”

As this regulation provides, if a retailer is selling feed which can either be a kind customarily used both to feed animal life of a kind the products of which ordinarily constitute food for human consumption (exempt) or to feed animal life not of this kind (not exempt), the retailer will have to secure an exemption certificate to relieve him of the liability to pay the sales tax. (This liability is created by Revenue and Taxation Code § 6051 which makes the sales tax the retailers responsibility and Revenue and Taxation Code § 6091 which provides that it is presumed that all gross receipts are subject to tax until the contrary is established.)

For situations where no resale certificate was accepted and held by the petitioner it is concluded that a deficiency was properly assessed.

The language referred to in Regulation 1587(c)(1) does not create a presumption that feed which is used in both exempt and nonexempt manners will be presumed to be exempt. This presumption applies only to sales of:

1. Feed of a kind ordinarily used only in the production of meat, dairy, or poultry products for human consumption, or
2. Feed in small units or feed of a kind customarily used either in food production or other purposes.

This portion of the regulation merely states that certain feeds can be sold tax free without obtaining an exemption certificate. The type of feed at issue in this petition does not qualify for this presumption. Rather the regulation specifically states that an exemption certificate must be obtained for feed which is customarily used to feed both exempt and nonexempt animals as described in Regulation 1587.

Finally, the Board has not acted improperly in making this requirement. The California courts have held that tax exemptions are solely a matter of legislative grace and must be strictly construed against the taxpayer. Hotel Del Coronado Corporation v. State Board of Equalization, 15 C.A.3d 612 (1971). As the petitioner did not hold exemption certificates or present evidence that the feed was used in an exempt manner, no adjustment can be recommended.

Recommendation

It is recommended that the tax be redetermined without adjustment.

Susan M. Wengel, Hearing Officer

July 14, 1981

Date

REVIEWED FOR AUDIT

Principal Tax Auditor

7-16-81

Date