

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

330.2825

In the Matter of the Petition)
for Redetermination Under the) HEARING
Sales and Use Tax Law of:) DECISION AND RECOMMENDATION
)
W--- H. R---) No. SR AD XX-XXXXXX-010
dba B--- R--- L---)
)
Petitioner)

The above-entitled matter came on regularly for hearing on August 31, 1983 in Downey, California before Stephen A. Ryan, Hearing Officer.

Appearing for Petitioner: Mr. W--- R---, Owner

Mr. W--- K---, CPA

Appearing for the Board:

Ms. Shirley Baca
Tax Auditor IV

Protested Item

The petitioner has filed a petition for redetermination of a tax deficiency determination issued on November 24, 1982, for the period November 1, 1979 through June 30, 1982. The protest involves tax determined on the following audit item:

1. Unreported lease receipts	<u>Tax Measure</u> \$42,714
------------------------------	--------------------------------

A 10 percent penalty was imposed for the failure to file returns.

Petitioner's Contentions

1. Petitioner paid sales tax reimbursement to the retailer on the purchase of the equipment and, therefore, the subsequent leases are not subject to tax.

2. If it is determined that sales tax reimbursement was not paid, the seller is liable to the Board for sales tax on the retail sale because petitioner did not issue a resale certificate to the seller. This liability should preclude the Board from seeking use tax from the petitioner.

3. The penalty should not be imposed.

Summary of the Case

Petitioner, is conducting a leasing business as a sole proprietor. He began this business in 1979 and this is the first audit.

In April 1979, petitioner purchased equipment from T--- S--- dba S--- P--- P--- of [city], Ca. The seller did not issue an invoice to petitioner. Petitioner stated that he issued a purchase order dated April 27, 1979, to the seller. The copy of this purchase order was lost. Petitioner claims to have mailed it to the auditor but it is not located in the files. The petitioner does not recall whether or not there was a separate amount specified for tax. He thinks that it stated that the price "included sales tax". He also recalls that the original asking price was \$45,000. He offered the seller \$46,000 including tax. Three days later, after thinking it over, the seller accepted. The seller told petitioner that he accepted in order to use the money to vacation to Hawaii with his wife.

Apparently Mr. S--- was operating without a seller's permit. The auditor's investigations have not located the seller or identified any permit for his [city] location. Thus, the Board has no record of sales tax being paid to the Board on this sale.

After some initial use, petitioner subsequently leased the equipment ex-tax to his corporation assuming that tax had been paid on the purchase.

Petitioner has purchased approximately 40 other machines since he began his business and he has paid sales tax reimbursement on each one. He stated that it was his custom to always pay sales tax reimbursement so that tax would not apply to the lease receipts.

Having no record of tax being paid on the purchase, the auditor assessed tax on the lease receipts.

Analysis and Conclusions

Regulation 1660(c)(2) [Cal. Admin. Code, title 18, section 1660(c)(2)], which implements section 6006(g)(5) of the Revenue and Taxation Code, states:

"PROPERTY LEASED IN FORM ACQUIRED. No sales or use tax is due with respect to the rentals charged for tangible personal property leased in substantially the same form as acquired by the lessor, or by his transferor, as to which the lessor or transferor has paid sales tax reimbursement or has paid use tax measured by the purchase price. If such tax has not been paid, and the lessor desires to pay tax measured by the purchase price, it must be reported and paid timely with the return of the lessor for the period during which the property is first placed in rental service. A timely return is a return filed within the time prescribed by Sections 6452 or 6455, whichever is applicable."

If petitioner paid sales tax reimbursement to Mr. T--- S--- on the purchase of this equipment, then no sales or use tax arises from the use or lease by petitioner to the corporation.

The factual question then is whether sales tax reimbursement was paid by petitioner to Mr. S---.

Although the written purchase order has been lost, there is other evidence that sales tax reimbursement was paid by petitioner. Petitioner's detailed recollection of the price negotiations for the machine indicate that the parties intended the \$46,500 price to include sales tax reimbursement. This together with petitioner's custom of always paying sales tax reimbursement lead the hearing officer to conclude that petitioner did pay sales tax reimbursement to Mr. S---. Nothing in either Regulation 1660(c)(2) or 1700 require that petitioner produce a receipt or prove that Mr. S--- actually paid the tax to the Board. Regulation 1685 and 1686 only apply to the collection of use tax. Accordingly, the lease receipts are not subject to tax.

The lack of a seller's permit would not preclude Mr. S--- from collecting sales tax reimbursement because he would still be a "seller" and a "retailer". Section 6071 of the Revenue and Taxation Code provides that it is a crime for a person to be engaged in business as a "seller" without holding a permit. Thus, a person can be a "seller" without holding a permit. A "retailer" is a "seller" who makes retail sales of tangible personal property (Rev. & Tax. Code section 6015(a)). It appears that Mr. S--- was making retail and not occasional sales. Petitioner submitted a statement (signed under penalty of perjury) from Mr. F--- P--- of L--- P---, XXXXX --- Ave., [city 2], Ca. Mr. P--- stated that Mr. S--- manufactured tooling and parts in a machine shop business. An inference can be made that Mr. S--- made sales of the tooling and parts also (Evidence Code section 600(b)). Mr. S---'s business card showed the name as S--- P--- P--- and that it specialized in "parts". Civil Code section 1656.1(a) provides that "retailers" may add sales tax reimbursement to the sales price of tangible personal property. Therefore, Mr. S--- was a seller and a retailer who could have collected sales tax reimbursement from petitioner on this sale.

Recommendation

It is recommended that the deficiency determination, including the penalty, be deleted from the measure of tax.

Stephen A. Ryan, Hearing Officer

9-20-83

Date