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STATE OF CALIFORNIA
BOARD OF EQUALIZATION
APPEALS SECTION

In the Matter of the Petition)
for Redetermination Under the) DECISION AND RECOMMENDATION
Sales and Use Tax Law of:)
)
REDACTED TEXT, INC.) No. SY KHD REDACTED TEXT
Dba REDACTED TEXT)
)
Petitioner)

The Appeals Conference in the above-referenced matter was held by Tax Counsel Michele F. Hicks, on April 17, 1996 in Sacramento, California.

Appearing for Petitioner: REDACTED TEXT
President; Shareholder

REDACTED TEXT
Shareholder

REDACTED TEXT
Controller

Appearing for the Sales Mr. Leon Adams
and Use Tax Department: District Principal Auditor

Type of Business: Sales of new and used mobile homes.

Protested Item

The protested tax liability for the period January 1, 1991 through June 30, 1994 is measured by:

<u>Item</u>	<u>STTI</u>
Additional 1.25% tax increase Effective July 15, 1991	\$1,249,497

Petitioner's Contentions

1. The contested tax is being assessed on sales of mobile homes made prior to July 15, 1991 on fixed price contracts. Therefore, the sales are exempt from the tax increase even though escrow did not close and the units were not delivered until after July 15, 1991.

Summary

During the audit period, petitioner was a corporation which engaged in the business of selling new and used mobile homes from six lots.

The audit item in issue concerns the audit staff's assessment of an additional 1.25% tax on 75% of the cost of new mobile homes to petitioner. The sales contracts for these mobile homes were signed prior to July 15, 1991 when a 6% tax rate was in effect. However, escrow did not close on the sales until after July 15, 1991 when the 7.25 % tax rate was in effect. The auditor set up an additional 1.25% tax on units sold according to the date escrow closed.

Petitioner contends that these sales were made under fixed price contracts. Therefore, the additional 1.25% tax is exempt under Revenue and Taxation Code section 6376.1. Petitioner also contends that it called the Board's Oroville branch office to inquire about the tax treatment of these sales and was told that the 6% tax rate would apply.

Petitioner has submitted copies of cost sheets prepared for each sale. The cost sheets itemize a 6% "sales tax" charged on 75% of the cost of the mobile home.

Petitioner has also submitted copies of the "Manufactured Home Purchase Order and Federal Disclosure Statements" which serve as the sales contracts. The total cash price is listed on the contract. There is no provision which allows either the purchaser or seller to cancel the contract.

The audit staff argues that petitioner's sales contracts are not fixed price contracts. This conclusion is based on a conversation the staff had with petitioner's president, Mr. REDACTED TEXT. According to the staff, Mr. REDACTED TEXT said the purchaser get out of the contract if, for example, the purchaser is not able to obtain financing, or for other reasons. Petitioner argues these are fixed price contracts. By law, escrow must be opened within 72 hours of the signing of the Federal Disclosure Statement. The cost sheets prepared by petitioner are given to the lenders and the loan is based on the amount in the cost sheet.

Analysis and Conclusions

On June 30, 1991, the Legislature enacted Assembly Bill 2181, Statutes 1991, Chapter 85. This bill amended sections 6051 and 6201, and added sections 6051.2, 6051.5, 6201.2, and 6201.5 of the Revenue and Taxation Code which raised the statewide sales and use tax rate by $\frac{1}{4}$ percent. This bill also added Revenue and Taxation Code section 6376.1 which provides that certain contracts executed prior to July 15, 1991, in which the seller is obligated to sell or the buyer is obligated to purchase tangible personal property for a fixed price, are not subject to the new rates.

In determining whether a contract, other than construction contracts or leases, is for a fixed price, the Board has consistently required that the contract satisfy the following criteria: (1) it be binding prior to July 15, 1991; (2) the contract must fix the amount of all costs at the outset; (3) the contract must include a provision which fixes the tax obligation on a tax included basis or sets forth the rate of tax and does not provide for an increase in the amount of tax. (Sales and Use Tax Annotation 190.2810, 4/20/93.)

The contracts for the sales in issue here were all entered into before July 15, 1991. The audit staff argues that they were not binding in practice, the purchaser could get out of the contract.

If petitioner chose not to enforce the contract in certain cases, that would be a voluntary election petitioner made subsequent to entering into the contract. However, the contract itself is binding. There is nothing in the contract which allows either the purchaser or the seller to cancel the contract. The first requirement for a fixed price contract is met.

The second requirement is that the amount of all costs be fixed at the outset. Petitioner's contract/disclosure statement specifically itemized and lists all the costs. No term is left open. The contract contains a "Notice to Buyer" that the buyer is entitled to a completely filled-in copy of the agreement. There is no provision for a change in the quoted prices. Therefore, the second requirement is meet.

The third requirement is that the tax obligation be fixed.

The general rule for sales of new mobile homes is that, unless the transaction qualifies as a sale for occupancy as a residence, or is otherwise exempt, tax applies to the gross receipts from the sale of a new mobile home to the same extent as sales of other tangible personal property. (Reg. 1610.2(b)(3)(A).) Special rules, however, apply to sales of new mobile homes sold to a customer for occupancy as a residence if the transaction would otherwise have been subject to the sales tax and the mobile home is thereafter subject to local property taxation. In such transactions, the retailer is regarded as the consumer of the mobile home sold to the customer. The retailer-consumer, though, may give a resale certificate for the purchase of the mobile home by the retailer-consumer but must report the gross receipts or sales price from the purchase with the return for the period during which the mobile home is sold to the purchaser for installation for occupancy as a residence. The gross receipts or sales price is 75 percent of the sales price of the mobile home to the retailer-consumer. The retailer-consumer may not charge the purchaser tax reimbursement. (Rev. & Tax. Code §§ 6012.8 and 6012.9 and Regulations 1610.2 and 1668(e).) The applicable tax is a use tax imposed upon the dealer. Therefore, the audit staff argues that the section 6376.1 exemption does not apply to sales of new mobile homes by a "retailer-consumer".

Section 6376.1(a)(1)(A) provides:

- “(a) On and after July 15, 1991, there are exempted from the taxes imposed by this part an amount equal to an amount that is attributable to a $\frac{1}{4}$ percent rate of tax with respect to the following:
 - “(1) The gross receipts from the sale of and the storage, use, or other consumption in this state of the following:
 - “(A) Tangible personal property if the seller is obligated to furnish or the purchaser is obligated to purchase, the property for a fixed price pursuant to a contract entered into prior to July 15, 1991.”

Sales and Use Tax Annotation 190.2810, quote above, applies to sales transactions where the purchaser pays the tax. In the present appeal, we have the unique situation where the retailer pays the use tax; there is no Board annotation which covers this unique situation. However, we believe these transactions clearly come within the provisions of section 6376.1. That statute applies to gross receipts from sales of, and to the storage, use, and other consumption in this state, of tangible personal property. It is a broad statute which is intended to give relief to retailers who had already obligated themselves to a contract for the sale of goods under the prior 6% tax rate. There is no provision in the statute which we can interpret as excluding a use tax paid by a “retailer-consumer” for a new mobile home from this exemption.

Petitioner's cost worksheets separately state that the tax is 6% on 75% of the cost of the new mobilehome. The tax was passed on to the buyers in the sales price of the mobile home. There is no provision in the contract which allows petitioner to increase the price of the mobile home due to a tax increase. We conclude that the cost worksheet taken together with the sales contract/disclosure statement satisfy the requirement that the amount of tax be fixed.

Petitioner contends that it received misinformation from the Board. To excuse a tax, the misinformation must be in writing. (Rev. & Tax. Code section 6596.) Since petitioner did not receive written advice, petitioner would not qualify for relief. However, since we have concluded that the additional tax is not due, this issue is moot.

Recommendation

We recommend that the additional tax assessment under audit item H be canceled.

MICHELE F. HICKS, TAX COUNSEL

January 14, 1997

DATE

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