557.0484

STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 920-7445

August 17, 1992

Mr. REDACTED TEXT

Re: REDACTED TEXT, Inc.

Dear Mr. REDACTED TEXT:

Enclosed is a copy of the Decision and Recommendation pertaining to the above-referenced petitions for redetermination. I have recommended that one petition be granted in part and denied in part, and that two petitions be denied.

Please read the Decision and Recommendation carefully. If you accept the decision, no further action is necessary. If you disagree with the decision, you have the following two options.

REQUEST FOR RECONSIDERATION. If you have new evidence and/or contentions not previously considered, you should file a Request for Reconsideration. Any such request must be sent to me within 30 days from the date of ·this letter, at the post office box listed above, with a copy to the Principal Tax Auditor at the same box number. No special form is required, but the request must clearly set forth any new contentions, and any new evidence must be attached.

BOARD HEARING. If you have no new evidence and/or contentions, but wish to have an oral hearing before the Board, a written request must be filed within 30 days from the date of this letter with Ms. Janice Masterton, Assistant to the Executive Director, at the above post office box.

The above options are also available to the Sales and Use Tax Department. If the Department requests reconsideration or an oral hearing before the Board, you will be notified and given a chance to respond.

If neither a request for Board hearing nor a Request for Reconsideration is received within thirty (30) days from the date of this letter, the Decision and Recommendation will be presented to the Board for final consideration and action. Official notice of the Board's action will then be mailed to you.

Sincerely,

H. L. Cohen
Senior Staff Counsel

HLC:ct

Enclosure

cc: Mr. REDACTED TEXT

Ms. Janice Masterton
Assistant to the Executive Director (w/enclosure)

Mr. Glenn Bystrom
Principal Tax Auditor (file attached)

Hollywood – District Administrator (w/enclosure)

Sacramento – District Administrator (w/enclosure)

Arcadia – District Administrator (w/enclosure)

Fresno – District Administrator (w/enclosure)

STATE OF CALIFORNIA

BOARD OF EQUALIZATION

BUSINESS TAX APPEALS REVIEW SECTION

In the Matter of the petition for Redetermination Under the Sales and Use Tax Law of:	)))))	DECISION AND RECOMMENDATION
Petitioner	)	

The Appeals conference in the above-referenced matters was held by Senior Staff Counsel H. L. Cohen on July 21, 1992, in Sacramento, California.

Appearing for Petitioner: REDACTED TEXT

Appearing for the Sales and Use Tax Department: Mr. D. Dugas, Senior Tax Auditor, Petitions Section

Protested Items

The protested tax liability for the period July 1, 1986, through December 31, 1989, is measured by:

	Item	State, Local and County
Account No. REDACTED TEXT (COMPANY A)		
A.	Claimed exempt transportation charges disallowed	REDACTED TEXT
Account No. REDACTED TEXT (COMPANY B)		
D.	Use tax amount claimed to be subject to sales tax	REDACTED TEXT
Account No. REDACTED TEXT (COMPANY C)		
D.	Use tax applied to amount claimed to be subject to sales tax	REDACTED TEXT
	TOTAL	REDACTED TEXT

Contentions

Petitioner contends that:

1. The audited deficiency for COMPANY A includes transportation charges which are not subject to tax.

2. The audited deficiencies for COMPANY B and C include amounts which are subject to sales tax; thus, petitioners are not liable for use tax on the amounts.

3. The negligence penalty applied to COMPANY C is not appropriate.

Summary

Petitioners are related corporations. Petitioner COMPANY A is a processor and canner of fruits and vegetables. Petitioner COMPANY B is a processor of various food and pet food products. Its last prior audit was for the period through June 30,1986. Petitioner COMPANY C is a division of COMPANY B. It produces milk, ice cream and related products. Its last prior audit was for the period through June 30, 1986.

COMPANY A purchased an evaporator from REDACTED TEXT, an Italian firm located in REDACTED TEXT, Italy. The purchase order was issued on December 9, 1988. The price stated was REDACTED TEXT FOB Italian port and REDACTED TEXT "CIF Oakland delivery" for a "total price CIF Oakland" of REDACTED TEXT. The purchase order carried as a shipping note the instructions “bill of lading must state 'house-to-house' REDACTED TEXT, Italy to Woodland, California, USA". REDACTED TEXT's invoice to COMPANY A contained the same price terms.

The auditor regarded the transaction as a contract for a delivered price and applied use tax to the total amount of the transaction.

COMPANY A contends that because the transportation charge was separately stated, that charge was not subject to tax. COMPANY A states that the price was subject to adjustment and the contract was therefore not for a delivered price. The auditor has no evidence that the transportation charge could not be adjusted. COMPANY A submitted evidence to show that the total price had in fact been adjusted upward by $40,000. COMPANY A contends that this evidence shows that the equipment was not sold for delivered price. In response to an inquiry from the Appeals Review attorney, COMPANY A stated that a bill of lading was not available. COMPANY A cites subdivision (b)(2) of Sales and Use Tax Regulation 1628, and Business Taxes Law Guide Annotation 557.0210 (10/31/74) as support for its position.

The auditor's response was that the purchase order did not state that the transportation charge was adjustable. There was no title clause in the purchase order. Therefore, title passed when the seller completed its performance. This occurred in California because the seller was obligated to install the equipment at COMPANY A's plant in this state.

COMPANY A contends that title passed in Italy because the seller placed the equipment with the carrier for transportation to the United States at that point. The purchase order does not require installation. COMPANY A states that the installation was the object of a separate contract.

Both COMPANY B and COMPANY C issued purchase orders for equipment which was to be used by COMPANY C in the manufacture of ice cream products. The auditor regarded certain of the transactions as use tax transactions and asserted liability for the tax against COMPANY B and COMPANY C. COMPANY B and COMPANY C contend that they have no liability because these transactions were subject. to sales tax and thus not subject to use tax. Two vendors are involved. The transactions are described in the following paragraphs.

COMPANY C purchased fabricated tubing from REDACTED TEXT Corporation, which is located outside California. REDACTED TEXT CORPORATION fabricated the tubing and contracted with a California business to polish the tubing. REDACTED TEXT CORPORATION shipped the fabricated tubing to its California subcontractor who polished the tubing. COMPANY C then picked up the tubing at the plant of the California subcontractor of REDACTED TEXT CORPORATION. REDACTED TEXT CORPORATION is not registered with the Board. It did not collect use tax or sales tax reimbursement from COMPANY C and did not remit any tax to the Board. During the period in which these transactions took place, REDACTED TEXT CORPORATION had an employee located in Modesto for the purpose of soliciting sales.

The audit staff applied use tax on the basis that the property had been purchased from an out-of-state retailer for use in California. COMPANY C contends that the sales were not sales in interstate commerce because COMPANY C took delivery from the seller's agent in California. COMPANY C argues that since the sale took place in California, the sales tax is the applicable tax. The audit staff believes that since no tax was paid to the Board, COMPANY C is liable for use tax under Section 6401 of the Revenue and Taxation Code. Further, there is no evidence that the California employee of REDACTED TEXT CORPORATION participated in the transactions.

Both COMPANY C and COMPANY B issued purchase orders for equipment to REDACTED TEXT, Inc., which is located in REDACTED TEXT, Wisconsin. This corporation maintained a sales office in Santa Ana. All shipments were CIF COMPANY C's California plant site. Shipment was made from Denmark by the manufacturer, REDACTED TEXT INC A/S, a related Danish corporation. The prices on the purchase orders were specified to include duty, customs handling, insurance, and ocean freight. The prices also included installation or erection where applicable. Invoices were issued by the Danish corporation and specified that the equipment remained the property of the Danish corporation until full payment was received. The purchase orders and the invoices listed a schedule of progress payments. Typically, these were 30 percent down, 60 percent on arrival of the equipment in California, and the remainder upon the completion of installation, erection, or startup. The invoices specified that the 60 percent payment was to be made to the Wisconsin corporation. Installation and start-up services were to be performed by the Wisconsin corporation and were to be billed separately and in addition to the purchase price of the equipment.

The audit staff regarded the Danish corporation as the seller. Since the Danish corporation had no presence in California, the audit staff concluded that use tax applied to the transaction and that COMPANY C and COMPANY B were liable for the use tax. The audit staff conceded the possibility that the sale actually took place in California, but the audit staff took the position that since there was no local participation in the sale by employees of the seller, the sales tax could not be applied.

COMPANY C and COMPANY B contend that the Danish and Wisconsin corporations operated as a single entity, and that the Santa Ana sales representative of the Wisconsin corporation satisfied the requirement of local participation for purposes of applying sales tax. Representatives of the Wisconsin corporation conducted negotiations with COMPANY C AND COMPANY B in Los Angeles on behalf of the Danish corporation. These negotiations were related to purchase orders which had already been placed by COMPANY C AND COMPANY B. The installation charges made by the Wisconsin corporation were for services which were actually performed over a one and a half to two-year period by personnel sent from Denmark by·the Danish corporation. Since the installers were in this state for a protracted period of time, COMPANY C AND COMPANY B contend that the Danish corporation also had a local connection in this state.

COMPANY C AND COMPANY B point out that in Uniform Local Sales and Use Tax Regulation 1806, a jobsite is regarded as a place of business of a construction contractor. They argue, therefore, that this substantiates the presence of the Danish corporation in this state.

COMPANY C AND COMPANY B cite Tyler Pipe Industries, Inc. v. Washington Department of Revenue, 483 U.S. 232, and General Trading Company v. State Tax Commission, 322 U.S. 335, as support for their contention that the presence of a sales representative in the state is sufficient to allow the imposition of sales tax.

A penalty for negligence was added to the COMPANY C audit at the time of the audit. The audit staff now recommends that it be deleted.

Analysis and Conclusions

Section 6011 of the Revenue and Taxation Code defines "sales price" which is the amount subject to use tax to exclude separately stated charges for transportation from the retailer's place of business or other point from which shipment is made directly to the purchaser. This exclusion does not apply if the property is sold for a delivered price unless the sale takes place before the transportation. Further, the exclusion can apply only to the cost to the retailer of the transportation.

At issue here is a charge of $140,000 for "CIF Oakland delivery". Section 2320 of the Commercial Code defines "CIF" to mean the cost of the goods and the insurance and freight. Some amount of insurance was included in the amount. The charge for transportation is not truly separately stated. We have in the past regarded the charge for shipping and handling as not meeting the requirement for a separately stated charge for transportation, even though the amount of the shipping charges can be determined from other documents. Inasmuch as the

shipping charge was not separately stated, it is unnecessary to decide whether the contract was for a delivered price or where title transferred. I conclude that the tax was properly applied to the CIF charge. The petition for redetermination of COMPANY A should therefore be denied.

Section 6051 imposes the sales tax on retailers based on the gross receipts from the retail sale in this state of tangible personal property. Section 6201 imposes the use tax on the storage, use, or other consumption in this state of tangible personal property purchased from a retailer for the purpose of such storage, use, or other consumption in this state. Section 6202 provides that every person storing, using, or otherwise consuming in this state tangible personal property which was purchased from a retailer is liable for the use tax. Section 6203 provides that under specified conditions, a seller may be required to collect the use tax from a buyer and to remit it to the state. Section 6401 provides:

> "The storage, use, or other consumption in this state of property, the gross receipts from the sale of which the purchaser establishes to the satisfaction of the board were included in the measure of the sales tax, is exempted from the use tax; provided, however, that this exemption does not extend to the possession of, or the exercise of any right or power over, tangible personal property by a lessee under a lease."

Thus, with the exception of leases, the basic tax as between the sales and the use tax is the sales tax. The only ambiguity in this respect in Section 6401 is whether "included in the measure of the sales tax" means sales tax actually paid to the state by the seller or sales tax which should have been paid to the state by the seller. It is my conclusion that absent fraudulent inducement by the buyer to the seller to sell without billing sales tax reimbursement or collusion between the buyer and the seller to evade the sales tax or a pattern of dealing between the parties, the proper interpretation is that the phrase should mean sales tax which should have been paid to the state by the seller. Otherwise, every shopper would be potentially liable for use tax on any property purchased within the state for which he or she could not produce a receipt for sales tax reimbursement. I do not believe that result to have been the intent of the Legislature. COMPANY C AND COMPANY B cannot be held liable for use tax solely on the basis that their vendor did not pay sales tax with respect to the transaction. They can be held liable for use tax only if the vendor had no sales tax liability on the transaction.

Section 6007 provides in pertinent part:

> "The delivery in this State of tangible personal property by an owner or former owner thereof or by a factor, or agent of such owner, former owner or factor, if the delivery is to a consumer or person for redelivery to a consumer, pursuant to a retail sale made by a retailer not engaged in business in this State, is a retail sale in this State by the person making the delivery. He shall include the retail selling price of the property in his gross receipts."

If REDACTED TEXT CORPORATION was not a retailer engaged in business in this state at the time of the transaction, the entity which polished the pipe and delivered it to COMPANY C would be regarded as the retailer of the pipe liable for the sales tax. However, REDACTED TEXT CORPORATION had an employee located in California for the purpose of

making sales. Accordingly, REDACTED TEXT CORPORATION was a retailer engaged in business in this state as defined in Section 6203. The tax due was therefore the use tax for which COMPANY C is liable.

Sales and Use Tax Regulation 1620 provides in pertinent part:

" (a) SALES TAX.

"(1) IN GENERAL. When a sale occurs in this state, the sales tax, if otherwise applicable, is not rendered inapplicable solely because the sale follows a movement of the property into this state from a point beyond its borders, or precedes a movement of the property from within this state to a point outside its borders. Such movements prevent application of the tax only when conditions exist under which the taxing of the sale, or the gross receipts derived therefrom, is prohibited by the United States Constitution or there exists a statutory exemption. If title to the property sold passes to the purchaser at a point outside this state, or if for any other reason the sale occurs outside this state, the sales tax does not apply, regardless of the extent of the retailer's participation in California in relating to the transaction. The retailer has the burden of proving facts establishing his right to exemption.

“(2) SALES FOLLOWING MOVEMENT OF PROPERTY INTO STATE FROM POINT OUTSIDE STATE.

"(A) From Other States--When Sales Tax Applies. Sales tax applies when the order for the property is sent by the purchaser to, or delivery of the property is made by, any local branch, office, outlet or other place of business of the retailer in this state, or agent or representative operating out of or having any connection with, such local branch, office, outlet or other place of business and the sale occurs in this state. The term 'other place of business' as used herein includes the homes of district managers, service representatives, and other resident employees, who perform substantial services in relation to the retailer's functions in this state, particularly in relation to sales. It is immaterial that the contract of sale requires or contemplates that the goods will be shipped to the purchaser from a point outside the state. Participation in the transaction in any way by the local office, branch, outlet or other place of business is sufficient to sustain the tax.

"(B) From Other States--When Sales Tax Does Not Apply. Sales tax does not apply when the order is sent by the purchaser directly to the retailer at a point outside this state, or to an agent of the retailer in this state, and the property is shipped to the purchaser, pursuant to the contract of sale, from a point outside this state directly to the purchaser in this state, *or* to the retailer's agent in this state for delivery to the purchaser in this state, provided there is no participation whatever in the transaction by any local branch, office, outlet or other place of business of the retailer or by any agent of the retailer having any connection with such branch, office, outlet, or place of business."

In order for sales tax to apply to a transaction, two things are necessary: The sale must take place in California and there must be some participation by a local office or agent of the seller in the transaction. This provision is in direct accord with Norton Company v. Department

of Revenue of Illinois, 340 U.S. 534. The cases cited by petitioner, while dealing with the same general area of law, are not directly on point. They deal primarily with business and occupation taxes, and use taxes. They also uphold the general proposition-that local participation is needed to sustain the sales tax.

The title clauses in the sales documents clearly establish that the sales occurred in California. The question is what constitutes local participation. The audit staff attempts to distinguish between the Wisconsin corporation and the Danish corporation. Obviously, they are separate entities and thus as such are different persons. See Section 6005. However, the fact that they are separate persons does not prohibit them from acting in concert as a joint venture or prohibit the Wisconsin corporation from acting as an agent of the Danish corporation. The facts indicate that they did in fact act together. The order was sent to Wisconsin, the property was sent and invoiced by the Danish corporation, and payment was made to the Wisconsin corporation. I see only one entity involved here. Where it is a joint venture or the Wisconsin corporation acting as an agent for the Danish corporation is immaterial.

Having decided that COMPANY C AND COMPANY B dealt with a single entity does not settle the question as to whether or not there was local participation by a local office or agent of the seller. The Norton case indicates that the local participation to be looked for is participation in the sale or delivery of the property. Here, the purchase orders were sent to the Wisconsin corporation and delivery was made directly to COMPANY C AND COMPANY B. There was no participation either in the sale or delivery of the property by the local agents of the Wisconsin corporation. The participation was solely in post-sale negotiations. That is insufficient to sustain the imposition of the sales tax. Since the sales tax does not apply, the use tax applies. COMPANY C AND COMPANY B are liable for the use tax.

COMPANY C AND COMPANY B reliance on Regulation 1806 is misplaced. That regulation deals solely with how the local sales tax is to be allocated between counties. It has no application to the concept of local participation for purposes of constitutional due process clause requirements.

The audit staff has already agreed that the penalty for negligence should be deleted. No further discussion is necessary here.

Recommendation

Delete the penalty from the COMPANY C determination. Deny the three petitions without other change.

_____ 8/11/92

H. L. Cohen, Senior Staff Counsel Date