

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Claim)
 for Refund Under the Sales) DECISION AND RECOMMENDATION
 and Use Tax Law of:) No. SR AS 18 713609-002
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Claimant)

The Appeals conference in the above-referenced matter was held by Senior Staff Counsel James E. Mahler on September 9, 1992, in Sacramento, California.

Appearing for Claimant: --- -, ---
 Attorney at Law

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 Vice President

Appearing for the
 Sales and Use Tax Department: Kurt Kunert
 Senior Tax Auditor

Subject of Claim

Claimant seeks a refund of tax for the period July 1, 1988, through June 30, 1991, measured by:

Item	State, Local <u>County & LACT</u>	EQRF	LATC
Claimed exempt sales disallowed	\$423,885	\$172,369	\$34,357

Claimant's Contentions

1. The delivery and placement of posters qualifies for the printed sales message exemption.
2. If the printed sales message exemption does not apply, substantially all the distribution charges qualify as nontaxable installation charges.
3. The audit includes various computational errors.

Summary

1. Claimant is a corporation which operates a graphic arts studio and also does some printing. Part of its business involves the printing and distribution of promotional posters for motion pictures, concerts and other events. Claimant creates and prints the posters to the special order of its customer, then sends them by mail or common carrier to independent contractors for distribution. The independent contractors are hired and paid by claimant, not by claimant's customer. The contractors place the posters in locations where they are likely to be seen by the public.

According to the staff, the contractors normally place the posters on building walls or telephone poles. Claimant denies that any posters distributed in California are placed on telephone poles, since that is illegal in this state. Claimant informs us that the posters are normally placed on the walls of boarded-up buildings or temporary walls surrounding construction sites.

Occasionally, claimant may direct the contractors to place the posters in specific locations or areas. For example, posters advertising a concert of Latin music might be concentrated in Spanish neighborhoods. As a general rule, however, finding a suitable location is left entirely to the discretion of the contractors, since that is their business and they are familiar with the best places.

Neither claimant nor the contractors normally request permission from the owners of the walls where the posters are placed. (For convenience, we shall hereinafter refer to these persons as the "property owners".) According to claimant, the property owners seldom if ever object, however. In fact, most property owners appreciate having the posters on their walls since the posters deter graffiti. In any event, once the posters are in place, neither petitioner nor the contractor has any further interest in them. The posters remain in place until the property owner or someone else removes them.

Claimant did not charge tax reimbursement or report tax on these transactions. Tax was asserted in an audit, which was the first sales and use tax audit of the business. Claimant paid the determination and filed this claim for refund.

2. Claimant billed its customers separately stated charges for the posters and for distribution of the posters. The audit assessed tax on both charges on the theory that distribution was a service that was part of the sale of the posters.

Claimant alleges that substantially all of the costs of distribution were for the labor of gluing or otherwise affixing the posters to the walls, with only a small part of the costs attributed to transporting the posters. Therefore, claimant concludes that substantially all the charge to the customer was for installation. No cost records, time and motion studies or other data have been presented to show the actual portion of the costs attributable to affixing the posters in place.

3. Claimant sometimes sells posters without distribution and sometimes distributes posters furnished by the customer. According to the audit comments, the measure of tax on the transactions in question was calculated on an actual basis and does not include gross receipts from those other types of transactions. Claimant appears to believe that the calculations are inaccurate, but has not identified any specific errors or offered any alternative calculation.

Analysis and Conclusions

1. Revenue and Taxation Code Section 6379.5 authorizes an exemption for printed sales messages, provided that certain requirements are satisfied. One requirement for exemption is that the printed sales messages be delivered "to any other person at no cost to that person who becomes the owner thereof." Sales and Use Tax Regulation 1541.5 interprets the statute and, in subdivision (a)(6), defines "any other person" to mean: "... any person, other than the purchaser or the purchaser's agent, who takes physical delivery of the printed sales messages and who exercises dominion and control over the property."

The District audit staff disallowed the claimed exemptions on the ground that claimant transferred possession of the posters to the contractors and the contractors did not become the "owners" of the posters. No other grounds for disallowance were cited. Presumably, therefore, the audit staff found that all other statutory requirements for exemption were satisfied.

Claimant now contends that the property owners became the "owners" of the printed sales messages, thus qualifying for exemption. The Board's Headquarters staff believes that the exemptions were properly disallowed, contending without elaboration that the property owners neither received "physical delivery" nor obtained "dominion and control" over the posters.

For sales and use tax purposes, "delivery" is a term of art which denotes "the point at which ownership is transferred." (Satco, Inc. v. State Bd. of Equalization, 144 Cal.App.3d 12 at 17, emphasis in original.) The questions raised by the staff thus resolve to a single issue: Do the property owners become the "owners" of the posters placed on their walls?

If we understand it correctly, the staff is arguing that claimant simply abandons or relinquishes possession of the posters. Claimant does not intend to make a gift of the posters to any particular property owner, but simply wishes to place the posters in a location visible by the public. The property owners do not give permission for the posters to be placed on their walls, and in fact are not even notified that the posters will be placed, so there is no acceptance of a gift from claimant. Thus, the staff believes, there is no transfer of ownership to the property owners.

We would find some merit in this argument if a transfer of title were a prerequisite to the printed sales message exemption, since mere abandonment does not effect a transfer of title (See Stephens v. Mansfield, 11 Cal. 363; Richardson v. McNulty, 24 Cal. 339; Dresser v. Allen, 25 Cal.App. 124). However, the statute requires only that the recipient become the "owner" of the property.

The words "owner" and "ownership" are broad terms which do not necessarily encompass title. For example, Civil Code Section 654 provides that "ownership" refers simply to the right to "possess and use" the property "to the exclusion of others." In Higgins v. San Diego, 131 Cal. 294, our Supreme Court held that "owner" as used in a city charter referred to the person who had control of the property without regard to legal title. (See also Government Employees Ins. Co. v. Kinyon, 119 Cal.App.3d 213.)

In subdivision (a)(6) of Regulation 1541.5, the Board has construed the statutory term "owner" to mean the person who has "dominion and control" of the property. Neither the statute nor the regulation mentions "title". Therefore, a transfer of title is not a prerequisite to the exemption.

Claimant transferred possession of the posters to the property owners by placing or having the posters placed on their walls. Claimant thereafter disclaimed any interest in the posters. The property owners acquired the right to dispose of the posters in any manner they saw fit. We conclude that the property owners acquired "dominion and control" over the posters and thus became the "owners" of the posters for purposes of Section 6379.5. Accordingly, we recommend a reaudit to delete the protested transactions from the measure of tax.

2. and 3. In view of the foregoing decision, claimant's second and third contentions are moot.

Recommendation

Reaudit to allow the claimed exemptions for printing and distribution of posters. Grant the claim for refund to the extent shown by the reaudit.

James E. Mahler, Senior Staff Counsel

2/23/93
Date