

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition	)	
for Redetermination Under the	)	DECISION AND RECOMMENDATION
Sales and Use Tax Law of:	)	
	)	
C--- C--- CORP.	)	No. SS -- XX XXXXXX-010
	)	
	)	
	)	
<u>Petitioner</u>	)	

The Appeals conference in the above-referenced matter was held by Staff Counsel Lucian Khan on June 29, 199X in Sacramento, California.

Appearing for Petitioner:	D--- F---
	CPA

Appearing for the	
Sales and Use Tax Department:	Richard Zahm
	Senior Tax Auditor

Protested Item

For the audit period covering October 1, 198X through December 31, 199Y, petitioner protests that portion prior to April 1, 198Z, measured by \$X,XXX,XXX.

Contention

Because the waiver form signed on April 7, 199- was invalid, the period of October 1, 198- through March 31, 198- was outlawed by the statute of limitations, and therefore should be deleted from the audit.

Summary

Petitioner is a corporation involved in the sale and service of computers, including optional maintenance contracts and sales of software. Prior to issuing a determination on July 27, 1992, the Sales and Use Tax Department (SUTD) auditor obtained various signed waiver forms, executed on various dates. With the exception of the last form signed on April 7, 1992, all forms were signed by individuals who were corporate officers. The form signed on

April 7, 1992 was signed by a R--- F---, who held the title of "tax manager". All forms were obtained and signed by the same auditor. According to the audit workpapers, the results of the audit were discussed with Mr. F---.

Petitioner argues that Audit Manual Section 0215.13 specifically requires that where a waiver form is to be obtained from a corporation, either an officer or someone holding a written power of attorney must sign it. If the signing is under a power of attorney, a copy must be obtained and attached to the waiver. Because neither a corporate officer's signature nor power of attorney was obtained, the last waiver form was invalid; thus, the period of October 1, 198X through March 31, 198Y was barred by the statute of limitations.

SUTD admits there is no evidence that the person who signed the waiver form was a corporate officer, or that a copy of a power of attorney was obtained.

There are two remaining issues, both of which SUTD concedes, and therefore which are no longer in contention. The first issue involves a July 22, 1987 sale to the U--- of C--- in the amount of \$X,XXX. Petitioner contends this item should be deleted from the audit, because it was the Board's policy at that time to exempt out-of-state companies making sales to agencies of the State of California if the transaction was subject to use tax, provided the seller did not collect use tax on that transaction. Several other sales of this type were deleted by the auditor, but this was apparently overlooked.

The second matter involves sales to unidentified customers. The auditor stated in the workpapers that such sales were considered taxable in the same ratio as sales to identified customers which had been found taxable. In the sample of sales less than \$25,000, however, the auditor applied a factor of 10 percent as the taxable percentage of sales to unidentified customers even though the taxable percentage of sales to identified customers is obviously less than ten percent of the tested sales. The appropriate percentage should be 4.967 percent. After discussing this matter with Mr. F---, SUTD agrees to the 4.967 percent adjustment.

#### Analysis and Conclusions

The "tax manager" who signed the waiver form would be deemed an "agent", as defined under Civil Code Section 2295 because he represented petitioner in dealing with a third party (SUTD). As an agent, the tax manager had such authority as petitioner actually or ostensibly, conferred upon him. (CC § 2315.) Actual authority is that which petitioner intentionally conferred upon the tax manager or allowed him to believe he possessed. (CC § 2316.) Ostensible authority included the authority given by law to the tax manager, except where SUTD had actual or constructive notice of restrictions; and such authority as petitioner either intentionally or by want of ordinary care, caused or allowed SUTD to believe the tax manager possessed. (CC §§ 2317, 2318.) Petitioner is liable if SUTD in good faith and without want of ordinary care, relied on the tax manager's ostensible authority to its detriment. (CC § 2334.) Therefore, the elements necessary to fasten liability upon petitioner are those which give rise to an estoppel. (House v. California (1981) 119 Cal.App.3d 861, 875, 174 Cal.Rptr. 279.)

According to a review of the petition file, of the six waiver forms obtained by the same auditor, only the last one signed on April 7, 1992 was signed by the tax manager, while the other five were signed by a vice-president. In the lower left-hand corner of the form signed by the tax manager, the following statement appears:

"Signatory, if not a corporate officer, partner or owner, certifies under penalty of perjury that he or she holds a power of attorney to execute this document, as evidenced by a copy of said notarized authorization attached hereto."

According to the audit workpapers, the tax manager was the person with whom the audit was discussed. Based on these facts, I find there is sufficient evidence, that even if the tax manager did not have actual authority to sign the waiver form, he had at least ostensible authority. Because the first five waiver forms were signed by corporate vice-presidents, petitioner was well aware that it was being audited. Petitioner then allowed the tax manager to sign a form in which he certified under penalty of perjury that he held a power of attorney to execute the form. The tax manager was also held out as the person with whom the auditor could discuss the audit findings. Accordingly, the auditor was reasonably led to believe the tax manager had authority to sign the waiver form, even if he did not.

The procedure set forth in Audit Manual Section 0215.13 does not indicate it is the Board's intent to invalidate any waiver form, where the procedure is not followed. This section merely sets forth a procedure which should be followed "to preclude any question about the validity of the waiver". Therefore, although the auditor did not follow the proper procedure in obtaining the last waiver form, this would not invalidate the form itself.

#### Recommendation

Conduct a reaudit deleting the July 22, 1987 transaction with the U--- of C--- in the amount \$X,XXX, and reduce to 4.967 percent, sales less than \$25,000 to unidentified customers.

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Lucian Khan, Staff Counsel

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Date