

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

395.0710
1/6/87

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

DECISION AND RECOMMENDATION
No. ----

The preliminary hearing on the above taxpayer's petition for redetermination was held on October 27, 1986, in Sacramento, California.

Hearing Officer:

Appearing for Petitioner:

Appearing for the Board: Mr. E. Pedeupe
Tax Auditor
Petition Unit

Protested Item

Petitioner filed a petition for redetermination by letter dated April 22, 1985. The protested tax liability for the period April 1, 1983, through June 30, 1983 is measured by:

<u>Item</u>	<u>Amount</u>
Unreported sales of fixtures and equipment	\$7,800,000

Contentions

Petitioner contends that:

1. The sale in question was an exempt occasional sale.
2. The Legislature did not intend to tax liquidation sales such as the sale here.

Summary

Petitioner is a corporation which is engaged in operating television stations in a number of states. During 1983 and 1984, petitioner sold five stations to five purchasers. One station was

located in California. Tax was asserted on the gross receipts from the sale of the fixtures and equipment of the California station. The auditor concluded that the California sale was not an exempt occasional sale because petitioner made more than two such sales within a twelve-month period.

Petitioner states that the stations were sold as part of liquidation plan which was free of federal income tax liability. Each station was a separate operating division. Petitioner states that the Federal Communications Commission requires that each station operate independently. Petitioner contends that each division should be treated separately. The California division should be regarded as a single sale by that division and exempt as an occasional sale. Petitioner cites Ontario Community Foundation, Inc. v. State Board of Equalization, 35 Cal.3d 811 as support for its position. Petitioner also cites Business Taxes Law Guide (BTLG) Annotation 395.0380 (April 18, 1958) as support.

Petitioner states that the California station held a seller's permit for selling videotapes. Petitioner contends that at most tax could apply only to the equipment used in the videotape selling activity.

Petitioner contends that a liquidation sale is not such a sale as was contemplated by the Legislature when it passed the Sales and Use Tax Law. The law is aimed at the privilege of operating, conducting, and maintaining a retail business, not on the "privilege" of going out of business. Petitioner points out that the Board does not regard in-kind distributions in liquidation as sales, and contends that there shouldn't be any difference when there is a liquidation sale and a cash distribution. It is unfair to deprive a taxpayer of the exemption for occasional sales when the taxpayer goes out of business.

Petitioner further contends that out-of-state sales should not be considered when applying the "three sale rule". Sales tax can only apply to sale within a state; therefore, out-of-state transactions are inapplicable.

Analysis and Conclusions

Section 6051 of the Revenue and Taxation Code imposes the sales tax on the gross receipts from the sale of tangible personal property in this state. As petitioner notes, there is no exemption for liquidation sales as such. In the case of Bigsby v. Johnson, 18 Cal.2d 860, the court held that tax 'applies to sales by a retailer of property of a type not usually sold by the retailer. Thus, even though petitioner may not have sold television stations on a regular basis, in the circumstances here, petitioner was making taxable retail sales. Section 6006 defines sale to include the transfer of title to tangible personal property for consideration. Where property is distributed to shareholders in kind as a liquidating dividend, there is no consideration, therefore no sale, and no tax. Under the Sales and Use Tax Law, this is distinctly different from selling the property and distributing the cash proceeds as a liquidating dividend.

Section 6367 exempts occasional sales from tax. Section 6006.5 defines "occasional sale" to include:

"{a} A sale of property not held or used by a seller in the course of activities for which he or she is required to hold a seller's permit or permits or would be required to hold a seller's permit or permits if the activities were conducted in this state, provided the sale is not one of a series of

sales sufficient in number, scope, and character to constitute an activity for which he or she is required to hold a seller's permit or would be required to hold a seller's permit if the activity were conducted in this state." (Emphasis added.)

Section 6019 provides that any entity which makes more than two retail sales of tangible personal property during any twelve-month period shall be considered a retailer.

Tax is being asserted here not because petitioner sold one television station in California, but because the sale of the television station in California was one of a series of sales of television stations sufficient in number (per Section 6019), scope and character to constitute an activity requiring the holding of a seller's permit. In short, petitioner is regarded as a retailer of television stations.

Section 6005 defines person to include "corporation" but not "division." There is no basis for treating petitioner's television stations as separate entities.

Petitioner's reliance on Ontario and the cited annotation is misplaced. Those situations involve a single sale of an entire business. In Ontario, the Board has imposed the tax on the entire amount for which the tangible personal property has been sold. The court held that since the plaintiff was engaged primarily in providing services, only the sale of property utilized in the making of sales of tangible personal property could be taxed. Since Ontario, we have in fact applied this principle to single sales of television stations. Only property used to fabricate videotapes for retail sale was taxed. That is different from petitioner's situation and the difference is of critical importance. The "three sale rule" does not come into play on single sales.

Recommendation

Redetermine without adjustment.

H.L. Cohen, Hearing Office

1/6/87
Date

Reviewed for Audit:

Principal Tax Auditor

Date