

STATE OF CALIFORNIA  
BOARD OF EQUALIZATION

345.0200

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition )  
for Redetermination Under the ) DECISION AND RECOMMENDATION  
Sales and Use Tax Law of: )  
)  
B--- L--- S--- & D---, INC. ) No. SR -- XX XXXXXX-010  
)  
)  
Petitioner )

The Appeals conference in the above-referenced matter was held by Staff Counsel Lucian Khan on January 31, 1994 in Van Nuys, California.

Appearing for Petitioner: No appearance (submitted brief).

Appearing for the  
Sales and Use Tax Department  
(SUTD):  
  
Jack Infranca  
District Principal Auditor  
  
Nancy Alvaro  
Senior Tax Auditor

Protested Item

Disallowed delivery and claimed exempt labor charges measured by \$786,420 for the audit period of April 1, 1988 through March 31, 1991.

Contentions

1. The transportation charges are not taxable.
2. The labor charges upon which SUTD assessed tax were for nontaxable installation labor.
3. Petitioner relied on advice in a September 1989 tax bulletin and therefore is entitled to relief under Revenue and Taxation Code Section 6596.

### Summary

Petitioner is a builder of movie sets and scenery for the television and motion picture industry. Contracts with customers require petitioner to build and deliver the sets to the customers' locations. Once the sets are delivered by petitioner's facilities, they must be assembled. After assembly, petitioner provides stand-by labor while filming takes place, then strike labor to disassemble the sets after filming is completed. All contracts are verbal.

In an audit covering the above period, SUTD assessed tax on delivery charges and disallowed claimed installation labor, after determining no installation of the sets was involved.

Petitioner argues that because of insurance liability for the sets, title passes to its customers prior to delivery; therefore, delivery charges are not taxable. The labor charges were for pure installation of theatrical sets, and after soliciting advice from the Board in 1989, petitioner was referred to a Board publication (Exhibit 1) which provides that installation labor is exempt. Petitioner has complied with that advice. The customers were specifically contracting for installation labor on pre-constructed sets as illustrated by the letter which is attached as Exhibit 2. In a prior Decision and Recommendation dated April 22, 1988, Senior Staff Counsel James Mahler concludes that separately stated assembly and installation charges are not subject to tax. Furthermore, in March of 1991, Assistant Chief Counsel Gary Jugum, in a letter regarding the "Intel" issue specifically held that separately stated charges for service items are not taxable.

SUTD argues that transportation charges were taxed because petitioner always delivered the sets, and because there were no written contracts it could not be determined if title passed prior to delivery. Furthermore, the invoices contained charges for various activities which took place after delivery, such as fabrication labor. Therefore, it appears unlikely that title could have passed prior to delivery.

The charges which were designated as installation labor were disallowed because the movie sets were freestanding; therefore, no installation would have been necessary. Most likely the charge represented some other form of labor which is taxable. Specifically, petitioner performs set-up or assembly labor in assembling the sets. There is also stand-by labor which is a charge for having an employee stand by for the purpose of making any modifications or repair to the set, while filming is taking place. Strike labor involves the disassembly of the set. These three types of labor were all involved with petitioner's furnishing of the sets and would be taxable as a fabrication-type labor. The records were not complete enough to determine whether any of petitioner's labor charges were exempt.

SUTD disagrees that the tax bulletin referenced by petitioner would apply in this instance. Petitioner has not proven that the labor in question was exempt installation labor. The undated letter referred to by petitioner (Exhibit 2) does not entitle petitioner to relief, because there was no written contract proving the labor was for installation. It is also noted the word "assembly" has been crossed out in the letter. This may either be an indication that the customer does not know the difference between these two types of labor, or that they consider each type to

be essentially the same. Therefore, the customer may have been unknowingly referring to assembly labor.

SUTD also disagrees with petitioner's interpretation of the Decision and Recommendation of April 22, 1988. The decision cites Business Taxes Law Guide (BTLG) Annotation 435.0140 which provides that reassembly labor is not taxable if title to the property passes to the buyer prior the reassembly, and the buyer is not required to hire the seller for the reassembly. In this case, since there is no written contract, it cannot be determined when title passed.

In support of its above arguments, SUTD submitted four sample invoices obtained from petitioner's records which are described as follows:

1. Invoice #1191 dated January 21, 1988. This invoice describes construction and installation of a movie set, but there is no specific amount for installation. There is also no charge for sales tax reimbursement. (Exhibit 3.)

2. Invoice #1460 dated June 8, 1990. This invoice contains separate charges for items such as materials and expendibles, prefabricated construction labor, installation labor, paint labor, and transportation. There is also a separate entry for sales tax reimbursement. (Exhibit 4.)

3. Invoice #1459 dated June 4, 1990. This invoice provides a general description for charges designated as "overages-changes-labor & materials", then specifically describes various functions to be performed and provides a separate charge for each function. No sales tax reimbursement is charged on this invoice. (Exhibit 5.)

4. Invoice #1458 dated June 4, 1990. This invoice appears to relate to invoice #1459 since each invoice refers to the production as "9017-opposite sex". The invoice contains separate charges for items designated as prefab. materials, prefab. labors, subcontracts (welding), transportation and installation labor. On this invoice, petitioner charges sales tax reimbursement. (Exhibit 6.)

All invoices apparently relate to the same customer.

### Analysis and Conclusions

#### Delivery Charges

Where delivery of the property is by the retailer's facilities, tax applies to charges for transportation unless (a) the charges are separately stated, (b) for transportation from the retailer's place of business or other point from which shipment is made directly to the purchaser, and (c) the transportation occurs after the sale of the property is made to the purchaser. When the sale occurs before the transportation to the purchaser commences, tax does not apply to separately stated charges for transportation. (Reg. 1628(b).) Unless explicitly agreed that title is

to pass at a prior time, the sale occurs at the time and place at which the retailer completes his performance with reference to physical delivery of the property. When delivery is by facilities of the retailer, title passes when the property is delivered to the purchaser at the destination unless there is an explicit written agreement executed prior to delivery that title is to pass at some other time. (Reg. 1628(b)(3)(D).)

Based on the review of the evidence submitted, we conclude SUTD appropriately disallowed the transportation charges. The transportation charges were for delivery of the sets to the customer's place of business and petitioner made delivery. No proof has been submitted to show that title passed to the customer prior to delivery of the sets. Any agreement passing title must be in writing, where delivery is made by the retailer. Petitioner's argument that insurance liability for the sets passed to the customer at delivery is irrelevant.

### Labor Charges

Generally, there are two theories under which certain types of labor may be taxed: First, where the labor is a service that is a part of the sale of the property (Revenue and Taxation Code Section 6012(b)(1); and second, where the labor is itself a "fabrication" sale (Rev. & Tax. Code § 6006(b)). Fabrication labor includes any operation which results in the creation or production of tangible personal property, or which is a step in the process, or series of operations resulting in the creation or production of tangible personal property. The term does not include the repair or reconditioning of tangible personal property to refit it for the use for which it was originally intended. (Sales and Use Tax Regulation 1526(a) and (b).)

Sales tax applies to sales of tangible personal property measured by the gross receipts from the sale of the property. (Rev. & Tax. Code § 6051.) "Gross receipts" means the total amount of the sales price including any charges for services that are part of the sale. (Rev. & Tax. Code § 6012(a) and (b).) Sales and Use Tax Regulation 1524(a) provides that the measure of tax is the gross receipts or sales price charged by the manufacturer, which includes any labor or service costs of any step in the manufacturing process, including work performed to fit the customer's specific requirements whether or not performed at the customer's request, or any other services that are part of the sale. BTLG Annotation 295.1690 provides that services that are part of the sale include any the seller must perform to produce and sell the property for which the purchaser must pay as a condition of the purchase and/or functional use of the property, even where such services might not appear to directly relate to production or sale costs.

Charges for labor or services used in installing or applying the property sold are excluded from the measure of tax. Such labor and services do not include the fabrication of property in place. (Rev. & Tax. Code § 6012(c)(3), Reg. 1546(a).)

Although invoices #1460 (Exhibit 4) and #1458 (Exhibit 6) list a separate charge for installation labor, we do not see how this type of labor would involve the furnishing of the sets. If, once the sets are assembled, they are freestanding until such time as striking takes place, no installation would be involved. Recently, the Board has held that charges for both stand-by labor (if strictly for repair), and strike labor (if it was optional) may be exempt. If in a Request

for Reconsideration petitioner can submit sufficient evidence to prove some installation occurred, or that stand-by or strike labor may be exempt as indicated above, the measure of tax may be reduced accordingly. Without further description and evidence of these charges, no further adjustments are warranted.

Relief Under Section 6596

The information contained in the September 1989 tax bulletin would not entitle petitioner to relief under Revenue and Taxation Code Section 6596. To obtain relief, petitioner must show that the written advice was erroneous and that petitioner reasonably relied on this advice. Here, the information contained in the bulletin is not incorrect. If it is proven the disputed labor charge was for installation or some other form of exempt labor, relief would be granted for that reason, rather than under this section.

Recommendation

Allow petitioner 30 days to submit evidence to substantiate any claimed exempt labor. After this period, deny the petition.

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Lucian Khan, Staff Counsel

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Date

Attachments: Exhibits 1-6