

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

325.0614
7/14/81

In the Matter of the Petition)
for Redetermination of State)
and Local Sales Tax)
)
)

Petitioner)

DECISION AND RECOMMENDATION

The above-entitled matter came on regularly for hearing on Thursday, June 11, 1981, in Sepulveda, California, before Robert H. Anderson, Hearing Officer.

Appearing for Petitioner:

Appearing for the Board: Guy Zimmerman, Auditor
 Van Nuys District

Protest

Petitioner was audited for the period from October 1, 1976, through September 30, 1979, and a determination for tax and interest to October 1, 1980, was issued on September 3, 1980.

Petitioner protests the assessment for sales tax on retail sales of supplies, disallowed as interstate sales. Tax measure: \$197,132.

Contentions

The disallowed interstate sales were, in fact, interstate sales. The firm has been audited in the past, and in c2ch prior audit it was found that these transactions were exempt. Title to the merchandise does not pass until the merchandise reaches the out-of-state production site.

The transaction is similar to goods placed on consignment, and no sale occurs until the goods are withdrawn from the consigned inventory, which is, in this case, always at some out-of-state film production location.

Summary

--- is a corporation and subsidiary of --- The firm is engaged in business of renting tax-paid film and lighting equipment, including vans or busses to house as well as transport the equipment to film production locations. The firm also sells filming supplies, which are purchased and consumed by the lessee producers who lease the equipment.

The equipment that houses and transports the filming and lighting equipment consists of greyhound-like busses described as mobile filming studios which contain technical equipment, including a self-contained power source. Petitioner always requires a trained driver-technician to operate the equipment every time a unit is leased.

There is a pool of specially trained drivers who are described as technicians and jacks of all trades. They are trained by petitioner, but are not on petitioner's payroll for labor union reasons.

A lessee must have a driver from the pool, and may select anyone he wishes. If the lessee has no choice, petitioner designates a driver. The drivers are equipment trouble shooters or maintenance men; they are not cameramen, and do not film scenes on film or video tape for the lessee-producers who rent the equipment. The drivers are paid directly by the lessee of the equipment as independent contractors.

Thus, when a bus loaded with equipment leaves petitioner's premises, petitioner has no control over the driver or the equipment. Custody of everything on the bus is in the driver until the bus reaches its destination, which, in the matter at hand, is always at some out-of-state point.

This controversy arises because of the filming supplies that petitioner sells to lessees of the equipment. Supplies needed are estimated by the lessee-producer or someone he designates. They are placed on board the bus before it leaves petitioner's place of business, and are transported to the location where filming is to be done. In this controversy, the locations were all outside of California.

Supplies are used, as needed, during the filming operations, and when the equipment is returned to petitioner, an accounting for the supplies is made and petitioner is billed for everything not accounted for and returned.

Petitioner contends that there is no sale until the supplies are withdrawn from the bus and consumed, and that this is always outside the State of California so no sales tax is applicable.

The auditor relies on Regulation 1620 and more specifically subsection (a) (3) (A) of the Regulation as authority for concluding that the sale occurs in California. The subsection reads, in part, as follows:

(3) Sales Preceding Movement of Goods From Within State to Points Outside State.

(A) To Other States - When Sales Tax Applies. Except as otherwise provided in (B) below, sales tax applies when the property is delivered to the purchaser or his representative in this state, whether or not the disclosed or undisclosed intention of the purchaser is to transport the property to a point outside this state, and whether or not the property is actually so transported.

Following the hearing, --- wrote the following supplement to arguments for an exemption as an out-of-state sale.

Item E of the audit "In state deliveries of supplies reported as exempt interstate sales" is the only remaining unresolved item. In your closing comments, you

stated you may consider the items sales and return of sales thereby concluding the transactions to be taxable. We were likening the situation to goods in consignment or a mobile retail store. The sale taking place at the production site at the time the supply is removed from the --- and used or consumed by the producer. Since we did not include this discussion in our original protest, I concluded a follow up letter would be in order.

As you know, a sale means "Any transfer of title or possession... of tangible personal property for a consideration" (6006). Also, sales price does not include... the amount charged for property returned by customers when that entire, amount is refunded either in cash or credit (6006 (c) (2))

It seems to me we do not have a sale and return for two reasons. One, the producer pays no consideration for the supplies furnished prior to going out to a production site. Two, the form and substance of the transaction is a single billing for any supplies used on site. We compare the supplies furnished to those not used. The difference constitutes supplies used. We do not bill for all the supplies furnished and issue a refund or credit for the supplies not used.

Therefore, both the form and the substance of the transaction constitute a sale outside the state.

Conclusions

Subsection (a) (3) (B) of Regulation 1620 provides, in part:

(B) Shipments Outside the State - When Sales Tax Does Not Apply. 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:

1. Facilities operated by the retailer, or
2. Delivery by the retailer to a carrier, customs broker or forwarding agent, whether hired by the purchaser or not, for shipment to such out-of-state point.

None of the foregoing events occurred in respect to the supplies. First, the bus was under lease to the lessee-producer, and the driver was being paid by the lessee-producer, so petitioner was not using his facilities or his employee to transport the property out-of-state. Second, the bus was not a common carrier.

On the other hand, the subsection relied on by the auditor is applicable. "Sales tax applies when the property is delivered to the purchaser or his representative in this state, whether or not the disclosed or undisclosed intention of the purchaser is to transport the property to a point outside this state, and whether or not the property is actually so transported."

As --- noted in his letter, quoted above, "Sale" means any transfer of title or possession ... of tangible personal property for a consideration (6006).

Clearly, possession was transferred, in California, when the supplies were placed on the bus which was under the control of a driver being paid by the lessee of the bus.

The occurrence of a sale is not dependent on when or where the property is consumed physically, when it is invoiced, or when payment is made for the property.

The consignment argument or analogy falls short because the sale of the supplies was not a sale for resale to the lessee-producer; it was a retail sale to the lessee-producer who intended to physically consume the supplies sometime and at some place. As noted, physical consumption does not complete the sale; the transfer of title or possession (in lieu of title) is the element necessary to complete the sale. Credit sales are taxable when the sale is made, not when payment is finally made.

The fact that auditors who made prior audits of petitioner's business failed to recognize these transactions as sales in California is not a basis in law on which to recommend that the practice be continued.

In summary, it is concluded that the sale of the supplies occurred when possession of them transferred from petitioner to the lessee through the driver of the bus who was not an agent or employee of petitioner, and this occurred in California, which precludes finding that the sales were in interstate commerce or were out-of-state transactions.

Recommendation

Redetermine without adjustment.

Robert H. Anderson, Hearing Officer

July 14, 1981
Date

REVIEWED FOR AUDIT:

Principal Tax Auditor

Date