

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

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

This matter was heard on Wednesday, 14 January 1976, at 1:30 P.M. in San Francisco, California.

Appearing for Petitioner:

REDACTED TEXT
Attorney at Law

REDACTED TEXT
Assistant Vice President

Appearing for the Board:

Robert S. Goldflam
Supervising Auditor

Robert E. O'Donnell
Field Audit Supervisor

Protested Item
(Audit Period 1-1-72 to 12-31-74)

	State, local <u>county</u>	<u>BART</u>
D. Taxable freight included in sales of personalized checks sold to depositors and BART use tax due on checks purchased from REDACTED TEXT ex BART use tax and sold to depositors in the transit district.	\$363,299	\$401,622

Contentions of Petitioner

1. Petitioner is not the retailer of the personalized checks but is acting only in the capacity of an agent of the depositor.
2. The printer is the retailer of the personalized checks and makes a separate charge for freight.

Summary of Petition

Petitioner is a bank which operates approximately 350 branches. Petitioner is a wholly owned corporate subsidiary of REDACTED TEXT. A prior audit covered the periods through 31 December 1971.

Briefly stated, the basic facts in the petition are as follows. When a depositor opens a checking account with Petitioner, he is informed of Petitioner's stock of personalized checks offered free of charge. He is also informed that special order personalized checks are available for an additional charge. Should the depositor prefer the special order checks, he makes his selection from the brochures of four printing companies (REDACTED TEXT) and leaves his order with the bank to be forwarded to the printer. The order forms state the name of the printer and direct that the form be sent to the printer. Reorder forms state the name of the printer.

The personalized checks are mailed by the printer directly to the depositor. The printer invoices Petitioner for its printing charges, plus sales tax and charges for postage, which are separately stated on the invoice to Petitioner. Petitioner debits the depositor's account with a lump-sum amount which includes the printing charges, the sales tax reimbursement paid to the printer, and the postage charges. Notification of the debit to the account is sent to the depositor by Petitioner. The debit memorandum states only a lump-sum amount with no separate statement of tax or postage.

Under these facts, the audit staff regarded Petitioner as the retailer of the checks. Since the postage charges are not separately stated on the debit memo received by the depositor, the audit includes the charges for postage as subject to the tax.

The audit work papers note that, during portions of the audited period, certain printers were charging tax on the postage; we assume they are presently doing so. The protested amount includes only postage on which the printer did not collect the tax or tax reimbursement, with the exception of Petitioner's purchases of checks from REDACTED TEXT, on which Petitioner owes BART tax also, as REDACTED TEXT did not charge BART tax on its sales to Petitioner.

Analysis and Conclusions

Petitioner contends that in regard to the special personalized check sales it is acting in the capacity of an agent of the depositor rather than as a retailer of the checks. The Board has consistently taken the position that banks which make personalized checks available for purchase by depositors in the manner utilized by Petitioner are the retailer of the checks. In *Bank of America v. SBE*, 209 Cal. App. 2d 780, the court in sustaining the Board's position considered and rejected

the contention that the bank was not the retailer of special personalized checks furnished to its depositors.

In its petition and at the preliminary hearing Petitioner states that the *Bank of America* case, supra, is inapplicable to the present facts because Petitioner did not make an additional charge to its depositors over and above the charge to Petitioner by the printer; the name of the printer appeared on the brochures and order forms thereby making the printer's identity known to the depositors; and Petitioner did not "accept" the depositors order. Because of these distinctions, Petitioner contends that the sales contract is between the depositor and the printer, not between the depositor and Petitioner.

The distinctions made, however, do not in our opinion detract from the principle in *Bank of America*, supra, and do not change the result reached by the Board in similar recent petitions. The depositor, even though knowing who may print the checks for the bank, does not deal with the printer, but with the bank, to whom he gives his order for the checks offered for sale by the bank and to whom he pays the sales price through authorization given to the bank to debit his account. We believe it is Petitioner to whom the depositor looks for performance under the contract for the checks. No express agency is shown to exist between Petitioner and its depositors and we find none created from the conduct of the parties.

The fact that a customer may have knowledge of, or specify, the supplier from which a retailer is to obtain the goods desired by the customer does not change the status of the retailer to that of agent for the customer. Depositors choose one check over another for purely aesthetic reasons, not because they wish to contract with a given printer. We would venture that a majority of new depositors, having chosen a given check design from the brochure strictly because of eye-appeal and after having the bank personnel type their order form, leave the bank without knowing the identity of the printer. The depositor does not sign the order; instructions to bank personnel on some order forms state "ask customer to review for correctness."

To distinguish the *Bank of America* case; supra, on the grounds that Petitioner does not "accept" the order would be to ignore the realities. The Bank of America order form had a specific space wherein the branch bank dealing with the depositor noted its acceptance of the order. The bank probably considered this as more important for bookkeeping purposes than for legal significance. More importantly, there is nothing in Petitioner's present procedure to indicate to the depositor that his order is not legally accepted at the time it is physically accepted by Petitioner. The fact that the printer could later refuse to fill an objectionable order does not conflict with the *Bank of America*, supra, rationale. A supplier (wholesaler) may refuse offers received from retailers.

The absence of an additional charge, profit, or markup does not aid Petitioner. Such fact was found to be immaterial in *Bank of America*, supra, at page 797, and is immaterial here. (See *Market St. Ry. Co. v. SBE*, 137 Cal. App. 2d 87; *Union League Club v. Johnson*, 18 Cal. 2d 275.)

We find Petitioner's position indistinguishable from the petition of REDACTED TEXT which was heard by the Board on 1 May 1974. REDACTED TEXT also attempted to distinguish

the *Bank of America* case, supra, on the grounds that the printer's name was shown on brochures, order forms, and checks and that no additional charge was made to the depositor. The Board concluded that the postage charges not separately stated on the billing document to the depositor were properly subject to the tax.

On 13 November 1974 the Board heard the petition of REDACTED TEXT and concluded that a bank which retailed checks to depositors and failed to collect the use tax due must pay the amount of the tax from its own funds as a debt owed the state. REDACTED TEXT's contention was an issue not raised in the *Bank of America* case, supra, i.e., whether the purchase of checks from a national bank is exempt from use tax pursuant to Section 6402 of the Revenue and Taxation Code. The Board rejected this contention and REDACTED TEXT has brought an action for refund against the Board. (*REDACTED TEXT v. SBE*, --- SFSC No. REDACTED TEXT.)

Recommendation

Redetermine without adjustment.

Donald J. Hennessy, Hearing Officer

18 Feb 1976

Date