

Contentions

Petitioner contends that:

1. A resale certificate was accepted in good faith, therefore the deduction for sales for resale should be allowed.
2. Sales of pigeon feed should be allowed as exempt.

Summary

1. Petitioners are a husband and wife operating a wholesale and retail feed store as a partnership. They began in business January 15, 1976. This is their first audit.
2. Petitioners sold pigeon feed to a customer who paid with a check upon which a seller's permit number was written by the customer. Petitioners accepted this as a resale certificate, neither charging tax reimbursement nor reporting or paying tax. There is some evidence that this purchaser raises racing pigeons. The auditor reviewed petitioners' records for the first quarter of 1978 and this transaction was the only one questioned. The auditor investigated and found that the customer was not the holder of the seller's permit number listed on the check. This sale was disallowed as a sale for resale. An error factor of 1.4% was calculated based on this transaction and the error factor was applied to the entire audit period.
3. Petitioners state that the transaction involved 800 pounds of feed and argue that a sale of this size must be for resale. Petitioners state that a resale certificate was requested, but that the check with the permit number on it was all that was received. Petitioners contend that this was accepted in good faith as a resale certificate.
4. The auditor examined petitioners' records of exempt feed sales for the first quarter of 1978. Petitioner had regarded pigeon feed as exempt. The auditor disallowed the sales of pigeon feed. An error factor of 4.74% was calculated and was applied to the entire audit period. The error factor did not include the sale previously disallowed as a sale for resale.
5. Petitioners argue that pigeons are animals of a type normally used as food for humans; therefore, sales of feed are exempt from tax. Petitioners state that a number of other feed stores were contacted to see if they charged tax reimbursement on pigeon feed and none did. Petitioners state that they know of businesses that specifically raise pigeons for sale to restaurants. Petitioners state that in audits of the business prior to their purchase of it, pigeon feed was allowed as exempt.

Analysis and Conclusions

1. Sales and Use Tax Regulation 1587(b)(2)(A) provides that tax does not apply to sales of feed for any form of animal life the products of which ordinarily constitute food for human consumption. The regulation does not require that the animals for which the food is sold actually be used as food for human consumption. The question to be resolved here is, therefore, not whether the pigeon feed was actually fed to pigeons raised for human food, but whether pigeons are to be regarded as animals ordinarily used as food for humans. Restaurants serve squab which is pigeon cooked for human consumption. I conclude that pigeons are a type of animal ordinarily used for human consumption. Audit Item B should be deleted from the measure of tax.
2. While the sale that was disallowed as a sale for resale was also a sale of pigeon feed, that does not resolve Audit Item A. The test conducted by the auditor for Audit Item A was a test for improperly claimed sales for resale. The particular sale was not included in the test for improperly claimed exempt sales. Two questions are posed here. First, did petitioner hold proper documentation to support the sale as a sale for resale? Second, if the documentation was inadequate, did the auditor properly extrapolate the results of the test of one quarter to the entire audit period?
3. Section 6092 of the Revenue and Taxation Code provides that a resale certificate is effective if, among other requirements, it is taken in good faith from a person who holds a seller's permit. Petitioners' customer was not a holder of a seller's permit. That alone makes the check with a permit number on it ineffective as a resale certificate. There are also other reasons which need not be discussed at this point. See Sections 6091 and 6093 of the Revenue and Taxation Code and Sales and Use Tax Regulation 1668.
4. In the sale for resale sampling conducted by the auditor only one invalid certificate was found, and sales to that customer amounted to only 1.4% of the total amount claimed as sales for resale. It is my opinion that this is insufficient to base a percentage disallowance for the entire audit period. The auditor should have disallowed only the sales to the one customer. In this case the sales were sales of pigeon feed which were found to be exempt in a previous paragraph. Audit Item A should therefore be deleted from the measure of tax.
5. Audit Item C pertained to taxable delivery charges, and it was not protested by petitioner. It is not clear from the audit work papers whether any part of this item involved sales of pigeon feed. Since sales of pigeon feed are regarded as exempt, any charges for delivery of the pigeon feed are also exempt. The auditor should review the delivery charges on which tax was asserted and delete charges for delivery of exempt feed.

Recommendation

Delete Audit Items A and B from the measure of tax. Reduce Audit Item C for any delivery charges related to sales of exempt feed. Redetermine without other adjustment. Adjustment to be made by Van Nuys District Office.

H. L. Cohen, Hearing Officer

June 27, 19980

Date