

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

325.0331
6/28/83

In the Matter of the Claim for)
Refund Under the Sales and Use)
Tax Law of:)
)
)
)
)
 Taxpayer)

DECISION AND RECOMMENDATION
No. ---

The preliminary hearing on the above taxpayer's claim for refund was held on May 23, 1983, in

Hearing Officer: James E. Mahler

Appearing for Petitioner:

Appearing for the Board: Supervising Auditor

Subject of Claim

<u>Item</u>	<u>Measure</u>
Sale to ---	\$180,000

Taxpayer's Contention

The scrapers were sold in foreign commerce.

Summary

Petitioner is a corporation engaged in business as an auctioneer. On May 8, 1975, it auctioned off the assets of a construction company which was going out of business. The auction occurred on the premises of the construction company in --- California.

The assets sold at the auction included three Caterpillar 631-8 scrapers. The bill of sale for the scrapers indicates that they were sold to --- of Atlanta Georgia --- operates a company

called --- which is apparently in the export business. It appears that --- purchased the scrapers as an agent of --- a Venezuelan corporation doing business in that country.

The bill of sale also states: "export--will furnish export papers." However, claimant did not obtain an exemption certificate or any other evidence of export from --- at the time of sale.

The Scrapers were picked up in -- by a --- was not an employee of --- or of ----. However, it appears that he had been engaged by --- on various previous occasions to haul property. The record does not reveal whether --- owned his own truck or merely rented a truck from some third party. --- was not registered with the Interstate Commerce Commission as a common or contract carrier, nor did he hold a use fuel tax permit issued by the Board.

Because of the size and weight of the scrapers, --- had to haul them one at a time. He picked up the first scraper on May 10, 1975, the second on June 6, 1975, and the third on July 2, 1975. While awaiting pick-up, the scrapers sat at the construction company's premises, apparently under the care of the construction company. The construction company did not charge anyone storage fees for the scrapers.

--- delivered the scrapers to the --- Shipping Company in --- Florida. --- shipped the scrapers to --- in Caracas, Venezuela, on July 22, 1975.

Claimant did not report or pay tax on the scrapers on its sales and use tax returns. An audit of claimant's records asserted tax on the sale. Claimant ultimately paid the tax and filed this claim for refund. In support of the claim, the following documents have been submitted in evidence:

1. A bill of landing for each of the three scrapers. These bills are signed by an employee of claimant as agent of the shipper, and by --- as agent of the carrier. --- Shipping Company is listed as the delivering carrier. The shipping destination is stated to be --- , Florida and the delivery route is described as: "--- Florida, c/c--- Shipping Company for export to --- Venezuela."
2. An additional bill of landing for the three scrapers showing that they were shipped from --- to Caracas by boat. The shipper named on this bill is --- Shipping Co., Inc. (as agents)."
3. A letter from --- stating that --- purchased the scrapers as agent of that company.
4. An affidavit from --- stating that --- the scrapers were transported directly from --- Florida, for export to Venezuela.
5. Two affidavit from ---. The first affidavit states that --- picked up the scrapers in --- and delivered them to ---, Florida. In the second affidavit, --- states that he signed the bills of lading for the scrapers as a for-hire carrier and accepted common carrier liability for the safety of the cargo. --- also states that he has performed similar for-hire transportation for many other persons, both before and after he served as carrier of the three scrapers.

6. A letter from --- stating that --- was not an employee of --- or --- but was an independent contractor in the freight moving business. --- also states that --- has often hauled equipment for --- over the years, either in his own freight contractor business or as driver for one of the major freight contractor business or as driver for one of the major freight contractor business or as driver for one of the major freight companies.
7. An affidavit from --- officer manager stating that --- had engaged the heavy hauling services of --- as a for hire carrier at various times for many years.

Analysis and Conclusions

For the reasons expressed below, we have concluded that the sale of the three scrapers does not qualify for exemption as an export sale, but does qualify for exemption as a sale in interstate commerce.

With respect to exports, subdivision (a) (3) (C) of Sales and Use Tax Regulation 1620 provides that "sales tax does not apply when the property is sold to a purchaser for shipment abroad and is shipped or delivered by the retailer to the foreign country...." In this case, although the scrapers were ultimately shipped to a foreign country, they were not shipped by claimant. The bills of lading signed by claimant's employee showed --- Florida, as the destination. There is no evidence in the record to suggest that claimant had a contractual obligation to ship the scrapers to Venezuela.

Furthermore, at the time of sale, there was no certainty of export as was found in Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69 and Gough Industries v. State Board of Equalization, 51 Cal.2d 746. In the last cited case, the California Supreme Court stated that the export exemption applies "if at the time title passed the certainty of the foreign destination was plain." In this case, insofar as we can tell from the record, title passed at the time of the auction, sale on May 8, 1975. The first scraper was not shipped until May 10, 1975, and the last scraper was not shipped until July 2, 1975. Therefore, at the time title passed, the goods had not been entered into the stream of foreign commerce.

However, the requirements for exemption as an interstate commerce sale differ from the requirements for export sales. Subdivision (a) (3)(B) of Regulation 1620 provides:

"Sales tax does not apply when the property pursuant to the contract of sale, is required to be shipped and is shipped to a point outside this state by the retailer, by means of... delivery by the retailer to a carrier, customs broker, or forwarding agent, whether hired by the purchaser or not, for shipment to such out-of-state point. As used herein, the term 'carrier' means a person or firm regularly engaged in the business of transporting for compensation, tangible personal property owned by other persons, and includes both common and contract carriers...."

There is no question that the scrapers were picked up in California by --- and carried by him to Florida. Also, since the bills of lading for shipment to Florida were signed by claimant as shipper, we have no doubt that the contract of sale required such interstate shipment by claimant. The only question is whether the shipment was done by a "carrier", that is, by a person regularly engaged in the business of transporting property owned by others for compensation.

The evidence of --- a status as a carrier is in conflict. On the one hand, --- was not registered as a carrier with the Interstate Commerce Commission and did not hold a use fuel tax permit issued by the Board. While this evidence is significant, however, we do not view it as conclusive. A person may be regularly engaged in business as a carrier even though he does so illegally.

On the other side of the coin, --- was not an employee of the purchaser and held himself out to the purchaser as a for-hire carrier. He has signed affidavits stating that he previously hauled property, not only for the purchaser, but also for other people as well. Because of the size and weight of the scrapers in question, special equipment and expertise was needed to haul them. Although the record does not reveal whether the equipment was owned by --- or merely rented from third parties, it was nevertheless not the sort of equipment available to or usable by casual laborers. Finally, shipment of the scrapers to Florida required three separate trips. Therefore, --- was clearly not just a friend of the purchaser Who happened to be in California and picked up the scrapers as a favor.

The weight of the evidence establishes that --- was regularly, albeit illegally, engaged in business as a for-hire --- of property owned by others. Accordingly, we conclude that the sale of the scrapers qualifies as an exempt sale in interstate commerce.

Recommendation

It is recommended that the claim for refund be granted.

James E. Mahler, Hearing Officer

6/28/83
Date

REVIEWED FOR AUDIT:

Principal Tax Auditor

Date