

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

400.0230

APPEALS DIVISION

In the Matter of the Petition)
for Redetermination Under the) HEARING
Sales and Use Tax Law of:) DECISION AND RECOMMENDATION
)
[S]) No. S- -- XX-XXXXXXX-010
)
Petitioner)

The above-referenced matter came on regularly for hearing before Hearing Officer Janet Saunders on September 17, 1990 in Oakland, California.

Appearing for Petitioner: --- . ---
Senior Vice President

Appearing for the
Department of Business Taxes: John F. Grgurina
Supervising Tax Auditor

Kpazawala W. Ballayan
Senior Tax Auditor

Protested Item

The protested tax liability for the period January 1, 1985 through December 31, 1987 is measured by:

<u>Item</u>	<u>State, Local County and BART</u>	<u>ACTA</u>
Purchases subject to use tax:		
Supply items purchased under Resale certificates not reported	\$11,700	\$6,000

Parties' Contentions

At issue is whether or not the refrigerant gel packs (Zeropacs) purchased by petitioner are items purchased for resale. Petitioner contends that it sells these Zeropacs to its customers for resale. The Department of Business Taxes (DBT) contends that Zeropacs are used for shipping, that petitioner is the consumer and that use tax applies.

Summary

Petitioner is in the business of harvesting and selling live brine shrimp to fish stores for use in feeding tropical fish; his business does a significant amount of out-of-state sales.

Petitioner harvests brine shrimp from local salt pools; the harvesting process is somewhat complicated. After harvest, petitioner maintains the live brine shrimp in a saline solution until it is time to package them for shipping. The packaging process involves placing the live brine shrimp into bags of saline solution at approximately 5:00 a.m.; the bags are then placed in cardboard boxes. Frozen Zeropacs are placed into the cardboard boxes if the customer has ordered them. The boxes are then delivered to the airport and placed on a plane by 8:00 a.m. Customers pick up the boxes upon delivery. To maintain adequate oxygen, it is necessary that the live brine shrimp arrive at their destinations and be placed in new water within 24 hours of shipment.

Zeropacs are a brand name for a refrigerant gel pack. Zeropacs are frozen prior to use and stay cold for two to three hours. They may be refrozen and reused.

Petitioner purchased Zeropacs under resale certificates. The Zeropacs are sold by petitioner at about 66 cents each and are listed as a separate item along with the prices of live brine shrimp; petitioner uses its standard markup to determine the selling price of Zeropacs.

It is not necessary that frozen Zeropacs be used in the shipping process. Approximately 50% of petitioner's customers purchase Zeropacs when they purchase live brine shrimp. The 50% breakdown does not vary with distance, but rather upon the personal preference of the customer. Petitioner presented invoices to show that a New York customer did not order Zeropacs with his purchase of live brine shrimp and that a Maryland customer did purchase Zeropacs. (Shipping time to Maryland and New York is about the same.) It is noted that the cold capacity of the Zeropac deteriorates within three hours; thus, the Zeropacs are most effective from 5:00 a.m. to 8:00 a.m. while the boxes await plane loading in San Francisco, a city which is usually chilly during those hours.

Analysis and Conclusions

Petitioner purchased Zeropacs under resale certificate pursuant to Revenue and Taxation Code section 6091. Revenue and Taxation Code section 6244(a) provides:

If a purchaser who gives a resale certificate or purchases property for the purpose of reselling it makes any storage or use of the property other than retention, demonstration, or display while holding it for sale in the regular course of business, the storage or use is taxable as of the time the property is first so stored or used.

At issue is whether or not petitioner made use of the Zeropacs prior to sale.

The court in People v. Monterey County Ice and Development Company (1938) 29 Cal.App.2d 421, addressed a similar issue when it found that ice sold to lettuce packers was sold at retail and was not sold for resale. The court found that the ice was purchased for the primary purpose of furnishing a refrigeration service that was a necessary incident of the packers' business of selling lettuce. The sale was held to be taxable even though the cost of the ice might be reflected in the price charged for the lettuce. The court in People v. Puritan Ice Company (1944) 24 Cal.App.2d 645, has further held that sales of ice to vegetable packers were taxable retail sales even though the packers charged their customers separately for the ice. The court found that the ice was not sold for the purpose of resale but was sold to be used as a refrigeration device.

Petitioner's case is distinguished on its facts in that the Zeropacs are reusable and are not necessary to the shipping process, i.e., the live brine shrimp will arrive at their destination in good condition even if Zeropacs are not used. However, these distinctions are not determinative. It is assumed by this Hearing Officer that petitioner purchases and stores its inventory of Zeropacs in an unfrozen condition and that it freezes the Zeropacs as needed. Petitioner's activity of freezing the Zeropacs constitutes a use, particularly a packing use. Packaging materials are taxable. California Code of Regulations, title 18, sections 1589 and 1630. That the cold packaging is not necessary is of less relevance than the fact that petitioner used the Zeropac in some way prior to sale. Further, petitioner's customers also use the Zeropac in some way prior to resale, i.e., they have the benefit of knowing that their goods have had the added protection of being shipped with a frozen Zeropac. This benefit may be illusory; nevertheless, it is presumably of value to the customers who make the purchase. If it was of no value, there would be no reason for petitioner to freeze the Zeropac prior to sale. If petitioner sold and shipped Zeropacs in an unfrozen state, it would have made its case for purchasing for resale only and no tax would be owed.

Petitioner has purchased the Zeropacs ex-tax and has issued resale certificates at time of purchase. Petitioner's purchase of this product is found herein not to be a purchase for resale; thus, petitioner owes use tax.

Recommendation

Redetermine without adjustment.

JANET SAUNDERS, Hearing Officer

November 30, 1990

Date