

STATE OF CALIFORNIA  
BOARD OF EQUALIZATION

**295.1810**  
1/6/84

In the Matter of Joint )  
Petition for Redetermination )  
And Claim for refund Under the )  
Sales and Use Tax Law )  
 )  
 )  
Claimant )

DECISION AND RECOMMENDATION  
No. ----

The above-entitled matter came on regularly for hearing on October 18, 1983 in Fresno, California before Stephen A. Ryan, Hearing Officer.

Appearing for Claimant:                   ---

Appearing for the Board:                   ---

Protested Item

The claimant has filed a petition for redetermination/claim for refund of taxes and interest paid pursuant to a tax deficiency determination issued on January 21, 1983, for the period July 1, 1979 through June 30, 1982. The protest involves tax determined on the following audit item:

	<u>Tax Measure</u>
B. "Labor sales pertaining to cutting and trimming charges disallowed on taxable sales"	\$47,488

Claimant's Contentions

1. The labor pertaining to claimant's cutting and trimming charges on rootings is exempt contract services and not part of the fabrication labor incurred for the manufacturing process. The cutting and trimming is highly irregular and not normally a part of the manufacturing/production process. Title to the rootings had already passed to the purchaser prior to the cutting and trimming.

### Summary of the Case

Claimant began business in 1974 as a nursery involved in the growing and cutting of vines and trees. There has been no previous audit.

Claimant annually plants vine stems in the ground to be grown for nine to ten months. After two or three good fall or winter frosts have put the vine stems into a state of dormancy, claimant digs them out of the ground. These untrimmed rootings are tied into large bundles and placed into temporary storage at claimant's business location.

Claimant has typically already taken orders for the sale of the majority of these rootings prior to planting. Claimant uses the number of requests from potential buyers to estimate the number of vine stems to plant. --- stated that claimant does not identify at that time which planted rootings or unplanted vine stems are for any particular buyer. Claimant does require a 20 percent-deposit prior to planting. The sales are usually made in bundles of fifty. --- estimated that 90 percent of claimant's rooting sales are in an untrimmed condition and sales tax reimbursement is collected on all such sales.

Once the rootings are dug up, claimant calls those pre-paid depositors and advises them to come pick up the bundles of rootings. Claimant does not deliver to the purchasers. The typical purchaser would then pay claimant the balance of the purchase price and pick up the untrimmed rootings. Some purchasers would be billed and expected to pay within 90 days.

On the estimated remaining 10 percent of sales, claimant trims the rootings for the purchasers prior to delivery. During the audit period, claimant made sales of trimmed rooting bundles to four purchasers. Claimant charged these purchasers separately for the rootings and for the trimming services. --- a stated that these four transactions were unique in that they occurred during a very wet year which prevented the purchasers from planting their newly purchased rootings. The purchasers left the rootings with claimant longer than usual because they did not want to pick them up and then have to store them. Consequently, claimant left the bundles in its own temporary storage facilities. When the weather warmed, the rootings began to sprout new growth. Rather than allow them to grow, the purchasers requested claimant to trim them. Claimant then trimmed the rootings for the purchasers and assisted these purchasers in finding cold storage for the trimmed rootings. ---stated that the amount of trimming charges was claimant's actual cost of trimming so no profit was made.

In some cases, claimant billed its customer on separate invoices for the rootings and for the trimming. In other cases, claimant used one invoice but separated the two charges. It did not collect sales tax reimbursement on the trimming charges.

Claimant submitted a letter from its attorney stating that pursuant to Uniform Commercial Code--Sales, section 2401(3)(b), title to the vine stems passed to the purchasers at the time of contracting. The attorney believes that delivery of the vine stems was to have been made without movement by claimant, that they were already identified at the time of contracting, and that there were no documents of title to be delivered to either of the parties.

Claimant also submitted a memorandum from ---, a research viticulturist/lecturer at the California State University, Fresno, Viticulture Research Center. --- stated that a rooting is a "finished product" at the time of bundling and labeling. He further stated:

"Almost without exception, the grower provides all necessary operations from what point on including any necessary trimming or clipping.

The situation you described on the phone is highly irregular in terms of the nurseryman trimming the rootings for the receiving party, as this operation normally takes place on the planting site. In any case, I seriously doubt that this operation was included in the original purchase agreement. It seems as though the nurseryman provided this service only as a favor or in special consideration to his client to suit his needs in this particular situation."

Claimant's accountant submitted a letter dated October 24, 1983 after the preliminary hearing raising the following three subissues:

- (1) The auditor included S207 in the tax measure on invoice #--- to --- which should have been excluded because it was for a charge for a bin rental which is not taxable.
- (2) The auditor made a mathematical error in the taxable measure for March 1982 by \$90 in excess of the actual figures.
- (3) Invoice #--- to --- shows a \$160 credit for previous invoice #--- which the auditor failed to deduct from the taxable measure.

Claimant has paid the determination.

#### Analysis and Conclusions

The issue is whether the trimming charges are the result of a "sale" generating "gross receipts" which are subject to sales tax pursuant to section 6051 of the Revenue and Taxation Code.

Section 6051 provides in pertinent part:

"For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of... [4-3/4] percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this state..."

Section 6012(a) (2) defines "gross receipts" to mean the full amount of the sale price of retail sales of retailers without any deduction for labor or service cost. Subsection (b)(l) further provides that gross receipts include "[a]ny services that are a part of the sale".

Revenue and Taxation Code section 6006 states that a "sale" means and includes all of the following:

"(a) Any transfer of title or possession, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, of personal property for a consideration..."

(b) The producing, fabricating, processing... of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the producing, fabricating, processing...

\*\*\*

(f) A transfer for a consideration of the title or possession of tangible personal property which has been produced, fabricated... to the special order of the customer..."

Sales and Use Tax Regulation 1526(b) [Cal. Admin. Code, title 18, section 1526] which implements section 6006 of the Revenue and Taxation Code, states as follows:

"Producing, fabricating, and processing include any operation which results in the creation or production of tangible personal property or which is a step in a process or series of operations resulting in the creation or production of tangible personal property. The terms do not include operations which do not result in the creation or production of tangible personal property or which do not constitute a step in a process or series of operations resulting in the creation or production of tangible personal property, but which constitute merely the repair or reconditioning of tangible personal property to refit it for the use for which it was originally produced."

Claimant contends that trimming services do not constitute a "sale" because such services are separate from the normal rooting manufacturing process. Claimant also argues that it had already sold the untrimmed rootings to the purchasers prior to its performance of the trimming services. Thus, claimant believes that the separately stated trimming charges do not constitute taxable "gross receipts".

It is the conclusion of the hearing officer that claimant "produces, fabricates and processes" tangible personal property for a consideration. The trimming labor is more than mere repair or reconditioning--it is a service operation which is a step in the creation or production of tangible personal property in the form desired for use by the customers (Regulation 1526(b)). A "sale" results whether or not title has passed to the purchasers prior to the trimming.

If title had passed prior to the trimming, then the purchasers furnished their rootings to claimant for such trimming. Consequently, claimant performed taxable fabrication labor on untrimmed rootings owned by another in order to create and produce trimmed rootings, i.e., a separate "sale" (Revenue and Taxation Code section 6006(b)). This scenario is apparently not the situation, however, since there were no title clauses in any of the agreements. Therefore, title to the rootings passed from claimant to the purchasers at the time of delivery--after the trimming (Uniform Commercial Code--Sales, section 2401(2) which states: "Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading."). Although delivery was to be made without moving the goods and no documents of title were involved, section 2401(3) (b) of this code is not applicable because --- has stated that the goods were not identified to the contract at the time of contracting. The rootings were labeled for

particular buyers only when bundled after being uprooted. Therefore, title did not pass to the purchasers at the time of contracting as argued by petitioner's attorney.

If title passed to the purchasers after the trimming, then the trimming services by claimant were a step in the process or a series of operations which resulted in the creation or production of tangible personal property (Regulation 1526(b)). Claimant's activities in planting a vine stem, growing it, uprooting it after nine months, and trimming it at the special order of a purchaser, constitutes one "sale" for a consideration which includes the separately stated trimming charges.

In either scenario, claimant receives "gross receipts" from a sale which is subject to California sales tax. In the first instance the trimming fabrication labor is a separate sale with the gross receipts being the trimming charges. In the latter instance, the gross receipts from the sale of trimmed rootings include the charges for the rooting itself as well as for trimming fabrication local since there is no deduction for labor or services which are part of the sale. It is immaterial that no profit was made on trimming since the sales tax is measured by gross receipts and not net income (see Union League v. Johnson (1941) 18 Cal.2d 275).

Therefore, no adjustment should be made to the taxability of the trimming charges as set up by the auditor.

As to the subissues raised in the accountant's letter, the following adjustments should be made:

- (1) Delete the \$207 as the charge for bin rental does not constitute gross receipts from the sale of tangible personal property.
- (2) Delete \$90 from the tax measure as a mathematical error created an excessive determination by that amount.
- (3) No adjustment can be made because the petitioner apparently did not report and the auditor did not include the original \$160 from invoice #2917 in the measure of tax.

#### Recommendation

It is recommended that the petition for redetermination and claim be granted solely with respect to items (1) and (2) raised by the accountant's letter of October 24, 1983. In all other respects, it is recommended that the petition be redetermined without adjustment and that the claim be denied.

---

Stephen A. Ryan, Hearing Officer

---

1/6/84

Date

Reviewed for Audit"

---

Principal Tax Auditor

---

1/12/84

Date