STATE OF CALIFORNIA

190.0192

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Claim for Refund Under the Sales and Use Tax Law of:	)	DECISION AND RECOMMENDATION
N--- P--- & I---, INC.	)	No. S- -- XX-XXXXXX-003
Claimant	)	

The Appeals conference in the above-referenced matter was held by Senior Staff Counsel H. L. Cohen on December 7, 1993 in San Francisco, California.

Appearing for Claimant: Mr. A. D---
Vice President

Appearing for the
Sales and Use Tax Department: Mr. W. Hitchcock
Supervising Tax Auditor
San Francisco District

Mr. S. Wagner
Tax Auditor
San Francisco District

Subject of Claim

Claimant seeks a refund of tax for the period January 1, 1985 through December 31, 1987, measured by:

	Item	State, Local and County
A.	Claimed sales for resale disallowed	$109,921
	Adjustment in reaudit report dated May 10, 1992	- 11,670
	Total	$ 98,251

Contentions

Claimant contends that:

1. It is not engaged in business in California and is not required to collect California use tax.

2. The purchaser resold the property in question; thus, petitioner's sale was a sale for resale and not subject to tax.

3. The property in question consisted of equipment which was sold in an exempt sale to the United States.

Summary

Claimant is a corporation which is engaged in the manufacture and sale of modular and prefabricated industrial buildings and interior enclosures. Manufacturing facilities are located in Florida, North Carolina, and Kansas. Claimant has no facilities in California and does no construction jobs in this state. Claimant's products are shipped from out-of-state manufacturing facilities to customers in California via common carrier. In May 1982, claimant applied for a Certification of Registration - Use Tax. On the application, claimant stated that it had a sales office in Orange and sales personnel traveling in California. The certificate is currently in force.

In December 1985, claimant sold an environmental enclosure to C--- C--- Company ("C---"). The unassembled enclosure was shipped to [name] Air Force Base in [California] where C--- installed it under a contract with the United States. Claimant did not charge sales tax reimbursement or use tax to C---, or report or pay tax to the Board on this transaction.

The auditor regarded claimant as making the sale of construction materials to C---. As a construction contractor, C--- was regarded as the consumer of materials which it furnished and installed in the course of performing a construction contract for the United States. As a consumer of property purchased outside the state, C--- was regarded as liable for use tax. Inasmuch as claimant was registered for collection of use tax, and also had an office and sales personnel in California, claimant was held liable for the amount of the use tax which it should have collected from C---.

Claimant states that it does not now have an office in California and obtains its customers through advertisements. Claimant is unsure as to whether it had an office in California at the time of the sale in question, although it admits that it may have had traveling sales personnel who operated in California at that time. In the sale to C---, claimant states that it had no contact with the property after it left claimant's Florida plant.

Claimant states that the environmental enclosure in question is completely movable and can be disassembled without damage to the building in which it is located or to itself. It is bolted to the floor. Claimant contends that this fits the definition of "equipment", rather than of "materials" in Sales and Use Tax Regulation 1521. Claimant further states that the Internal Revenue Service permits income tax deductions for depreciation on this type of property on the basis that the property is equipment, rather than improvements to realty. If the enclosure is regarded as equipment, then claimant's sale to C--- should be regarded as a sale for resale since C--- sold the enclosure to the United States. The enclosure is 50 feet by 180 feet by 14 feet high.

Analysis and Conclusions

Sales and Use Tax Regulation 1521 provides in subdivision (b)(1)(A) that the United States construction contractors are consumers of materials and fixtures which they furnish and install in the performance of contracts to improve realty for the United States. Either the sales tax or the use tax applies to the sale to or use by the United States construction contractors of materials and fixtures. Since the sale in this case took place outside the state, use tax is the applicable tax.

Section 6202 of the Revenue and Taxation Code provides that the use tax is the liability of the person making use of the tangible personal property in this state. However, Section 6203 requires retailers who are engaged in business in this state to collect the use tax from their retail customers in California. Section 6204 provides that the use tax which a retailer is required to collect constitutes a debt owed to the state. The evidence showed that claimant had an office and sales personnel in this state and was thus a retailer engaged in business in this state. See subdivisions (a) and (b) of Section 6203. Further, Regulation 1684 provides in subdivision (b) that retailers who hold a Certificate of Registration--Use Tax are required to collect use tax from their customers until such time as the certificate is canceled.

If the property in question is regarded as materials or fixtures, C--- is the consumer and claimant was required to collect the use tax from C---. If, on the other hand, the property is regarded as equipment, C--- would have resold the property to the United States. Claimant's contention that the sale was a sale for resale would be correct, and claimant would not be liable for tax.

Regulation 1521 distinguishes between materials, fixtures, and machinery and equipment in subdivision (a)(1) as follows:

> "(4) **Materials.** 'Materials' means and includes construction materials and components, and other tangible personal property incorporated into , or affixed to, real property by contractors in the performance of a construction contract and which, when combined with other tangible personal property, loses its identity to become an integral and inseparable part of the real property. A list of typical items regarded as materials is set forth in Appendix A.

> "(5) **FIXTURES.** 'Fixtures' means and includes items which are accessory to a building or other structure and do not lose their identity as accessories when installed. A list of typical items regarded as fixtures is set forth in Appendix B.
>
> "(6) **MACHINERY AND EQUIPMENT**. 'Machinery and equipment' means and includes property intended to be used in the production, manufacturing or processing of tangible personal property, the performance of services or for other purposes (e.g., research, testing, experimentation) not essential to the fixed works, building, or structure itself, but which property incidentally may, on account of its nature, be attached to the realty without losing its identity as a particular piece of machinery of equipment and, if attached, is readily removable without damage to the unit or to the realty. 'Machinery and equipment' does not include junction boxes, switches, conduit and wiring, or valves, pipes, and tubing incorporated into fixed works, buildings, or other structures, whether or not such items are used solely or partially in connection with the operation of machinery and equipment, nor does it include items of tangible personal property such as power shovels, cranes, trucks, and hand or power tools used to perform the construction contract. A list of typical items regarded as machinery and equipment together with a list of typical items not regarded as machinery and equipment is set forth in Appendix C."

In the past, we have regarded contracts for the erection of free-standing structures as construction contracts, notwithstanding the fact that they are erected inside another structure and are designed to be readily dismantled and portable. See Business Taxes Law Guide Annotation 190.1200 which reads:

> "**X-ray Booths**. A construction company was the consumer of materials used in the construction of lead-lined X-ray booths consisting of prefabricated panels fastened together and to a concrete floor by metal bolts. Although the booths were designed to be dismantled and portable, they were of substantial size and permanence so as to be considered improvements to realty. 8/11/64."

Claimant's enclosure is also of substantial size and permanence. C---'s contract should thus be regarded as a contract for construction of improvements to realty. Tax therefore applies to C---'s cost. As previously discussed, claimant is liable for the amount of tax it should have collected from C---. I note that Regulation 1521 specifically recognizes that size may determine the classification of property. In Appendix C, tanks of over 500-barrel capacity are declared not to be machinery and equipment. Presumably, tanks under 500-barrel capacity could be regarded as equipment.

Recommendation

Deny the claim except to the extent of the reaudit report dated May 10, 1992.

H. L. Cohen, Senior Staff Counsel Date