565.0256

STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

January 19, 1990

Dear REDACTED TEXT,

Enclosed is a copy of the Decision and Recommendation pertaining to the petition for redetermination in the above-referenced matter.

There are three options available to you at this point.

1. If, after reading the Hearing Decision and Recommendation, you believe that you have new evidence and/or contentions not previously considered by the Hearing Officer, you should file a Request for Reconsideration. No special form is required to file the Request for Reconsideration, but it must be filed within 30 days from the date of this letter and clearly set forth any new contentions. If new evidence is the basis for filing the request, the evidence must be included. Direct any such request directly to me, with a copy sent to the State Board of Equalization, P.O. Box 942879, Sacramento, CA 95279-0001, Attn: Principal Tax Auditor. I will subsequently notify you whether the request has been taken under review or whether the request is insufficient to warrant an adjustment. If I conclude that no adjustment is warranted, I will then notify you of the procedure you can follow to request an oral hearing before the Board.

2. If, after reading the Hearing Decisions and Recommendation, you find that there is no basis for filing a Request for Reconsideration, but nevertheless desire to have an oral hearing before the Board, a written request must be mailed with 30 days to: State Board of Equalization, P.O. Box 942879, Sacramento, CA 95279-0001, Attn: Janice Masterton, Assistant to the Executive Director.

3. If neither a Request for Board Hearing nor a Request for Reconsideration is received within thirty (30) days from the date of this letter, the Hearing Decisions and Recommendation will be present to the Board for final consideration and review.

Very truly yours,

James E. Mahler
Hearing Officer

cc: Ms. Janice Masterton
Assistant to the Executive Director
With Copy of Hearing Decision and Recommendation

Mr. Glenn Bystrom
Principal Tax Auditor (file attached)

STATE OF CALIFORNIA

BOARD OF EQUALIZATION

APPEALS UNIT

In the Matter of the petition for Redetermination Under the Sales and Use Tax Law of:	)	DECISION AND RECOMMENDATION
Petitioner	)	

The above-referenced matter came on regularly for hearing before Hearing Officer James E. Mahler on July 13, 1989, in Santa Ana, California.

Appearing for Petitioner: REDACTED TEXT

Appearing for the Department of Business Taxes: Greg Reynolds, Senior Tax Auditor

Protested Item

The protested tax liability for the period January 1, 1984, through December 31, 1986, is measured by:

	Item	State, Local and County	LACT
Ex-tax purchases of materials and fixtures subject to use tax:			
A.	Acquired from out-of-state vendors	$2,123,379	$1,528,187
B.	Acquired from California vendors	4,097,547	3,102,028
		$6,220,926	$4,630,215

Petitioner's Contentions

1. Petitioner denies liability and requests a reversal of any amounts of the determination which are asserted on the total selling price or contract price as set forth in the purchase orders, contract documents or proposals by vendors which exceed the amount of tax due on the incorporated materials at the time the petitioner's subcontractor acquired the said materials.

2. Petitioner furnished items of machinery and equipment to the United States Government or one of its agencies.

3. The audit working papers disclosed that an amount of use tax was asserted on purchases of materials, machinery and equipment which was at the time of sale subject to the imposition of a sales tax.

Introduction

Petitioner is a corporation engaged in business as a construction contractor. It was previously audited for the periods January 1, 1977 through December 31, 1980 and January 1, 1981 through December 31, 1983. Both of those prior audits resulted in determinations which were ultimately paid and are currently being litigated in suits for refund.

The current audit has asserted use tax on a number of purchases of tangible personal property. In each case, the auditor found that petitioner had purchased the property under a resale certificate or from an out-of-state vendor, without paying tax reimbursement to the vendor or use tax to the state, then furnished and installed the property pursuant to a "United States construction contract" as that term is defined in Sales and Use Tax Regulation 1521. Petitioner contends for various reasons that most of the purchases are nontaxable under the terms of the regulation (the "Regulation 1521 issues") or alternatively, that any applicable tax is due from the vendor and not from petitioner (the "proper taxpayer issues"). Petitioner also raises factual or accounting issues with respect to certain specific transactions (the "miscellaneous issues").

Summary
(Regulation 1521 Issues)

Substantially all of the liability results from purchases for six construction jobs. We understand that petitioner was a general contractor on each job, and that its customer was an agency or instrumentality of the United States Government. The six jobs are as follows.

Job No. [1]. According to testimony at the appeal hearing, this job involved work on a flight simulator building at the REDACTED TEXT. Petitioner's representatives at the hearing could not recall exactly what work petitioner had done. We therefore held the record open after the hearing so that petitioner could submit a copy of the contract and a written description of the work. No copy of the contract has been presented, but petitioner did provide the following description of the work by letter dated August 17, 1989:

"Reinforced masonry and steel framed building with insulated panels including electrical and mechanical to service Operational Training Facilities (Flight Simulator)."

The total contract price was $3,068,882. The auditor asserted use tax on purchases totalling $31,932. Included are purchases of two "Fisher regulators" (1, 2, 26 and 1, 2, 30).[1/] According to testimony at the appeal hearing, these were probably valves placed in air or hydraulic lines.

Most of the audited measure is from two purchases of air conditioners (1, 3, 9 and 1, 3, 13) which the auditor classified as fixtures. According to testimony at the appeal hearing, these air conditioners were installed in the flight simulator room itself, and were probably intended to provide a stable environment for the flight simulator computers.

Job No. [2]. According to testimony at the appeal hearing, this work was done at a jet engine testing facility in REDACTED TEXT. The total contract price was $2,573,636. Tax has been asserted on purchases totalling $212,796.

Petitioner's representatives at the appeal hearing were uncertain as to the details of this job. No copy of the contract or description of the work has been presented.

The auditor asserted tax on purchases of an air compressor and accouterments (1, 2, 19 and 1, 5, 13 et seq.); rings and flanges (1, 9, 30 et seq.); and sheet metal (1, 10, 1 and 3). According to testimony at the appeal hearing, the air compressor is bolted to the floor of the test cell structure and is used to start the jet engines. The rings and flanges are installed on piping leading from the air compressor to the engines. The sheet metal is bolted to the internal surfaces of the test cell and functions as accoustic paneling. Petitioner's representatives believe that the sheet metal is often removed and replaced.

Job No. [3]. This was also a contract to build or refurbish a jet engine test cell. Petitioner has not provided a copy of the contract or any description of the work.

The total contract price was $3,439,000 and included installation of compressors, pumps, a refrigeration system and several other devices. The auditor asserted tax only on purchases of steel for $1,800 (3, 16, 4 et seq.) and nuts and bolts for $210 (3, 9, 24).

Job No. [4]. No copy of the contract or written description of this job has been provided for our review. According to testimony at the appeal hearing, the work was performed at REDACTED TEXT dry dock used in repairing and maintaining ships.

[1/] Throughout this hearing report, we shall use a three-number code to indicate where specific purchased can be located in the audit workpapers. The first number of the code will be a one, a two or a three, referring respectively to Schedule 12A-1, Schedule 12A-2 or Schedule 12A-3 of the workpapers. The second and third numbers refer to the page and line of the specific schedule.

Petitioner's representatives described the dry dock as a barge which is attached to a pier in such a manner that it can rise and fall with the tide. Electrical lines run underground from a shore facility to the dry dock. Fresh water is provided from the shore facility through pipes which run along the pier, then through flexible hoses from the pier to the dry dock. An air compressor is installed under the pier, and compressed air is supplied to the dry dock through flexible hoses for use in inflating flotation devices and operating pneumatic tools. Other flexible lines and cables supply electricity, fresh water and compressed air from the dry dock to the ships being repaired. The dry dock is also equipped with emergency pumps to take salt water from the bay for use in fighting fires.

The total contract price for the work done by petitioner was $20,145,556. The audit asserted tax on purchases of approximately $1,570,000. Included are purchases of pipes, tubing, valves, spools, clamps, gaskets, nuts and bolts, rectifiers, cast iron anodes, aluminum sheets, fabricated steel and steel beams.

Also included in the audit measure of tax are purchases of "concrete piles" (1, 6, 3-11). These are the pilings which support the pier. According to testimony at the appeal hearing, each pile is driven 60 to 80 feet deep into the bottom of the bay.

The measure also includes purchases of "pneumatic dryers" (1, 2, 13 et seq.) which are used to filter and remove excess moisture from air lines. We assume that the dryers are located under the pier, near the air compressors. Petitioner's representatives at the appeal hearing stated that the dryers are only "incidentally attached".

Job No. [5]. This job was for the construction or refurbishing of a pier used to refuel ships, as well as construction of a pipeline to carry the fuel to the pier from an existing refinery or storage depot. Some portions of the pipeline were buried and some portions were laid underwater. The total contract price was $30,189,498.

No copy of petitioner's contract with the government is available. Petitioner has submitted a written description of the work as follows:

> "A. Three 18" diameter pipelines each approx. 3.5 miles long exist. REDACTED TEXT Fuel Depot near REDACTED TEXT Blvd. and REDACTED TEXT Bridge extending across REDACTED TEXT Harbor to REDACTED TEXT at the REDACTED TEXT. Work includes storage tanks, reclamation [sic] fuel ballast handling, air and wastewater systems, miscellaneous [sic] bldgs., electrical and 65' wide by 1060 foot long pile support pier with marine fendors. [¶] The main portion of the pipeline is on Government leased land or right of way including the channel cross from REDACTED TEXT.

Audited taxable purchases for this job total approximately $4,235,000, including purchases of nuts and bolts, washers, flashing, steel, several different types of pipes and valves, steel baskets (used as filters inside the pipeline), coalescing plates (filters for a waste fuel disposal system), fabricated steel, concrete mix, concrete piles and mooring hooks.

Also included are: six 16-foot and four 12-foot manual marine loading arms, which are attached to the pier and are used to move the hoses which carry the fuel from the pier to the ship (2, 4, 6); filter/separator and clarifier units, which are bolted to the pier and used to clean the fuel being loaded into the ship (2, 5, 7); a fendering system, that is, bumpers to keep ships from scraping the pier (2, 7, 1 and 2, 11, 30 and 3, 12, 1);; "RBLD 6" bore CYL," described at the hearing as hydraulic valves for the fuel lines (2, 10, l); "Model 3711", described at the hearing as hose reels for air or water lines (2, 10, 14); and a heat exchanger, bolted to the dock at the end of the pipeline, used to warm the fuel so that it will flow more easily through hoses to the ship (3, 9, 9).

Job No. [6]. According to testimony at the appeal hearing, this is an experimental facility designed to test a new or improved system for dredging sand and silt from harbor bottoms. The facility is located at REDACTED TEXT, California, but is allegedly intended to be removed when testing is completed in 1990. Tile total contract price is $5,551,994 and the audit has asserted tax on purchases of approximately $165,000.

We understand that the system includes a barge (110 feet long by 80 feet wide) upon which the dredging pumps are located; two platforms which rest on pilings embedded in the harbor bottom, one on each side of the harbor; and a submerged pipeline to carry the sand from each platform to an existing pipeline on the beach. During operation, the barge is moored to one of the platforms, raised up the pilings to a height of approximately 25 feet above the water, and then gradually lowered as the sand is removed. Upon completion, the barge is towed to the other platform to dredge the other half of the harbor.

Petitioner has presented the following written description of this job:

> "A. Sand Bypassing Facility Plant trailer mounted on a mobile jackup barge includes Diesel engines, pumps, motor control and monitor system, crane complete with submerged pipelines, jet pumps, booster pump, fuel systems and discharge point piping. [¶] The platform (Barge) is redeployed between North REDACTED TEXT and South REDACTED TEXT as directed by Army. [¶]
>
> The North REDACTED TEXT and South REDACTED TEXT Jet Pump Systems are retrieved and redeployed between North and South REDACTED TEXT as directed by Army. [¶]
>
> After construction phase is completed there is a two year lease period for the mobile barge and trailer pump system. First year operation is by contractor, second year operation is by Government. Upon termination of lease period (2 yrs) contractor will remove and deliver the barge mounted Government equipment (Trailer Pump System) over to the Army together with all other parts of the installation. [¶] This plant is strictly for experimental purposes. The research gathered will be used to determine feasibility at other locations."

Petitioner has also submitted photocopies of pages 1E-l and 1E-2 of its contract for this job. These two pages are apparently only a small part of the entire contract. Section 1.9 on page 1E-2 provides: "Upon termination of the Barge Lease, the Contractor shall deliver the Barge Mounted Government Equipment to" a government storage facility REDACTED TEXT.

Petitioner has also submitted a copy of a letter dated January 8, 1987, which it received from the Department of the Army. This letter emphasized that petitioner must apply protective coating to "steel pipe piles" so that they remain structurally sound for the duration of the "experiment". The letter also states that petitioner is "required to remove [the piles] at the conclusion of this experiment".

The auditor concluded that the barge is not an improvement to realty, but that the platforms and submerged pipes are improvements to realty. Accordingly, no tax was asserted on property which the auditor believed had been purchased for installation on the barge. Tax was asserted on property which the auditor believed to be part of the platforms and submerged piping.

The specific items upon which tax was asserted include nuts and bolts, pipe, fittings, steel and epoxy, in the total amount of approximately $165,000. According to testimony at the appeal hearing, the pipes and fittings (3, 15, 13-24) were for use in the submerged pipe system.

Other jobs. The auditor also asserted tax on purchases totalling $802 for jobs REDACTED TEXT and REDACTED TEXT. It appears that job REDACTED TEXT is the same job as REDACTED TEXT described above. Job REDACTED TEXT is not identified in the record.

Analysis and Conclusion
(Regulation 1521 Issues)

Petitioner's arguments regarding Regulation 1521 can be grouped into three categories: (1) whether the contracts were construction contracts; (2) if they were, whether any of the specific items furnished by petitioner were machinery and equipment, rather than fixtures or materials; and (3) whether petitioner was the installing contractor.

(1) Subdivision (a) (1) (A) of Regulation 1521 defines "construction contract" to mean and include contracts to:

> "1. Erect, construct, alter, or repair any building or other structure, project, development, or other improvement on or two real property, or
>
> "2. Erect, construct, alter, or repair any fixed works such as…pipelines and other systems for the transmission of petroleum and other liquid or gaseous substances...."

Under general legal principles in this state, the classification of property as an improvement to realty depends on: (1) the manner of its affixation to realty; (2) its adaptability to the use and purpose for which the realty is used; and (3) the intention of the parties making the annexation. (San Diego First Savings Bank v. County of San Diego, 16 Cal.2d 142.) At least for tax purposes, the controlling intent is not subjective intent, but objective intent as manifested by the physical facts surrounding the annexation. (Bank of America v. County of Los Angeles, 224 Cal.App.2d 103.) The objective intent of the parties as manifested by the physical facts is regarded as the crucial and overriding factor, with affixation and adaptability as subsidiary

ingredients relative to the determination of intent. (Sea Train Terminals of California, Inc. v. County of Alameda, 83 Cal.App.3d 69.)

With respect to jobs REDACTED TEXT, REDACTED TEXT and REDACTED TEXT, the auditor found that petitioner contracted with the government to improve real property. Petitioner has not presented copies of the contracts or any other contrary evidence. Accordingly, we find no basis for disagreeing with the auditor.

We reach the same conclusion with respect to job REDACTED TEXT including job REDACTED TEXT. The auditor found that the dry dock was an improvement to realty and petitioner has not presented a copy of the contract or any other contrary evidence. We also note that this dry dock was found to be an improvement to realty in the last prior audit of petitioner. The Board has recently found this dry dock to be an improvement to realty in audits of other taxpayers as well.

At the appeal hearing, petitioner's representatives conceded that job REDACTED TEXT was a construction contract. We agree entirely. The pipeline and pier are permanent improvements intended to remain in place.

This leaves job REDACTED TEXT. The portions of the contract submitted by petitioner state that "Barge Mounted Government Equipment" will be removed after two years and delivered to a government storage facility. The staff concedes that the barge, and the equipment installed thereon, are not improvements to realty. We agree.

The portions of the contract presented in REDACTED TEXT evidence do not mention the submerged pipeline. We therefore have no basis for disturbing the auditor's conclusion that the submerged pipeline is an improvement to realty. The mere fact that this facility is intended as an experiment does not prove that the submerged pipeline is tangible personal property.

As for the pilings and platforms, the applicable portions of the contract have not been presented in evidence. Although the Army's January 8, 1987 letter indicates that petitioner is required to remove the pilings after two years, this in itself is not sufficient to show that the pilings and platforms are tangible personal property rather than improvements to realty.

Even assuming that the pilings remained tangible personal property, however, we would still recommend no adjustment to the audit at this time. Petitioner admits it was to operate the experimental facility itself for at least the first year. There is no evidence to suggest that petitioner has resold the pilings and platforms to the government, or even if it has resold them, that the resale occurred prior to use by petitioner. If the pilings and platforms are tangible personal property, they are tangible personal property which petitioner purchased for use in operating the experimental facility and not for resale to the government.

(2) Regulation 1521 distinguishes between "fixtures" and "materials" which are considered to be improvements to realty, and "machinery and equipment" which are not considered improvements. The term "machinery and equipment" is defined in subdivision (a) (5) of the regulation as follows:

"'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 or 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 [sic] 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."

Petitioner contends that some of the items in question qualify as machinery and equipment. However, petitioner does not identify the specific items to which it refers. Furthermore, except for allegations by petitioner's representatives at the appeal hearing, petitioner has also not presented any evidence of the function, manner of attachment or removability of any item. Lacking such evidence, petitioner has failed to prove that any item qualifies as machinery and equipment.

(3) This contention involves purchases of pipe and pipe fittings from the REDACTED TEXT for use on job (1, 8, 28 and 32); "purchases of steel beams from REDACTED TEXT for that same job (1, l0, 10-17 and 2, 1, 5); and purchases of coalescing plates from REDACTED TEXT for job REDACTED TEXT (2, 4, 23). In each case, petitioner contends that it not only purchased the property from the vendor, but also hired the vendor as a subcontractor to do the installation work. Petitioner contends that the vendor, as the installing contractor, should be liable for any applicable use tax.

Petitioner has presented a copy of its June 16, 1983 subcontract with REDACTED TEXT. The first paragraph of Attachment A to the contract provides: "Subcontractor will furnish all labor, materials, taxes, equipment, supplies and any other items necessary for furnishing, installing and testing" the steel. However, paragraph six of that same attachment provides, "See Attachment 'B' for Enumeration of items to be furnished only and furnished and installed...." Petitioner has not seen fit to provide a copy of Attachment B for our review, and we are therefore unable to determine whether the transactions taxed in the audit are purchases of steel which the vendor furnished and installed, or purchases of steel which petitioner itself installed. We therefore find the evidence insufficient to warrant any adjustment at this time.

No evidence whatsoever has been presented for the other transactions. Accordingly, we find no basis for adjustment.

Summary
(Proper Taxpayer Issues)

Petitioner contends that any applicable tax on the following types of transactions should have been assessed against the vendor, not against petitioner.

(1) Many of the audited purchases were from California vendors to whom petitioner had issued blanket resale certificates. In some cases, the auditor found that petitioner had given a purchase order to the vendor which was marked "taxable", but the vendor had failed to charge tax reimbursement on its invoice to petitioner. The auditor concluded that the purchase order marked "taxable" was sufficient to revoke the resale certificate as to that specific purchase, so that the applicable tax would be a sales tax on the vendor. No use tax was asserted against petitioner in such cases (see 3, 10, 27-33 for examples).

In other cases, however, although petitioner had a copy of a purchase order marked "taxable" in its records, the auditor found that the purchase order was simply an internal document prepared by petitioner for its own records, and that no copy had ever been sent to the vendor. The purchase apparently had been made pursuant to a contract or perhaps a verbal purchase order. Since petitioner had not given a purchase order marked "taxable" to the vendor, the auditor concluded that the blanket resale certificate issued by petitioner was sufficient to cover the transaction and to relieve the vendor of liability for sales tax. Use tax was accordingly asserted against petitioner (see 3, 10, 6-17 for examples).

At the appeal hearing, petitioner's representatives admitted that petitioner sometimes prepared purchase orders marked "taxable" for internal record-keeping purposes, without sending copies to the vendors. However, they contended that purchase orders marked "taxable" had in fact been sent to the vendors in "about half" of the transactions where the auditor found that such a purchase order had not been sent. They did not specify any particular transactions and did not present any supporting evidence.

(2) Petitioner's next contention also involves purchases from California vendors to whom petitioner had issued blanket resale certificates. Again, if the auditor found that a purchase order marked "taxable" had been given to the vendor, no use tax was asserted against petitioner. However, if no purchase order could be located, use tax was asserted (see 2, 4**,** 34-35 as examples). Petitioner contends that if all or most of the available purchase orders to a vendor were marked "taxable", it should be presumed that any missing purchase orders to the vendor were also marked "taxable" and were in fact sent to the vendor.

(3) This next contention also involves California vendors to whom petitioner had issued blanket resale certificates. In these cases, a purchase order was sent to the vendor, but the purchase order was not marked either "taxable" or "for resale" (see 2, 5, 28 as an example). According to testimony at the appeal hearing, this could happen when the clerk who filled out the purchase order simply forgot to check the appropriate box. Petitioner contends that if all or most purchase orders to a vendor were marked "taxable", then any purchase order inadvertently left blank should be sufficient to revoke the resale certificate for that particular transaction.

(4) In some transactions involving California vendors to whom petitioner had issued

blanket resale certificates, petitioner gave the vendor a purchase order marked "taxable" and the vendor accordingly charged tax reimbursement on the invoice. However, petitioner crossed out the tax reimbursement on the invoice and did not pay it. Petitioner returned the invoice to the vendor with a notation that the purchase was "for resale" (see 1, 2, 17 as an example). Petitioner's representatives at the appeal hearing objected to the assertion of use tax in such cases, but we are uncertain of the basis for their objection.

(5) These are purchases from out-of-state vendors. The audit either found or assumed that the property had been delivered to petitioner in California by carrier.

Petitioner alleges that the vendors in fact delivered the property to petitioner in California via their own facilities, so that the sales occurred in this state and the vendors should be liable for sales tax (see 2, 6, 29 as an example). Alternatively, if the property was delivered into this state by carrier, petitioner contends that the vendor's representatives subsequently entered California to supervise the installation of the property (see 2, 4**,** 23 as an example).

(6) This contention involves one purchase from an out-of-state vendor (2, 9, 30). At the appeal hearing, petitioner's representatives conceded that the property was delivered from out of state by carrier and that any applicable tax would be a use tax on petitioner. However, petitioner's representatives contended that the vendor was engaged in business in California and therefore had a duty to collect the use tax from petitioner. They argued that the vendor's collection duty would be primary, and that the Board should therefore assess the tax against the vendor rather than against petitioner.

Analysis and Conclusions
(Proper Taxpayer Issues)

(1), (2) and (3). Revenue and Taxation Code Section 6401 provides:

> "The storage, use, or other consumption in this state of property, the gross receipts from the sale of which the purchaser establishes to the satisfaction of the board were included in the measure of the sales tax, is exempted from the use tax...."

In each of the transactions at issue here, petitioner had issued a blanket resale certificate to the vendor. Such blanket certificates are sufficient to relieve the vendor from liability for sales tax "until revoked in writing". (Sales and Use Tax Reg. 1668(b) (2) (B).) Although petitioner had purchase orders marked "taxable" in its records for some of these purchases, there is no evidence to show that such purchase orders were sent to the vendors or that petitioner otherwise revoked the blanket resale certificates. We therefore conclude that the blanket resale certificates were sufficient to relieve the vendors from liability for sales tax. Petitioner thus does not qualify for use tax exemption under Section 6401.

(4) In these transactions, petitioner issued a purchase order marked "taxable" to the vendor, but upon receipt of the vendor's invoice charging tax reimbursement, petitioner crossed out the tax reimbursement and refused to pay it. Petitioner returned the invoices to the vendors with a notation that the purchase was for resale. We agree with the auditor that the blanket resale

certificate petitioner issued to these vendors, coupled with the "for resale" notation on the returned invoices, relieved the vendors from liability for sales tax. Petitioner is therefore not entitled to a use tax exemption under Section 6401.

(5) Subdivision (a) (1) of Sales and Use Tax Regulation 1620 provides:

> "When a sale occurs in this state, the sales tax, if otherwise applicable, is not rendered inapplicable solely because the sale follows a movement of the property into this state from a point beyond its borders....If title to the property sold passes to the purchaser at a point outside this state, or if for any other reason the sale occurred outside this state, the sales tax does not apply...."

In the transactions at issue here, the auditor found that the sales occurred outside California because the property was delivered into this state by carrier. Petitioner contends otherwise, but has presented no evidence. Even if the vendor subsequently sent representatives to California to supervise installation, this would not subject the previous delivery by carrier to sales tax rather than use tax. We therefore find no basis for disagreeing with the auditor. We conclude that petitioner is not entitled to exemption from the use tax under Section 6401.

(6) Revenue and Taxation Code Section 6203 provides that retailers engaged in business in California have a duty to collect any applicable use tax from their purchasers. However, Section 6202 of the Code provides that the purchaser's liability for use tax "is not extinguished" until the tax has been paid to the state, unless the purchaser receives a receipt from a retailer who is engaged in business in California or who is otherwise authorized to collect the tax.

In the transaction at issue here, even assuming that the retailer was engaged in business in California, the tax has not be paid to the state and petitioner has no receipt showing that the tax was collected by the retailer. Petitioner's liability for the use tax has therefore not been extinguished.

Summary, Analysis and Conclusions
(Miscellaneous Issues)

(1) Petitioner contends that twice on a single purchase, once on 1, 3, 15 and again on 1, 10, 22. At the appeal hearing, the staff conceded that petitioner is correct.

(2) The auditor asserted use tax on a number of transactions which were described on the purchase orders or vendor invoices as purchases of "blueprints" (2, 3, 26-35 and 3, 6, 1-17). At the appeal hearing, petitioner's representatives denied that these were in fact purchases of blueprints, and contended that they were purchases of computer processing services.

According to petitioner's representatives, petitioner was required to provide job-related information to the government on computer tape. Petitioner provided the raw information to a computer service bureau for transcription onto computer tape, which petitioner could then send to the government.

Subdivision (c) (3) of Sales and Use Tax Regulation 1502 provides:

"A transfer for a consideration of the title or possession of tangible personal property which has been produced, fabricated, or printed to the special order of the customer, including property on which or into which information has been recorded or incorporated, is generally a sale subject to tax. However, if the contract is for the service of researching and developing original information for a customer, tax does not apply to the charges for the service. The tangible personal property used to transmit the original information is merely incidental to the service."

Similarly, subdivision (d) (l) of that regulation further provides:

"Generally tax applies to the conversion of customer-furnished data from one physical form of recordation to another physical form of recordation. However, if the contract is for the service of developing original information from customer-furnished data, tax does not apply to the charges for the service. The tangible personal property used to transmit the original information is merely incidental to the service."

No evidence has been presented to describe exactly what sort of "services" were performed by the computer service bureau. It appears that these transactions involved the production of computer tape to petitioner's special order, or the conversion of petitioner's data from one physical form of recordation to another. Accordingly, we find no basis for concluding that tax does not apply.

(3) This contention involves purchases of steel elbows and valves for job (3, 8, 30-33 and 3, 16, 11-15). As noted above, the staff concedes that the barge portion of this job was not an improvement to realty, and the auditor did not intend to assert tax on any purchases for installation on the barge. However, the auditor found that these steel elbows and valves were purchased for installation on the platforms, so tax was asserted. Petitioner contends that they were actually purchased for installation on the barge.

No blueprints, plans or specifications have been presented to show where the steel elbows and valves were actually installed. Nor has any other evidence been presented. We therefore find no basis for disturbing the auditor's findings.

(4) This is a purchase of an air compressor for job REDACTED TEXT (3, 4, 11). The auditor found that this was a portable compressor not attached to the realty. However, the auditor found no evidence to indicate that petitioner had resold this compressor to the government or, if resold, that the resale had occurred prior to use by petitioner. The auditor therefore concluded that petitioner had purchased this compressor for use and not for resale to the government.

Petitioner has presented no evidence to contradict the auditor's findings. We find no basis for adjustment.

(5) Petitioner rented a crane from an out-of-state company for use on job REDACTED TEXT. The auditor found that petitioner was not liable for use tax on this rental. However,

petitioner also purchased crane parts from this same out-of-state vendor, and the auditor asserted use tax on that purchase (2, 4, 22).

At the appeal hearing, petitioner's representatives assumed that petitioner must have damaged the crane while using it, and therefore been required to purchase repair parts. Assuming that is correct, tax would apply to the purchase.

(6) Petitioner purchased pumps for job REDACTED TEXT from REDACTED TEXT, a California vendor (3, 12, 28-35). The auditor concluded that tax applies because petitioner installed the pumps as fixtures (improvements to realty). Since job REDACTED TEXT was performed within the REDACTED TEXT County Transit District, the auditor further concluded that both state tax and transit tax are applicable.

Regarding the state tax, it appears that the vendor failed to charge tax reimbursement to petitioner in reliance on petitioner's purchase order, which was marked "nontaxable". However, the auditor noted that petitioner had not given a resale certificate to the vendor, and that petitioner's purchase order did not include the essential elements of a resale certificate. The auditor therefore concluded that the applicable tax was a sales tax on the vendor. No state use tax was asserted against petitioner.

Regarding the transit tax, the auditor noted that the vendor is engaged in business in REDACTED TEXT, California, and has no place of business in a transit district. The auditor further found that the pumps had been delivered to the job site in the transit district by Consolidated Freightways, a common carrier. The auditor therefore concluded that the applicable transit tax is a use tax on petitioner.

At the appeal hearing, petitioner's representatives contended that the applicable transit tax is a transactions (sales) tax on the vendor. In support, they alleged that the vendor delivered the pumps to the jobsite via its own trucks, not by common carrier. They presented no evidence, however.

The transactions (sales) tax applies only if the place of sale is within a transit district. (See Transactions and Use Tax Reg. 1823(a) (1).) The "place of sale" means the retailer's place of business where the principal sale negotiations are carried out. (See Transactions and Use Tax Reg. 1822(a).) Since the vendor in this case had no place of business in a transit district, the transactions (sales) tax does not apply, even if the vendor delivered the pumps to the jobsite via its own trucks. The applicable transit tax is a use tax on petitioner.

(7) Petitioner contends that the vendor has already paid sales tax with respect to one of the audited purchases (1, 2, 1). No evidence has been presented; therefore no adjustment is warranted.

* * *

We have found herein that petitioner is liable for tax on numerous purchases because petitioner has failed to present evidence supporting any exemption. If evidence is in fact available, petitioner should present it to the hearing officer by a request for reconsideration. We will revise our recommendation to the Board to the extent warranted by any such evidence.

During the administrative proceedings in tile two prior audits of petitioner, the hearing officer and the Board concluded that tax had properly been asserted on numerous transactions because petitioner had failed to present evidence supporting exemption. Petitioner paid the determinations, filed claims for refund and sued. At or shortly before trial, petitioner finally came forward with evidence. Based on that evidence, the Board conceded that petitioner was entitled to a refund measured by $527,366.

Petitioner's tactic of awaiting trial before submitting evidence is extremely wasteful. It wastes petitioner's time, it wastes the Board's time and it wastes the trial court's time. We do not know whom this tactic is intended to benefit.

More importantly, petitioner's tactic is not without danger. If this current audit proceeds to litigation, we cannot guarantee that the trial court would allow submission of evidence not previously presented to the Board. (See E.C. Barnes v. State Board of Equalization, 118 Cal.App.3d 994.) If evidence supporting any exemption is actually available, therefore, petitioner would be well advised to submit it to the hearing officer.

Recommendation

Delete the duplicate transaction and redetermine without other adjustment to the tax.

_____ 12/5/89

James E. Mahler, Hearing Officer Date