

STATE OF CALIFORNIA

BOARD OF EQUALIZATION

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

The above entitled matter came on regularly for hearing on Wednesday, October 15, 1980, in Santa Rosa, California before Susan M. Wengel, Hearing Officer.

Appearing for Petitioner: REDACTED TEXT

Appearing for the Board: A. Theodos, Principal Auditor
N. Stameroff, Tax Auditor

Protested Item

The petitioner has filed a petition for redetermination of a tax deficiency determination issued on May 3, 1979, for the period December 1, 1975 through September 30, 1978. The protest involves tax determined on the following audit item:

Audit Item A:

Total sales understated. Taxable transportation charges netted from total sales in reporting 7-1-77 to 9-30-78 (actual).

REDACTED TEXT

Contention of Petitioner

1. The transportation charges are exempt as the drivers are independent contractors.

Summary of Petition

The petitioner is a corporation engaged in the business of selling rock and gravel. During a routine audit the Board's audit staff concluded that the transportation charges were properly included in the measure of tax as the transportation was not by facilities other than facilities of the retailer. This conclusion was based on the auditor's findings that the drivers appeared to be under the petitioner's control.

The petitioner contends that the drivers were independent contractors. In support of this position the following information was presented:

1. The drivers all owned their own cabs. Only the trailers were leased from the petitioner.
2. The drivers did not have to haul exclusively for the petitioner.
3. The drivers were paid once a month based on the weight of the loads they hauled. Each job was written up on a separate invoice. At the end of the month these invoices were totaled and the drivers were paid accordingly.
4. There were no employee withholdings and the drivers were not on the petitioner's payroll.
5. The drivers were given jobs. Once given an assignment, a driver would pick up the load and check back in once the load was delivered. There was no direction from the petitioner as to which jobs a driver must take or how to make the deliveries.
6. All cab repairs and fuel were paid for by the drivers.

Analysis and Conclusion

Revenue and Taxation Code Sections 6011(c)(7) and 6012(c)(7) exclude from the measure of tax separately stated charges for transportation when certain requirements are met. One of these requirements is the need for the transportation to be conducted by facilities other than facilities of the retailer.

Sales and Use Tax Regulation 1628(a) further provides that transportation is by other than facilities of the retailer when it is by United States mail, common carrier or independent contract.

In determining whether one who performs services for another is an employee or an independent contractor, the most important factor to consider is the right to control the manner and the means of accomplishing the result desired. Empire Star Co. v. California Employment Commission 28 C. 2d 33 (1946). Other factors which may not be conclusive, are:

1. The independent nature of the business.
2. The existence of a contract for the performance of a specified piece of work.
3. An agreement to pay a fixed price for the work.
4. Employment by the person engages to do the work of assistants who are under his control.

5. The furnishing by him of necessary materials.
6. The degree of skill required to perform the service.
Cooperative Bldg. Materials, Inc. v. Robbins and Larkey, 80 C.A. 2d 832 (1947)

The facts indicate that the drivers, although closely connected to the petitioner, performed the hauling as independent contractors. There are no "contracts" per se for each job but there are invoices which show that each driver was paid a set amount per ton for each job performed. The monthly income for the drivers varied each month and this too is evidence that the drivers were independent contractors. Furthermore, there is no evidence of employee benefits or withholdings and the drivers were only paid once a month. In sum, the greater weight of evidence supports a finding that the drivers of the trucks were independent contractors and that the requirement set out in Regulation 1628 concerning delivery by "facilities other than facilities of the retailer" has been met.

Recommendation

It is recommended that the petition as to Audit Item A be granted. The remaining liability to be redetermined without adjustment.

Susan M. Wengel, Hearing Officer

November 4, 1980
Date