

STATE OF CALIFORNIA
BOARD OF EQUALIZATION
APPEALS DIVISION

495.0012

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

The above-referenced matter came on regularly for hearing before Hearing Officer H. L. Cohen on February 26, 1991 in --- ---, California.

Appearing for Petitioners: --- ---
Attorney at Law

Appearing for the Sales and Use Tax Department: Mr. G. Hodgkinson
Tax Representative

Protested Item

The protested tax liabilities for the period July 1, 1989, through September 30, 1989 is measured by:

<u>Item</u>	<u>State, Local and County</u>
Unreported sale of Fixtures and equipment	\$20,000

Contentions

Petitioner contends that there was no sale' therefore, no tax is due.

Summary

Petitioner is a corporation which was engaged in operating a wholesale and retail bakery. It began in business during the first calendar quarter of 1988. The seller's permit was closed out effective October 31, 1988. It reported tax of \$10.00 for the fourth calendar quarter of 1988 on its last tax return.

Petitioner entered into a purchase agreement to sell the business to ABC and DEF. The agreement was signed by the shareholders of petitioner on February 13, 1989. The agreement provided that: (1) the buyers would go into possession immediately; (2) the seller's lease of the business premises would be assigned to the buyers; (3) the buyers would assume a loan on the business in the amount of \$62,758.75. This loan had been made by XYZ Savings and Loan; (4) the buyers were to provide business insurance effective February 14, 1989.

No down payment was required.

The buyers did in fact go into possession of the business premises immediately and the lessor of the premises accepted the assignment of the lease to the buyers. XYZ Savings and Loan did not, however, agree to the assumption of the loan by the buyers. The buyers made no payments on the loan and XYZ ultimately foreclosed on the collateral for the loan that had been put up by some of petitioner's shareholders.

Petitioner sued the buyers for damages and specific performance on the contract in an effort to force the buyers to make payments on the loan. The buyers thereupon filed for bankruptcy. The buyers did not list the fixtures and equipment as assets in the bankruptcy proceedings.

The Sales and Use Tax Department (SUTD) concluded that there in fact had been a sale of fixtures and equipment on the basis that there was a transfer of possession in exchange for a promise to pay. SUTD takes the position that tax is due unless and until petitioner writes the amount off as a bad debt.

Petitioner contends that there was no sale because there was in fact no consideration from the buyer. The contract of sale did not go into effect because the principal condition, the assumption of the loan by the buyers, did not occur. No bill of sale or title documents were transferred and the buyers did not claim ownership in the bankruptcy proceedings. Petitioner's attorney states that the buyer's attorney offered to allow petitioner to remove the fixtures and equipment from the premises.

Analysis and Conclusions

Section 6051 of the Revenue and Taxation Code imposes the sales tax on retailers based on the gross receipts from the retail sale in this state of tangible personal property. Section 6006

defines "sale" to include any transfer of title to or possession of tangible personal property for consideration. Clearly, a promise to pay the debt of another is consideration.

Section 6055 provides that a retailer is relieved from liability for sales tax insofar as the amount upon which the tax is based is represented by accounts which have been found worthless and charged off for income tax purposes in accordance with generally accepted accounting principles. Petitioner has not written off the amount in question and thus cannot be relieved from possible tax liability under this provision.

The ultimate question here is whether there was in fact a sale. If there was not sale, obviously there can be no tax. [Yes it could if a lease. See below]. Business Taxes Law Guide Annotation 495.0260 (October 2, 1958) states that if purchase of a sales contract by a finance company is agreed to by the parties as a condition to the transaction, and the finance company does not approve the buyer's credit, there is no sale for sales tax purposes. That is a close analogy to the situation here. The contract was based on the approval by XYZ Savings and Loan of the buyer's assumption of petitioner's note. This did not occur. Thus, the sale did not occur. In confirmation of this conclusion is the fact that the buyer does not even claim to own the fixtures and equipment.

One question remains. If the transaction is not at sale, could it be regarded as a lease since petitioner retained ownership while the "buyers" were in possession? While this could be the legal consequences of the acts of the parties, at this point there would be no tax liability to petitioner. A lessor is liable for payment of the lessee's use tax only to the extent that lease payments are received. See Sales and Use Tax Regulation 1660(c)(1). Since petitioner has received no lease payments, petitioner would not be liable for any tax at this point in time.

Recommendation

Grant petition.

H. L Cohen, Hearing Officer

4-2-91

4/2/91

Date