

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

185.0325

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition)
for Redetermination Under the) DECISION AND RECOMMENDATION
Sales and Use Tax Law of:)
)
A--- W---, INC.) No. SR -- XX-XXXXXX-010
)
)
Petitioner)

The above-referenced matter was convened for conference on July 30, 1991 before Staff Counsel Janet Saunders in Arcadia, California.

Appearing for Petitioner:

No appearance was made at the hearing. B--- W---, Vice President, spoke to the staff counsel after the conference and his statements are considered herein.

Appearing for the
Sales and Use Tax Department:

Randy Bennett
Supervision Tax Auditor

Lillian Murkidjanian
Tax Auditor

Protested Item

The protested tax liability for the period January 1, 1986 to March 31, 1989 is measured by:

<u>Item</u>	<u>State, Local County and LACT</u>
Unreported taxable sales of L--- petroleum gas	\$205,983

Parties' Contentions

Petitioner contends that it was not a seller of the L--- gas delivered to catering trucks parked on its lot, that it collected money as a service and that it is the L--- gas company who is responsible for the payment of sales tax. Sales and Use Tax Department (SUTD) contends that petitioner was a seller and thus is responsible to pay sales tax.

Summary

Petitioner is a corporation; its business started in January 1983. There was a prior audit through the fourth quarter of 1985.

Petitioner operates a catering house making wholesale sales to catering trucks; the trucks occupy space on petitioner's premises for overnight parking and daily maintenance of inventory; the catering trucks are individually owned. Petitioner sells prepared and unprepared food products, beverages, paper supplies and cleaning supplies. The catering trucks are also supplied with propane to fuel cooking grills. At issue is whether or not petitioner is liable to pay sales tax; specifically, the issue is: was petitioner the retailer of the fuel that was delivered to the catering trucks parked on petitioner's lot?

Propane was delivered at night by first one company, C--- P---, Inc., and then by another company, L--- E--- Corporation (L--- E---). (Because C--- P---, Inc. was the vendor for only a short period of time and because there does not appear to be a significant difference in their modes of operation, reference to L--- E--- herein shall include a reference to C--- P---.) L--- E--- would fill the propane tank of each catering truck and leave an invoice on the windshield of the truck, indicating the meter readings and gallonage used. The catering truck driver would take that invoice to petitioner's cashier and pay the amount owed together with the payments due for food and other stocked inventory. An invoice copy was provided to petitioner by L--- E---.

The arrangement between petitioner and L--- E--- during the audit period was as follows:

1. Petitioner collected the money owed as per the meter readings noted on the invoice. The price as invoiced by L--- E--- was ninety cents per gallon. Petitioner retained ten cents per gallon and gave the balance of eighty cents to L--- E---.
2. Petitioner handled all billings; there was no correspondence between the catering truck drivers and L--- E--- other than the invoice left on the windshield at time of delivery.
3. The contract between petitioner and L--- E--- was captioned a "Service Contract" and provided that L--- E--- would be the exclusive supplier of all petitioner's propane fuel needs for a period of five years. L--- E--- paid to petitioner the amount of \$10,000.

Petitioner claims that it believed that L--- E--- had already included the sales tax in its price. However, an exemplar invoice in the record shows that the only notations are the number of the catering truck, the date, the amount of gallons used and the meter reading before and after delivery; there was nothing on the invoice to indicate that tax was collected.

The arrangement between petitioner and L--- E--- was changed after the audit. The propane tanks are filled in a similar way. However, petitioner no longer collects any funds owed to L--- E---. A representative from L--- E--- comes to petitioner's lot on a regular basis and collects the money owed directly from the catering truck drivers. According to petitioner, this new procedure is the solution to this audit problem and "shows the real intent of the parties", i.e., that L--- E--- is the seller of the propane and that petitioner collected money only as a courtesy/service. Petitioner compares its collection of the propane funds to the impound account it keeps for the catering truck drivers to help them accumulate funds to pay their insurance; however, there is no indication that petitioner retains a portion of the impound account.

According to SUTD, L--- E--- requested petitioner to submit a resale certificate a number of times and petitioner refused.

Petitioner did not appear at this conference because its president had a relapse of a medical condition two days prior to the scheduled conference and was unable to be present. Through its vice-president, on July 31, 1991, petitioner requested that the matter be reconvened. That request was denied. However, petitioner did present its position by telephone to the staff counsel and his statements were fully considered in the preparation of this Decision and Recommendation.

Analysis and Conclusions

Pursuant to Revenue and Taxation Code sections 6051 and 6091, tax is due on the gross receipts of the sales of all tangible property; it is presumed that all gross receipts are subject to the tax until the contrary is established; the burden of proof is on the person making the sale unless he receives a resale certificate from the purchaser. Propane fuel is tangible personal property; at issue is whether or not petitioner was the seller.

Revenue and Taxation Code section 6006(a) defines sales as:

"any transfer of title or possession, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. 'Transfer of possession' includes only transactions found by the board to be in lieu of a transfer of title, exchange, or barter."

The person making the sale, the seller, is generally understood to mean the person who has authority to make the sale or the authority to transfer title. Cf. Sales and Use Tax Annotation 185.0000. Included in the elements of this authority is the ability to set a price, to issue billing invoices, to operate control over the goods until the time of delivery, etc. In this case, it appears that L--- E--- was the seller as the only function performed by petitioner was the collection of money at the selling rates set by L--- E---.

It is undisputed that petitioner never had possession or control of the fuel; the fuel was delivered directly to each catering truck by L--- E---. Petitioner had no authority to adjust the price; the price was set by L--- E---. Petitioner was given a ten cent per gallon fee; this fee represented the service charge set forth in the "service contract" between the petitioner and L--- E---. While the agreement between a taxpayer and a third party is not dispositive as to the payment of tax, in this case, the facts demonstrate that petitioner was not a seller.

Recommendation

Grant the petition. The measure of tax in dispute should be deleted.

Janet Saunders, Staff Counsel

September 27, 1991
Date