

STATE OF CALIFORNIA
BOARD OF EQUALIZATION
APPEALS SECTION

In the Matter of the Petition)	
for Redetermination Under the)	SUPPLEMENTAL
Sales and Use Tax Law of:)	DECISION AND RECOMMENDATION
)	
REDACTED TEXT)	No. REDACTED TEXT
)	
<u>Petitioner</u>)	

The Appeals conference in the above-referenced matter was held by Staff Counsel Rachel M. Aragon on October 6, 1994, in Sacramento, California. A Decision and Recommendation (D&R) dated December 14, 1994, was mailed on December 23, 1994. The D&R concluded that the sale price of the vessel was the proper measure of tax and not the lease receipts. The D&R recommended that petitioner be credited for tax previously paid on the lease receipts.

The information set out in the original D&R is incorporated herein by reference as though fully set forth above. Petitioner, through his representative REDACTED TEXT, submitted a timely request for reconsideration.

Petitioner agrees that petitioner made a taxable use of the vessel in question in May 1991. Petitioner also agrees that the correct measure of tax is the purchase price. However, the vessel was purchased in May 1991; the determination was issued for the period June 1, 1991, to December 31, 1992; therefore, tax was not due during the period covered by the notice.

The Sales and Use Tax Department (Department) agreed with petitioner that the vessel was purchased in May 1991. The Department noted that petitioner had filed a sales tax return which covered the period January 1, 1991, through December 31, 1991; therefore, the three-year statute of limitations applies and has expired. Since the statute of limitations has expired, the Department cannot issue a deficiency determination covering the period of May 1991 when the vessel was purchased. The Department recommended that the petition be granted. I agree that the petition should be granted.

Petitioner stated that since there is no deficiency determination petitioner is entitled to a refund of the lease receipt payments. Petitioner relies on an opinion letter from Mr. Glenn Bystrom, written to a different taxpayer, to support that position.

The Board stated that although a determination cannot be issued to enforce collection of the tax, the tax liability still accrued under the law and the use tax submitted with respect to the same transaction may be retained in satisfaction of the liability.

We agree with the Department that no credit or refund is due. In Owens-Corning Fiberglass Corp. v. State Board of Equalization (1974) 39 Cal.App.3d 532, the court cited a statement used in Lewis v. Reynolds (1932) 284 U.S. 281, 283 [76 L.Ed. 293, 294, 52 S.Ct. 145] which was applicable to Owens-Corning and which is applicable here. In Lewis, after an initial assessment had been paid, a claim for refund was filed and the statute of limitations for enforcement had lapsed. The Lewis court stated (Owens-Corning, at page 536) that ‘[a]lthough the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded.’ See also Annotation 465.0110 (12/26/90).

The opinion letter which petitioner cites was not written to petitioner; therefore, the opinion letter is not applicable. (See Rev. & Tax. Code § 6596(b).) In any event, we see nothing in Mr. Bystrom’s letter which is inconsistent with our decision herein. Petitioner is not entitled to a refund of the lease receipts paid in 1992.

Recommendation

It is recommended that the petition be granted.

Rachel M. Aragon, Staff Counsel

March 4, 1996
Date