

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

557.0104

APPEALS UNIT

In the Matter of the Petition)	HEARING
for Redetermination Under the)	DECISION AND RECOMMENDATION
Sales and Use Tax Law of:)	
)	
W--- I--- INCOR-)	No. SY --- XX-XXXXXX-010
PORATED)	
)	
<u>Petitioner</u>)	

The above-referenced matter was scheduled for hearing before Hearing Officer James E. Mahler on April 21, 1989, in Sacramento, California. By telephone, petitioner requested that the hearing be postponed and rescheduled for May 22, 1989. The request was granted and the hearing was rescheduled for that date, but petitioner failed to appear.

Appearing for Petitioner:	None
Appearing for the Department of Business Taxes:	Jack Warner District Principal Auditor

Protested Item

The protested tax liability for the period January 1, 1983, through December 31, 1985, is measured by:

<u>Item</u>	<u>State, Local and County</u>
B. Taxable transportation charges not reported	\$172,575

Petitioner's Contention

Under Rules and Regulations of the California Department of Alcoholic Beverage Control, the sales of wine occurred at petitioners premises prior to delivery.

Summary

Petitioner is a corporation which sells imported wines through four retail outlets in California. Petitioner advises us that it holds an off-sale beer and wine license issued by the California Department of Alcoholic Beverage Control (ABC).

Petitioner delivers wine from its retail outlets to its customers via its own vans or trucks. A flat charge for delivery is separately stated on petitioner's invoices, and we understand that the charge remains the same without regard to the time or distance required for delivery and without regard to the quantity delivered. Petitioner has no written or oral agreements with its customers regarding the time at which title in the wine will pass to the customer.

Petitioner did not charge tax reimbursement or report tax on the separately stated delivery charges. Tax was asserted in an audit, giving rise to this petition.

Analysis and Conclusions

Subdivision (b)(2) of Sales and Use Tax Regulation 1628 provides:

“When transportation is by facilities of the retailer or the property is sold for a delivered price, tax applies to charges for transportation to the purchaser, unless (a) the transportation charges are separately stated, (b) are for transportation from the retailer's place of business or other point from which shipment is made directly to the purchaser, and (c) the transportation occurs after the sale of the property is made to the purchaser. When the sale occurs before the transportation to the purchaser commences, the tax does not apply to separately stated charges for the transportation. The amount that may be excluded from the measure of the tax cannot exceed a reasonable charge for transportation by facilities of the retailer or the cost of transportation by facilities other than facilities of the retailer.”

The audit made no express findings as to whether petitioner's transportation charges are “reasonable” as required by the last sentence of this subdivision. Since petitioner charges a flat rate for all deliveries, without regard to the distance or time required or the quantity of wines delivered, there is potentially a question on this point. For purposes of this decision and recommendation only, however, since the staff has not raised the issue, we assume without deciding that petitioner's transportation charges are “reasonable”.

Petitioner and staff agree that requirements in (a) and (b) in Regulation 1628(b)(2) have been satisfied in this case. The issue is whether requirement (c) has been met, that is, whether the transportation occurred before or after the sale to the customers. On this point, subdivision (b)(3)(D) of Regulation 1628 provides:

“Unless explicitly agreed that title is to pass at a prior time, the sale occurs at the time and place at which the retailer completes his performance with reference to the physical delivery of the property, even though a document of title is to be delivered at a different time or place. If the contract requires or authorizes the retailer to send the property to the purchaser but does not require him to deliver it at destination, the retailer completes his performance with reference to the physical delivery of the property at the time and place of shipment, e.g., delivery of the property to the carrier for delivery by the carrier to the purchaser; but if the contract expressly requires delivery at destination, including cases where one of the terms of the contract is F.O.B. place of destination, the retailer completes his performance with reference to the physical delivery of the property on tender to the purchaser there. When delivery of the property is by facilities of the retailer, title passes when the property is delivered to the purchaser at the destination unless there is an explicit written agreement executed prior to the delivery that title is to pass at some other time.”

Since petitioner had no agreements with its customers regarding title, the audit found that title passed at the time and place at which petitioner completed its performance with reference to the physical delivery of the wine, that is, when physical possession of the wine was transferred to the customer at destination. Since title passed and the sale occurred at destination, after the transportation, the audit concluded that petitioner is liable for tax on the transportation charges.

Petitioner contends that title passed prior to delivery by operation of law, so that it was not necessary to have any agreements with its customers. Petitioner relies on ABC Rules 17 and 27 (California Code of Regulations, Title 4, Chapter 1, Sections 17 and 27). Subdivision (e) of Rule 17 provides, in relevant part: “No alcoholic beverage shall leave the premises of an off-sale licensee for delivery to a consumer, except pursuant to an order previously received by such licensee....” Subdivision (c) of Rule 27 further provides: “All alcoholic beverages sold shall be delivered from the licensed premises, and shall not be delivered from a supply of alcoholic beverages stored off the licensed premises.”

We find nothing in either rule to indicate that title to alcoholic beverages must pass to the customer at the vendor’s premises. The cited portions of Rule 17 merely state that an order must be received from the customer before alcoholic beverages leave the vendor’s premises. Subdivision (c) merely prohibits delivery from storage facilities off the licensed premises. Accordingly, we find no support for petitioner’s contention that title passed prior to delivery by operation of law.

Petitioner has also provided us with a photocopy of ABC Rule 60.4 (California Code of Regulations, Title 4, Chapter 1, Section 60.4). Petitioner does not cite or discuss this rule in its brief, and we are uncertain why the photocopy has been provided. In any event, Rule 60.4 applies to sales and deliveries of alcoholic beverages under off-sale general licenses, and it does not appear that petitioner holds an off-sale general license. Furthermore, assuming that Rule

60.4 does apply to petitioner's operations, there is nothing to show that petitioner complied with its provisions. We find nothing in Rule 60.4 to indicate that title in the wine sold by petitioner must have passed to petitioner's customers at petitioner's premises prior to delivery.

In short, petitioner had no agreement with its customers that title in the wine would pass prior to transportation. Nor did title pass prior to transportation by operation of law. Accordingly, petitioner has not satisfied the requirements for exemption, and tax was properly asserted on the transportation charges.

Recommendation

It is recommended that the account be redetermined without adjustment to the tax.

James E. Mahler, Hearing Officer
HLC 6/12/89

6/12/89

Date