

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

190.0630

In the Matter of the Petition)
for Redetermination of State)
and Local Sales and Use Taxes)
)
L--- M---, INC.)
)
)
)
Petitioner)
)

DECISION AND RECOMMENDATION
OF HEARING OFFICER

Account No. SS -- XX XXXXXX

The above-referenced matter came on regularly for hearing on June 14, 1979, in Los Angeles, California. H. L. Cohen, Hearing Officer.

Appearing for Petitioner:

Mr. F--- N---, President

Appearing for the Sales and
Use Tax Department:

Mr. Arthur Brown, Principal Auditor
West Los Angeles District

PROTEST

Petitioner protests the assertion of tax on assembly charges. Tax was asserted on the basis of an audit covering the period from January 1974 through December 31, 1976. A determination was issued on August 15, 1978. The amount upon which the protested tax is based is \$27,991.

CONTENTION

Petitioner contends that the charges upon which tax was asserted are charges for installation which are not subject to tax.

SUMMARY

1. Petitioner is a corporation engaged in manufacturing and selling shielded rooms and enclosures. It commenced in business May 1, 1967. There has been no prior audit.

2. Petitioner builds and sells prefabricated, modular enclosures or rooms which provide shielding from radio frequency radiation. The rooms are sold in kit form unassembled or are assembled on-site by petitioner. A separate charge is made for installation. The assembled rooms may or may not be attached to the floor of the buildings in which they are installed. The auditor regarded the assembled rooms which were not attached to the building as tangible personal property, and the charges for onsite work as taxable assembly labor. Petitioner contends that all manufacturing is done in the factory and that the onsite workers are construction workers who do no fabrication. Petitioner holds a construction contractor license. Half of the purchasers assemble the kits themselves. Petitioner also contends that manufacturers of similar items, such as ovens, humidity and salt spray test rooms, commercial refrigerators, paint booths and guard houses are not taxed on installation labor. Petitioner states that large units are regarded by the Board as improvements to realty, therefore the small units which are sold should be regarded the same.

3. Petitioner argues that it is unfair to tax his charges when no tax applies if the buyer assembles the property or contracts with a third party to assemble the property.

ANALYSIS AND CONCLUSIONS

1. Sales and Use Tax Regulation 1521 provides that construction contractors are consumers of materials used in the performance of contracts for making improvements to realty. The contractor must pay sales tax reimbursement or use tax on the cost of the materials. A key element in deciding whether a contract is a construction contract or a contract for the sale of tangible personal property is whether the item which is the subject of the contract is attached to realty in a permanent manner. If the item is movable and not attached to realty, the contract is one for the sale of tangible personal property. The distinction made by the auditor in this respect is correct.

2. Section 6011(c)(3) provides that charges for installing property sold are not to be included in the sales price which is subject to tax. The Board has historically distinguished between exempt installation labor and taxable assembly labor. Installation does not include the assembly of prefabricated components. See Business Taxes Law Guide, Annotations 435.0020, July 19, 1950 (Assembly of Steel Lockers and Shelving); 435.0040, July 25, 1967 (Assembly of Knocked-Down Furniture); and 435.0060, March 15, 1966 (Assembly of Shelving). Petitioner's work at the customer's site consists of the assembling of parts which is a step in a series of operations resulting in the production of tangible personal property. Charges made for this operation are not charges for installation; they are charges for assembly, thus subject to tax. The classification of the workers performing the work is not determinative of whether the work is assembly or installation, nor is the fact that petitioner holds a contractor's license have any special significance.

3. While it is true that no tax applies to the assembly labor if a customer does this work itself, this is not a basis for not taxing petitioner's charges. The application of tax is based on

how the transaction is carried out, not on how it could be carried out. See Freeman v. Commissioner, 303 F.2d 580. If a customer hires a third party to assemble the property, charges by the third party are subject to tax. See Section 6006(b) and Sales and Use Tax Regulation 1526.

RECOMMENDATION

Redetermine without adjustment.

H. L. COHEN, HEARING OFFICER

July 12, 1979

Date

Reviewed for Audit:

Principal Tax Auditor

Date