



STATE BOARD OF EQUALIZATION

September 29, 1964

S---, S--- and P---
Attorneys at Law
XXX --- Street
--- ---, California

Attention: Mr. A--- L. P---

-- XXXXXX
E--- B--- E--- Co., Inc.

Gentlemen:

This is in reference to the preliminary hearing held in Oakland last July 22, 1964, on the E--- B--- E--- Co. account.

After reviewing the petition for Redetermination, notes taken at the hearing and exhibits entered on behalf of your client, we have reached the following conclusions:

1. That your client was not acting in the capacity of a common carrier when hauling rock, etc., sold by him at retail.

We support our conclusion with Standard Oil Company v. Johnson, 24 Cal. 2d 40, wherein the buyer was also a common carrier. Although the issue in that case was an exemption based on interstate sale, the mere fact of delivery to a carrier did not, per se, make it an interstate sale, and the courts looked to where title passed to rule on the claimed exemption. In addition, E--- B--- in their hauling transactions did not issue bills of lading specifying destination and consignee as was done by the carrier in the Standard Oil case.

2. That the statements by E--- B--- customers and the E--- B--- price list show only that the price of materials did not include delivery charges and did not indicate where title would pass when E--- B--- sold and hauled the rock and sand.

3. That title to the goods sold by E--- B--- passed at point of delivery to the customer.

Our conclusion is based on case authority in Select Base Materials v. State Board of Equalization, 51 Cal. 2d 642; Santa Clara Sand and Gravel Co. v. State of California, 160 Cal. App. 2d 60; and Civil Code § 1739, rule 5.

Accordingly, we are recommending that the petition for Redetermination be granted only to the extent that separately stated charges for transportation by independent haulers after July 1, 1962, be excluded from the measure of tax.

The basis for excluding delivery charges after July 1, 1962, when made by independent truckers, is found in § 6012(g) of the Sales and Use Tax Law. Actually, the effective date of the section, as amended, was July 3, 1962, but the board has used July 1 as a starting date since only tow days are involved and July 1 is the commencing date for the third quarter reporting period.

Prior to July 1962, one authority for inclusion in such charges was found in *Select Base Materials v. State Board of Equalization* (supra) in which the Supreme Court held the fact that the seller elected to discharge his responsibility for delivery by the use of independent truckers was immaterial and the inclusion of those charges in the taxable gross receipts was proper.

Very truly yours,

Robert H. Anderson
Associate Tax Counsel

RHA:spg

cc: Oakland District Administrator

Attached are two copies of the report of hearing officer dated August 27, 1964, which has been approved. This hearing was held in Oakland on July 22, 1964.