

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition)
 for Redetermination Under the) DECISION AND RECOMMENDATION
 Sales and Use Tax Law of:)
)
 S--- C--- F---) No. SY --- XX-XXXXXXX-010
 Services, Inc.)
)
)
Petitioner)

The Appeals conference in the above-referenced matter was held by Senior Staff Counsel David H. Levine on --- XX, 1993 in Sacramento, California.

Appearing for Petitioner: Appearance waived

Appearing for the
 Sales and Use Tax Department: Scott A. Lambert
 Supervising Tax Auditor

Protested Item

The protested tax liability for the period December 27, 19XX to December 27, 19XX is measured by:

<u>Item</u>	<u>State, Local and County</u>	<u>Transit Districts</u>
A. Extax fixed asset acquisitions from out-of-state vendors	\$ XX,XXX	\$ XX,XXX
B. Extax fixed asset sales	X,XXX	XX,XXX
C. Taxable vending sales understated	<u>XXX,XXX</u>	<u>XXX,XXX</u>
TOTAL	\$XXX,XXX	\$ XXX,XXX

Petitioner's Contentions

Petitioner contends that audit items A and B were intercompany transfers which were not invoiced and were therefore not sales. Petitioner contends that the amounts in audit item C were

commission revenues and that no sale occurred.

Summary

The audit disclosed amounts recorded as debits in connection with property acquired for use in California. The Sales and Use Tax Department (Department) regarded these debits as the purchase price of property purchased for use in California. Since petitioner did not establish that use tax had been paid with respect to such amounts, the Department assessed use tax measured by the amount of the debits. This assessment is represented by item A. In its petition, petitioner characterizes Business Taxes Law Guide Annotation 495.0760 as stating that an invoice must be issued and tax must be paid on that invoice price. Based on this, petitioner contends that sales tax is not due since no invoice was issued with respect to these intercompany transfers.

The audit disclosed amounts recorded as credits in connection with property transferred to other persons. The Department regarded these credits as petitioner's gross receipts from the sale of property. The audit papers indicate that the auditor excluded all property shipped outside California, examining only those transfers of property to persons in California. The Department regarded these as sales of property in California, and assessed sales tax with respect to those transfers for which the auditor could not trace to a nontaxable transfer. This assessment is represented by item B. The petition includes the same argument for tax not applying to these amounts as asserted with respect to item A.

The amounts represented by item C were reported by petitioner and then deducted. Petitioner could not explain the reason for the deduction during the audit. In its petition, petitioner states that these amounts were commissions given to petitioner by vending subcontractors and then credited to the client.

Prior to the setting of the Appeals conference, the Department requested additional documentation from petitioner to support its assertions, but no additional documentation was provided. Petitioner waived appearance at the Appeals conference, but indicated that it wished to submit additional evidence or arguments. Petitioner has not submitted any additional evidence, but it has submitted a letter which included additional arguments.

Petitioner explains that it acquires various assets, such as vending machines, with respect to food service provided to its clients. Assets acquired for use on one client's contract may thereafter be transferred for use with respect to a different client's contract. The location to which the assets are moved or relocated may be within the region of a different operating corporation. That is, apparently the M--- family of corporations have specific regions in which each operates, and the book entries in question here arise when assets are transferred by (or to) petitioner to (or from) a company in a region in which petitioner does not operate. Petitioner asserts that sales tax was paid when the sale was made by the original vendor. It contends that the tax assessed by the Department is an imposition of double taxation on a mere consolidating M--- Corporation (presumably its parent) reconciliation entry. Petitioner states:

“In order to accurately reflect the ‘Asset Inventory’ of each S--- C--- F--- Service unit location for personal property tax assessment it is necessary for us to move or ‘transfer’ the booked assets from one unit inventory listing to another unit inventory listing. This bookkeeping entry to record the movement or relocation of assets between operating locations has been misinterpreted by the board as a ‘transfer’ of assets between corporations for a consideration as a taxable transaction.

“In the instance where an asset moves from one operating location to another no value, liability, or consideration are **ever** exchanged.

“It is imperative to understand at this point that all operational entities associated with M--- Corporation I.E. S--- C--- F--- Service, S--- S--- Corporation, M--- M--- Services Corp. etc. are all consolidated and reported onto one Federal Income Tax return under M--- Corporation (FEI XX-XXXXXXX).

“No change in cash or corporate liabilities would be transferred or sold within M--- as one corporate entity for any asset movement or relocation.”

In addition to the argument quoted above, petitioner also cites Beatrice Company v. State Board of Equalization (1993) 13 Cal.App.4th 69 for the proposition that “some form of consideration, assumption or transfer of liabilities is required in exchange for the transfer of assets to incur a state sales tax liability.” (Emphasis omitted.)

Analysis and Conclusion

A retailer's retail sale of tangible personal property in California is subject to sales tax measured by gross receipts unless that sale is specifically exempt by statute. (Rev. & Tax. Code § 6051.) The use in California of tangible personal property purchased from a retailer for use in California is subject to use tax unless that use is specifically exempt by statute. (Rev. & Tax. Code § 6201.) “Sale” is defined for purposes of the California Sales and Use Tax Law to include any transfer of tangible personal property for a consideration. (Rev. & Tax. Code § 6006.) Similarly, “purchase” is defined to include any transfer of tangible personal property for a consideration. (Rev. & Tax. Code § 6010.)

Petitioner asserts that no money changed hands. However, “consideration” is not limited to the physical transfer of money. For example, a seller of tangible personal property may enter the amount of the sales price of that property in its records as a credit owed by the purchaser, and the purchaser may enter in its records a corresponding debit owed to the seller. This intercompany debt in the amount of the sales price is consideration for the transfer, and the amount of that consideration is subject to sales or use tax unless the sale and use of the property is specifically exempt by statute.

Petitioner characterizes Business Taxes Law Guide Annotation 495.0760 (10/25/63) as stating that tax would only apply to a transfer of property between wholly-owned subsidiaries if an invoice were issued. The annotation, however, deals with a specific transaction where property was transferred and an invoice for that property was issued. The invoiced amount was regarded as the sales price of the property. The annotation does not stand for the proposition that a transfer of tangible personal property in exchange for consideration is taxable *only* if an invoice showing that consideration is issued. Rather, the annotation dealt with the specific question of whether the facts in that case established that consideration was transferred, and the answer was yes. The annotation does not state that only the facts on which it was based will lead to a finding that consideration was transferred. (See, e.g., BTLG Annots. 495.0740 (8/24/53), 495.0780 (7/21/53).)

Petitioner also cites Beatrice in support of its position. Petitioner is correct in asserting that without the payment of consideration, there is no sale, and that if there is no sale, there is no sales tax. The Department has not contended otherwise. Rather, the Department contends that the book entries it discovered show that petitioner incurred intercompany debts with respect to purchases of property and that petitioner realized intercompany credit with respect to sales of property. That is, the Department contends that there was consideration paid with respect to the transactions at issue. Thus, the question remains whether petitioner gave consideration for property it acquired (item A) or received consideration for property it transferred (item B).

The Department notes that there may be an explanation for the book entries at issue with respect to items A and B other than that they represent consideration paid for sales of tangible personal property. At the conference, the Department's representative indicated that if petitioner provided further documentation, the Department would review it and advise me if that documentation established to the Department's satisfaction that the book entries did not represent consideration paid to petitioner by transferees, or consideration paid by petitioner to transferors. Relevant documentation would consist of claimant's general ledger accounts for fixed assets, intercompany accounts, the capital accounts, and the general journal. Since petitioner has not provided such supporting documentation for its contentions, the Department remains of the view that the measure of item A is subject to use tax and that the measure of item B is subject to sales tax.

The type of book entries identified by the Department during the audit generally represent intercompany credits and debits in connection with the intercompany sale of tangible personal property. That is, these book entries are sufficient evidence to support the Department's position that sales of tangible personal property were transferred for consideration. Since petitioner has provided no documentation to the contrary, I conclude that the amounts in item A represent the sale price of property purchased by petitioner for use in California. Petitioner has not argued that the use of such property is exempt from use tax, nor does it appear that any exemption is applicable. Petitioner has also failed to establish that use tax was paid with respect to item A. I therefore conclude that petitioner owes use tax on such amounts.

Similarly, I conclude that the amounts in item B represent petitioner's receipts from the sale of tangible personal property in California. Since petitioner has not established that such sales were exempt or that it paid sales tax with respect to such amounts, I conclude that it owes sales tax on the amounts included in item B.

Petitioner contends that the amounts included in item C are commissions and are therefore not from sales. Assuming such amounts are commissions, it does not necessarily follow that they are not from sales. An example would be if petitioner hired subcontractors to maintain vending machines from which petitioner made sales and the subcontractors retained 25 percent of the proceeds as their fees ("commissions"), remitting the remainder to petitioner. In this example, petitioner is the seller of the property and must report 100 percent of its receipts from the vending sales. It is not allowed a deduction of the 25 percent commission paid to the subcontractors. (Rev. & Tax. Code § 6012.)

I note that even if the subcontractors were themselves the sellers of the items dispensed by the vending machines, petitioner would nevertheless be liable for tax measured by the total sales from those machines since petitioner has not established that it took valid resale certificates from those subcontractors and notified the Board of their names and addresses. (Reg. 1574(a)(4).)

Since petitioner has provided no documentation to establish its contention that the amounts included in item C are not gross receipts from the sale of tangible personal property, I have no basis to reach any other conclusion.

Recommendation

Redetermine without adjustment.

David H. Levine
Senior Staff Counsel

Date