STATE OF CALIFORNIA

295.0770

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition for Redetermination Under the Sales and Use Tax Law of	)	DECISION AND RECOMMENDATION
J--- C---	)	No. SA -- XX-XXXXXX-010
Petitioner	)	

The Appeals conference in the above-referenced matter was held by Paul O. Smith on September 14, 1993, in San Diego, California.

Appearing for Petitioner: J--- W. C---

K--- M. C---

Appearing for the Sales and Use Tax Department: Ted Matthies
Senior Tax Auditor

Protested Item

The protested tax liability determined February 13, 1991, is measured by:

Item	Amount
Actual cost of vehicle (motorhome)	$33,000.00

Petitioner's Contentions

Petitioner contends that the purchase of the motorhome was never completed because he and his wife never formally took title to it, or assumed obligation for the balance owed on it to Bank of America. Petitioner also contends that he returned the motorhome to the seller, and therefore it is nontaxable.

Summary

Petitioner J--- C--- and his wife K--- M. C--- (hereinafter "petitioners") sold property in ---, California (hereinafter "property"), to F--- S. C--- and C--- V--- - C---, (hereinafter "the C---s") for $131,000.00. The escrow instructions (Exhibit A), provided in relevant part that the C---s would pay for the property by a $100.00 deposit, the transfer of their 1985 Ford Econoline MotorHome, Model E-350 (hereinafter "motorhome"), with an agreed equity of $8,100 to petitioners, by a $93,000.00 Trust Deed, and a $29,800.00 Purchase Money Trust Deed. On January 29, 1987, these instructions were amended to provide that, among other things, the C---s would pay for the property by a $100.00 deposit, a $93,708.28 Trust Deed (previously $93,000.00), and a $29,091.72 Purchase Money Trust Deed (previously $29,800.00).[1] The sales price remained as $131,000.00, and there was no mention of the motorhome. (Exhibit B). The transaction settlement date was February 17, 1987.

The Sales and Use Tax Department (Department) determined that petitioners agreed to assume the $33,000.00 balance owed on the motorhome and to register it in their names.[2] Petitioner contends that he only made six payments on the motorhome, and that the C---s misrepresented it to be new when it had been previously rented to various individuals and was in need of repairs.[3]

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[1] These amounts equal $122,900.00, not the $131,000.00 stated on the amended escrow instructions. The difference represents an omission of the $8,100.00 equity in the motorhome. I believe this omission to be a typing error.

[2] The $33,000.00 amount was obtained from the Release of Liability submitted to the Department of Motor Vehicles by the C---s, and indicates that the motorhome was sold to petitioner on February 1, 1987. This $33,000.00 was used as the taxable measure of the vehicle. However, since the motorhome had an agreed upon equity value of $8,100.00 (the Department incorrectly states it was $8,800.00) when received by petitioners, this amount must be added to the previously determined taxable measure.

[3] Petitioner provided copies of the canceled checks. The check paid to "F--- C---", dated August 1, 1987, contained the notation "camper payment". The remaining five were paid to Bank of America in 1988, and petitioner noted the account number on four of the five checks.

In June 1988, the C---s' attorney contacted petitioners regarding their failure to title the motorhome in their names, and to formally assume the loan balance. (Exhibit C). On August 5, 1988, the attorney sent another letter to petitioners reminding them of their agreement of June 29, 1988, in which they agreed to register the motorhome in their names and to formally assume the loan balance. (Exhibit D). On or about September 20, 1988, petitioners and the C---s acknowledged in a "Settlement Agreement" (Exhibit E) that the purchase of the motorhome was part of the sale of petitioners' property and that they "... [did] not wish to proceed to complete the purchase transaction by formally taking title and assuming the [loan balance on the motorhome]." The agreement also provided that the C---s agreed to accept back the motorhome, and to assume the remaining balance on the loan.[4] Petitioners also waived any right to reimbursement for payments made to Bank of America or anyone else for the motorhome.

On February 13, 1991, the Department issued its Notice of Determination, inclusive of a failure to file penalty, to petitioner. On February 17, 1991, petitioner submitted a timely Petition for Redetermination. On September 14, 1993, petitioner submitted a request for relief from the penalty under penalty of perjury, together with a copy of a February 1988 notice from the Ford Motor Company regarding a recall of the motorhome. (Exhibit F). The request stated that no tax was due because the motorhome was defective, and was never purchased.

Analysis and Conclusions

Revenue and Taxation Code Section 6201 imposes use tax not only on the "use" of tangible personal property in this state, but also on the "storage...or other consumption" of such property. Section 6008 defines the term "storage" to include "any keeping or retention in this State for any purpose except sale in the regular course of business...." Section 6009 provides in relevant part that "use" includes the exercise of any right or power over tangible personal property incident to the ownership of that property. Section 6010 provides in relevant part that the term "purchase" means and includes "Any transfer of title or possession, exchange ..., in any manner or by any means whatsoever, of tangible personal property for a consideration. `Transfer of possession' includes only transactions found by the board to be in lieu of a transfer of title, exchange, or barter." The assumption of liabilities can constitute consideration for a transfer of tangible personal property. (See Beatrice Company v. State Bd. of Equalization (1993) 6 Cal.4th 767.) Section 6011 provides in relevant part that the term "sales price" means the total amount for which tangible personal property was sold, valued in money, whether paid in money or otherwise. Section 6201 imposes a use tax upon the sales price of tangible personal property purchased from any retailer for storage, use, or other consumption in this state.

[4] On December 16, 1991, the Department contacted the C---s and advised them that the return of the vehicle to them, and assumption of petitioners' loan balance, is considered a taxable sale.

Petitioner argues that the purchase of the motorhome was never consummated because he never formally took title to it, or assumed obligation for the balance owed on it to Bank of America. I disagree.

Since petitioners accepted the motorhome and other consideration in exchange for their property, the only conclusion is that petitioner took possession of the motorhome at or near the closing on the sale of their property (most likely shortly after issuance of the amended escrow instructions on January 29, 1987).[5] If petitioners did not have possession of the motorhome, I doubt that they would have made a payment to Mr. C--- on August 1, 1987, and five subsequent payments in 1988, to Bank of America. None of the canceled checks for these payments suggests that they were made under duress, protest, or otherwise. Thus, for purposes of this Decision and Recommendation I must conclude that petitioners obtained possession of the motorhome from the C---s. Further, an assumption of a debt is considered sufficient consideration for the finding of a purchase within the meaning of section 6010. (See Beatrice Company v. State Bd. of Equalization, supra.)

While petitioner is correct that he and his wife did not formally assume the debt on the motorhome, I must advise petitioner that, absent a contract provision to the contrary, a formal assumption agreement is not necessary to find that there was an assumption of debt. An acknowledgment by petitioners that the debt exists, from which the promise to pay may be implied is sufficient in most instances. (See Searles v. Gonzales (1923) 191 Cal. 426, 430.) Here, there is the canceled check of August 1, 1987, to Mr. C---, in which petitioner acknowledged that the payment to him represented a "camper payment". Each subsequent check to Bank of America that contained petitioner's notation of the loan account number, is also considered an acknowledgment of the debt's existence.[6] Though petitioners never formally took title to the motorhome, or formally assumed the outstanding liability on it, there was a "transfer of possession, or exchange" of the motorhome to petitioners for consideration, within the meaning of section 6010. The use tax applies to the sale price of tangible personal property, unless exempt by some statutory provision. (Rev. & Tax. Code, § 6201.) Having decided that use tax applies to the purchase, the taxable measure must be determined.

The correct taxable measure of the motorhome is determined by reference to section 6011, which provides in relevant part that the term "sales price" means the total amount for which tangible personal property was sold, valued in money, whether paid in money or otherwise. Here, petitioners paid for the motorhome by giving the C---s a credit of $8,100.00 (the equity in the motorhome) towards the sales price of their property, and assumption of the

[5] Petitioner has attempted several times to obtain a copy of the closing statement, and was told that it had been destroyed.

[6] I believe it could be successfully argued that the Escrow Instructions are a formal acknowledgment of the petitioners' obligation for the balance owed on the motorhome.

outstanding debt of $33,000.00 on the motorhome. Thus, the correct taxable measure of the motorhome is $41,100.00 ($8,100.00 plus $33,000.00). (See Rev. & Tax. Code, § 6011, subds. (a) and (b)(2).)

Petitioner also argues that he returned the motorhome because it was defective, and therefore it is nontaxable. I disagree.

No evidence has been presented by petitioner that the motorhome was defective, or that at anytime before petitioner's payments on it to Bank of America, petitioner attempted to return it to the C---s. There is the notice from the Ford Motor Company (Exhibit F), issued a little over a year after the purchase of the motorhome by petitioners. However, this notice did not state that the vehicle in question was defective. This notice stated that the company had obtained information that a defect existed in various 1983 through 1987 model vehicles, which included petitioners' motorhome. The notice directed the current owner (petitioner) to take the vehicle to a dealer for inspection and any necessary modifications to remedy the problem, if it existed. The notice did not authorize an owner to return his or her vehicle to the Ford Motor Company as a "defective vehicle." Its purpose was to apprise the owner of a possible defect and what to do, if necessary, to have the defect corrected.

Petitioner, by his argument seeks to treat the Settlement Agreement of September 20, 1988, as a valid rescission of the transaction as it relates to the motorhome. Sections 6011, subdivision (c), and 6012, subdivision (c), relating to "sales price" and "gross receipts", respectively, both provide in relevant part that the amount charged for property is not taxable when "that entire amount is refunded either in cash or credit...." In effect, the Sales and Use Tax Law recognizes a valid rescission. (See Youngstown Steel v. State Bd. of Equal. (1957) 148 Cal.App.2d 205; see also Sales & Use Tax Reg., 1655, subd. (a).) When a contract is rescinded, the original taxable transaction remains subject to tax unless it satisfies the returned merchandise deduction provided in regulation 1655. (See Sales and Use Tax Annots. 490.0080 (Sept. 4, 1964); 490.0220 (Dec. 14, 1953).)

As set forth above, there was an agreement reached between the parties for the C---s to accept back possession of the motorhome (Exhibit E), and to assume the debt obligation thereon. The agreement further provided that petitioners also waived any right to reimbursement for payments made to Bank of America or anyone else for the motorhome. Accordingly, there was a rescission, not a second taxable sale. (See Sales and Use Tax Annots. 490.0080 (Sept. 4, 1964).) The retention of the payments by the C---s does not defeat the rescission since such payments can be considered payment for the use of the motorhome during the period the petitioners were in possession of it. When a sale of equipment is rescinded and a rental is substituted as a charge for use of the equipment, no refund is allowable. A charge for "usage" is inconsistent with the requirements of section 6012 and Regulation 1655, that for a returned merchandise deduction there be a return of the "full sale price." (See Sales and Use Tax Annot. 490.0180 (May 17, 1957)). Thus, the original sale is taxable and no returned merchandise deduction is

allowable because the full purchase price was not refunded by the C---s. (Sales and Use Tax Annots. 490.0080 (Sept. 4, 1964); 490.0220 (Dec. 14, 1953).)

With respect to the penalty assessed, I find that petitioner's request September 14, 1993, is sufficient to establish that his failure to timely pay the tax was due to reasonable cause and circumstances beyond its control, and was not due to willful neglect. Accordingly, I recommend that the penalty should be waived.

Recommendation

The penalty assessed should be waived, the taxable measure should be increased by $8,100, and the petition should be denied in all other respects.

4/20/94

Paul O. Smith, Staff Counsel Date