

STATE OF CALIFORNIA
BOARD OF EQUALIZATION
APPEALS DIVISION

190.1083

In the Matter of the Claim)
for Refund Under the Sales)
and Use Tax Law of:)
C--- D. AND C--- N. W---)
Claimant)

HEARING
DECISION AND RECOMMENDATION
No. SR --- XX-XXXXXX-001

The above-referenced matter came on regularly for hearing before Hearing Officer Susan M. Wengel on January 15, 19XX in Sacramento, California.

Appearing for Claimant:

P--- N---
Accountant

C--- D. W---
Co-Owner

P--- W---

Appearing for the
Sales and Use Tax Department:

Dennis Ensley
Senior Tax Auditor

Bruce Henline
District Principal Auditor

Special Appearance:

Joyce Carrillo
Hearing Officer

Sharon Jarvis
Hearing Officer

Protested Items

The protested tax liability for the period July 1, 1986 through June 30, 1989 is measured by:

<u>Item</u>	<u>State, Local and County</u>
A. Taxable delivery charges not reported.	\$82,096
B. Taxable ending accounts receivable not reported.	\$70,700

Contentions of Claimant

1. Claimant is a construction contractor for all sales of large trusses as the claimant's boom truck holds the trusses in place when they are being affixed to real property.

2. In the alternative, the transportation charges cannot be subject to tax because at the time of the sale the truss is affixed to real property and is not tangible personal property.

Summary of Claim

Claimants, C--- D. and C--- N. W---, are owners of W--- T--- Company, a business which used to manufacture and sell trusses. Most of the claimants' customers were general contractors who built custom homes. They would provide the claimants with plans and specifications and then claimants would assemble the trusses. The business was sold in December 19XX but in June 19XX claimants took the business back. It is no longer operating.

During an audit by the Sales and Use Tax Department (Department) the auditor found that claimants were selling two types of trusses. The smaller trusses were less than 25 feet across and would be banded together and dropped off at the customer's job site. The larger trusses had to be delivered to the job site in a truck and then a boom was used to hold the truss in place while the construction crew secured it to the support beam. A transportation fee of \$100 was charged to each customer.

The auditor and claimants are in agreement that claimants are the retailer of the smaller trusses. The transportation or delivery charges are conceded to be part of the total selling price and subject to tax. Claimants disagree that they are the retailer of the larger trusses. They contend that they are construction contractors and that because in many instances their boom operator holds the truss in place while a construction crew secures the truss, title does not pass until after the truss becomes real property. Claimants contend that because title does not pass until the trusses are realty, no sales tax applies.

The Department takes the position that claimants are not construction contractors as there are no contracts which require the claimants to furnish and install materials pursuant to a contract to improve realty. The Department contends that the sales of the trusses are retail sales. The further assert that the transportation charge, which is a standard \$100 regardless of the number of trusses delivered, is subject to tax. The audit staff notes that there are no title transfer clauses in either claimant's sales invoices or other sales agreements which state that title is to pass before transportation takes place. They contend that title passes when the trusses are delivered to the property owner or the construction contractor who in turn secures the truss in place.

Analysis and Conclusions

1. The first issue is whether claimants are construction contractors. Sales and Use Tax Regulation 1521(a)(2) defines a construction contractor to mean any person who for himself, in conjunction with, or by or through others, agrees to perform and does perform a construction contract. Regulation 1521(a)(1)(A), in pertinent part, defines a construction contract as:

“‘Construction contract’ means and includes a contract, whether on a lump sum, time and material, cost plus, or other basis to”

“1. Erect, construct, alter, or repair any building or other structure, project, development, or other improvement on or to real property, or...”

A construction contract does not include the furnishing of tangible personal property under what is otherwise a construction contract if the person furnishing the property is not responsible under the construction contract for the final affixation or installation of the property furnished.

Initially, it is noted that there are no contracts which require claimants' to furnish and install the trusses. Claimants' proposal and contract provides that the trusses will be delivered for a \$100 fee but there is no indication that claimant must install the trusses. Testimony at the Appeals hearing indicated that the driver of the delivery truck will operate a boom which holds the truss in place while the construction crew nails it to the support beams. This driver allegedly supervises the attachment of the truss but there is no indication that this driver has any unique expertise relating to the attachment of the trusses. The customer is charged \$100 for the delivery of the trusses, no matter how many are delivered, and the driver of the boom will stay at the jobsite until all the trusses are in place. The customer is not charged for this driver's "supervision" by the hour which would normally be the case if an expert was being hired. Quite clearly the boom operator did not provide the type of supervision provided by Western Concrete Structures, Inc. when its supervisor controlled all the employees of a general contractor. (See Western Concrete Structures, Inc. v. State Board of Equalization (1977) 66 Cal.App.3d 543.) In that case, only Western Concrete's supervisor had the expertise necessary to finish the job. In the present case, any boom operator could be hired to raise the trusses so that the crew could attach the trusses to the support beams. Likewise, the \$100 delivery fee appears to be charged regardless of whether or not the claimant's boom is used to hold the truss in place while

a crew secures it to the support beam. In summary, claimants are not construction contractors because they are not, pursuant to a construction contract, required to furnish and install the tangible personal property. This conclusion is supported by Greenblatt v. State Board of Equalization (1947) 148 Cal.App.2d 619. In this case, Greenblatt provided precut lumber for “do-it your-self” builders. Like claimants, Greenblatt was found not to be a construction contractor and any of his services were held to be services related to a sale of tangible personal property. (See, Hayward Building Material Co. v. State Board of Equalization (1958) 164 Cal.App.2d 607.)

The second issue is whether the trusses become realty before the sale takes place. Revenue and Taxation Code Section 6012 defines “gross receipts” as including the total amount of the sale without any deductions for the cost of transportation. Sales and Use Tax Regulation 1628(b)(2) provides that when transportation is by facilities of the retailer tax applies to charges for transportation from the retailer’s place of business directly to the purchaser, and are for transportation which occurs after the sale of the property. This regulation goes on to provide that unless explicitly agreed that title is to pass at a prior time, the sale occurs at the time and place at which the retailer completes his performance with reference to the physical delivery of the property. (Sales and Use Tax Regulation 1628(b)(3)(D).) There is no contract which calls for title to pass prior to delivery so unless the trusses are realty at the time title passes, the transportation charges will be taxable pursuant to Regulation 1628. Initially, it is noted that if larger trusses are merely delivered to a jobsite, the sales of these trusses like the smaller units which are also just dropped off, are sales of tangible personal property and the delivery charges are subject to tax. Furthermore, we must conclude that claimants pass title to the trusses before the trusses become affixed to real property. For a fee of \$100 claimants’ driver will lift the trusses up to the support beams so that the construction crew can manipulate the trusses into place and secure them to the support beams. Once this crew takes control of the trusses, delivery takes place and title passes. At this point in time, the trusses are not realty. It is well to acknowledge that even if title did pass after the trusses were affixed, the tax result would be the same. It is well established that for the purpose of California’s sales tax, the sale and installation of personal property are nonetheless subject to sales tax even though affixed to the buyer’s land. (United States Line, Inc. v. State Board of Equalization (1986) 182 Cal.App.3d 529.) We must conclude that claimants are making retail sales of tangible personal property and that the transportation charges are subject to tax.

Recommendation

It is recommended that the claim for refund be denied.

Susan M. Wengel, Hearing Officer

April 29, 1991

Date