

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

185.0203

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition)
for Redetermination Under the) DECISION AND RECOMMENDATION
Sales and Use Tax Law of:)
)
H--- M. S---) No. SN -- XX-XXXXXXX-010
)
)
Petitioner _____)

The Appeals conference in the above-referenced matter was held by Staff Counsel Lucian Khan on August 10, 1993 in Culver City, California.

Appearing for Petitioner: H--- M. S---
J--- F---
Manager – D--- & T---

Appearing for the
Sales and Use Tax Department
(SUTD):
Sylvia Lee
Senior Tax Auditor
George Ito
Supervising Tax Auditor

Protested Item

The protested item involves sales of office equipment during the period of July 1, 1987 through December 31, 1987, measured by the amount of \$293,260.

Contention

Petitioner made only one exempt occasional sale. All remaining sales were made by CCR V--- Corporation (CCR).

Summary

Petitioner is the owner of a commercial building, located on --- --- Avenue in Los Angeles. At that location, petitioner leases office space to various tenants. He does not hold a seller's permit.

Sometime in late 1986-early 1987, a tenant abandoned the leased premises, leaving behind computers, computer imaging equipment, office furniture and fixtures, and miscellaneous equipment. Petitioner purchased the abandoned equipment from various lien holders. He felt the equipment would help secure a new tenant, who may want to own, and use it in place.

In July 1987, petitioner and CCR reached agreement for the lease of office space and purchase of the equipment which was earlier abandoned by the prior tenant. The agreement required CCR to pay \$275,000 for the equipment, of which petitioner financed \$225,000. CCR planned to sell off most of the equipment as surplus, and use the proceeds to reduce the balance owing petitioner.

CCR occupied the premises sometime between August 24 and September 1 of 1987. After procuring buyers for the excess equipment (now owned by CCR), problems arose with obtaining releases for outstanding liens on the equipment. Petitioner also wanted all sales proceeds be paid to him, to ensure compliance with the S--- - CCR agreement. Accordingly, CCR continued to procure buyers, and arrange all terms of the sale. Petitioner then invoiced the buyers, collected the money, and credited the proceeds against the amount CCR owed to him.

After reviewing the various activities and transactions which took place, the auditor initially concluded that petitioner was a retailer in only the first \$275,000 sale to CCR, and CCR was the retailer for all remaining sales. Apparently, after conferring with her supervisor and reassessing the facts, it was concluded that petitioner was the retailer for all transactions. SUTD felt the other equipment sales were made under consignment, because petitioner invoiced the transactions, and had possession of the property at the time of sale. Since more than three sales were made in a 12-month period, all transactions were considered taxable. SUTD assessed tax based on a measure of \$293,260, which is the amount reported on petitioner's 1987 federal income tax return.

Petitioner argues that he was only a retailer on the first sale to CCR. The difference between the \$275,000 sales price and the amount reported on his 1987 income tax return (\$293,260) represents interest charges. Since this transaction qualifies as an exempt occasional sale, no tax is due. He only invoiced the customers and collected the proceeds to ensure repayment on CCR's account. CCR located all buyers and negotiated all terms of the sale. When all sales were made, the equipment was in the possession of CCR. The auditor originally concluded CCR was the retailer, then concluded otherwise once she discovered it filed bankruptcy and had no assets.

SUTD argues the transactions were consignment sales taxable under Regulation 1569. As a landlord, petitioner had possession of the equipment, he invoiced all transactions, and reported all sales on his federal income tax return for that year. A security agreement was entered into on November 1, 1987. It refers the \$275,000 sale to CCR, but based on the content of the agreement, the invoiced sales may have occurred prior to the Snyder-CCR sale.

In preparation of this Decision and Recommendation, I have reviewed the following documents:

1. A July 29, 1987 letter addressed to petitioner. It is authored by R--- M--- - President of CCR. The letter states CCR agrees to purchase the equipment for \$275,000 and enter into a five-year lease with petitioner.
2. A sworn statement from Mr. M--- dated August 9, 1993. It states that CCR planned to sell off the surplus equipment and use the proceeds towards the \$225,000 balance due petitioner. As each piece of equipment was sold, CCR informed petitioner about the sale, and its terms. CCR had full possession and control of the premises and equipment during the period when all sales were made.
3. Invoices representing four separate transactions, all occurring in September 1987. All invoices show petitioner's name, customer's name, description of the property sold, and sales price.
4. An October 16, 1987 letter addressed to Mr. M---, authored by petitioner. The letter provides a detailed summary of all sales made, amounts credited against the original \$275,000 purchase price, and the balance due from CCR.
5. A security agreement dated November 1, 1987. The agreement states CCR has negotiated the equipment purchase for a total price of \$275,000. Petitioner has agreed to credit CCR the sum of \$199,045, which represents amounts received from the sale of certain property. It references a promissory note in the amount of \$75,955, for the remainder of principal due. The agreement was intended to provide security for payment of the promissory note.
6. A March 27, 1991 memo addressed to SUTD supervisor Hong Tran, from Senior Tax Auditor Sylvia Lee. The memo gives a brief summary of the facts in this case, and concludes CCR was the seller of the equipment.

7. A copy of petitioner's 1987 federal income tax return. The return shows an equipment sales price of \$293,260, and acquisition date of June 29, 1987. The sales date is August 26, 1987.

8. A lease agreement between CCR and petitioner which was signed August 24, 1987. The term of the lease is five years, commencing on September 1, 1987 and ending on August 31, 1992.

Analysis and Conclusions

With the exception of mobile homes, commercial coaches, vehicles, vessels, or aircraft, there is an exemption from sales and use tax, for occasional sales of tangible personal property in this state. However, where a person makes three or more sales for substantial amounts in a 12-month period, he or she is required to hold a seller's permit and the gross receipts from all sales are subject to tax. (Revenue and Taxation Code Section 6367, Regulation 1595(a)(1), (4).)

Based on the above authority, the Snyder-CCR sale is an exempt occasional sale, unless petitioner was also a retailer of the subsequent equipment sales.

Revenue and Taxation Code Section 6015 defines a "retailer" as every seller who makes retail sales of tangible personal property. Regulation 1569 (which applies to consignment sales) provides that where a person has possession of property owned by another, and exercises his authorized power to transfer title to a third person without any further action on the part of the owner, he is a retailer and tax applies to the gross receipts from such sales.

Black's Law Dictionary (6th ed.) defines the term "consignment" (as used in the commercial sense) to mean an agency agreement where property is committed to the consignee for care or sale. One who is a consignee is also known as a factor. A factor/consignee is one who is entrusted with the possession and control of goods for the purpose of selling the merchandise consigned to him. He receives a commission for his efforts, commonly called "factorage". Factors are distinguished from other sales agents in that the factor is given possession of the property by the owner, and has ostensible authority to deal with it as his own, and can sell and receive payment. (C.C. 2026, 2369; see Babson v. Salisbury (1920) 46 Cal.App. 523, 522, 189 P. 702; Pacific Finance Corp. v. Foust (1955) 44 Cal.2d 853, 856, 285 P.2d 632.) The factor is held to a high degree of care and diligence in carrying out his principal's instructions. (CC 2027; Rhee v. Small Co. (1927) 83 Cal.App. 339, 343, 256 P. 839; Cooper v. American Fruit Growers (1934) 137 Cal.App. 494, 496, 30 P.2d 558; Bones v. Fusco (1937) 21 Cal.App.2d 476, 478, 69 P.2d 911.)

Here, petitioner did not procure the buyers, negotiate the terms of the sales, receive a commission, or have actual possession of the property. At best, he had constructive possession. He merely invoiced the transactions, collected the proceeds, and applied those amounts against

the balance CCR owed to him. In short, petitioner was only protecting his secured interest in the property. He did not enter into this arrangement for the purpose of receiving a commission. Therefore, I conclude the arrangement between petitioner and CCR was not a consignment. Accordingly, the only sale petitioner made was to CCR in the amount of \$275,000. Since there is no evidence of other sales, this sale was occasional, and therefore exempt under Section 6367.

Recommendation

Grant the petition.

Lucian Khan, Staff Counsel

11-2-93

Date