



STATE BOARD OF EQUALIZATION

STATE OF CALIFORNIA
BOARD OF EQUALIZATION
BUSINESS TAXES APPEALS REVIEW SECTION

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

DECISION AND RECOMMENDATION

No. XXXXXXXXXXXX

The Appeals conference in the above-referenced matter was held by Staff Counsel Cynthia Spencer-Ayres on May 12, 1992 in San Francisco, California.

Appearing for Petitioner:

--- --- ---
--- --- ---
--- --- ---

Appearing for the
Sales and Use Tax Department:

--- --- ---
--- --- ---

Protested Item

The protested tax liability for the period July 1, 1987 through June 30, 1990 is measured by:

<u>Item</u>	<u>State, Local and County</u>
Disallowed claimed sales for resale of "bill inserts" to _____	\$1,018,975

Petitioner's Contention

The bill inserts should be exempt either as a periodical or as printed sales messages and it does not owe the interest.

Summary

Petitioner is a partner in the printing and typesetting industry and is a printer of legal books and periodicals where most of the sales are for resale or exempt. The business commenced in January 1987 and there was no prior audit.

The audit covered the period July 1, 1987 through June 30, 1990 and disallowed claimed sales for resale of "bill inserts" to --- All sales made to --- were claimed as exempt. The disallowed sales are based on the examination of all --- invoices for the audit period. Petitioner prints a monthly publication for --- known as --- which was mailed along with their monthly bills. This publication qualifies as an exempt periodical. --- issued an exemption certificate to the petitioner specifically for the --- publication. Sometimes petitioner also prints loose leaflets (bill inserts) which are sent with the monthly bills. These sales were not specifically listed on the exemption certificate. Therefore, the exemption claimed for the bill inserts were disallowed. Petitioner contends that all bill inserts should be exempt due to the exemption certificate kept on file. Petitioner asserts that the disallowed sales are valid exempt sales despite the fact that the resale card from --- is a specific exemption certificate for the --- publication. He states that all the bill inserts were based on the purchase order issued for --- and therefore must also be exempt.

Petitioner argues that the --- monthly bill insert is a periodical as defined by Regulation 1590 and therefore tax exempt. The bill inserts are exempt because they appear at stated intervals (monthly); contain news or information of general interest to the public, or to some particular organization or group of persons (telephone subscribers); and each monthly issue bears a relationship to prior or subsequent issues in respect to continuity of literary character or similarity of subject matter and there is some connection between the different issues of the series.

Petitioner further argues that the bill inserts also fall into the category of printed sales messages which are exempt under Regulation 1541.5 because the items were printed to the specific order of --- the items were mailed by the U.S. postal service; and the items were received by telephone subscribers at no cost to them. The Board staff argues that the inserts are delivered to --- who it claims is the purchaser. Petitioner further argues that it makes no difference whether there is an independent mailer of the item.

The Board staff sees no basis for exemption of the billing inserts sold to --- because they do not meet all the criteria set forth in Regulation 1590 to qualify as a periodical. The items are in the nature of notices and/or advertised services or pertaining to PUC regulations, etc. They are small, one-page items and are not printed at stated intervals although they generally have a printing date noted on the back of the insert. To qualify as a periodical under the regulation, each issue must bear a relationship to prior or subsequent issues in respect to continuity of literary character or similarity of subject matter, and there must be some connection between the different issues of the series in the nature of articles appearing in them. The Board staff argues the bill inserts are no different than handbills which are specifically excluded from the definition of "periodical" under Regulation 1590.

Petitioner further contends the audit adjustments should be the responsibility of the buyer, --- If the printing work ordered was under the blanket purchase order with the exemption certificate, no sales tax was charged in reliance on the underlying exemption certificate. Therefore, petitioner contends it should not be liable for any interest since it had no benefit or use of any funds during the period in question and was intentionally misinformed by --- regarding the collection of the tax. --- agreed to reimburse petitioner for the tax, but not the interest. Petitioner argues that --- has admitted its liability...by paying the tax; therefore, it follows that since --- had the use of the tax money, it should pay the interest and the state should collect from ---.

Analysis and Conclusions

Revenue and Taxation Code section 6362 authorizes an exemption from tax for "periodicals". Insofar as is relevant here, the term "periodical" is defined in Sales and Use Tax Regulation 1590, subdivision (a) (2), as follows:

“The term ‘periodical’ as used herein is limited to those publications which appear at stated intervals, each issue of which contains news or information of general interest to the public, or to some particular organization or group of persons. Each issue must bear a relationship to prior or subsequent issues in respect to continuity of literary character or similarity of subject matter, and there must be some connection between the different issues of the series in the nature of the articles appearing in them. Each issue must be sufficiently similar in style and format to make it evident that it is one of a series. An annual report of a corporation which is substantially different in style and format from the corporation's quarterly reports is not part of a series with the quarterly reports. The term 'periodical' does not include books complete in themselves, even those that are issued at stated intervals, for example, books sold by the Book-of-the-Month Club or similar organizations; so-called 'pocket books,' a new one of which may be issued once a month or some other interval; or so-called 'one-shot' magazines that have no literary or subject matter connection or continuity between prior or subsequent issues. The term does not include catalogs, programs, scorecards, handbills, price lists, order forms or maps. Neither does it include shopping guides or other publications of which the advertising portion, including product publicity, exceeds 90 percent of the printed area of the entire issue in more than one-half of the issues during any 12-month period.” (Emphasis added.)

Section 6379.5 of the Revenue and Taxation Code provides:

“There are exempted from the taxes imposed by this part the gross receipts from the sale of, and the storage, use, or other consumption in this state of catalogs, letters, circulars, brochures, and pamphlets consisting substantially of printed sales messages for goods and services printed to the special order of the purchaser and mailed or delivered by the seller, the seller’s agent, or a mailing house, acting as the agent for the purchaser, through the United States Postal Service or by common carrier to any other person at no cost to that person who becomes the owner thereof.”

Sales and Use Tax Regulation 1541.5 provides in the pertinent part of subdivision (b) that tax does not apply to the sale or use of printed sales messages which are:

"(1) Printed to the special order of the purchaser;

"(2) Mailed or delivered by the seller, the seller's agent or a mailing house acting as the agent for the purchaser, through the United States Postal Service or by common carrier;

"(3) Received by any other person at no cost to that person who becomes the owner of the printed material.

"(4) If all of the above conditions in (b) (1) through (b) (3) are not met, tax applies to the charges for the printed sales messages to the same extent as to charges for printed matter generally.

"(5) To satisfy the common carrier requirement, it is only necessary that a common carrier be involved in some stage of the delivery.

"(6) The tax exemption applies regardless of whether or not the purchaser of printed sales messages offers for sale the goods or services advertised in the printed sales messages."

We conclude that the bill inserts do not meet the definition of periodical because they constitute handbills. Even if they were not considered handbills, they are publications in which the advertising exceeds 90 percent of the printed area of the entire issue under Regulation 1590(a) (2). Consistent with this conclusion, the petitioner even argues that the sole purpose of the bill inserts is to promote the use of the telephone and reveal what services are provided. Additionally, the PUC-required notices do not qualify because each notice is independent, and not one of a series of issues of the same publication.

We further conclude that the bill inserts do not meet the requirements of the printed sales messages because the bill inserts were delivered in an inappropriate manner. The key element in question is whether the bill inserts were delivered in accordance with subdivision (2) of Regulation 1541.5(b). We conclude they were not. Petitioner did not deliver the bill inserts to the final destination or to a mailing house. The delivery was to ---. My interpretation of the exemption is that delivery from the seller cannot be to the buyer. Petitioner argues for a broad interpretation of the exemption which is contrary to established principles of taxation law. Exemption statutes are strictly construed against the person claiming the exemption. See Santa Fe Transportation v. State Board of Equalization 51 Cal.2d 531. With respect to the advertising inserts, the criteria for the printed sales message exemption would have been met if the bill inserts had been delivered other than to ---, in accordance with the delivery requirements of the regulation. The PUC-required notices are not printed sales messages because they are not printed for the principal purpose of advertising goods or services.

Furthermore, petitioner contends that it is entitled to rely on the exemption certificate for the inserts. Based upon the evidence presented, petitioner was entitled to rely upon the exemption certificate for only the --- publication which did not extend to the inserts. We therefore conclude that the inserts did not come within the exemption certificate.

Petitioner argues it should not be liable for any interest because --- has admitted its liability by paying the tax. We conclude that --- does not owe the interest to the Board. The retailer is liable for sales tax to the Board. Whether sales tax reimbursement, including interest, is collected is a private matter between the retailer and the purchaser. (See civil Code section 1656.1.) Any interest that results from the petitioner's tax liability remains its liability.

Recommendation

Deny the petition.

Cynthia Spencer-Ayres,
Staff Counsel