

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

340.0129

In the Matter of the petition)
for Redetermination Under the)
Sales and use Tax Law)
)
)
)
Petitioner)

DECISION AND RECOMMENDATION

The above-entitled matter came on regularly for hearing on Monday, December 8, 1980 in Sacramento, California before Susan M. Wengel, Hearing Officer.

Appearing for Petitioner: --- ---
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Appearing for the Board: --- ---
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Protested Item

The petitioner has filed a petition for redetermination of a tax deficiency determination issued on May 19, 1980, for the period November 1, 1976 through September 30, 1979. The protest involves tax determined on the following audit item:

Audit Item A:

Claimed sales of mailing lists disallowed (based on test of the first quarter of 1978 and the third quarter of 1978). \$409,389

Contentions of Petitioner

1. The mailing lists are provided for a one time use only and therefore under Regulation 1504(a) (3) the charges re considered to be for information or addressing services.
2. The mailing services are not subject to tax as per Regulation 1504 (b) (1) and (2).

Summary of Petition

The petitioner is a corporation based in New York. Since November of 1976 the petitioner has had an office in San Francisco and has made sales in California. The petitioner is engaged in the business of providing consulting assistance to publicly - held corporations. As part of these

services, the petitioner provides lists of certain names associated with the investment community. The names on the list are registered representatives, portfolio managers and security analysts. A typical agreement entitles the customer to up to six undated, individualized and custom designed sets of labels during any contract year.

The lists are provided to the petitioner's clients in three formats:

- (1) Pressure sensitive labels. Once the peel-off labels have been removed, there is nothing left on the page but a blank piece of paper.
- (2) Cheshire labels. Once these are transferred to envelopes, there is nothing left at all.
- (3) Magnetic tape. [The tax on the magnetic tapes has been paid and is not protested in this petition.]

The audit staff concluded that the petitioner's operations were sales of tangible personal property as the mailing list was the true object of each contract. The audit staff also concluded that Regulation 1504(a) (3) cannot provide the basis for an adjustment as the contracts do not restrict the customer to one use. In fact, the contracts provide for the furnishing of six sets of labels during the contract year.

The petitioner contends that because of the turnover and change in the names on the lists, their personnel thoroughly update the lists of registered representatives every month. The lists of registered managers is updated every two weeks and the lists of European investors who follow U.S. securities is updated at least every six weeks. Therefore, should a client request a list every two months, each list would contain some different names and addresses. The petitioner contends that their clients agree that each list is provided to them for a one-time use. Apparently each salesperson orally advises their clients that the lists are for one use only. To ensure that a client will not duplicate the list, the Petitioner receives copies of all the materials sent out to the financial community through its lists.

The petitioner contacted eight of its largest clients and questioned them as to their understanding of whether the lists could be used more than once. Two companies responded that the lists were for one time use.

The petitioner further contends that Sales and Use Tax Annotation 340.0060 supports its position. If not excluded from tax as a service under Regulation 1504(a) (3), the petitioner contends the provisions of Regulation 1504(b) (1) and (2) are applicable.

Analysis and Conclusion

Sales and Use Tax Regulation 1504 (a) (2) provides that tax applies to receipts from the transfer of title or possession, rental, or granting of a license for use of mailing lists, to the same extent as to receipts from sales or rentals of tangible personal property generally. Tax does not apply, however, to charges for the transfer or use of mailing lists where a contract restricts the transferee or user to use of the mailing list one time only. (Regulation 1504 (a) (3).) The contracts in question do not restrict the use of the list to one use. Rather, the client may per the contract have six sets of labels during each contract year. The fact that some of the names may

be deleted and others added will not affect this finding. There is nothing on the contract which would restrict a client from receiving six sets of labels at one time. While this clearly would not be practical, it would be possible. As the regulation provides that tax will not apply only where the contract restricts the transferee to use of the mailing list only one time, it cannot be concluded that an adjustment be made. Tax exemptions and exclusions are solely a matter of legislative grace and must be strictly construed against a taxpayer. *Hotel Del Coronado Corporation v. State Board of Equalization* 15 C.A. 3d 612 (1971).

Sales and Use Tax Annotation 340.0120 will not affect this decision as it clearly states that sales of copies or lists are taxable.

The petitioner further contends that Regulation 1504(b) (1) and (2) are applicable to the present tax situation. These sections provide:

"Tax does not apply to charges for services rendered in preparing material for mailing, such as addressing, enclosing, sealing, collating, affixing labels, blocking out, tucking or clasp ing envelope flaps, metering, affixing stamps, edging seal or edging with stamp, addressing permit indicia, and sorting, tying and sacking in compliance with postal rules and relations, nor to charges for the handling or wrapping of material left over after preparation of material for mailing, which is to be returned to the customer.

"'Addressing' means the actual writing, typewriting, printing, imprinting or affixing of names and addresses or addresses only on property to be mailed. The mailing may be done by the person doing the addressing or by another person. The process may include the preparation of Cheshire tapes, Dick tapes, cards, gummed labels, etc., to be affixed to, or enclosed in, the property so as to serve as addresses for that property and not to be used for 'any other purpose such as reproduction or reference."

As the "mailing services" are not completed by the petitioner, sections will not apply. The petitioner merely furnishes names and addresses on labels. They do not affix these labels. While it may, be true that the preparation of the labels is part of the process of preparing materials for mailing, Regulation 1504(a) (2) specifically provides that if only mailing lists are transferred, tax will apply.

Sales and Use Tax Annotation 340.0060 will not affect this finding.

Recommendation

It is recommended that the tax be redetermined without adjustment.

Susan M. Wengel, Hearing Officer

Date

Reviewed for Audit:

Principal Tax Auditor

Date