

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

460.0256

BUSINESS TAXES APPEALS REVIEW SECTION

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

The Appeals conference in the above-referenced matter was held by Staff Counsel Michele F. Hicks on March 17, 19XX in Sacramento, California.

Appearing for Petitioner: Mr. -. -. B---
Certified Public Accountant

Appearing for the Sales and Use Tax Department: Mr. A. Dale Blue
Supervising Tax Auditor

Observer: Mr. Carl Bessent
Staff Counsel

Protested Items

The protested tax liability for the period January 1, 1988 through December 31, 1990 is measured by:

<u>Item</u>	<u>State, Local and County</u>
A. Taxable 4Q-90 sales not reported due to taxpayer's method of reporting on a cash basis.	\$520,740
B. Deduction for netted use tax disallowed.	\$950,662

Petitioner's Contention

The gross amount invoiced to the purchaser includes use tax. Although the tax is not separately stated, it is a deliberate and determinate amount.

Summary

Petitioner sells vitamins, soap, and light bulbs. It operates approximately 14 telemarketing locations throughout California. When a customer purchases an item, the salesperson transmits the order to an out-of-state warehouse where the item is packaged for shipment by common carrier directly to the purchaser. A sales invoice for the quoted price is included with the package. The invoice states that the sales price includes an unspecified shipping and handling charge. No reference is made to California sales or use tax.

The audit staff concluded that the gross receipts from petitioner's sales were subject to tax and picked up the difference between the sales amounts reported by petitioner and petitioner's gross receipts. The audit staff also computed taxable sales using the accrual method rather than the cash method used by petitioner.

Analysis and Conclusions

Audit Item A: Taxable sales not reported due to petitioner's reporting on a cash basis.

Revenue and Taxation Code Section 6452 provides that a return shall be filed by every retailer engaged in business in the state. Section 6453 provides that the return shall show the total sales price of the property sold during the preceding reporting period. Sales and Use Tax Regulation 1628 (b) (3) (D) provides "unless explicitly agreed that title is to pass at a prior time, the sale occurs at the time and place at which the retailer completes his performance with reference to the physical delivery of the property." Thus the sales and use tax law requires that sales be computed and reported on an accrual basis. (See also Sales and Use Tax Regulation 1641.) The audit staff correctly computed petitioner's sales during the audit period by using the accrual method.

Audit Item B: Disallowed deduction for netted use tax.

Under the provisions of Sales and Use Tax Regulation 1620, petitioner's transactions are subject to the use tax. Provisions of the use tax law are contained in Chapter 3 of the California Sales and Use Tax Law. In Article I of Chapter 3, Revenue and Taxation Code Section 6206 provides:

"Separate statement of tax. The tax required to be collected by the retailer from the purchaser shall be displayed separately from the list price, the price advertised in the premises, the marked price, or other price on the sales check or other proof of sales."

Thus, Section 6206 specifically requires that the use tax be separately stated. There is no provision in the law which authorizes retailers to sell items subject to use tax on a tax included basis. Further, none of the invoices contain a statement that tax was included in the sales price. The invoices merely state that an unspecified amount was added for shipping and handling.

Petitioner contends that its customers were told by the salesperson and again by a follow-up caller that the quoted price included tax. However, this verbal notice would not be sufficient to qualify as a tax included sale even for sales tax. Sales and Use Tax Regulation 1700 requires that the retailer give its customer some form of written or printed notice that an item is sold tax included.

Recommendation

Redetermine without adjustment.

MICHELE F. HICKS, STAFF COUNSEL

4/15/94
DATE