565.0626

STATE OF CALIFORNIA

BOARD OF EQUALIZATION

BUSINESS TAXES 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 matter was held by Paul O. Smith, Staff Counsel on July 29, 1993, in Sacramento, California.

Appearing for Petitioner:	REDACTED TEXT
Audits	REDACTED TEXT
Appearing for the Sales and Use Tax Department:	REDACTED TEXT Supervising Tax Auditor

Protested Item

The protested tax liability for the period July 1, 1985 through December 31, 1988, is measured by:

	Item	Amount
D.	Materials consumed (cables) in the performance of construction contracts for the United States government. ($1,891,954 per original audit less $964,473 for reaudit adjustment)	$927,481

Petitioner's Contentions

Petitioner contends that it is not a United States construction contractor because it did not improve realty, or install equipment that became imbedded in or affixed to a structure. Petitioner further contends that since the cable it installs in a building can be removed without any damage

to the building, the cable should be classified as machinery and equipment instead of materials or fixtures.

Summary

During the period in issue petitioner REDACTED TEXT[1] engaged in the business of selling and installing telephone systems to various federal agencies. The cable, other than "jack cable", is hooked to PBX equipment on the one end and cable coming in from the street on the other end. The "jack cable"[2] is hooked to a telephone and telephone jack. Plaintiff contends that the cable in question is not attached, incorporated into, or affixed to the realty, and is moveable without damage to the realty: the cable is pulled or laid in Government furnished ducts, conduits, raceways, plenums, or surface mounts between campus buildings, between floors within a building, or between instruments and their common equipment or wire closets. Each contract has a provision for "deinstallation" of the cable when requested by the government.

The Sales and Use Tax Department (Department) examined petitioner's operations and determined that the cable in question should be classified as materials or fixtures, and taxable as such. On July 31, 1991, the Department issued its Notice of Determination to petitioner. Petitioner filed a timely Petition for Redetermination.

Analysis and Conclusion

Revenue and Taxation Code section 6384 provides that tax shall apply to gross receipts from the sales or tangible personal property to contractors with the United States for the construction of improvements on or to real property. Sales and Use Tax Regulation 1521, subdivision (a) (1) (A) provides in relevant part that a construction contract does not include the sale and installation of machinery and equipment. This regulation further provides that "materials" means tangible personal property which in combination with real property loses its identity and becomes an integral part of the real property. The term "fixtures" means any items that are accessory to real property and do not lose their identity when incorporated into the real property. (See Sales and Use Tax Reg. 1521, subd. (a) (4) and (5), and Appendixes A and B for a listing of items typically regarded as materials and fixtures.) In effect, under Regulation 1521, a United States contractor is the consumer of materials and fixtures and must pay tax on the purchase of these items. (See also C. R. Fedrick, Inc. v. State Bd. of Equalization (1988) 204 Cal.App.3d 252.)

Petitioner argues that it is not a United States construction contractor because it did not improve realty, or install equipment that became imbedded in or affixed to a structure. Petitioner makes this argument because it alleges that the cable in question is not attached, incorporated into, or affixed to the realty. It is laid in Government furnished plenums.

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[1] During 1988, petitioner's name was formally changed from REDACTED TEXT to REDACTED TEXT.

[2] At the conference petitioner offered into evidence samples of "jack cable", which it alleges is included in the taxable measure. The parties agreed that this cable is property classified as machinery and equipment, and therefore not taxable pursuant to Revenue and Taxation Code section 6384. I concur with the parties that "jack cable" should not be included in the taxable measure. Hereafter the cable discussed is other than "jack cable".

Subdivision (a) ((B) (3), of Regulation 1521 provides that "'United States construction contractor' means a construction contractor who for himself, in conjunction with, or by or through others, agrees to perform and does perform a construction contract for the United States." The regulation also provides that "construction contract" means and includes a contract, whether on a lump, time and material, cost plus, or any other basis, to erect, construct, alter, repair...or other improvement on or to real property...." (Sales and Use Tax Reg., § 1521, subd. (a) (1) (A).) Here, the parties do not dispute that under a government contract, petitioner acted as the contractor and installed telephone systems for various federal agencies. Thus, petitioner is a "United States construction contractor", and as such is the consumer of materials and fixtures consumed in the performance of contracts with the various federal agencies. (See Sales and Use Tax Reg. 1521, subd. (b) (1) (A).)

I now address petitioner's argument that since the cable installed in a building can be removed without any damage to the building, the cable should be classified as machinery and equipment and not materials or fixtures.

Under Regulation 1521 the principal means of distinguishing "fixtures" and "materials" from "machinery and equipment" is by the listings of examples appended to the regulation. (See Sales and Use Tax Reg., § 1521, Appendixes A, B, and C.) Yet, nowhere in the regulation or appendixes thereto is cable identified as either a fixture, material, or machinery and equipment. Therefore, the determination must be made from any relevant case law. This case is factually similar to Chula Vista Electric Co. v. State Bd. of Equalization (1975) 53 Cal.App.3d 445.

Although the issue in Chula Vista was whether electrical cable was tangible personal property, the case is nonetheless instructive because there the cable was found to be a fixture, not machinery and equipment. In Chula Vista the taxpayer, an electrical contractor, contracted with the U.S. Government to remove electrical cable from a facility and replace it with new cable. The cable was drawn into a conduit at the meter and switching station to a substation used to divide the cable inlet into a number of outlet cables leading to buildings, equipment, and motors at an air station. Both the meter and switching station and the substation were movable property. The cable was laid in but was not attached to the conduit. The court, reasoning that the cable was necessary to an electrical transmission line and was so firmly attached to a structure as to become part of it, held that the cable was a fixture within the meaning of Regulation 1615.[3] (Chula Vista Electric Co. v. State Bd. of Equalization, supra, Cal.App.3d at 450-451; see also Sales and Use Tax Annot. 565.0650 (Sept. 23, 1976; see also C. R. Fedrick, Inc. v. State Bd. of Equalization (1988) 204 Cal.App.3d 252.)

The mere fact that the cable here can be removed without material damage to the plenum in which laid is not determinative of whether it is affixed to the structure. Because petitioner adapted the cable to the use and purpose of the realty, and there was a low probability that the cable would be replaced often, I conclude that the cable was intended to remain in place, and thus permanently attached to the realty. The attachment of the article need not be by cement, plaster, or nails, it can be considered attached from an intent to make the article permanent, or an intent for the article to remain in place until worn out. (C. R. Fedrick Inc. v. State Bd. of Equalization, surpa, 204 Cal.App.3d at 265.)

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[3] Effective April 1, 1976, this regulation was incorporated into regulation 1521.

The cable here is laid in government furnished plenums that are an integral part of the building, and will remain in place until deinstalled by petitioner. Even though the cable is hooked to PBX equipment on the one end, I must nonetheless consider it to be a fixture because it unquestionably is necessary to the cable coming into the structure from the street. Petitioner has not offered any evidence that the cable coming into the building is not so firmly attached that it is not a part of the building. Therefore, the cable in question is a fixture within the meaning of Regulation 1521. (Cf. Chula Vista Electric Co. v. *State Bd. of Equalization*, supra, 53 Cal.App.3d 445.) Thus, petitioner as a "United States construction contractor" is the consumer of the cable it installed in the performance of contracts with the various federal agencies, and must pay tax on the purchase of these items. (See C. R. Fedrick. Inc. v. State Bd. of Equalization, supra, 204 Cal.App.3d 252.)

Recommendation

Conduct a reaudit to exclude "jack cable" from the taxable measure, and deny the petition in all other respects.

_____ 4/19/94

Paul O. Smith, Staff Counsel Date