

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

335.0012

APPEALS UNIT

In the Matter of the Petition)
for Redetermination Under the) HEARING
Sales and Use Tax Law of:) DECISION AND RECOMMENDATION
)
)
T--- E--- CO.) No. SR -- XX XXXXXX-010
D---)
)
Petitioner)

The above-referenced matter came on regularly for hearing before Hearing Officer, Susan M. Wengel on February 13, 1990 in Torrance, California.

Appearing for Petitioner:

W--- M. S---
Attorney

A--- E---
Controller

B--- L---
Regional Manager

Appearing for the Department
of Business Taxes:

Kent L. McLellan
Senior Tax Auditor

Richard Hess
Supervising Tax Auditor

Protested Item

The protested tax liability for the period January 1, 1983 through December 31, 1985 is measured by:

<u>Item</u>	<u>State, Local and County</u>
(B) Claimed exempt sales disallowed per an actual basis examination of invoices over \$10,000.	\$2,975,354
(Petitioner disagrees with only \$1,276,479 of the total measure.)	

Contentions of Petitioner

1. The sales of trucks with concrete pumping equipment are not sales of mobile transportation equipment.
2. Several sales for resale were improperly disallowed.

Summary of Petition

Petitioner is a corporation which began business in California manufacturing trailer and truck mounted concrete pumping equipment in January 1983. It is a subsidiary of P--- W---, the parent corporation. During the first audit of petitioner's records the Department of Business Taxes (Department) established that the equipment sold by petitioner was mobile transportation equipment and disallowed many of the sales claimed by petitioner to be exempt sales for resale.

Petitioner initially contends that the pumping equipment should not be classified as mobile transportation equipment (MTE). In the alternative, petitioner asserts that the sales should be exempt as sales for resale or sales in interstate commerce. The details of each transaction and petitioner's position as to each sale are detailed below. No penalties were assessed.

Analysis and Conclusions

The first issue is whether the cement pumping equipment has been properly classified as mobile transportation equipment. This issue is important because petitioner has had numerous sales to businesses which lease the equipment. If the equipment is MTE, then the leasing is a use by the lessor and consequently the sale by petitioner to the leasing company cannot be a sale for resale. Petitioner contends that the concrete pumps (see Exhibit A attached) are not MTE because transportation is not the principal purpose for the trucks. Rather, the trucks are to support the pumping equipment. Petitioner further asserts that the equipment is used predominantly off the road and usually travels 50 miles or less between jobs. The truck has to be modified to carry the pumping device and the drive shaft has to be replaced with a specialized drive shaft that will operate the pumping equipment as well as the truck. In sum, petitioner's position is that the equipment is not designed for long distance transportation of persons or property at highway speeds. We cannot agree.

In relevant part, Revenue and Taxation Code Section 6023 defines the term "mobile transportation equipment" to include busses, trucks... and tangible personal property which is or becomes a component part of such equipment." The concrete pumps are not in themselves transportation equipment. They can, however, be classified as MTE if they are or become a "component part" of the trucks upon which they are carried.

In previous decisions, the Board has determined that mobile generators designed to be installed and actually installed on trailers are MTE. The rationale is that the generators are permanently attached to the trailers and remain on the trailers at all times, even when being used. The generators are, therefore, component parts of the trailers. The same rationale applies to the concrete pumps in this appeal. The pumps are permanently attached to the trucks and remain on the trucks when in use. Trucks are by statute defined as MTE so quite clearly once the pump is attached to the truck and becomes a component part of that truck, it becomes MTE.

In the present case, the trucks were capable of traveling at highway speed and were, in some cases, driven across the United States. The classification of equipment by any other agency as non-highway vehicles reflects only the opinion of that particular agency and therefore is not binding on this Board.

The second issues involves several sales which have been claimed by petitioner as sales in interstate commerce or sales for resale. For purposes of clarification, each sale will be addressed individually.

(1) Invoice #6338 dated June 28, 1985 to B--- C--- S---, Inc. (\$182,240)

Invoice #6338 dated June 28, 1985 indicates that a sale of a pumping truck was made to B--- C--- S---, Inc. for \$214,400.00. The invoice states that pick up was to be by the customer. (See Exhibit B). In a letter to petitioner, dated June 18, 1985 just 10 days prior to the above-referenced invoice, a J--- B--- of B--- C--- S---, Inc. wrote the following letter to petitioner:

“At this time, we would like to commit to an order of one (1) Thomsen Model 32-12 Concrete Pump on a ten month lease purchase agreement for \$6,500 per month. At the end of the ten month period, it is understood that all monies paid toward the leasing of the machine will be applied to the purchase price of \$214,000.00. At the end of ten months the lease will be converted to a sale...

We would also like for you to arrange for a drive away service as to insure safe delivery.”

A copy of a delivery ticket to R--- D--- A--- from petitioner dated June 29, 1985 indicates that R--- D--- A---y was to pick up the equipment at petitioner’s premises and then drive the equipment to B--- C--- S---, Inc. which is located in [city], New York. (See Exhibit C-1). An address for delivery is not specified, however, it is assumed that because the purchaser was concerned about a safe delivery that the equipment was driven to New York. This is confirmed by B--- C--- S---, Inc. when it responded to a Departmental inquiry. In this response, B--- C--- noted that it purchased the equipment for leasing and that “sales tax from rentals are paid to New York State where the equipment is located.” (See Exhibit C-2)

The Department has taken the position that because the sales invoice indicates that the customer will pick up the equipment and because there is a delivery ticket that indicates that shipment is to be "W/C" or "will call", that delivery to B--- C--- S---, Inc. took place when R--- D--- A--- took possession of the equipment in California on behalf of B--- C--- S---, Inc. We agree. Sales and Use Tax Regulation 1620(a)(3)(A) provides that sales tax applies when the property is delivered to the purchaser or the purchaser's representative in this state, whether or not the disclosed or undisclosed intention of the purchaser is to transport the property to a point outside this state, and whether or not the property is actually so transported. B--- C--- S---, Inc. contracted to pick up the equipment in California and did actually receive the equipment in California via their agent, R--- D--- A---. A sale with delivery in this state took place and tax was properly assessed. The sale could not have been an exempt sale unless the property, pursuant to a contract of sale, was required to be shipped and was so shipped to a point outside this state by the retailer by means of facilities operated by the retailer or by delivery by the retailer to a carrier, customs broker or forwarding agent for shipment to such out-of-state point. As there is no evidence that R--- D--- A--- is a common carrier or that the contract between petitioner and B--- C--- S---, Inc. required petitioner to have the property shipped to an out-of-state location. Furthermore, there is no evidence that the property was resold by B--- C--- S---, Inc. without any prior use. No adjustment can be recommended.

(2) Invoice #5600 dated May 15, 1985 to G---
Equipment leasing. (\$259,238.72)

Invoice #5600 dated May 15, 1985 indicates that a sale totaling \$259,238.12 was made to G--- Equipment Leasing. (See Exhibit D). The equipment was picked up by G--- in California. (See Exhibit E). No sales tax reimbursement was collected. G--- at that time had on file with petitioner a resale certificate which listed a false California seller's permit number. (See Exhibit F). A check of valid permit numbers for G--- indicated that they do not hold a California seller's permit. When the resale certificate held by petitioner was completed, G--- merely used their Massachusetts permit number.

Revenue and Taxation Code Section 6296 provides in relevant part that a resale certificate relieves a seller from liability for sales tax only if taken in good faith from a person who holds a California seller's permit. Sales and Use Tax Regulation 1668(b)(1)(c) requires a seller's permit number to be held by the purchaser unless the purchaser makes no sales in California and an appropriate notation to that effect is made on the resale certificate in lieu of the seller's permit number. There was no such notation on the certificate and there is no evidence that G--- was a purchaser who made no other sales in California. As G--- Equipment Leasing did not hold a valid seller's permit, petitioner remains liable for the tax unless it can be shown that the equipment was in fact resold without any prior use. In a letter dated February 27, 1987, A--- G--- stated that G--- Equipment Leasing, Inc. is an authorized distributor of T--- E--- and that the equipment in question was purchased with the intent to resell it. He does not, however, state that the equipment was, in fact, resold prior to any use. Given the fact that G--- is a leasing company, a sale without prior use cannot be assumed. As petitioner has failed to show that the equipment was resold prior to any use, no adjustment can be recommended.

We note that in a subsequent audit a sale to G--- has been accepted as an exempt sale. The facts surrounding this transaction, however, differ from the present situation. In the subsequent audit the equipment was delivered to G--- out-of-state by an agent of petitioner.

- (3) Invoice #3875 dated January 31, 1985 to
L--- S--- Corp. (\$260,000)

Petitioner's sole argument as to this item is that the equipment is not mobile transportation equipment. As this issue has already been determined and the finding is adverse to petitioner's position, no adjustment can be recommended.

- (4) Invoice #7004 dated August 7, 1985 to E---
T--- C--- P---

A sale of a pump truck was made to E--- T--- C--- P---. The invoice indicates that E--- T--- was to pick up the equipment. (See Exhibit G). E--- T--- did in fact authorize M--- K--- to take delivery of the equipment (see Exhibit H) which he did on July 31, 1985. (See Exhibit I). As delivery was in California and because E--- T--- leased the equipment and did not resell it, the Department considered the sale to be a California sale to a consumer. We agree.

There are letters from E--- T--- that indicate the equipment should have been sold to A--- C--- P--- E---, which in turn would have resold it to E--- T--- for leasing purposes. The sale was not to A---, however, and cannot qualify as a sale for resale. Other letters from E--- T--- that were written after the tax was assessed are self-serving. There is no evidence that the equipment was resold prior to any use by E--- T---.

We note that in the subsequent audit a sale to E--- T--- was allowed because the auditor thought E--- T--- was the same company as A---, which is a dealer of petitioner's equipment. The auditor did not realize that E--- T--- C--- P--- is a separate entity. A subsequent error in petitioner's favor is not binding as to the findings of this petition. No adjustment can be recommended.

- (5) Invoice #458 dated July 26, 1984 to P---
S--- Co. (\$102,252)

In July of 1984 petitioner sold a boom to P---' S--- Company of Oklahoma City. A truck was brought to California from Oklahoma so that the boom could be attached. The equipment was apparently resold to S--- C--- P--- who hired an independent truck driver to pick up the equipment from petitioner and deliver it to S--- C--- P--- in Oklahoma. The Department confirmed these facts by an XYZ letter from S--- C--- P--- and a subsequent telephone discussion with its president.

The Department considered the sale to be taxable as a Revenue and Taxation Code Section 6007 transaction as a California permittee made delivery to a consumer in California at the request of an out-of-state non-permitized retailer. We agree.

Revenue and Taxation Code Section 6007 provides:

“A ‘retail sale’ or ‘sale at retail’ means a sale for any purpose other than resale in the regular course of business in the form of tangible personal property.

The delivery in this State of tangible personal property by an owner or former owner thereof or by a factor, if the delivery is to consumer or person for redelivery to a consumer, pursuant to retail sale made by a retailer not engaged in business in this State, is a retail sale in this State by the person making the delivery. He shall include the retail selling price of the property in his gross receipts.”

When delivery was made to the agent of Sooner Concrete Pumping in California, a taxable sale occurred. No adjustment is recommended.

- 6) Invoice #8826 dated November 21, 1985 to H---, Inc. (\$145,000)

A pump truck was sold to H---, Inc. which is an out-of-state distributor of this type of vehicle. Delivery was made to H---, Inc. in California, through its agent Mr. B--- T--- of A--- E--- and S--- C---. The unit was driven back to [city], Kansas where it was allegedly sold to D--- C--- C---.

Revenue and Taxation Code Section 6388 provides:

“Where a new or remanufactured truck, truck tractor, semitrailer, or trailer, any of which has an unladen weight of 6,000 pounds or more, or a new or remanufactured trailer coach or a new or remanufactured auxiliary dolly, is purchased from a dealer located outside this State for use without this state and is delivered by the manufacturer or remanufacturer to the purchaser within this state, and the purchaser drives or moves the vehicle from the manufacturer’s or remanufacturer’s place of business in this state to any point outside this state within 30 days from and after the date of the delivery, there are exempted from the taxes imposed by this part the gross receipts from the sale of and the storage, use or other consumption of the vehicle within the state, if the purchaser furnishes the following to the manufacturer or remanufacturer:

- (a) Written evidence of an out-of-state registration for the vehicle.

(b) The purchaser's affidavit attesting that he or she is not a resident of California and that he or she purchased the vehicle from a dealer at a specified location without the state for use outside this state.

(c) The purchaser's affidavit that the vehicle has been moved or driven to a point outside this state within 30 days of the date of the delivery of the vehicle to him or her.

The Department has noted that this statute appears to be applicable to the present situation, however, petitioner has not presented the evidence required. As no evidence has been presented, no adjustment can be recommended. If petitioner can obtain the necessary evidence, it may be submitted to this hearing officer for review.

Recommendation

It is recommended that the liability be redetermined without adjustment.

Susan M. Wengel, Hearing Officer

August 15, 1990

Date

W/Exhibits A, B, C-1, C-2, D, E, F, G, H and I