

STATE OF CALIFORNIA

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:)	
)	
)	
<u>Petitioner</u>)	

The Appeals conference in the above-referenced matter was held by Staff Counsel Lucian Khan on September 21, 1993 in Sacramento, California.

Appearing for Petitioner: No appearance

Appearing for the	
Sales and Use Tax Department:	Leon Adams, CPA District Principal Auditor

Protested Item

The protested tax liability for the period November 10, 1988 through December 31, 1991 involves four sales to a U.S. construction contractor measured by the total purchase price of \$103,713.

Petitioner's Contentions

1. The sales to _____ are valid sales for resale. _____ was a United States construction contractor involved in a contract containing a title-passing clause to the U.S. Government upon acquisition of materials.
2. If it is determined the transactions were taxable, the sales price listed on the invoices should be considered tax included.

Summary

Petitioner is a retailer and wholesaler of insulated side and roofing panels. In June 1992, SUTD completed an audit covering the period of November 10, 1988 through December 31,

1991. The auditor disallowed claimed resales and petitioner protested the disallowance of four sales made to _____.

_____ had a subcontract with _____ which had a contract with the U.S. Government to make improvements to real property at Vandenburg Air Force Base. The _____ contract, and the _____ U.S. Government contract each had clauses passing title to the materials to the U.S. Government upon acquisition by the contractor. Apparently, the auditor was shown a copy of the _____ contract; however, the _____ U.S. Government contract has never been submitted for review.

The invoices representing the four transactions stated the sales were for resale; however, _____ had no resale certificate on file with petitioner, nor is there evidence _____ had a seller's permit.

Petitioner argues that sales to _____ are valid sales for resale since the contract with the U.S. Government contained the title-passing clause upon acquisition by _____. In the alternative, petitioner argues if the sale to _____ is taxable, the invoiced sales price should be considered tax included.

SUTD obtained a copy of an April 5, 1989 "Proposed Supply Agreement" between petitioner and _____ which was authored by petitioner's vice president, _____. The proposal specifically states prices exclude any provision for taxes.

SUTD argues Revenue and Taxation Code Section 6007.5 provides that a contractor or subcontractor is the consumer of materials used in the performance of a U.S. construction contract. The clauses in either contract would not change _____'s status as a consumer. The amounts shown on the invoices should not be considered tax included, since the invoices stated that the sales were for resale. Therefore, it is obvious that the sales prices listed were not tax included.

The above facts and petitioner's arguments were reconstructed from information obtained from SUTD and a review of the file. The record shows petitioner was sent a conference notice and no mail was returned.

Analysis and Conclusion

United States construction contractors are consumers of materials which they furnish and install in the performance of contracts with the U.S. Government. Either the sales tax or the use tax applies with respect to the sales of tangible personal property to contractors for the use in performance of such contracts with the United States for the construction of improvements on or to real property in this state. (Revenue and Taxation Code Section 6007.5; Sales and Use Tax Regulation 1521 (b) (1) (A).)

California has the constitutional power to impose sales and use taxes on contractors in relation to work performed at federal facilities located in California. (C. R. Fedrick, Inc. v. State Board of Equalization (1974) 38 Cal.App.3d 385.) The California sales and use tax scheme in

which tax is imposed on the transfer of property from suppliers to federal contractors who can pass tax onto the Federal Government when they set their price does not impermissibly levy a direct tax upon the U.S. Government. (In re Howell, 731 F.2d 624.)

The application of tax differs in the case of contracts with the Federal Government from that with a private person or corporation. (Business Taxes Law Guide Annotation 565.0040.) Where a sale is made to a U.S. contractor whose contract with the U.S. Government contains a title clause, passing title to the property prior to any use by the contractor, the sale is a nontaxable sale for resale providing the property is not used to construct improvements on or to real property. (BTLG Annot. 56S.1200.)

From the facts submitted, I conclude the sales made to _____ were taxable. It is undisputed that _____ purchased the materials for use in a U.S. Government construction contract. It is well settled that U.S. Government construction contractors are consumers of materials even where the contract with the U.S. Government contains a clause transferring title to materials prior to final installation.

I also conclude that the amount shown on the _____ invoices were not tax included. When a sale of tangible personal property occurs, it is presumed the property is sold at a price which includes tax reimbursement if (among other methods) the retailer posts on his premises or includes on a price tag or advertisement a notation that all prices include sales tax reimbursement computed to the nearest mil. (Civil Code Section 1656.1.) Here, petitioner did not include a notation on the invoices that tax reimbursement was included in the purchase price. In fact, in petitioner's "proposal" of April 5, 1989 to _____, it specifically provides that taxes are not to be included. There also is no evidence that petitioner advertised or posted a notice on its premises that reimbursement was included.

Recommendation

Deny the petition.

Lucian Khan, Staff Counsel

11-2-93
Date