STATE OF CALIFORNIA
BOARD OF EQUALIZATION

330.2575
12/3/76

In the Matter of the Petition for Redetermination Under the Sales and Use Tax Law	)	DECISION AND RECOMMENDATION No. ----
Petitioner	)	

The above entitled matter came on regularly for hearing on August 31, 1976 in Marysville, California. Glenn L. Rigby, Hearing Officer.

Appearing for Petitioner:

Appearing for the Board: Messrs. C. Brown and J.R. Schwegerl

Protested Item
(Period 1/1/70 to 12/31/70)

Item A - Taxable rental receipts not reported: $12,248

Contention of Petitioner

The rental receipts are not subject to tax since the units were purchased tax paid and leased in substantially the same form.

Summary of Petition

In 1968, an oral partnership was formed by --- and --- to rent houseboats on Shasta Lake. "Initially, Petitioner purchased certain houseboats from vendors outside the state and timely paid tax on such purchases. Since the vessels were purchased tax paid and leased in substantially the same form as acquired, petitioner did not take out a permit or report tax on the rentals since the leases were not considered continuing sales (Sections 6006(g) (5) and 6006.1 of the Revenue and Taxation Code).

In 1969, --- and --- decided to go into the business of manufacturing houseboats. In furtherance to this, an oral partnership --- was formed having the same ownership interests as Petitioner. i.e., 50 percent in --- and 50 percent in --- took out a seller's permit No. --- Petitioner stated the reason the partnership was formed was because it could not buy the type of houseboat it wanted from outside sources.

In 1969, ---, manufactured and sold two houseboats to Petitioner for $7,500 a piece. Tax reimbursement was paid by Petitioner --- and reported to the state. The $7,500 selling price per boat was arrived at by taking the --- material cost and direct labor of manufacturing. No profit was added to arrive at the selling price. Petitioner then rented these houseboats but did not charge its lessees tax, since it believed no tax was due. ---tated she was told by someone in our Redding office that if the transactions were consummated in the foregoing manner, i.e., the formation or a manufacturing partnership by the same individuals as Petitioner and tax paid on acquisition, no tax would be due on the rentals.

The audit staff disagreed with this analysis and concluded --- It and Petitioner were, for sales tax purposes, one and the same entity. Accordingly, tax was assessed against Petitioner measured by the rental receipts for the period-1/1/70 to 12/30/70.

Analysis and Conclusion

Regulation 1660(c) (2) provides in part:

> "No sales or use tax is due with respect to the rentals charged for tangible personal property leased in substantially the same form as acquired by the lessor, or by his transferor, as to which the lessor or transferor has paid tax or tax reimbursement measured by the purchase price. If such tax or tax reimbursement has not been so paid, and the lessor desires to pay tax measured by the purchase price, it must be reported and paid timely with the return of the lessor for the period during which the property is first placed in rental service. A timely return is a return filed within the time prescribed by Sections 6452 or 6455, whichever is applicable."

In view of the foregoing quotation, the sole legal issue is whether the subject houseboats were purchased tax paid and leased in substantially the same form as acquired. This will turn on our analysis as to whether a manufacturing partnership which is composed of the same identical members of a leasing partnership can be regarded as two separate entities for sales and use tax purposes. If they are separate entities, the determination must be cancelled; contra, if they are not. Manufacturers of tangible personal property do not have any election to pay tax on the cost of the property (see Regulation 1660(c) (2), copy enclosed).

Although a partnership is sometimes regarded as a legal being separate from its members (the entity theory; it is usually regarded as having no juristic existence distinct from the members who comprise it (the aggregate theory). The partnership law of California (Corp. Code §§ l500l-l5045) basically follows the aggregate theory. In applying the Sales and Use Tax Law, the Board follows the partnership law insofar as the two laws do not conflict. In accordance with Section 6005 of the Revenue and Taxation Code, it treats a partnership as a person for purposes of reporting tax. It taxes a transfer of property between a partner and a partnership because under the partnership law of California a partnership holds title to property distinct from its members. For purposes of tax collection, the Board follows California partnership law in holding the individual partners liable for the tax obligations of the partnership and may also charge a partner's interest in the partnership for his individual tax liability arising from his other activities. We think that for the purpose of determining which associations are partnerships, and therefore persons under Section 6005, we must look to the general California law of partnership.

It has been held under the facts of one California case that a partnership is not an entity distinct from an individual who is a member of the partnership. In recognizing that California follows the aggregate theory of partnership, the court observed that under such a theory a partnership with identical partners under one partnership name is the same partnership when conducting some other portions of its business under another name and that the separation of bookkeeping and all operations and dealings thereof is immaterial, since ownership and ultimate control are still in the partners who compose the firm. (Park v. Union Mfg. Co., 45 Cal. App. 2d 401.)

Further, the general common law rule that a man is incapable of contracting with himself, which once led to the conclusions that an action could not be maintained at law between a partner and a partnership of which the partner was a member and that an action could not be maintained at law between partnerships having in common even a single member, now seems to lead to the conclusion that a contract may not be formed between two or more persons acting as a partnership and those same persons acting as what purports to be another partnership.

In the past we have taken the position that there is no change of title where equipment is transferred from one business to another where both businesses are entirely owned by the same person as sole priprietor. In our opinion, two “partnerships” each owned and controlled by the same parties are not separate persons, capable of contracting between themselves, but are one person within the meaning of that term as it is used in Section 6005. To conclude otherwise would be to confer upon a partnership one of the distinguishing attributes of a corporation and to create an exception unwarranted by law to the general rule laid down both by the Legislature (Corp. Code §§ 15001-15045) and the courts (Park v. Union Mfg. Co., supra).

We can appreciate Petitioner's attempt to separate the two entities. We take note that separate books were kept, separate information tax returns were filed for federal and state purposes, and separate business licenses were taken out. However, the hearing officer is of the opinion that under the foregoing analysis, for sales and use tax purposes, partnerships with identical ownership are not separate entities. Accordingly, for all intents and purposes Petitioner and --- were one and the same. Therefore it was the manufacturer or the houseboats. As the manufacturer/ lessor it could not avoid the tax due measured by the rental receipts since the units were not being leased in the same form as acquired (Section 6006(g) (5)).

Even assuming that erroneous information was given by someone in the Redding office, this does not estop the Board of Equalization from asserting the tax on rentals. (Market Street Railway v. State Board of Equalization, 137 Cal. App. 2d 87.)

Recommendation

Redetermine without adjustment.

12-3-76

Glenn L. Rigby, Hearing Officer — Date

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Appearing for Petitioner: --- --- ---

Appearing for the Board: Messrs. C. Brown and J. R. Schwegerl

Protested Items
(Period 6/29/71 – 5/2/75)

Audit Item A

Taxable rental receipts not reported: $99,058

Audit Item B

Asset sales not reported: 4,200

Contentions of Petitioner

1. The rental receipts are not subject to tax since the units were purchased tax paid and leased in substantially the same form as acquired.

2. The sale of the assets is exempt under Section 6006.5(a).

Summary of Petition

In 1968, an oral partnership was formed by --- and --- to rent houseboats on Shasta Lake. Originally this partnership purchased certain houseboats from vendors outside the state and timely reported use tax on such purchases. As related in case No. ---, no permit was taken out by

the partnership since the leases were not continuing sales under Section 6006(g) (5) of the Revenue and Taxation Code. In 1969, --- and --- decided to go into the houseboat manufacturing business and sell them to the original partnership. They formed an oral partnership and commenced business operations under permit ---. The partnership was composed of the same identical ownership as the original partnership and was known as ---.

In 1969, --- sold two houseboats it had manufactured to the original partnership for $7,500 a piece and tax reimbursement was collected and paid to the state. In January 1971, two more houseboats were sold to the original partnership for $10,000 a piece plus tax. Again, tax reimbursement was collected and remitted to the state. Since the original partnership thought it was leasing the property tax paid in substantially the same form, no tax was collected on the rentals.

On June 29, 1971, a new partnership (Petitioner) was formed by ---. The Partnership ownership was 40, 40, 20, respectively. --- contributed all of the assets held by the original partnership to Petitioner. This transfer was held to be exempt under Section 6006.5(b) of the Revenue and Taxation Code. Since Petitioner believed the four boats it acquired from the original partnership were purchased tax paid by their "transferors" (the original two-way partnership), Petitioner did not take out a permit nor collect tax on the rental receipts from those four houseboats.

The audit staff took exception to this and concluded the four houseboats were not exempt from tax under Section 6006(g) (5) (A) of the Revenue and Taxation Code. Their conclusion was based on the theory --- and the original partnership were in effect one and the same entity for sales and use tax purposes.

In May of 1975, Petitioner sold its business. Although tax was paid by the purchaser on its purchase of the houseboats, Petitioner did not report any tax on the sale of tangible personal property used in its business. The reason for petitioner not .paying tax on these items was based on the theory the sale of those items were exempt under Section 6006.5(a) of the Revenue and Taxation Code. Again the audit staff took exception to this conclusion based on the theory the petitioner was engaged in a business that required the holding of a seller's permit, i.e., it was engaged in the business that required the holding of a seller's permit.

Analysis and Conclusion

The “Analysis and Conclusion” set forth in the hearing report under account No. --- hereby incorporated by reference. Since it was concluded in the --- Account that the original partnership and --- were, for sales tax purposes, the same entity and therefore the tax was properly due on the rentals, it is the hearing officer's conclusion that the transfer to Petitioner of the houseboats that were manufactured by --- could not qualify for the exemption of Section 6006 (g) (5). This is cased on the holding that the transferors (the original partnership) was leasing the property in substantially a different form them acquired.

In regar to the sale of the tangible personal property in 1975, it is the hearing officer's opinion Petitioner was engaged in the business or leasing tangible personal property and such leases were continuing sales. Petitioner was required to hold a seller's permit and the tangible personal property was therefore used in an activity requiring the holding of a seller's permit. Accordingly, Section 6006.5(a) is not applicable to the transaction.

Recommendation

Redetermine without adjustment.

	12/3/76
Glenn L. Rigby, Hearing Officer	Date

REVIEVIED FOR AUDIT:

Principal Tax Auditor	Date