

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

475.0035

APPEALS DIVISION

In the Matter of the Petition)
for Redetermination Under the) HEARING
Sales and Use Tax Law of:) DECISION AND RECOMMENDATION
)
C--- V--- L---) No. SR --- XX-XXXXXX-010
)
)
Petitioner)

The above-referenced matter was scheduled for hearing before Hearing Officer Michele F. Hicks on November 13, 19XX in San Jose, California.

Petitioner's representative waived appearance at the hearing and submitted the matter for decision based on material in the petition file.

Protested Items

The protested tax liability for the period January 1, 1984 through December 31, 1986 is measured by:

<u>Item</u>	<u>State, Local and County</u>
Purchases subject to use tax not reported, based on an examination of paid bills on an actual basis.	\$367,805
Reaudit Adjustment	\$ <u>-12,364</u>
	\$355,441

A 10 percent penalty was added for negligence.

Petitioner's Contentions

1. Petitioner should not be liable for tax on purchases for its own use in those transactions where it issued a defective resale certificate.

2. Petitioner is a retailer, not a consumer, of packing materials it uses in performing moving contracts with the U.S. Government.

Summary

Petitioner is in the business of contracting with moving companies to serve as the packing agent for those companies. It performs packing services for both civilian and government jobs.

The issue in this appeal concerns packing materials which petitioner purchased with resale certificates. The audit staff contends that petitioner was the consumer of these packing materials.

Petitioner's first argument is that it should not be liable for use tax on the purchase price of the packing materials in those transactions where it issued a defective resale certificate. Specifically, petitioner contends that the resale certificates it issued to G--- P--- and G--- S---C--- are not valid because they do not list the correct seller's permit number. Petitioner contends that the resale certificate it issued to C--- P--- C--- is not valid because it was issued one day after the purchase.

With respect to the incorrect seller's permit number listed on the resale certificates given to G--- P--- and G--- S--- C---, the staff points out that petitioner held a valid seller's permit at the time of the purchases. Petitioner should not be relieved of responsibility for the tax because it unintentionally or intentionally listed on the resale certificate, the seller's permit number which it held prior to its incorporation. With respect to the timeliness of the resale certificate which petitioner issued to C--- P--- C---, the staff points out that the resale certificate was issued within the normal billing cycle of the seller.

The staff argues that the resale certificates issued by petitioner were accepted in good faith by the sellers and were complete and timely.

Petitioner's second argument is that it is the retailer, not the consumer, of packing material it purchases.

The staff response to this argument is that petitioner's contracts contain no separate billing for packing material. Rather, the contracts consolidate the charges for packing material and services. Further, there is no provision to pass title to the property to the customer prior to the use of the property. Petitioner argues that the charges for packing material can be determined by reviewing the contracts in conjunction with the government rate schedule. Petitioner submitted copies of the three schedules from the "Military Traffic Command, Household Goods Domestic Rate Solicitation 7-4". Item 100, designated "Packing and Unpacking" states in part:

"Carriers in responding to this Rate Solicitation must independently submit their rates as a percentage above or below or equal to these baseline rates. These baseline rates are listed for solicitation purposes only and are not intended as the setting of rates by MTMC. Rates include packing, the use of packing containers and material from origin to destination and unpacking."

Lastly, petitioner contends that the negligence penalty should not be imposed because the majority of errors were a result of its misunderstanding of Sales and Use Tax Regulation 1630. After reviewing petitioner's argument, the audit staff recommended that the negligence penalty be deleted.

Analysis and Conclusions

All gross receipts from the sale of tangible personal property are presumed to be subject to tax. The seller has the burden of proving that the sale is not a retail sale unless the seller takes a resale certificate from the purchaser. (Revenue and Taxation Code Section 6091; Sales and Use Tax Regulation 1668.) Regulation 1668 provides in pertinent part:

“(a) EFFECT OF CERTIFICATE.

“(1) The burden of proving that a sale of tangible personal property is not at retail is upon the seller unless the seller timely takes a certificate from the purchaser that the property is purchased for resale. If timely taken in good faith from a person who is engaged in the business of selling tangible personal property and who holds a California seller's permit, the certificate relieves the seller from liability for the sales tax and the duty of collecting the use tax. A certificate will be considered timely if it is taken at any time before the seller bills the purchaser for the property, or any time within the seller's normal billing and payment cycle, or any time at or prior to delivery of the property to the purchaser.”

Petitioner does not contend that it did not give resale certificates. Rather, it contends that two of its resale certificates were defective because the wrong seller's permit was listed, and, therefore, cannot operate to relieve the seller from liability for the sales tax. Petitioner contends that a third resale certificate was given to C--- P--- C--- was given after the sale and was not timely. The resale certificate given to C--- P--- C--- was issued one day after the sale, well within the normal billing cycle, and, was therefore timely. With respect to the other two resale certificates, each contained what appeared to be a legitimate entry in each part of the certificate. The sellers took these resale certificates in good faith from a purchaser who held a seller's permit. This meets the requirement of Regulation 1668. A buyer cannot issue a resale certificate with incorrect information and then attempt to be relieved of the responsibility to pay use tax if the property is not resold.

With respect to petitioner's argument that it is a retailer, not a consumer of packing material, Sales and Use Tax Regulation 1630(b)(2) provides:

“(2) PROPERTY 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. 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.”

The contract which petitioner submitted does not contain a separate charge for the packing material. The contract states the number of containers used and a unit price per container which includes packing material and services. The government rate schedule submitted by petitioner does not fix the price of the containers, but, rather, appears to be a request for a bid. Further, there is nothing in any of the documents which expressly states that title to the packing material passes to the customer before any use is made of the packing material.

Recommendation

Delete the negligence penalty. Otherwise, redetermine in accordance with the reaudit dated March 2, 1989.

MICHELE F. HICKS, HEARING OFFICER

1/25/91

Date

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