

STATE OF CALIFORNIA

557.0602

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:)	
)	
E--- Corporation)	No. SY --- XX-XXXXXXX-010
)	
)	
<u>Petitioner</u>)	

The Appeals conference in the above-referenced matter was held by Elizabeth Abreu, Staff Counsel, on March 2, 19XX in Downey, California.

Appearing for Petitioner: D--- S---, CPA

Appearing for the Sales and Use Tax Department: Doreen H. Watanabe Senior Tax Auditor

Protested Item

The protested tax liability for the period April 1, 1988 through March 31, 1991 is measured by:

<u>Item</u>	<u>State, Local and County</u>
B. Unsupported recorded exempt freight on an actual basis:	
2) M--- services division	\$XX,XXX

Petitioner's Contention

Petitioner's charges for transportation of the products sold by its M--- Services Division are excludable from tax.

Summary

Petitioner is a corporation which sells environmental and --- well products such as sand, pipes, and well covers. Petitioner's M--- Services Division manufactures and sells a mixture known as "m---," which is a product used to seal --- wells to prevent them from seeping.

Petitioner delivers the m--- in its own trucks. Petitioner's sales invoices, which are issued after the m--- is delivered, separately state the transportation charges but do not contain a title clause.

Petitioner stated that it also issues each of its customers a delivery ticket, which is similar to a bill of lading. Included in the audit working papers is a copy of a delivery ticket that has a statement at the bottom which reads: "Title to goods passes to customer at warehouse prior to shipment." Petitioner believes that in about half of the sales transactions in issue, the purchaser saw the delivery ticket at the time the purchaser was ordering the m---.

Petitioner also asserts that its president, G--- G---, quoted prices over the phone from a price sheet that indicated products were sold F.O.B. warehouse. After the Appeals conference petitioner submitted three price sheets and asserted in its cover letter that it was Mr. G---'s normal business practice to supply a copy of the price list to petitioner's customers.

The Sales and Use Tax Department contends that the transportation charges are not excludable from the measure of tax because the m--- was delivered in petitioner's trucks and there was no explicit written agreement executed prior to the delivery that title was to pass prior to delivery. (Sales and Use Tax Reg. 1628(b)(3)(D).)

Petitioner contends that the price list and delivery tickets were sufficient to meet the requirements of the regulation and statute. Alternatively, even if they were not sufficient, only charges for the first delivery to a customer should be included in the measure of tax since the customer would thereafter know that title passed prior to shipment.

Analysis and Conclusion

Revenue and Taxation Code section 6051 imposes a sales tax on all retailers measured by their gross receipts from retail sales of tangible personal property. "Gross receipts" mean and include the total amount of the sale price without any deduction on account of the "cost of transportation of the property, except as excluded by other provisions of this section." (Rev. & Tax. Code § 6012(a)(3).) Subdivision (c)(7) of section 6012 authorizes an exclusion for transportation charges which: (1) are separately stated; (2) are for transportation directly to the purchaser; (3) do not exceed a reasonable charge for transportation by facilities of the retailer; and (4), if transportation is by facilities of the retailer, are for transportation which occurs after the sale of the property to the purchaser.

The first three requirements are not in dispute. With respect to the fourth requirement, the last sentence in Sales and Use Tax Regulation 1628(b)(3)(D) provides:

".... 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."

Until recently the Board had interpreted this provision in the regulation literally. Unless a written sales contract with a title clause was executed prior to shipment, transportation charges were regarded as taxable if transportation was by facilities of the retailer. Title clauses on invoices did not meet the requirement because invoices were generally issued to customers after shipment.

In recent years new interpretations evolved. Initially, the Board allowed a retailer to exclude transportation charges if the retailer included a title clause on an invoice to a repeat customer. The basis of this interpretation was that through prior course of dealings, the purchaser understood title would pass prior to shipment.

After several Board hearings, the interpretation of this regulation evolved further. The Principal Tax Auditor summarized this new interpretation by the Board in a memorandum dated August 13, 1987 which states:

"Regulation 1628 - When there is a question as to when title passes involving transportation charges, again the intent and the practice of the parties involved will govern. To clarify Regulation 1628, paragraph (b)(2), if the taxpayer has a statement on the sales invoices that title to the goods passes prior to transportation, we will consider this to be proof that there was an explicit agreement under Section 2401 of the Commercial Code that title did pass

prior to shipment."

In the present case the price lists do not provide a basis for excluding the transportation charges since the "F.O.B. Warehouse" term is only on the price list for equipment rentals. However, an explicit title clause appears on the delivery tickets which petitioner issued to its customers. A delivery ticket is part of the documentation for a sale, and therefore a title clause in a delivery ticket is just as effective to express the intent of the parties as a title clause in an invoice. Based upon the Board's new interpretation of Regulation 1628, we recommend that the petition be granted with respect to the transportation charges for the m--- sales made by petitioner's M--- Services Division.

Recommendation

Grant the petition.

Elizabeth Abreu, Staff Counsel

Date