

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

515.0458

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter Of The Claim)	
for Refund Under the Sales)	DECISION AND RECOMMENDATION
and Use Tax Law of:)	
)	
T---, INC.)	No. SC OH XX XXXXXX-001
)	
<u>Claimant</u>)	

The above-referenced matter was assigned to Senior Staff Counsel James E. Mahler. Claimant waived its right to appear at an Appeals conference.

Subject of Claim

Claimant seeks a refund for the period July 1, 1985, through June 30, 1988, measured by:

<u>Item</u>	<u>State, Local County, SCCT & SCTA</u>
A. Unreported taxable fabrications Labor	\$ 2,520
B. Unreported taxable engineering charges	<u>55,178</u> \$57,698

Claimant's Contentions

1. Claimant's customer has advised claimant that no tax was due on the charges in question.
2. The tax should have been assessed against and collected from claimant's customer.
3. Claimant was relying on advice received from Board employees.
4. No penalties should have been assessed.

Summary

Claimant is a corporation headquartered in ---, Oregon. It manufactures, sells and installs ovens used for drying and smoking food products. At all times relevant herein, it had manufacturer's representatives soliciting sales in California and held a permit issued by this Board, but apparently did not have any office or other place of business in this state.

The issues in this claim concern an oven which claimant designed to the special order of G--- F---, Inc., of [A], California. Claimant manufactured the oven in Oregon, shipped it to [A] by common carrier and sent workers to [A] to install it on G---'s premises.

The contract price totaled \$542,288. Claimant charged tax reimbursement to G--- and reported tax to the Board measured by only \$450,755.50. The portion of the total contract price which claimant considered nontaxable included separately stated charges of \$55,177.50 for "engineering" and \$25,200 for "oven labor".

The Board's auditor investigated and determined that the "engineering" charge was for the labor of designing the oven to G---'s specifications. As for the "oven labor" charge, the auditor found that 90 percent of it was for installation labor and the remaining 10 percent was for reassembly labor. According to the audit comments, claimant built the oven in Oregon, broke it down for shipment, then reassembled it at the jobsite.

Tax was asserted on the charges for engineering and reassembly labor. The auditor's theory is that claimant was a construction contractor, that the oven was a fixture and that claimant was therefore the retailer of the oven. However, the applicable tax was a use tax on G---, not a sales tax on claimant, because there was no local participation in the transaction by any office or other place of business of claimant. Claimant was required to collect the use tax from G--- and pay it to the state, but failed to do so, and therefore becomes liable for a debt to the state.

Analysis and Conclusions

1. According to claimant, G--- has asserted that tax was not due on the engineering and reassembly labor charges. No specific grounds for exemption have been raised, however, and claimant itself appears to concede taxability. Nevertheless, for the sake of completeness, we have researched the issue.

Revenue and Taxation Code Section 6051 imposes sales tax on the retail sale of retailers in this state. As an exception to this rule, sales tax does not apply to sales following movement of the property into California from a point outside this state unless, inter alia, there is participation in the transaction by a local branch, office, outlet or other place of business of the retailer. (Sales and Use Tax Reg. 1620(a)(2). The auditor in this case found that sales tax did not apply because there was not such local participation and, lacking contrary evidence, we accept the auditor's findings.

Section 6201 of the Code imposes use tax when tangible personal property is purchased from a retailer for use in this state and used in this state. Sales and Use Tax Regulation 1521(b)(2)(B)(1) provides that construction contractors (other than United States construction contractors) are retailers of the fixtures they furnish and install. The term "fixtures" is defined in subdivision (a)(5) of the regulation to include "items which are accessory to a building or other structure and do not lose their identity as accessories when installed."

The auditor found that the oven in question was a fixture and that petitioner was the construction contractor. No contrary evidence has been presented and we must therefore accept the auditor's findings as correct. It follows that claimant was a retailer of the oven and that G--- purchased the oven from a retailer. Since there is no doubt that G--- purchased the oven for use in California and used it here, use tax applies.

Under Section 6011 of the Revenue and Taxation Code, use tax applies to the total amount for which the property is sold, including any charges for services that are a part of the sale." The Board has consistently held that "services that are a part of the sale" include any services which the seller was required to perform in order to produce and sell the property. (See, e.g., Sales and Use Tax Annotation 295.1690 [8/16/78].) More specifically, the term includes charges for designing, developing and engineering property which are performed as part of the contract to sell the property. (See, e.g., Sales and Use Tax Annotations 515.0440 [2/27/64] and 515.0480 [11/4/64].) The auditor found that the amount claimant charged G--- for engineering was for designing the oven to G---'s specifications. There is no contrary evidence. The charge was therefore taxable as found in the audit.

As for reassembly labor, Sales and Use Tax Annotation 435.0140 (11/14/67) states:

"When tangible personal property is manufactured and completely assembled at the retailer's plant, then disassembled for shipment and reassembled at the buyer's place of business, the reassembling constitutes a reconditioning of the property rather than fabrication. Accordingly, separately stated charges for such reassembly are not subject to tax if title to the tangible property passed to the buyer prior to its reassembly and if the buyer was not required to hire the seller to do the reassembly."

It appears that title to the oven passed to G--- when claimant completed its performance with respect to physical delivery, which was prior to reassembly. (See California Commercial Code Section 2401.) There was no separate statement of the reassembly charge, however, since it was commingled with a lump-sum installation charge. Further, there is no showing that G--- was free to hire anyone other than claimant to perform the reassembly labor. The charge for reassembly was therefore subject to tax.

To sum up, we find that use tax was properly asserted on the charges in question.

2. Revenue and Taxation Code Section 6202 imposes the use tax on the person who uses the property in this state. Claimant is therefore correct that the tax was due from G---.

However, Section 6203 of the Code provides, with certain exceptions not relevant here, that every “retailer engaged in business in this state” has a duty to collect the applicable use tax from its customers. Section 6204 further provides that the taxes required to be collected are “debts owed by the retailer to this state.”

Section 6203(b) of the Code defines “retailer engaged in business in this state” to include:

“Any retailer having any representative, agent, salesman, canvasser, or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, or the taking of orders for any tangible personal property.”

Claimant had representatives soliciting sales in California and was therefore a retailer engaged in business in this state. Claimant was therefore liable to collect the applicable use tax from G--- and, when it failed to do so, it became liable for a debt to this state. Accordingly, while the tax was due from G---, the assessment against claimant was proper.

3. Claimant alleges that an unidentified Board employee or employees, at some unidentified time or times prior to the sale in question, advised claimant that charges for engineering and reassembly would not be taxable. Claimant also alleges that, after the taxes in question were assessed, a Board employee promised claimant that the Board would attempt to collect them from G---. No supporting evidence has been presented to support either allegation.

Revenue and Taxation Code Section 6596 allows the Board to grant relief from taxes if, among other things, a person has relied on “written advice” received from a Board employee in response to a “written request for advice.” There is no statutory or other authority for granting relief from tax on the basis of oral representations or misrepresentations. (Fischbach & Moore, Inc. v. State Board of Equalization, 117 Cal.App.3d 627.)

Claimant did not make written requests for advice and did not receive written responses. Claimant therefore cannot qualify for relief under Section 6596.

4. The Board’s files reveal that no penalties were imposed against claimant in this case.

Recommendation

It is recommended that the claim for refund be denied.

James E. Mahler, Senior Staff Counsel

9/27/91

Date