

STATE OF CALIFORNIA

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:)	
)	
)	
<u>Petitioner</u>)	

The Appeals conference in the above-referenced matter was held by Staff Counsel Lucian Khan on February 1, 1994 in Culver City, California.

Appearing for Petitioner:

Appearing for the
Sales and Use Tax Department:

Protested Item

Unreported taxable sales of syndication shares of racing horse “_____”, in the amount of \$8, 612,500.

Contentions

1. Mr. A’s sale of his one-half interest in share number six was a sale for resale.
2. Mr. A sold his one-half interest in share number 17, and his partner Mr. B kept his one-half share.
3. Ten shares were sold while the horse was outside California; thus, use tax would apply.
4. The sales of all shares were a nontaxable sale of a security.
5. The sales would also qualify as a nontaxable sale of a partnership interest in the subject horse.
6. The failure-to-file penalty should not apply.

Summary

Prior to 1984, the race horse _____ was owned 50 percent by Mr. A and 50 percent by Mr. B. Starting late June of 1984, they syndicated the horse into 40 fractional shares to be sold at \$325,000 each. Documentation submitted to the auditor showed that Mr. B and Mr. A retained 11.5 shares for themselves and gave two shares to the trainers as gifts. The auditor determined the remaining 26.5 shares were sold, and included the above measure in a determination covering the period of July 1, 1983 through September 30, 1986. The determination was billed to Mr. B only, under his account number _____. This was based on documents which indicated that only Mr. B, and not Mr. A executed the bill of sale as to each transaction.

At an Appeals conference held on February 27, 1991, Mr. B maintained that Mr. A as well as himself was involved in all sales of any potentially taxable shares. After the conference, a second bill of sale was submitted listing both Mr. A and Mr. B as sellers, rather than Mr. B alone. On April 8, 1992, a dual determination was issued to Mr. A. The conference of February 1, 1994 followed.

Mr. A and Mr. B now agree that of the 26.5 shares sold, 25 were sold jointly, with the remaining 1.5 shares sold individually. It is further maintained that none of the shares are subject to sales or use tax, or in the alternative, a portion of the shares are subject to use tax. This decision is incorporated by reference to the documentation for Mr. B under _____. Some documents referenced, and arguments made by Mr. B's attorney, _____, are summarized below, and apply to both Mr. B and Mr. A. To avoid duplication of facts, all arguments and analysis and conclusions will incorporate the facts relevant to each issue discussed.

A's Sale of His One-Half Interest in Share No. 6 to B for Resale

According to an unsigned letter dated August 6, 1984 which is addressed to Mr. A and signed by Mr. B, effective June 3, 1984, Mr. A sold his one-half interest in share number 6 to Mr. B for resale. Sometime around February 12, 1985, Mr. B sold this same one-half share to _____, as well as a one-half share that he had previously owned prior to his purchase from Mr. A. Mr. C then owned all of share number 6.

Mr. A and Mr. B both agree, and argue, that the sale by Mr. A of his one-half interest in share number 6 was for resale, and the subsequent sale by Mr. B to Mr. C was a sale by Mr. B alone. It was admitted no resale certificate was submitted on the sale between Mr. A and Mr. B and that during the time Mr. B held the half interest for resale, the horse was actively engaged in racing. On both the purchase date from Mr. A and subsequent sale date to Mr. C, the horse was located in California.

The Sales and Use Tax Department (SUTD) argues that because the horse continued racing between transactions, a taxable use was made.

Based on a review of the facts presented, we conclude the sale by Mr. A to Mr. B of his one-half interest was a taxable retail sale, because of the interim use of the horse (racing), and the sale by Mr. B to Mr. C was a taxable sale as well. According to Revenue and Taxation Code

Section 6091 and Sales and Use Tax Regulation 1668(a)(1), the burden of proving a sale of tangible personal property is not at retail is upon the seller unless he takes a timely resale certificate from the purchase indicating the property is for resale. In the absence of the required certificate, subdivision (c) allows the seller to sustain this burden by proving that the property was not used or consumed by the purchase, but merely held for the purpose of resale. Since racing (Business Tax Law Guide Annotation 110.0280) or training (Annotation 110.0300) constitutes a use of the horse, the sale from Mr. A to Mr. B would not be considered a valid sale for resale. Furthermore, when Mr. B subsequently sold all of share number 6 to Mr. C, the sale of that share was taxable as well. (Sec. 6006, 6051, Anno. 540.0300).

A's Sale of One-Half Interest in Share Number 17

Both Mr. A and Mr. B agree that Mr. A sold his one-half interest in this share to D. Mr. B kept his one-half interest; therefore, after the transfer, Mr. D. and Mr. B. each owned one-half interest in this share. The sale to Mr. D occurred on November 20, 1984, at which time the horse was located in California.

Based on the above authority, we conclude the one-half share sold by Mr. A is subject to sales tax.

Ten Shares Subject to Use Tax

According to both Mr. A and Mr. B ten of the 26.5 shares assessed by the auditor were sold while the horse was temporarily outside California. In support of this contention, the following documentation was submitted: (1) a billing date July 5, 1984 from _____ Transportation, _____, for the transportation of the subject horse from _____, California to _____, Washington. This document did not photocopy well; however, it appears the horse was transported on July 6, 1984. (2) An undated invoice from Ranch _____ which shows the subject horse was transported and delivered to the Ontario airport on July 22, 1984. (3) An undated invoice submitted by _____, and _____ for plane fare for Mr. _____ and an _____, for round-trip plane fare from Los Angeles to Seattle, and a rate differential for a total of 17 days. The billing represents the month of July 1984 and indicates the plane flights occurred on July 8 and 11 of 1984.

In a brief dated January 19, 1994 authored by Mr. _____, he maintains the above evidence proves the horse was outside California between the period of July 6, 1984 through July 22, 1984. He also provided a summary of the date of sale for each of the ten transactions, as well as copies of ten cover letters, each dated July 25, 1984. Each letter is addressed to a purchaser. Also included are copies of the signature pages for each of the ten transactions. All copies contain the signatures of both Mr. A and Mr. B as well as the purchaser. The signature pages are not dated and the remainder of the agreement is not included. Attached as Exhibit 1 is a listing of the ten transactions summarized in the brief.

At the conference, it was pointed out that none of the signature pages for the ten transactions were dated. It was also pointed out that the claimed date of sale for each of the ten

transactions listed in Exhibit 1 were only a summary, and therefore insufficient proof on this issue. It was suggested that the actual sales agreements be submitted.

In a follow-up three-page letter dated February 10, 1994, Mr. _____ again summarizes the sale dates for each of the ten transactions. Attached to the letter are copies of financing statements for all ten sales transactions. No sales agreements were included.

SUTD argues that although the sale of the ten shares would be subject to use tax, Mr. A and Mr. B were engaged in business according to the definition under Revenue and Taxation Code Section 6203, and therefore required to collect use tax. Furthermore, Section 6204 provides that the tax required to be collected constitutes a debt owed to the state.

Revenue and Taxation Code Sections 6014 and 6015 define a seller/retailer as one engaged in the business of selling tangible personal property, the retail sale of which is subject to sales tax. Section 6051 imposes a sales tax on the gross receipts of any retailer from the sale of tangible personal property in this state. Section 6066 requires that any seller engaged in business in this state register with the Board.

Where a transaction is not subject to sales tax, Sections 6201 and 6202 impose a use tax on the storage, use or other consumption of property in this state. This tax is imposed on the purchaser who must pay tax to the state except where a receipt is obtained from a retailer engaged in business in this state, or authorized by the Board to collect the tax. Section 6203 provides that a retailer engaged in business in this state must collect the use tax imposed, and Section 6204 provides that the tax required to be collected by the retailer constitutes a debt owed by the retailer to this state.

Based on a review of the evidence submitted both before and after the second conference, we conclude it has not been proven the ten transactions were subject to use tax, rather than to sales tax. Even if it were proven the transactions were subject to use tax, Mr. A and Mr. B were considered retailers engaged in business in this state (for the remaining 16.5 shares), and therefore required to collect use tax.

Although it may have been shown the subject horse was outside California between the time period of July 7, 1984 through July 21, 1984, it has not been proven that the ten transactions occurred during this time period. No sales agreements have been submitted for any of the ten transactions, and further review of the petition files reveal the dates on the various financing statements submitted with Mr. _____'s February 10, 1994 letter does not necessarily reflect the true sale date. It is noted from a review of the bill of sale involving Mr. _____ (interest number 1) the purchase occurred on June 30, 1984 (Exhibit 2 attached.) On the other hand, the financing statement which Mr. _____ submitted shows a date of July 9, 1984 (Exhibit 3 attached). This discrepancy would indicate that the date the financing statements were signed is not necessarily reflective of the true purchase dates. Accordingly, we do not find Mr. _____'s representations sufficiently complete.

Sale of a Security

The argument that the sale of all shares was a sale of an intangible security and therefore not taxable has been considered in the Decision and Recommendation issued under account number SN _____. As concluded in that decision, sales of shares pursuant to a syndication of a horse passes an undivided ownership interest in the horse to the buyer. Such sales are sales of tangible personal property and subject to sales or use tax. (Annotation 540.0300.)

Sale of Partnership Interest

Mr. A. and Mr. B argue that the syndicate was a general partnership, and the sales of fractional interests were sales of partnership interests. Mr. _____'s brief of January 19, 1994 details on pages 11 through 17 the definition of a partnership and essential elements to find its existence. He argues a general partnership interest such as fractional interests constitutes intangible property. The interest in a partnership is not the ownership of the partnership property, but rather the partner's share of the profits in surplus of the partnership, according to California Corporations Code Section 15026. He notes his argument was previously rejected by the prior Appeals Staff Counsel based solely on Annotation 540.0300. SUTD argues this annotation applies.

We agree with SUTD that Annotation 540.0300 applies. No matter how artfully or creatively this argument is made, the simple fact remains the transactions involve sales of shares pursuant to a syndication agreement. If in a Request for Reconsideration petitioner can point to any authority where this argument has succeeded in a sales and use tax context, it will be considered.

Failure-to-File Penalty

A 10 percent failure-to-file penalty was added to the determination issued to Mr. A. In order for his request for relief of penalty to be considered, Section 6592 requires submission of a written statement under penalty of perjury. Although various requests were submitted on a companion case (SN _____) those requests cannot be considered here, since it involved a different horse and transaction. Accordingly, a separate request must be submitted by Mr. A.

Recommendation

Allow 30 days for Mr. A to submit a written request for relief of penalty under Section 6592. Otherwise, redetermine without adjustment.

Lucian Khan, Staff Counsel

8-2-94
Date