



STATE BOARD OF EQUALIZATION

State of California
Board of Equalization
Appeals Division

In the Matter of the Petition)	
for Redetermination Under the)	Hearing
Sales and Use Tax Law of:)	Decision and Recommendation
)	
)	

The above-referenced matter came on regularly for hearing before Hearing Officer Anthony I. Picciano on March 28, 1991 in Van Nuys, California.

Appearing for Petitioner:

Appearing for the Sales and Use Tax Department:	Greg McNamee Supervising Tax Auditor
	Roger J. Pasarow Tax Auditor

Protested Items

The protested tax liability for the period July 1, 1986 through June 30, 1989 is measured by:

<u>Item</u>	<u>State, Local and County</u>	<u>LACT</u>
A. Gasoline sales on wet rentals of mobile transportation equipment within California not reported.	\$168,450	\$157,183
B. Tax paid purchase resold credit on A above.	\$-47,446	\$-44,274

Petitioner's Contentions

A. Petitioner contends that the charge that was listed on its invoices as "Mobile Crane Gas/Oil per mile" was a charge for the use of the equipment and not representative of a sale of gas. It was a charge for rental of mobile transportation equipment, therefore, it is exempt.

B. Petitioner does not protest this item except to the extent that it relates to audit item A.

Summary

Petitioner is a corporation that has been in business since 1969. It manufactures and rents various types of equipment to motion picture studios. The majority of petitioner's receipts emanate from the rentals of mobile transportation equipment. There has been one prior audit of the petitioner that ran through the first quarter of 1986.

The Sales and Use Tax Department's (Department) representative, --- stated that the staff had made an inquiry to the Department's Principal Tax Auditor to determine whether the separately stated charges on petitioner's invoices for "Mobile Crane Gas/oil per mile" caused the petitioner to be considered the retailer of fuel. ---, the Principal Tax Auditor's opinion was, regardless of that it was a per mile charge, that the terms used by the petitioner were determinative and that petitioner would be considered the retailer of the gas and oil involved. He said that it made no difference that the charges were made on a per mile basis as that was a matter of agreement between the petitioner and its clients. It was on the basis of this advice that the audit was completed.

--- determined that the fuel that was sold by the petitioner was purchased tax paid. In order to provide the proper credit for these tax paid purchases, --- took the gas and oil sales per the petitioner's general ledger and divided it by the selling price of \$1.05 that was used for most of the audit period. He derived the number of miles for which there was a charge. He introduced a rate of four miles to the gallon and computed the cost of the fuel from that rate. The application of an average purchase cost of \$1.30 through the fourth quarter of 1987 and \$1.10 thereafter provided the calculation of the overall amount of credit to be given for the audit period. See audit workpapers schedule 12A. This amount appears as audit item B.

The Department argued that the form of the transaction governs in this case. The staff pointed to Sales and Use Tax Regulation (Regulation) 1598 as support for its position that the petitioner becomes the retailer of fuel when it is separately stated from the rental charge for the vehicle.

The petitioner presented a number of letters from its customers that state that the customers understood that the mileage charge was not for fuel. The petitioner also argued that because of the course of dealing that it had with its long-time customers, it was implicitly understood that the mileage charge represented a charge made for the use of the vehicles similar to those mileage charges made by car rental agencies.

--- presented authority for the proposition that the course of dealing between the petitioner and its clients should be controlling in this situation. That letter brief and the response by the Department are attached hereto as Exhibits A and B respectively. --- indicated that sometime

after 1979 the name attributed to the mileage charge became Gas/Oil. That title was purely arbitrary and had no meaning other than that there was a charge for mileage. In addition, he argued, if one was to use the strict interpretation of the Regulation 1598, it requires that fuel be separately stated and because the title attributed to the taxable measure includes oil, therefore there is not a separate statement for fuel. He suggested that the price charged in this instance for fuel is certainly an outrageous sum and if it were only for fuel the petitioner's customers would be most upset. This of itself supports the proposition that the mileage charge is exactly that and not a sale of fuel. He said that there was no correspondence between the amount of fuel used and the amount that is charged on the mileage charge. The money is not for gas but is in fact for the extra wear and tear on the vehicles associated with their being driven extensive distances. He agreed that the petitioner lists these revenues in a separate general ledger account titled "gas and oil sales". Once again he came back to the premise that fuel was not separately stated because oil is also included in the title given and oil has a longer life and is not consumed by the customer on a mileage basis. He noted that Mr. Pasarow did not attempt to break out the tax-paid purchases for oil as he did for the fuel.

Analysis and Conclusions

Sales and Use Tax Regulation 1598 (e) is dispositive of the issue presented herein. It provides that the lessor is the retailer of fuel furnished by him to a lessee of a vehicle if the sales price of the fuel is separately stated from the rental charge for the vehicle. The sales price of the fuel is separately stated from the rental charge. There is no requirement that there be a per gallon charge so long as there is a charge listed as a charge for fuel. The fact that the petitioner chose to charge for its fuel based upon mileage is its choice and has no effect on the outcome. Theoretically, the petitioner could have charged for fuel based upon time in the hands of the lessee and the same result would occur.

The petitioner has argued that the prior course of dealing between the petitioner and its customers should be considered as controlling in this instance. The authorities cited by the petitioner are appropriate for the establishment of the meaning that should be attributed between parties to a contract. Those meanings are as between the contracting parties and not the Board. Here we are concerned with the question of whether the petitioner is to be considered the retailer of fuel by the Board and not whether the customer and the petitioner agree that the petitioner is or is not the retailer of fuel. The appropriate authority to consult is therefore that which is dispositive of the issue at hand. Regulation 1598(e) is very clear on the issue presented and does not require any review of the law under the contract.

There is no question that the choice of the title given to the charge involved may not have been chosen arbitrarily. However, I believe that the petitioner is the retailer of the fuel that it sells and that it is selling fuel. However, some consideration must be given to the fact that the charge is for oil as well as fuel. Oil is provided with the vehicles for the purpose of maintaining the engine. Unlike fuel, oil is not consumed in any measurable quantity during the course of a single rental. It is simply changed in its entirety on an as needed basis. The auditor did not attempt to break out the oil charges and instead attributed all of the charges and credits to fuel which is clearly not the case. It is appropriate that when an adjustment to taxable measure is certain that the trier of fact has a wide latitude in setting such an adjustment. See Cohan v. Commissioner (1930) 39 F2d 540. In consideration of all of the facts and evidence presented, I will assign twenty-five percent of the taxable measure to the provision of oil for the vehicles. In that there is no sale of the oil to the customers then the taxable measure of audit item A should be

reduced to \$126,337. In view of the fact that there was no sale of oil and that there has been credit given for the tax-paid purchases of gas, then the tax paid credit of audit item B should remain as stated.

Recommendation

Reduce the taxable measure of audit item A to \$126,337. Aside from that redetermine without adjustment.

Anthony I. Picciano, Hearing Officer

Date 5/30/1991

W/Exhibits

Exhibit A

Mr. Anthony I. Picciano
Hearing Officer
State Board of Equalization
P.O. Box 942879
Sacramento, CA 94279-0001

March 29, 1991

Re

Dear Mr. Picciano:

I explained at our meeting yesterday, that starting in 1979, the Petitioners had a separate charge for "gas and oil" at actual cost, and a separate charge for "mileage". At some point in time between 1979 and 1986, the Petitioners replaced the two separate charges by a single charge which they characterized as "Mobile crane gas/oil per mile".

The Petitioners stated that they did not consider the "mobile crane gas/oil charge per mile" as being solely for gas and oil. The charge was also meant to cover the cost associated with wear and tear on the equipment from long trips. The Petitioners also presented you with copies of letters from their customers indicating that the customers believed that the \$1.00 per mile charge covered more than just gas and oil.

I advised you that in construing the term "Mobile crane gas/oil per mile", you should consider the prior course of dealing between the parties in interpreting the meaning of the term. I also advised you that the Board should not substitute their definition of the term for the meaning given to the term by the actual parties to the contract. You requested that I provide you with some authority to support these contentions.

Section 1205(1) of the Commercial Code defines course of dealing as:

A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

Section 1205 (3) goes on to provide:

A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

Since most of the Petitioners' customers have been dealing with them for over twenty years, they were well aware of the evolution of the gasoline and mileage charge. That is why the Petitioners and their customers attribute the same meaning to the term.

Certainly the interpretation given to terms of a contract by the parties themselves deserves more weight than the interpretation applied to the terms by a non party such as the Board. In Brecher v. Gleason, 27 C.A. 3d 496, 502 the court held:

... to a considerable extent words in a contract mean what the parties intended them to mean, and the action of the parties may speak louder in deciphering meaning than objective definitions of the words they used.

In Acheson v. Falstaff Brewing Corporation, 523 F.2d 1329, 1330, the court stated:

Finally, it is a fundamental rule of contract interpretation that great weight should be given to the interpretation of the contract by the parties thereto.

Based on the prior course of dealing between the Petitioners and their customers, and on the parties own interpretation, the term "Mobile crane gas/oil per mile" meant not only gas and oil but also a per mile charge for wear and tear on the crane. Based on the rules of contract interpretation set forth in the above cases and the California Commercial Code, the term "Mobile crane gas/oil per mile" should be given the same meaning by the Board as given by the parties and as established through the parties past course of dealing.

If you need any additional information, please let me know.

Very truly yours,

Charles L. Nagel
Attorney at Law

Mr. Anthony I. Picciano
Hearing Officer
State Board of Equalization
P.O. Box 942879
Sacramento, CA 94279-0001

March 28, 1991

Re:

Dear Mr. Picciano:

--- --- --- and --- --- --- were audited by the State Board of Equalization for the periods July 1, 1986 to June 30, 1989 and January 1, 1986 through June 30, 1989 respectively. Pursuant to those audits, Notices of Determination were issued, whereby tax was determined on an additional \$121,004 measure with respect to --- and an additional \$57,097 measure with respect to ---. The additional measure related to a \$1.00 per mile charge made by the Petitioners with respect to their rental of mobile cranes. It is with respect to this measure that the Petitioners are seeking a redetermination.

Statement of Facts

Petitioners are engaged in the business of renting special purpose camera dollies and cranes to the television and motion picture industry. The cranes were specially manufactured by Petitioner for use in filming motion pictures and television productions. The mobile crane trucks are considered to be mobile transportation equipment. Tax was paid on the cost of the equipment.

The Petitioners, in billing for the crane rental, separated their charge into three components. The first component was a daily or weekly rental charge for the crane. An additional service charge was made for cleaning the crane upon its return. The last component of the charge was a \$1.00 per mile charge characterized as "mobile crane gas/oil per mile".

It is with respect to the \$1.00 per mile charge that this petition is concerned. The staff have construed the charge as being a separate charge for the sale of gasoline.

The mobile cranes are delivered with gasoline in their fuel tank. The customers are also provided with a --- --- --- credit card so that they can replenish the fuel if needed.

Grounds for Petition

It is Petitioners' position that the \$1.00 per mile charge represents part of the rental receipts for the rental of the mobile crane, and not a separate charge for the sale of gasoline. Since the cranes are mobile transportation equipment, their rental is not considered to be a continuing sale, and therefore any rental receipts are exempt from tax. The per mile charge is to recover for increased wear and tear on the vehicle due to driving it extended distances. The charge far exceeds what could be reasonably considered the fair retail selling price of the gasoline.

According to the Board's audit report dated January 3, 1980 (exhibit A), the per mile charge first originated on January 1, 1979. At the time of the 1980 audit, the Petitioners had both a charge for gas and oil (at cost) and also a charge for mileage. At some point in time, beyond the Petitioners' period of record retention, the dual charge was replaced by the single charge characterized as "Mobile crane gas/oil charge".

The reason I am bringing up this historical background, is that it helps to explain why the Petitioners' customers believe the per mile charge is not just a charge for gasoline. The Petitioners' major customers have been dealing with the Petitioners since long before any mileage charge was instituted. Their perception of the charge is influenced in part by what transpired in their previous course of dealing with the Petitioners.

Attached as Exhibit B, are letters from some of Petitioners' major customers. These letters confirm the customers' understanding that the mileage charge is for more than gasoline.

This is a case where the Board is putting form over substance. The Board is ignoring the meaning imparted to the terms of the contract by the parties to the contract. The Board is also ignoring the parties prior course of dealing, in interpreting the meaning of a short descriptive blurb on the sales invoice. The Board, in construing the \$1.00 per mile charge as being solely for gasoline, is attributing an unrealistic sales price to the gasoline.

In construing the per mile charge as taxable, the Board is apparently relying on a strained reading of Regulation 1598(e)

Regulation 1598(e) provides that:

The lessor is the retailer of fuel furnished by him to a lessee of a vehicle or an aircraft if the sales price of the fuel is separately stated from the rental charge for the vehicle or aircraft.

As we discussed up above, the charge for gas and oil was actually a charge for gas, oil and wear and tear on the vehicle. If the Board insist on taking a form over substance approach, then we must look at the form of the transaction. The charge for fuel is not separately stated. It is combined with the charge for oil. The oil is not consumed during the process of a single lease, but is in the vehicle for the period of several leases. It is a component of the mobile transportation equipment because it is encased in the vehicle's crankcase until it wears out and is changed.

The customer does not get to keep the oil in the vehicle. The oil is not fully consumed during the period of a single lease. There has therefore been no outright sale of the oil but only a lease of the oil. Since the oil is a component of the mobile transportation equipment, and since there has not been a separation of the charge for the gasoline from the charge for the oil (MTE), the Regulation's requirement of a separate charge has not been met.

If the Board wants to follow a formalistic approach, they should be no less stringent in their requirement for a separate statement of fuel, than they are in applying the separate statement requirement of Regulation 1541 with respect to printing aids. The charge for fuel is commingled with the charge for oil which is a tax paid component of the mobile transportation equipment. It

is therefore the Petitioners I position, that there has not been a separate statement of fuel as required by Regulation 1598(e).

A final point which the Petitioners would like to make has to do with the fact that the Board, in prior audits, accepted the Petitioners' treatment of the per mile gasoline/oil charge as just an element of the vehicle's lease receipts. The Petitioners have been prejudiced because they could well have revised the wording of their sales invoice many years ago, at a time when their sales volume was much lower, and any sales tax bill would have been much smaller.

For all of the above grounds, Petitioners request that the determination be canceled.

Memorandum

Date: April 5, 1991

To: HQ - Appeals Unit - A_ I. Picciano Hearing Officer

From: Van Nuys - Audit --- Tax Auditor

Subject --- --- --- --- ---

Auditor's response to 3/29/91 letter from --- --- ---

--- states that in periods prior to the audit separate charges on invoice for "gas and oil" and "Mileage" on the mobile cranes was merged into a single line item "mobile charge gas and oil per mile." This would seem to be supposition at this point, since no invoices were available during the audit.

He also states that prior course of dealing with customers of over twenty years should be considered. While the auditor agrees that several customers go back a number of years it should also be pointed out that m production companies are formed and dissolved for one specific production i.e. a motion picture or television show. What prior course of dealing there in this instance?

It would seem that customer letters after the fact stating that they do not believe the questioned amount to be for gas and oil would be self-serving.

In addition, both the letter from HQ Legal, which seems rather and the memo from June 1987, from Compliance Supervisor ---- indicate that the company was informed that this was taxable and that a tax paid purchase resold deduction should be taken, as well as Reg. 1598, argue strongly that the questioned charges are taxable

RP: dg

cc:

bcc: HQ: Assistant Principal Tax Auditor