

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

325.0330
6/17/77

In the Matter of the Petition)
for Redetermination of State)
and Local Sales and Use Taxes)
)
)
Petitioner)

DECISION AND RECOMMENDATION

The above-entitled matter came on regularly for hearing on Tuesday, May 24, 1977 in Santa Ana, California. Robert H. Anderson, Hearing Officer.

Appearing for Petitioner: , Attorney at Law

Appearing for the Board: Mr. M. L. Lewis, Principal Auditor
Orange County District

Mr. Wm. Monsanto, Audit Supervisor
Orange County District

Ms. Joanne Frankel, Auditor
Orange County District

Protest

Pursuant to an audit covering the period from 4-1-73 through 3-31-76, and a determination issued on August 9, 197X, petitioner protests the assessment for sales tax on the sale of the documented vessel XY a 60 foot Pacemaker FBMY 1968. The measure of the tax is \$133,000.

Contentions

Transaction was an exempt sale in interstate commerce with delivery made in accordance to provisions of Regulation 1620, subsection (3) (B)2, delivery by a retailer to a "carrier".

Summary

Petitioner is a yacht broker that makes sales of yachts purchased for resale in addition to brokerage transactions. He operates his business as a sole proprietorship.

This controversy is over the sale of one 60' Pacemaker FMBY 1968 yacht named "XY". The vessel was sold to Mr. and Mrs. YZ of Portland, Oregon who purchased it through an Oregon yacht broker named AB. The yacht is a United States Coast Guard documented vessel and was documented in the Coast Guard District in Oregon upon the passage of title to Mr. and Mrs. YZ.

Negotiations to purchase the vessel commenced in February of 1976 with a proposal letter from the Oregon Yacht Broker. Mr. YZ, the buyer, made a trip to Newport Beach, California to inspect the boat; he made an offer through his Oregon broker and petitioner accepted the offer after modifying some of the terms relating to payment.

The contract called for the delivery of the vessel to the buyer in Oregon and the buyer retained a Mr. PQ to deliver the vessel, along with papers needed for documentation, to Mr. YZ in Oregon.

Mr. PQ is a licensed skipper, United States Coast Guard License No. 123456. He resides in Hammond, Oregon. On June 26, 1976 he executed a letter statement that reads as follows:

I, PQ, am a licensed Coast Guard skipper. I engage in the delivery of yachts between the states of Washington, Oregon, California and Mexico. I make these deliveries on a fixed fee basis. I delivered the yacht "XY" from Long Beach, California to Astoria, Oregon in April of 1976. The buyer, Mr. YZ, took delivery at Astoria, Oregon in April of 1976.

The record indicates that PQ and Mr. DE boarded the yacht in Long Beach and sailed it to Monterey Bay. Originally they had intended to go to San Francisco Bay but put in at Monterey Bay because of weather. In Monterey Bay, Mr. DE, left the vessel and Mr. FG, the yacht broker from Oregon, boarded and the vessel proceeded on to Astoria, Oregon where it was delivered to the possession of the buyer.

Petitioner has supported the foregoing with evidence including a copy of the skipper's license with the Coast Guard and a copy of his statement regarding the delivery and his profession.

Petitioner contends that title did not pass to Mr. and Mrs. YZ until the vessel was delivered to them in Oregon and then only after documentation with the Coast Guard had been completed. Documentation included an abstract of title (history of the vessel), a bill of sale, etc. The vessel was not registered to the buyer until all documentation was received in the Coast Guard District in Oregon. It is contended that the vessel is still in Oregon and there is no intent to berth it in California.

Conclusions

The portion of Regulation 1620, relied on by petitioner, provides as follows:

Sales tax does not apply when the property pursuant to the contract of sale, is required to be shipped and is shipped to a point outside this state by the retailer, by means of:

Delivery by the retailer to a carrier... Whether hired by the purchaser or not, for shipment to such out-of-state point. As used herein the term "carrier" means a

person or firm regularly engaged in business of transporting for compensation tangible personal property owned by other persons, and includes both common and contract carriers.

Evidence has been presented to support the conclusion that the skipper who took the vessel to Oregon was a person regularly engaged in the business of transporting vessels owned by others. However, the Coast Guard license does not automatically make him a carrier for purposes of delivering the vessel.

The agreement between the buyer and seller was carried out as intended; to wit, the vessel was delivered in California to the person (carrier) who was hired by the buyer to sail it from California to Oregon.

Subsequent to the hearing, counsel for petitioner obtained additional information on the status of a person, such as Mr. PQ who is licensed by the Coast Guard. Following are extracts from what he learned:

There are no requirements for a Coast Guard license or registration with the Public Utilities Commission or the Interstate Commerce Commission to permit a person to engage in skippering vessels, under 80 tons, pursuant to a contract for delivery of a vessel on its own bottom. The Coast Guard does, following proof of experience and passing certain tests, issue an Ocean Operators License -- more commonly known as Skipper's Papers. This particular license is required for operating vessels for hire with six or more passengers.

However, for delivery (of a vessel) no license is needed under 200 gross tons. But, whoever hires a delivery skipper wants him to have this type of license because it is an indication of his knowledge and experience.

The licenses are issued by the headquarters of a specific Coast Guard district. The license, a copy of which was presented at the hearing, was issued by the Coast Guard in Portland, Oregon, and therefore the geographical limitation in the license is the waters bounding that particular district. Such does not restrict the holder of those skipper papers from operating in any other Coast Guard district.

Both the PUC and the ICC confirm that there is nothing in the conduct of a skipper for hire delivering a vessel on its own bottom which would place that transaction within their jurisdiction. Thus, there are no restrictions from the standpoint of the PUC or the ICC Which would prevent Mr. PQ from being classified as a contract carrier.

Counsel cites Garrett v. State Board of Equalization (1951) 189 Cal. App. 2d 504 as authority for a secondary position to the effect that delivery of the vessel to Mr. PQ constituted placing the vessel into interstate commerce. Among other things, Garrett stands for the following:

Cal. Admin. Code, title 18, 2015 (formerly ruling 55, and now Reg. 1620, renumbered Cal. Admin. Code, title 18, sec. 1620) exempting from sales tax all transactions in which goods are transported outside the state by the retailer, a carrier or a forwarding agent, does not indicate a legislative intent not to impose a tax on goods that are to be removed from the state and not used here but merely

endeavors to define when goods have entered the flow of interstate commerce and become exempt from taxation.

It is argued that the case enforces the position that the transaction was in the flow of interstate commerce when Mr. PQ took over control to deliver the vessel to Oregon.

However, this appears to beg the question because the crux of the exemption is whether Mr. PQ is a "carrier" within the meaning of the word as used in the statute and regulation. If he is, then there is no argument about whether the interstate journey began with delivery to him. If he is not, then Garret stands for the proposition that exempting from sales tax all transactions in which goods are transported outside this state by a common carrier does not indicate a legislative intent not to impose a tax on goods that are to be removed from the state and not used here. In other words, delivery could be made to the buyer himself or his agent or broker for delivery to the out of state point and the sale would not be an interstate commerce transaction even though the goods were removed from the state and used outside of California. This being the case, the sales tax would apply.

Another point was raised when it was noted that printed instructions on the State, Local and District Sales and Use Tax Return form contained conditions for claiming a transaction exemption under the interstate commerce rule, and one was "delivery by the retailer to a customer's broker or forwarding agent for shipment outside this State".

Counsel pointed out that the buyer's broker was on board the vessel when the seller left it in Monterey and to that extent there was a form of delivery to the customer's broker. On this point, it is obvious that there is a printing error and the word should be "customs" broker. The error does not change the law or Regulation and the Regulation language is "customs broker". It might be erroneous advice but there is not any evidence that petitioner relied on it and claimed the exemption because of it. The point is made to collaterally support an exemption in case the interstate commerce argument fails. Be that as it may the State is not estopped from collecting taxes, found to be due, because a taxpayer relied on erroneous advice from the Board of Equalization in failing to pay the taxes. See Market Street Railway Co. v. State Board of Equalization (1955) 137 Cal. ADD. 2d 87.

It is also argued that title passed to the buyer in Oregon, and in support of this Counsel cites the Uniform Commercial Code sections 2401(2) and (2)(b). He contends that the sections could be interpreted to make the sale take place where title transfer took place and since this was a documented vessel it required documentation in its new home port in Oregon which is where the title papers were transferred. We disagree with this theory or argument since the documentation is the formality of documenting title. The vessel could have been sold to the buyer and the buyer could have taken delivery in California under a bill of sale and title (as a matter of law, not registratin or documentation) would have passed to the buyer in California for purposes of the Sales and Use Tax Law, notwithstanding that at a later date the formalities of documentation might have been completed in Oregon.

In summary, it is concluded that Mr. PQ is a carrier within the meaning of the term as used in Regulation 1620 (18 Cal. Admin. Code 1620) and delivery by petitioner to Mr. PQ resulted in an interstate commerce transaction, and the exemption claimed under section 6396 of the Sales and Use Tax Law.

Recommendation

Redetermine. Reaudit and adjust the protested item. Adjustment to be made by petition unit.

Robert H. Anderson, Hearing Officer

Date Jun 8 1977

Reviewed for Audit: