

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

190.0165

In the Matter of the Petition for)
Redetermination of State and Local) DECISION AND RECOMMENDATION
Sales Tax;)
) No. SR -- XX XXXXXX
R & O P--- C---)
F. W. R--- C---, INC.,)
)

Petitioner)

The above-entitled matter came on regularly for hearing on Monday, February 14, 19XX in Covina, California.

Appearing for Petitioner:

Mr. E--- -. G---, Attorney at Law
B---, S--- & G---

Mr. A--- -. R---, President
F.W. R--- C---, Inc.

Appearing for the Board:

Mr. Irwin Lieberman, Principal Auditor
Covina-Foothills District

Mr. T. F. Mcguire, Audit Supervisor
Covina-Foothills District

Mr. H. Mitchell, Auditor
Covina-Foothills District

Protest

Pursuant to an audit covering the period from 9-1-7X through 3-31-7X, and a determination issued on September 27, 197X, petitioner protests the assessment for sales tax measured by the following gross receipts:

Processing of customer-owned materials at jobsite	\$XXX,XXX
Sale of crushed rock and base material	\$XXX,XXX

Contentions

None of the work performed by petitioner described in the audit involved a sale of tangible personal property as defined in the applicable laws of the State of California including any regulations.

Crushing material at the jobsite did not change its character from that of real property.

There was no severance of the real property in the traditional sense. There was no taking and carrying away, and the material was put back on the site immediately after crushing.

While petitioner did not contract to replace the crushed materials to roadbeds there is no distinction between situations where one crushes materials only and where one crushes and places materials as far as the application of tax to crushing is concerned.

The measure of the tax on the sale of crushed rock and base material is excessive because, by mutual agreement, the total amount paid for the materials sold was approximately \$140,000.

Summary

R & O P--- C--- is a division of F. W. R--- C---, Inc. The division processes base material provided or furnished by general contractors and/or owners of materials. The crushing is done at the various jobsites.

The “base material” referred to consist of old concrete and asphalt roads that is broken into large chunks, removed from the roadbed and piled. Petitioner crushes the large chunks into small particles that are reused as roadbed material.

Typically, a contractor such as G--- -. A--- Co., who was one of petitioner’s primary customers, has a contract to upgrade, remake and/or replace a road or highway. The contractor uses a pavement crusher to rip up the road. The ripped up road, in large unusable chunks, is removed from the road area and placed into piles nearby.

Petitioner contracts to crush the stockpiled roadbed chunks of concrete or asphalt into small particles that the road contractor can use to reconstruct the road. Petitioner does not dig up the old road and does not replace the processed material on the new road being constructed.

Counsel cites an Attorney General opinion (Ops. Cal. Atty. Gen. NS 59-151, February 12, 1960; 35 Cal. Atty. Gen. 48) to distinguish taxable producing and processing of materials from what petitioner did to the materials.

One question answered in the opinion was whether furnishing of equipment and an operator to the prime contractor is merely a rental transaction or whether the receipts therefrom are receipts from a sale as defined under section 6006(b) of the Revenue and Taxation Code.

Briefly the facts were: A subcontractor furnished equipment and an operator under a contract to do certain things to materials that the prime contractor had windrowed on a roadbed. The materials windrowed were furnished by the prime contractor.

The subcontractor operated his equipment, which picked up the material in the windrows, combined it in a mixer with oil and dumped the mixture back on the roadbed in windrows. The mixed material cured for about forty-eight hours after which the prime contractor spread and compacted the processed materials into a surfaced asphalt road.

The operations also included the preparation of a “cement-treated base material.” Instead of mixing oil the subcontractor spread dry cement on the windrows of materials (furnished by the prime contractor). The subcontractor then scooped up the dry cement and earthen material, mixed it with water in a mixer forming a low-grade concrete (called “cement-treated base”) which was dumped back on the roadbed in windrows. The subcontractor’s operations also included using a “striker blade” that was on the mixer; it spread the base so that a water tank could pass over it. Behind the water tank came another spreader that further spread the material. This ended the subcontractor’s operations. The prime contractor further spread the base material where necessary, leveled high spots, filled in low spots and compacted the base material into its final position.

The Attorney General concluded that the operations of the subcontractor constituted a “sale” with section 6006(b) of the Revenue and Taxation Code. Section 6006(b) provides that a sale includes:

The producing, fabricating, processing, printing or imprinting of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the producing, fabricating, processing, printing or imprinting.

In the opinion the Attorney General pointed out that the oil used in making asphalt paving is personalty [sic] because oil becomes a chattel on being removed from the ground. (Texas Co. Moynier (1933), 129 Cal. App. 738, 744). The sand, gravel or other earthen materials with which the oil is mixed are also personal property. The mere fact that these are the very materials of which real property is composed does not prevent such materials from becoming personalty [sic]. (Palumbo v. Harry M. Quinn, Inc., (1944) 232 Ill. App. 404, 55 N.E. 2d 825). They assume this character when they are severed from their natural place in the earth. (People v. Williams, (1868), 34 Cal. 671; Ops. Cal. Atty. Gen. NS-3526 dated May 19, 1941, 20 Ops. Cal. Atty. Gen. 1).

The Attorney General also noted that while there is judicial language (primarily dicta) which states that temporary severance and movement of earthen materials from one place to another without removal from the land on which they earlier lay in nature does not change them into chattels. (See e.g. Steinfeld v. Omega Copper Co., (1914), 16 Ariz. 230, 141 Pac. 2d 847).

Here the native earthen materials are not merely moved to another place on the same property, but are combined with a product substantially different from any of its ingredients. To argue that in such a case the native earth does not become a chattel would be equivalent to arguing that if one cuts a tree into lumber (or processes it into paper) and plans to use the lumber (or paper) on the land where the tree grew, the lumber (or paper) is at all times real property.

With respect to the sale of crushed rock and base material for \$194, 402, one customer, G--- -. A---, was billed sales tax in the amount of \$9,857.86 which was collected by petitioner and paid to the State. It is argued that the actual gross receipts from the sale was closer to \$140,000 because the customer refused to pay the amount invoiced on the ground that the materials sold were not entirely useable.

Accordingly, petitioner claims a refund of tax measured by the difference in what was billed and what was actually paid for the materials. It is alleged that the refund will be, in turn, refunded to the customer(s) from whom it was collected.

Conclusions

Crushing ripped up chunks of cement and asphalt that come from roads is a form of processing.

Apparently counsel believes that the distinction between the facts giving rise to the Attorney General Opinion above and those in petitioner's situation is that in the former something (oil or cement and water) was added to the soil while in the latter the materials (chunks of concrete or asphalt) were merely crushed into small particles and nothing was added to them by petitioner. Thus, where nothing is added the act of crushing alone is not fabrication, processing or producing under 6006(b). We disagree.

The asphalt or concrete road, when it was a road, was an improvement to real property. When it was ripped up and stockpiled in large chunks awaiting crushing it was tangible personal property.

The question of whether crushing materials into smaller particles is a form of processing is not a new one. There is a 1954 Tax Counsel Opinion annotated in Business Law Guide at 435.0620 that provides:

The crushing of materials furnished by a consumer constitutes processing, the receipts therefrom being subject to sales tax. (2-24-54).

There are many other opinions that are analogous:

435.0600 Core Samples. The sawing off of the ends of core samples in order to prepare them for use in making compression tests on concrete structures constitutes taxable fabrication under section 6006(b). 11-9-67.

435.0660 Cutting and Threading Pipe or Shafting, making a bearing, constitutes taxable processing. 3-9-51

435.0680 Cutting Brick, Lumber and Rock. Cutting adobe brick; cutting of lumber into smaller sizes; cutting or crushing of rock; are all taxable processing. 2-27-51.

435.1200 Planing and Ripping Lumber constitutes taxable processing. 3-29-51.

All of the foregoing do not involve adding anything to the materials processed; it follows, processing and/or fabricating tangible personal property does not necessarily require that property be added to property.

On the other hand when materials furnished by the customer are separated according to size, e.g., rock, gravel, whether by screening, hand sorting or otherwise, this operation alone does not amount to a taxable fabricating or processing. Tax Counsel Opinion 435.1460.

The opinion goes on to point out that the crushing of rock or mixing of it with other ingredients is considered taxable processing.

Thus, batching concrete aggregate into ready-mix truck [sic] and mixing the aggregate in the truck on the way to the jobsite, each constitutes taxable fabrication of the resultant wet concrete. Tax Counsel Opinion 435.0500, 3-25-66.

In summary, while there is a distinction between processing that involves mixing one ingredient with another (e.g., dirt and oil to make asphalt) and processing that involves cutting, crushing or breaking property of one size into smaller sizes it is a distinction without a difference as far as the application of the tax under section 6006(b) is concerned; both constitute a sale within the meaning of the term.

The Attorney General Opinion cited above clearly supports the conclusion that the stockpiled chunks of concrete and/or asphalt dug up from roads is tangible personal property and remains so until it is replaced in some form as a road again. Petitioner, in crushing the materials for use in building roads in no more improving real property than a saw mill that cuts trees into lumber is building a house. The argument that there is no distinction between situations where one crushes materials only and where one crushes and places materials, as far as the application of tax to crushing is concerned, is without merit.

Sales tax is an excise tax on retail sales of tangible personal property in this State and is measured by gross receipts from the sale.

Where G--- -. A--- paid less for materials than agreed upon because they were not up to standard the lesser amount paid is the measure of the tax on the sale.

Recommendation

Redetermine. Reaudit and check petitioner's records to verify that the gross receipts from the sale of crushed rock, etc., to G--- -. A--- was less than the audited amount.

No adjustment to the audited liability relating to gross receipts from crushing materials furnished by customers.

Adjustments, if any, to be made by Covina-Foothills auditing.

Robert H. Anderson, Hearing Officer

Mar 4, 1977

Date

Reviewed for Audit:

Principal Tax Auditor

3-9-77

Date