

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

190.2725

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition)
for Redetermination Under the) DECISION AND RECOMMENDATION
Sales and Use Tax Law of:)
)
N--- S--- & F---) No. SS -- XX XXXXXX-010
)
)
Petitioner)

The Appeals conference in the above-referenced matter was held by Staff Counsel Lucian Khan on January 31, 1994 in Van Nuys, California.

Appearing for Petitioner: J--- M---
Chairman

Appearing for the
Sales and Use Tax Department
(SUTD): Ira Anderson
Supervising Tax Auditor

Nancy Alvaro
Senior Tax Auditor

Protested Item

Ex-tax purchases of building materials for use in out-of-state construction jobs measured by \$1,074,308 for the audit period of October 1, 1987 to September 30, 1990.

Contentions

1. All materials were properly purchased ex-tax since petitioner made some retail sales (fixtures).
2. A credit should be allowed for tax paid to other states (i.e., Nevada and New Jersey).

3. If it is determined that tax is due, neither the local nor transit taxes would apply since the jobsites were not in California (Sales and Use Tax Regulations 1806 and 1826).

4. Petitioner relied on written advice in prior audits and is therefore entitled to relief under Revenue and Taxation Code Section 6596.

5. There is no evidence petitioner ever used a resale certificate in making the purchases; therefore, the seller is responsible for the sales tax due.

Summary

Petitioner is a lump-sum construction contractor engaged in manufacturing, selling, and installing moldings, reception stations, cabinets, showcases, free-standing furniture, and bars. Construction jobs exist both in and outside California.

In an audit covering the above period, it was discovered petitioner purchased various construction materials ex-tax for out-of-state jobs. The seller had a pre-existing resale certificate on file for petitioner. The materials generally consisted of different sizes of lumber, particle board, plywood, nails, glue and screws. The materials were used for construction jobs at gaming casinos in Nevada and New Jersey.

Petitioner filed a petition contesting the initial measure of \$1,990,178, arguing that since the materials were used out of state, no California tax would apply. It was also pointed out that both Nevada and New Jersey assessed use tax for that same material. In a revised audit of July 11, 1991, SUTD reduced the measure to \$1,074,308 after allowing credit for materials which were incorporated into free-standing furniture, or fixtures. The remaining materials which were not incorporated into fixtures or furniture were still deemed taxable.

On May 20, 1992, a conference was held in the Van Nuys office of the Board by Staff Counsel Tony Nevarez. In a Decision and Recommendation dated August 4, 1992, he concludes petitioner is not entitled to relief. In a letter dated October 26, 1992, Mr. M--- points out that certain issues which were raised at the prior conference were not addressed in the Decision and Recommendation. He requested, and was granted, a new conference.

At the conference, Mr. M--- argued that since petitioner fabricates fixtures, it is a retailer according to Regulation 1521. Therefore, petitioner may purchase all materials for resale, even those not incorporated into fixtures. Revenue and Taxation Code Section 6009.1 would then apply to relieve petitioner of any use tax liability since the materials were transferred outside California for use in out-of-state construction jobs. Accordingly, petitioner does not have to comply with Section 6386. In support of this argument, Mr. M--- submitted copies of two prior Decisions and Recommendations.

Mr. M--- admits that at the time of purchase, petitioner knows the materials will be used for out-of-state jobs. However, once delivery is made to petitioner's yard, the materials are not segregated; therefore, it is possible that some material purchased for out-of-state jobs may in fact be used for in-state jobs. Petitioner does not know which materials will be incorporated into fixtures or furniture because of the fungible nature of the goods, but does know the approximate amount which will be incorporated into each. During the audit period, approximately 45 percent of all materials purchased were incorporated into fixtures or furniture.

The SUTD position is that Revenue and Taxation Code Section 6386 is applicable. An article in the March 1983 Tax Information Bulletin states contractors are cautioned not to use resale certificates for materials used on out-of-state construction jobs to improve real property. The appropriate certification is an exemption certificate, not a resale certificate.

Mr. M--- argues credit should be given for the tax paid to Nevada and New Jersey. There is no requirement the tax must be paid to the other state prior to the California sales or use tax obligation arising. Not allowing credit creates a multiple tax burden, a violation of the U.S. Constitution.

Mr. M--- also argued that since the jobsites were outside California, according to the provisions of Regulations 1806 and 1826, neither the local nor transit taxes would apply.

He further argued that in prior audits purchases were handled in exactly the same manner and SUTD did not assess tax. He did not provide copies of prior written audit comments, and because of the recent earthquake (January 1994), the District office records were unorganized. Therefore, the prior audits could not be reviewed. He will not offer any evidence at this time; however, if the matter is not resolved in petitioner's favor, proof will be submitted in a Request for Reconsideration.

Finally, Mr. M--- argued that although there was a pre-existing resale certificate on file, there is no evidence petitioner referred to it in making the questioned purchases; thus, these transactions are subject to sales tax - a responsibility of the seller. According to the auditor, there were no comments on the invoices to indicate whether the suppliers were advised the purchases were for resale; however, principals of the corporation admitted the suppliers were advised the purchases were for resale. Mr. M--- admits he was also advised of this; however, he seems to question the accuracy of this admission.

Analysis and Conclusions

Generally, construction contractors (other than United States construction contractors) are consumers of materials which they furnish and install in the performance of construction contracts, and retailers of fixtures. (Regulation 1521(b)(2)(A), (B).)

The term "materials" includes tangible personal property which is incorporated into, attached to, or affixed to real property and when combined with other tangible personal property loses its identity and becomes an integral and inseparable part of real property, pursuant to the performance of a construction contract. (Reg. 1521(a)(4).) The term "fixture" is defined as an item which is accessory to a building or structure and does not lose its identity when installed.

Sales tax does not apply to sales of tangible personal property to a construction contractor who holds a valid California seller's permit when the property is used by the contractor outside this state in his performance of a contract to improve real property, provided that at the time of purchase, the contractor certifies in writing to the seller that he holds a valid California seller's permit, provides the number of that permit, identifies the property purchased, and states the property will be used in the manner stated above. Any certificate given subsequent to the time of purchase will not be recognized. (Revenue and Taxation Code Section 6386; Reg. 1521(b)(6)(B); Annotation 190.2730.)

Where property is purchased for resale, and the retailer obtains a timely resale certificate from the purchaser who holds a seller's permit and is engaged in the business of selling tangible personal property, the retailer is relieved of sales tax liability (Revenue and Taxation Code Sections 6091 and 6092). A contractor may issue a resale certificate to the supplier if he also generally makes sales of tangible personal property. (Levine v. State Board of Equalization (1956) 142 Cal.App.2d 760, 766-767, 299 P.2d 738.) Property purchased ex-tax under a resale certificate and removed from inventory for use is subject to tax; however, if the property is removed from resale inventory for the purpose of transporting it outside of California for use thereafter solely outside California, the tax does not apply (Revenue and Taxation Code Sections 6008 and 6009.1.)

It is undisputed that for petitioner's out-of-state construction jobs, a significant percentage (45 percent) of the materials purchased were incorporated into fixtures or free-standing furniture, of which petitioner would be considered a retailer. Accordingly, applying the above authority, we conclude that petitioner is correct that the construction materials may be properly purchased under a resale certificate providing at least some of the materials are incorporated into fixtures or furniture that is resold. As pointed out by Mr. M---, this position has previously been taken by the Board staff.

Because of the finding that petitioner is entitled to relief on this issue, the other contentions raised in the petition will not be further considered. If, in a Request for Reconsideration, SUTD can point to certain evidence or arguments to support its position, and reconsideration is granted, the remaining issues will be considered.

Recommendation

Grant the petition.

Lucian Khan, Staff Counsel

3-16-94
Date