

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

120.0345

In the Matter of the Petition
for Redetermination Under the
Sales and Use Tax Law of:

[A]

Petitioner

DECISION AND RECOMMENDATION

No. S- -- XX-XXXXXX-010

The above-entitled matter came on regularly for hearing on May 17, 1983 in San Jose, California, before H. L. Cohen, Hearing Officer.

Appearing for Petitioner:

Ms. -. --- [S]
President

Mr. -. [F]
Assistant Treasurer
[E]

Mr. -. [B]
Vice President
[E]

Mr. -. -. [E]
Attorney at Law

Appearing for the Board:

Mr. F. Holby
Principal Auditor
San Jose District

Mr. D. Fox
Auditor
San Jose District

Protest

Petitioner protests the assertion of tax on sales of computer programs. Tax was asserted based on an audit covering the period from July 1, 1973, through June 30, 1981. A deficiency determination was issued September 22, 1981. The amount upon which the protested tax is based is \$2,290,524 for state, local and county tax purposes and \$503,510 for transit district tax purposes.

Contention

Petitioner contends that the receipts in question are payments for rendering services and are not subject to tax.

Summary

Petitioner is a corporation engaged in developing and selling computer programs. It began in business March 31, 1971. There has been no prior audit.

In a reaudit report dated November 13, 1981, the amount subject to tax was increased to \$3,038,480 for state, local, and county tax purposes and to \$671,356 for transit district tax purposes.

Petitioner entered into an agreement with a number of counties, effective July 1, 1975 to perform certain computer programming activities relating to the maintenance of a computerized welfare case data system. The computer program was originally developed by [B] county and was eventually adopted for use by 14 counties. Key elements of the agreement between petitioner and the counties are listed below by contract paragraph number.

1.2 "Joint Committee" means a committee consisting of Welfare and Data Processing personnel from each county which will meet periodically to administer this agreement in accordance with the by-laws established by the committee. Each county has one vote on this Joint Committee.

1.4 "Maintenance" means modifications or enhancements to the Case Data System authorized by the Joint Committee including work of a periodic or one-time only nature.

2.1 The Joint Committee will be responsible for administering all aspects of joint maintenance. The Joint Committee shall have the full authority of the counties to act within the scope and definition of this contract in accordance with the Joint Committee's by-laws to ensure satisfactory performance of this contract.

3.1 Subject to time limitations as set out in Paragraph 20.2, and as directed by the Joint Committee, [A] (petitioner) shall:

3.1.1. Maintain the System,

3.1.2. Provide Advanced Systems Analysis,

3.1.3. Provide drafts of user procedural material,

3.1.4. Provide assistance in support of Committee functions, and

3.1.5. Assume sole responsibility for the timely accomplishment of all assigned tasks.

3.5.1 [A] shall provide to each county for new programs, or changes to programs, source programs on tape (or if modification involves a change of 25 cards or less, coding sheets containing only the changed cards). Such tapes are to be returned to [A].

9.1 Any county desiring to become a party to this agreement shall submit a written request directly to the Chairman of the Joint Committee. [A] shall render joint services to a new county becoming a party to this agreement commencing on the date set forth in the amendment.

19.1 [A] shall submit to each participating county, once a month, an invoice for services performed in the prior month. Such invoice will include:

- 19.1.1. The respective county's share for Joint Services.
- 19.1.2. An equal share of the actual itemized costs of data entry and computer services.
- 19.1.3. Charges for Separate Services.
- 19.1.4. The respective county's share for Staff Services.

19.3 [A] recognizes and agrees that should Joint Services work be performed which as not specifically authorized by the Joint Committee or in accordance with the Joint Committee's by-laws or as defined in this contract, the work shall be deemed to have been a gratuitous effort on the part of [A] and [A] shall have no claim of any kind against the counties for such work.

The auditor concluded that petitioner was selling prewritten computer programs. This conclusion was based on the fact that petitioner was providing modified programs to each county individually and was separately paid by each county. The auditor reviewed petitioner's records for four months and found that 82.05% of petitioner's charges were for computer programs.

Petitioner contends that the agreement with the counties provides only for services; therefore, tax does not apply. Petitioner has no ownership rights in the program; therefore, no sale can occur. Petitioner also argues that if there was a sale, the sale was a sale of a custom computer program to a joint venture consisting of the various counties rather than individual sales of a prewritten program. Petitioner cites several court cases which define joint ventures. Petitioner also contends that the counties acting together may be regarded as an unincorporated association. Whether regarded as a joint venture or an unincorporated association, the group of counties should be regarded as an entity separate from the individual counties. Petitioner states that it is paid on the basis of the number of hours expended, not on the number of copies transferred.

Analysis and Conclusions

Sales and Use Tax Regulation 1502 provides in subdivision (f) (1) that tax applies to the transfers of prewritten computer programs. "Maintenance" of a prewritten program which consists of modifying the program and results in the transfer of either another prewritten program containing the modifications or additional prewritten elements of the program is also regarded as a sale of a prewritten program. Even if the original program is owned by some other entity, the providing of prewritten modifications is taxable as a sale. See subdivision (b) of Section 6006 of the Revenue and Taxation Code. Petitioner's contention that the providing of programs is an exempt service is rejected insofar as prewritten programs are concerned.

Section 6010.9 was added to the Revenue and Taxation Code in 1982. It provides that "sale" and "purchase" for purposes of the Sales and Use Tax Law do not include the design, development, writing, translation, fabrication, lease, or transfer for a consideration of title or possession of a custom computer-program, other than a basic operational program, in any form. "Custom computer program" means a computer program prepared to the special order of a customer. The term does not include a prewritten computer program which is held for general or repeated sale or lease.

The question here is whether petitioner sold or fabricated custom computer programs for a single entity or whether petitioner prepared prewritten computer programs for repeated sales to the various counties.

The counties involved joined together to execute a single contract with petitioner. All instructions to petitioner were issued by a Joint Committee representing all of the counties and which acted as the executive body for the group. We conclude that the evidence supports a finding that the counties formed a joint venture for the purpose of contracting with petitioner for computer programs. Section 6005 of the Revenue and Taxation Code defines "person" to include a joint venture. Petitioner was, therefore, providing computer programs to the special order of a customer, the joint venture, and did not prepare computer programs for repeated sales or lease to the individual counties. Under Section 6010.9 petitioner's programs were custom programs sale or lease of which are not subject to tax. It is immaterial that payments to petitioner were made by individual members of the joint venture. The payments were allocated and made in accordance with the contract which set up the joint venture.

Recommendation

Cancel the determination.

H. L. Cohen, Hearing Officer

7-6-93
Date