

Petitioner's Contentions

- A. Packing material used in interstate, export and United States Government moving operations are not subject to sales tax; title passes to shipper when goods are packed.
- E. No specific contention made with respect to this item.
- G. The packing materials were sold to the California customers with sales tax reimbursement collected and reported.

Summary of Petition

Petitioner is a corporation engaged in business as a household goods carrier. The protested items concern packing cartons and materials purchased ex-tax for resale and utilized in the performance of Petitioner's hauling operations. It is Petitioner's policy to make a separate itemization of charges to its customers of packing materials upon which sales tax reimbursement is charged on intrastate shipments. No tax reimbursement is billed on packing material charges in connection with shipments going interstate, export or for the United States Government.

Petitioner has taken the position that it is in fact selling the packing materials to its customers and should not be regarded as the consumer of such material and that sales of the materials for shipments in interstate commerce, export and for the United States Government are exempt from sales tax.

The audit has regarded the Petitioner as the consumer of the packing materials subsequent to August 19, 1971, pursuant to Regulation 1630 on the basis that Petitioner did not meet the requirements for classification as a retailer of such materials in that no statement of title passage appears on any document recording the transaction and there is no evidence to show that title passed prior to use by Petitioner in performing the packing service. However, the audit has included only the cost of packing materials used in interstate, export and United States Government shipments.

In our consideration of the petition subsequent to the preliminary hearing, a complete review of the audit working papers and auditing procedures followed therein revealed that in establishing the cost of packing materials purchased upon which the tax is applicable by reason of Petitioner being regarded as the consumer of such materials under Regulation 1630, the audit did not include the cost of the packing materials used in the intrastate (California) shipments for which Petitioner had made a separate charge and collected sales tax reimbursement. The Hearing Officer will recommend that the determination be increased to give effect to the inclusion in the measure of tax to the cost of packing materials used in intrastate shipment prior to their sales to the customer. Petitioner was informed of this proposed recommendation by telephone conversation of May 7, 1975.

Analysis and Conclusions

Regulation 1630, in subsection (b)(2), provides:

“When the shipper [moving company] is not the seller of the contents, the sale of the containers or container materials or parts to the shipper is a taxable retail sale unless the shipper expressly contracts with his customer for the sale to his customer of the container or container material, making a separate charge therefore, with title passing from the shipper to his customer before any use of the material is made, and without any understanding or trade custom that the property will be returned to the shipper for reuse. When all of these conditions exist, the shipper may purchase the property for resale by giving a resale certificate to the supplier of the property. The sale of the property by the shipper is taxable unless exempt as a sale to the United States, as a sale in interstate or foreign commerce, or exempt for any other reason.”

While charges for the containers and container materials are itemized on documents signed by the customer, there is no express title clause indicating when or where title to the containers and container materials pass to the customer. To qualify as a sale to the customer, title must expressly pass prior to any use by the shipper as required by the regulation. In its contentions, Petitioner states, “Title passes to the shipper when goods are packed.” There is no evidence in support of that statement. In any event, the passage of title as stated is not in accordance with the requirement that title pass prior to use of the containers and container materials. There is no express contract for the passage of title.

Petitioner has submitted a copy of Interstate Commerce Commission Regulation Supplement No. 5 to Tariff No. 155-A, Section 5, which provides under Packing Rates Apply as Follows:

- “1. Packing container charge includes container and materials, which remain the property of the consignee.
- “2. Packing rates include packing service of carrier furnished containers.”

Petitioner asserts that the above statements clearly indicate that title to containers and container materials passes to the customer prior to use of such materials by the carrier.

We do not regard the above statements as constituting an express contract between the carrier and the customer for passage of title prior to use as required by Regulation 1630.

Under the provisions of Section 2401 of the Uniform Commercial Code, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods unless there is an explicit agreement of title passage at another time and place. In the instant case, delivery of the containers and container materials to the

customer is at the destination, after the service of packing, hauling, and generally unpacking performed by the seller.

In view of the fact that all of the conditions of Regulation 1630 have not been met, it is concluded that Petitioner was properly regarded as the consumer of the containers and container packing materials.

Under the provisions of the regulation, if the shipper does not qualify as the retailer of the packing materials prior to the use of such materials, he must be regarded as the consumer with respect to all packing materials used whether the shipments are intrastate, interstate, export or for the United States Government. In the absence of the required substantiation that title passed to the customer prior to use, use tax is applicable to the use and sales tax is applicable to the subsequent intrastate sales.

Accordingly, we must recommend that the determination be increased to include the tax applicable to the cost of the packing materials used in the intrastate shipments.

Petitioner has also argued that with respect to the interstate movement of goods, the packing materials are committed to interstate commerce at the time of or prior to the performance of the packing service and, accordingly, not subject to the tax. In support of this argument Petitioner has submitted a copy of a trade journal article summarizing a memorandum decision of a Rhode Island Superior Court case wherein the court prohibited Rhode Island from asserting its sales and use tax on packing materials for use in interstate commerce as violative of the commerce clause. Neither the article nor Petitioner gave a citation from which the case could be found. Our research through CCH – Rhode Island – All Taxes failed to reveal the case and it is unknown whether the decision is published. Accordingly, analysis to determine on what basis the court's decision was founded could not be made. In any event, that decision, however determined, is not binding on California in the administration of its tax law.

Under California law, sales in interstate or foreign commerce and sales to the United States Government are exempt from sales tax. However, in the instant case Petitioner has not met the requirements to be regarded as a retailer of the cartons or carton materials and, accordingly, is the consumer whose use of such property in the performance of its packing service in this state is subject to the tax.

Where the shipper is not the seller of the contents, tax applies to the sale to the shipper of the containers and container materials used in preparing goods for shipment and it is immaterial that the goods are shipped in interstate or foreign commerce, or that the shipper's contract is with the United States Government. The property is purchased by the shipper for a purpose other than resale, i.e., the preparation of the goods for shipment and the protection of such goods during shipment.

Petitioner has also suggested that even if some use of the packing material was made in performing the packing service, those materials were not completely consumed prior to title passing to the customer.

The suggestion is without merit. Under the California Sales and Use Tax Law, taxability does not depend upon the complete consumption of property. The tax is imposed upon the use of tangible personal property in this state (Section 6201, Revenue and Taxation Code). Use includes the exercise of any right or power over tangible personal property incident to the ownership of that property. (Section 6009, Revenue and Taxation Code.) The use of the cartons and carton material in the performance of the packing services clearly is a "use" to which the tax is applicable.

Petitioner's claim that it was never notified by the Board of the tax consequences of Regulation 1630 as amended August 19, 1971 provides no legal basis for relief from the taxes due.

Pursuant to the Board's practice in adopting regulations or amendments thereto, a special notice of proposed Regulation 1630 was sent to interested parties in 1970. After the adoption of Regulation 1630 in 1971, another notice was sent to interested parties informing them of the adoption and the effective date. In addition, the adoption of the regulation was published in our September 1971 Notice to Managers publication which was mailed to all business taxes permit holders.

Petitioner has been the holder of a business taxes permit for a period commencing prior to 1970. Why Petitioner did not receive direct notice of the regulation is unknown. In any event, the tax payer is charged with the duty to determine how the tax applies to its business.

Recommendation

The determination be redetermined to give effect to an increase in the determined liability by reason of the inclusion of the cost of packing materials used in connection with the intrastate shipments.

Adjustment to be made by Petitions Unit.

Joseph Manarolla, Hearing Officer

5/12/7

Date