

BOARD OF EQUALIZATION

In the Matter of the Petition)	
for Redetermination of State)	DECISION AND RECOMMENDATION
and Local Sales and Use Tax;)	
)	
A--- I---, INC.,)	No. SR -- XX-XXXXXX-010
)	
)	
<u>Petitioner</u>)	

The above-entitled matter came on regularly for hearing on Tuesday, February 24, 1987, in --- ---, California before Robert H. Anderson.

Appearing for Petitioners: Mr. -. -. M---
President

Appearing for the Board: Mr. Philip V. Nicassio
Auditor
--- --- District

Protest

Petitioner was audited for the period from 1-1-82 through 12-31-84, and a notice of determination was sent on 8-20-85. On August 30, 1985, petitioner filed a timely petition for redetermination, a copy of which is in the petition file.

Petitioner protests the assessment for use tax on ex-tax purchases of dry ice. The measure of tax is \$XX,XXX.

Contentions

1. A--- I---, Inc. uses dry ice for processing or packaging for purposes of sale. The provisions of Regulation 1630 are not applicable where the preservation and packaging of the goods is merely incidental to the performance of the sales activity (citing Tax Counsel Opinion 400.0190, Business Taxes Law Guide).
2. The principal activity of A--- I---, Inc. involves the sale of the goods or the processing or the packaging of goods in individual containers for purposes of sale; then a resale certificate may be accepted to exempt the charge, notwithstanding the failure to comply with the provisions of Regulation 1630 (again citing Tax Counsel Opinion 400.0190).

3. A--- I---, Inc. has nothing to do with food products for human consumption, as such; Regulation 1630(b)(1)(B) has nothing to do with a tax consideration in this instance.

Summary

Petitioner is a corporation that commenced in the first quarter of 19XX. The audit under consideration in this matter is the first by the Board of Equalization of this business.

Petitioner is engaged in the sale of premixed, degassed frozen epoxy (resin systems) which is custom packaged for specific applications (mostly for aerospace use).

The product must be quick frozen in mini tubes and/or polyethylene syringe-type containers ranging from 1cc to 12 ounces. Freezing is to prevent any chemical reaction between the catalyst and the adhesive material. In order to maintain the frozen condition, the product is packaged in a styrofoam box filled with dry ice.

About 25 to 30 percent of the dry ice purchased is used to quick freeze the product; the ice vaporizes and is lost into the air. Because the cold is transferred to the product, petitioner believes that the dry ice becomes a component of the product and may be purchased ex-tax for resale.

The remainder of the dry ice is packed around the tubes and syringes filled with the frozen resins to keep them in a frozen state during transportation to the customers. When unpacked, the product can be used directly from the tubes or syringes. The dry ice packaging method assures the longest "potlife" (usage after thawing) possible.

Petitioner believes the dry ice should be deemed as exempt "dunnage" because while keeping the product in a frozen condition it prevents the frozen tubes and syringes from coming into contact with one another and resulting in fracturing or breakage which would render them useless. Petitioner makes an analogy with a flower that is frozen in liquid nitrogen; the flower is extremely brittle and breaks into thousands of pieces if dropped. The frozen tubes and syringe containers would likewise break if jostled during shipping. Another analogy is that the dry ice is like the styrofoam "popcorn" dunnage used to prevent breakage during shipping. However, the principal purpose of the dry ice is to keep the resins in a frozen condition prior to use by the customer.

Analysis and Conclusions

The obvious primary purpose of the use of dry ice is to freeze the product and keep it frozen until it is used by the customer. In Kaiser Steel Corporation v. State Board of Equalization (1972) 24 Cal.App.3d 188, the court held "the primary intent of the purchaser or the primary purpose of the purchase is the test for determining whether a sale is taxable as a retail sale or exempt as a sale for resale, and such test is applicable to the manufacturing industries."

Petitioner purchased the dry ice to use (quick freeze) in processing the product to be sold and the dry ice did not become a component of the resin. The ice that was packed around the tubes and syringes containing the resin was primarily for the purpose of keeping the product frozen and secondarily or incidentally beneficial as dunnage.

There is a statutory exception in the form of an exemption under Section 6359.7 relating only to ice and/or dry ice and then only when it is used or employed in packing and shipping or transporting food products for human consumption. Obviously, the exemption is not applicable to petitioner's use of dry ice.

However, we point out that were it not for the statutory exemption the use of dry ice in packing and shipping or transporting food products for human consumption would be taxable and not for resale. It would be illogical and redundant for the Legislature to enact a statute exempting from taxation transactions which were not within the coverage of the pre-existing statutes which actually imposed the taxes in question.

The enactment of the ice exemption would be contrary to the principle that when the Legislature states an exemption to a general rule, it indicates that without that exemption the general rule would apply (Myers v. Stevenson (1954) 125 Cal.App. 2d 399).

Petitioner's reliance on Tax Counsel Opinion 400.0190 in the Business Taxes Law Guide is misplaced. We have researched the background giving rise to annotation 400.0190 and find that the question presented was whether a person engaged in packing individual containers of goods for marketing by their resale customers are "packers, loaders and shippers" therefore subject to the separate statement of the price and title requirements of Sales and Use Tax Regulation 1630(b)(2). The tax counsel was addressing the opinion to a case involving "property used as containers or parts of containers of goods shipped".

Where property is used as containers or parts of containers of goods shipped, when the shipper 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.

In order for the opinion to be applicable petitioner must not be the seller of the contents of the container. The facts giving rise to the opinion are in no way similar or analogous to the facts in petitioner's case. In petitioner's case dry ice is not a container and petitioner is the seller of the "resin systems" which are the contents of the container. Petitioner reads the opinion out of context in relying on it as authority for purchasing dry ice ex-tax for resale.

Notwithstanding the specific exemption under Section 6359.7, we conclude that the principle to be applied here is stated in the "ice cases" (People v. Puritan Ice Co. (1944) 24 Cal.2d 645; Monterey County Ice & Development Co. (1938) 29 Cal.App. 2d 241; and Good Humor Co. v.

State Board of Equalization (1957) 152 Cal.App.2d 873). The Good Humor case holds “Sales of dry ice are at retail when made to a retailer who places the dry ice with ice cream products in a cardboard container and delivers the entire package to a purchaser of the ice cream products.

In Monterey County Ice & Development (supra) the Court held that the sales of ice by an ice manufacturer to lettuce packers were not sales for resale by the lettuce packers even though a separate charge was made by the packers to their customers for icing the lettuce. The Court held that the real purpose for which the ice was purchased by the packers was to preserve and protect the lettuce during shipment to customers and to furnish a refrigeration service as a necessary incident to the packer’s business of selling lettuce.

In petitioner’s case the real purpose for which the dry ice was purchased was to preserve (in a frozen condition) and to protect the resin systems as a necessary incident to petitioner’s business of selling resin systems. We see the facts in petitioner’s case as being on all fours with the Monterey County Ice & Development case.

Finally, we cite Tax Counsel Opinion 400.0380 which provides:

“A company engaged in heat-treating aluminum is the consumer of dry ice used for the purpose of keeping aluminum parts cold while shipping them to customers subsequent to treatment, it may therefore be purchased on a tax-paid basis and the charge made to customers on account of the ice need not be included in the measure of the tax declared and paid on its returns. 4/15/60.”

In summary, it is concluded that petitioner is the consumer of the dry ice purchased both for processing the resin and shipping the resin, and the ice may not be purchased ex tax for resale.

Recommendation

Redetermine without adjustment to the audited measure of tax.

Robert H. Anderson, Hearing Officer

4-1-87
Date

Reviewed for Audit:

Principal Tax Auditor

Date