STATE OF CALIFORNIA

BOARD OF EQUALIZATION **557.0009**

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition for Redetermination Under the Sales and Use Tax Law of:	)	DECISION AND RECOMMENDATION
R--- D. G---	)	No. SN -- XX-XXXXXX-010
Petitioner	)	

The Appeals conference in the above-referenced matter was held by Senior Staff Counsel W. E. Burkett on March 23, 199X in Bakersfield, California.

Appearing for Petitioner:	Mr. R--- D. G--- Mr. P--- C. C--- Attorney at Law Ms. B--- S--- Office Manager
Appearing for the Sales and Use Tax Department:	Mr. Spencer B. Stallings Supervising Tax Auditor Mr. Norman Angelo Tax Auditor

Protested Item

The protested tax liability for the period January 1, 1987 through December 31, 1989 is measured by:

Item	State, Local and County
Unreported delivery charges	$398,504

Contentions of Petitioner

1. The delivery charges qualify for exemption under Revenue and Taxation Code Section 6012(c)(7) because the purchases of materials were made as agent for the customers.

2. Alternatively, the delivery charges qualify for exemption under the terms of Revenue and Taxation Code Section 6012(c)(8).

3. The Board is estopped from collecting interest and penalties on these taxes.

Summary

The petitioner is an individual that operates a trucking firm. He did not hold a seller's permit prior to the date of the issuance of the subject deficiency determination.

The audited tax deficiency consists of separately stated transportation charges made in connection with billings for dirt, sand, gravel, and related materials. An audit investigation disclosed that in form, the petitioner was purchasing the materials "tax-paid" from K--- R--- Company and reselling the property to customers. The transportation charges were included as taxable gross receipts in the absence of an explicit agreement transferring title prior to the time the transportation was performed. (Sales and Use Tax Regulation 1628.)

The petitioner contends that the sale of the materials was carried out as agent for the customers. There were no express agency agreements. It is argued, however, that an agency arrangement is demonstrated by the actions of the parties. It was pointed out that it was most convenient for working contractors to place orders with petitioner via telephone at any time. Writings have been secured from customers confirming the claimed agency agreements. (See Exhibit G to petition.)

It is also contended that the transportation receipts qualify for exemption under the provisions of Revenue and Taxation Code Section 6012(c)(8).

The Sales and Use Tax Department (Department) contends that the facts and circumstances do not support the claim of a purchase as an agent for the customers. It is submitted that the exemption provided by Section 6012(c)(8) is limited to "unprocessed" landfill.

The petitioner received orders for materials by telephone. He then ordered the materials from K--- R--- Company for delivery to the customer. He rendered a billing to each customer in his own name and without reference to any agency. Some customers were extended credit with payment due on the 15th of the following month. Petitioner maintains an account with K--- R--- Company and pays for the materials on a monthly basis.

A weight slip is signed by a representative of the customer at the time of the delivery of the materials. A copy of this weight slip is ultimately returned to K--- R--- Company. According to petitioner's representative, this forms the basis for a preliminary notice of lien to all credit customers. Petitioner's representative cites this action as additional evidence of agency pointing out that a lien would not be authorized if the vendor, K--- R--- Company, was selling the material to petitioner for resale. Petitioner does not issue a lien notice for materials sold.

The petitioner is a licensed hauler regulated by the Public Utilities Commission. It pays the statutory rate imposed by the commission on his transportation charges but does not pay on the charges billed for the materials.

A reaudit adjustment was made for transportation charges billed where the actual transportation was performed by sub-haulers. While these charges were billed through petitioner, he retained only 5 percent of the billing. Exemption for these charges was granted under Revenue and Taxation Code Section 6012(c)(7).

The Department also argues that an agency relationship does not exist in the absence of compliance with the proof requirements set forth in Regulation 1540.

Finally, petitioner asserts that the Department is estopped to apply penalty and interest to the determination by reason of a "de facto" amendment of Sales and Use Tax Regulations 1640 and 1628(c) without benefit of the public notice and due process protections of Section 11346.4 of the Government Code.

Analysis & Conclusions

The petitioner is entitled to exclude the transportation charges from gross receipts if he made the purchases of materials as agent of the customers. (Revenue and Taxation Code Section 6012(c)(7); Sales and Use Tax Regulation 1628).

The standard of proof for establishing an agency set forth in Sales and Use Tax Regulation 1540 is not applicable to transactions of the type here considered. The regulatory provision is by its terms applicable only to advertising agencies.

Petitioner's letter brief correctly sets forth the applicable general law agency principles. An agency relationship may be created by precedent authorization or by a subsequent ratification (California Civil Code Section 2307). The authorization may be express or implied from attendant facts and circumstances (Brea v. McGlashan 3 Cal.App.2d 454, 457). Consideration is not required to support the authorization to act as an agent. (See Leno v. Y.M.C.A., 17 Cal.App.3d 651, 658 (1971).) A ratification of the agent's previously unauthorized acts may occur by the principal accepting the benefit of the act of the agent (California Civil Code Section 2310).

While the form of the transactions are sales and resale of material, there is substantial evidence of an agency for the purchase of materials. This includes the following:

1. The vendor is disclosed to the customer together with the price and other terms of purchase.

2. Petitioner does not seek or obtain any profit from the sale of the material.

3. The customer believes the arrangement amounts to an agreement to purchase as agent. Many of the purchasers have executed written agency agreements.

4. The material supplier regards the transaction as an agency transaction. The issuance of a preliminary Notice of Lien for each transaction constitutes independent evidence of this. If the sales were made to the petitioner, as principal, for resale and not on behalf of a contractor, the actual perfection of a lien against the customer would be unlawful.

5. There is an independent business purpose for the authorization. The taking of orders directly is of benefit to the petitioner because he is then assured of obtaining the hauling contract. The arrangement is also beneficial to the customers who have a "round-the-clock" source for obtaining price quotes and placing orders with the K--- R--- Company. The supplier's business practice is also consistent with the agency relationship. In each case it requires the return of delivery tickets and issues a preliminary Notice of Lien to the customers. It would not be authorized to take this action if it were merely selling the materials to the petitioner for resale to the customer. (See Wilson v. Hind, 113 Cal.357; also see Theisen v. County of Los Angeles, 54 Cal.2d 170.)

It is our conclusion that the preponderance of the evidence warrants a finding that the materials were ordered by petitioner as agent for the customers. It follows that the separately stated transportation charges are not includible in taxable gross receipts, because the transportation services were not performed by facilities of the retailer and were derived from delivered price transactions. (Revenue and Taxation Code Section 6012(c)(7); Regulation 1628, paragraphs (a) and (c).)

The files of the Board indicate that hauling transactions involving the movement of "unprocessed" landfill were the underlying reason for the creation of the exclusion provided by Revenue and Taxation Code Section 6012(c)(8). However, the exclusion is not by its terms limited to such transactions. The statute reads as follows:

> "Charges for transporting landfill from an excavation site to a site specified by the purchaser, either if the charge is separately stated and does not exceed a reasonable charge or if the entire consideration consists of payment for transportation."

This provision is implemented by an addition to ~~Revenue and Taxation Code Section~~Regulation 1628 which interprets the exemption to apply to "landfill materials, e.g. sand, dirt or gravel".

In light of this interpretation, we cannot conclude that the exemption is limited to unprocessed materials. Under the interpretative ruling, all dirt, sand, and gravel excavated from a site and hauled away for use as landfill would qualify if it otherwise meets the terms of the exemption statute. This application would not apply, however, to the processing of dirt, sand or gravel with other materials to produce items such as asphalt or concrete. In view of our determination on the agency issue, a segregation of specific transactions qualifying for exemption is not required.

We find no basis for the application of the doctrine of estoppel. There is no evidence of justifiable reliance on an erroneous ruling.

Recommendation

It is recommended that the protested tax deficiency be deleted from amounts redetermined.

_____ 6-7-94

W. E. BURKETT, SENIOR STAFF COUNSEL DATE