

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

325.0257

In the Matter of the Petition)	
for Redetermination of State)	DECISION AND RECOMMENDATION
and Local Sales and Use Taxes)	OF HEARING OFFICER
)	
)	
S--- I---, INC.)	Acct. No. SZ --- XX XXXXXX
)	
<u>Petitioner</u>)	
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The above-entitled matter came was submitted and decided on the facts contained in the file at the request of Mr. R. E. D---, Petitioner's C.P.A.

Protest

Pursuant to an audit covering the period 10/1/70 through 9/30/73 and a determination issued on July 18, 1974, Petitioner protests the assessment of sales tax on sales in interstate commerce. The measure of the assessment is: Audit Item A - - Sales in interstate commerce disallowed, \$340,000.

Contentions

Petitioner contends that the two sales in question are exempt from California sales tax under Regulation 1620(a)(3)(B)2.

Summary

Petitioner is a corporation engaged in the business as a highway construction contractor and retailer of ready-mix concrete and related products. Petitioner also is a retailer of construction equipment.

The measure of tax includes the following two transactions: (1) U--- S--- & G--- Company purchased of certain machinery and equipment of an asphalt plant owned by Petitioner for \$175,000; and (2) P--- C--- Company of Hawaii purchase of certain off-highway vehicles from Petitioner for \$165,000.

Although both sales were claimed as exempt interstate sales, the audit staff disallowed the claimed exemption as not conforming to the provisions of Regulation 1620(a)(3)(B)2.

1. On December 1, 1972, Petitioner issued a Bill of Sale (Exhibit A) to U--- S--- & G--- Company for its sale of the equipment in question. The Bill of Sale makes no mention of the fact that the goods are to be shipped out of state nor is there any written requirement which obligates the Petitioner-seller pursuant to the contract of sale to deliver the equipment to the out-of-state point. In fact the Bill of Sale provides that the goods are sold "as is where is". The effect of this particular phrase will be considered under the Analysis and Conclusion of this report. After the sale, the equipment in question was removed by the buyer from California by a common carrier hired by the buyer. The equipment has been in use outside the state since its removal.
2. On May 29, 1973, P--- C--- Company of Hawaii submitted its purchase order to Petitioner for several pieces of off-highway equipment (Exhibit B). The purchase order provided that the Petitioner was to deliver the equipment at a designated berth in Oakland for shipment via a carrier supplied by the purchaser to Hawaii. This equipment was picked up by the carrier in Oakland and delivered to Hawaii and has been used there since the delivery.

Analysis and Conclusions

Regulation 1620(a)(3)(B)2 provides:

"Sales tax does not apply when the property pursuant to the contract of sale, is required to be shipped and is shipped to a point outside this state by the retailer, by means of:

* * *

"Delivery by the retailer to a carrier, customs broker or forwarding agent, whether hired by the purchaser or not, for shipment to such out-of-state point. As used herein the term 'carrier' means a person or firm regularly engaged in the business of transporting for compensation tangible personal property owned by other persons, and includes both common and contract carriers. The term 'forwarding agent' means a person or firm regularly engaged in the business of preparing property for shipment or arranging for its shipment. An individual or firm no otherwise so engaged does not become a 'carrier' or 'forwarding agent' within the meaning of this regulation simply by being designated by a purchaser to receive and ship goods to a point outside this state. (This subsection is effective on and after September 19, 1970, with respect to deliveries in California to carriers, etc., hired by the purchasers for shipment to points outside this state that are not in another state or foreign country, e.g., to points in the Pacific Ocean.)" (Emphasis added.)

Since all of the other provisions of the section of the regulation have been met, the only question is whether the seller, pursuant to the contract of sale, was obligated to deliver the property to the out-of-state destination.

There is nothing indicated in the contract of sale of the equipment to U--- S--- & G--- that would in any way indicate that the Petitioner was obligated to ship the goods to the out-of-state destination. In fact the words "sold as is where is" seem to negate such a conclusion. However, in an attempt to explain the meaning of those words, Petitioner submitted a statement from Mr. C---, the broker involved in the sale (Exhibit C). He states on page two that this terminology is only concerned with the fitness of the equipment and in no way indicates how shipment is to be made. For the sake of this discussion, we will accept this conclusion. However, the question still remains whether the Petitioner is obligated to ship the goods to the out-of-state destination. We believe that this is also fully answered by Mr. C--- on page two. He states, in part, that the particulars as to who is to ship and how is always negotiated after the sale is made. Accordingly, it is clear that Petitioner is no obligated pursuant to the contract of sale to deliver the goods or do anything else with them.

In regard to the P--- C--- sale, it is our opinion that the required delivery responsibility of the Petitioner-seller is met by the terms of the purchase order requiring the goods to be delivered to an Oakland berth to the carrier supplied by the purchaser.

Recommendation

Delete the \$165,000 sale to P--- C--- Company. No other adjustment recommended. Petition Unit to make adjustment.

Glenn L. Rigby, Hearing Officer

Aug. 29, 1975
Date

REVIEWED FOR AUDIT:

Principal Tax Auditor

Date