

STATE OF CALIFORNIA
BOARD OF EQUALIZATION
APPEALS DIVISION

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

The above-referenced matter came on regularly for hearing before Hearing Officer Janice M. Jolley on February 28, 1991, in Downey, California.

Appearing for Petitioners:

Appearing for the	
Sales and Use Tax Department:	Mr. Howard Y. Tse Supervising Tax Auditor

Protested Item

The protested tax liability involves use tax totaling \$468, a 10% penalty in the amount of \$46.80 asserted on the grounds of negligence, and interest in the amount of \$23.01 through October 31, 1989. A 10% finality penalty has also been applied. The use tax was asserted to be due as the result of petitioners' purchase of a 1985 Ford pickup and a 1977 Dream camper in May or June 1989. The Sales and Use Tax Department alleges petitioners paid \$14,200 for a house car but only reported its cost as \$7,000 to the Department of Motor Vehicles when it was registered.

Petitioners' Contention

Petitioners contend that they acquired the Ford pickup and a removable camper for which they separately negotiated sales prices of \$7,000 and \$7,200, respectively. Petitioners allege the appropriate measure of tax is \$7,000 which they state was the fair market value of the pick up, exclusive of the value of the Dream camper at the time of purchase. Petitioners further allege that they were misled by information obtained from an employee at the Department of Motor Vehicles (hereinafter, the DMV) who stated that the value of the camper shell need not be included in the reported sales price. Thus petitioners allege grounds for estoppel exists and that they were not negligent.

Background

Petitioners purchased a 1985 Ford pickup truck and a 1977 Dream Camper from _____ in 1989. Petitioners alleged that the truck was acquired on or about June 12, 1989, and that the camper was acquired on May 9, 1989. Exhibit A is the Ownership Certificate for the truck executed by the seller, in favor of petitioners. According to a Notice of Release of Liability dated May 9, 1989, _____ notified the DMV that he had sold the 1985 Ford pickup to petitioners for \$14,200. (Exhibit B.) According to a statement of Facts signed by petitioner _____ on July 18, 1989, which was submitted to the DMV, petitioners did not receive title to the vehicle until July 3, 1989. (Exhibit C.) Petitioners alleged that they provided _____ with the funds used to payoff the loan on the truck. Petitioners stated that they paid _____ a total of \$14,200 by tendering a certified check in the amount of \$14,000 and a personal check in the amount of \$200. Petitioners allegedly accompanied _____ to his bank at which time petitioners' checks were deposited into the _____ bank account. The proceeds of the checks were allegedly applied to payoff the bank loan on the truck. According to petitioners, the camper was not subject to financing. Petitioners alleged that it took the bank approximately five weeks to deliver the endorsed pink slip.

Petitioners alleged that when they attempted to register the truck with the DMV, an employee of that agency informed them that the vehicle could be registered as a mobile home because it was sold with the camper top attached. In so doing, petitioners were informed that they would pay a lesser registration fee but that they would be precluded from removing the camper. Petitioners were informed they could elect to register the truck as a commercial vehicle at a higher fee, which would then allow them to remove the camper. Petitioners' vehicle registration reflects that they chose the latter alternative. (Exhibit D.)

Petitioners alleged that they informed this DMV employee that they had paid \$7,000 for the truck and \$7,200 for the camper. Petitioners admitted that the camper was attached to the vehicle at the time of sale and at the time the vehicle was registered with the DMV. The Sales and Use Tax Department (hereinafter, the Department) contended that because the camper was affixed at both times, the sales price upon which petitioners owe use tax includes the fair market value of the camper. The DMV employee allegedly informed petitioners that they did not have to include the price of the camper in the sales price. At the hearing, petitioners stated that the camper had been the subject of separate negotiations.

In response to requests from the Department, at the hearing petitioners submitted two Bills of Sale dated May 9, 1989, which they claimed were provided by _____ (Exhibits E and F.) Exhibit E stated that _____ sold the 1985 Ford pickup for \$7,000. Exhibit F stated that _____ sold a 1977 Dream Camper to petitioners "as is" for \$7,200. Petitioners alleged that the negotiated sales prices were the fair market values of the items. At the hearing, the Department submitted a copy of the Kelley Blue Book for Used Cars for the period May-June 1989 to refute the fair market values. (Exhibit G.) It reflected that the wholesale value of a 1985 Ford V-8 crew-cab truck without any adjustments for mileage and/or additional equipment should have approximated \$8,350. Its retail selling price should have approximated \$10,695.

Petitioner _____ is a Sergeant in the Sheriff's Office of _____ County.

Analysis and Conclusion

Revenue and Taxation Code section 6275 defines a retailer as every person making a sale of a vehicle required to be registered with the DMV. _____ was the retailer of the vehicle sold to petitioners. Revenue and Taxation Code section 6201 imposes an excise tax on the storage, use, or other consumption in this state of tangible personal property purchased from a retailer for storage, use, or other consumption in this state. Petitioners acquired the 1985 pickup in a retail sale in this state and are liable for the use tax on the purchase of the vehicle under Revenue and Taxation Code section 6293. This section exempts the retailer from the duty of collecting use tax on the sale of the vehicle.

Revenue and Taxation Code section 6276 creates a rebuttable presumption that the sales price at the time of purchase is the fair market value of the vehicle. Revenue and Taxation Code section 6011 defines the sales price as the total amount for which tangible personal property is sold or leased or rented, as the case may be, valued in money, whether paid in money or otherwise.

Two issues present themselves for resolution. First, for purposes of determining the measure of tax, what did petitioners acquire -- a pickup and a camper or a house car? Second, what was the fair market value of the item(s) subject to use tax?

Issue I -What did petitioners acquire?

Petitioners contended that by bifurcating their negotiations with _____ to acquire the camper separate from the pickup, the sales price of the camper is excludable from use tax under Revenue and Taxation Code section 6006. 5. Petitioners contended the camper was acquired in an occasional sale from _____ who was not a retailer as to that item within the meaning of Revenue and Taxation Code section 6201, and that no use tax is due on the camper. Petitioners rely on the certificate of Ownership (Exhibit A) and the Bills of Sale (Exhibits E and F) as their evidence that the camper was the subject of separate negotiations. The Department submitted that the \$14,200 selling price denoted by _____ on the Notice of Release of Liability (Exhibit B) and the retail price for the truck according to the Kelley Blue book (Ex. G) refute petitioners' evidence.

For purposes of implementation of tax under Revenue and Taxation Code section 6272, et seq., which impose sales or use tax on the sale or purchase of vehicles in this state, the definition of a vehicle under Veh. Code section 670 was adopted. Vehicle Code section 670 defines a vehicle as “a device by which any person or property may be propelled, moved, or drawn upon the highway, excepting a device moved exclusively by human power or used exclusively upon stationary rails or tracks.” Vehicle Code section 465 defines a passenger vehicle as “any motor vehicle, other than a motor truck or a truck-tractor, designed for carrying not more than 10 persons including the driver, and used or maintained for the transportation of purposes. The term ‘passenger vehicle’ shall include a house car.” A house car, as defined in Veh. Code section 362, is defined as follows:

“A 'house car' is a motor vehicle originally designed, or permanently altered, and equipped for human habitation, or to which a camper has been permanently attached. A motor vehicle to which a camper has been temporarily attached is not a house car except that, for the purposes of Division 11 (commencing with section 21000) and Division 12 (commencing with Section 24000), a motor vehicle equipped with a camper having an axle that is designed to support a portion of the weight of the camper unit shall be considered a three-axle house car regardless of the method of attachment or manner of registration. A house car shall not be deemed to be a motortruck.” [Emphasis added.]

Vehicle Code section 243 defines a camper as “a structure designed to be mounted upon a motor vehicle to provide facilities for human habitation or camping purposes. A camper having one axle shall not be considered a vehicle.”

Petitioner registered the pickup as a commercial vehicle. (Exhibit D.) A commercial vehicle is defined at Vehicle Code section 2060(a) as follows:

“(a) A 'commercial vehicle' is a vehicle of a type required to be registered under this code used or maintained for the transportation of persons for hire, compensation, or profit or designed, used, or maintained primarily for the transportation of property.”

Vehicle Code section 9400 provides, in pertinent part, as follows:

“In addition to any other registration fee, there shall be paid the fees set forth in this section for the registration of commercial vehicles. Whenever a camper is temporarily attached to a motor vehicle designed to transport property, the motor vehicle shall be subject to the fees imposed by this section. The camper shall be deemed to be a load, and fees imposed by this section upon the motor vehicle shall be based upon the unladen weight of the motor vehicle, exclusive of the camper.”

Vehicle Code section 661 excludes from a determination of the unladen weight of a vehicle "any camper unit that is temporarily attached to the vehicle." However, Vehicle Code section 660 provides, in pertinent part, that “[t]he unladen weight of a vehicle shall have no application in determining any fee under this code or the Revenue and Taxation Code other than section 9400...”

Based upon the above statutory provisions, it appears that the advice concerning registration of the truck as a commercial vehicle provided by the DMV representative was appropriate for purposes of determining the registration fee of the truck as a commercial vehicle. It appears the DMV employee's advice was also partially erroneous, even under the Vehicle Code. It is questionable whether petitioners could properly have elected to treat the camper as a permanently affixed item to the truck in order to register it as a house car. Registration of the truck as a passenger vehicle (housecar) would have precluded the additional surcharge set forth in Vehicle Code section 9400. Erroneous advice by an employee cannot create an exemption

where one is not authorized by law. Fischbach and Moore, Inc. v. State Board of Equalization, (1981) 117 Cal.App.3d 627. Petitioners were entitled to exclude the weight of the camper under Veh. Code section 661 from the unladen weight which was used to determine the fee for registering a commercial vehicle under Veh. Code section 9400. While the provision in Veh. Code section 660 stated that unladen weight has no application to the Revenue and Taxation Code, neither is it determinative of what petitioner bought for purposes of imposition of sales and use taxes.

Application of use tax really depends upon what type of vehicle petitioners acquired -- a house car or two separate items of tangible personal property, only one of which is taxable. The terms of petitioners' contract with _____ rest in parole. It is irrelevant whether petitioners and _____ negotiated separately for the truck and camper unless what petitioners acquired met the statutory definition of a house car which can be registered as a vehicle. Information currently available to the hearing officer indicates that petitioners bargained for and obtained a truck and a camper, not a house car.

Since Revenue and Taxation Code section 6272 specifically adopts the term "vehicle" as used under Veh. Code Section 670 for purposes of applying the tax, and Veh. Code Section 362 by definition excludes a temporarily attached camper from the definition of a "house car," petitioners cannot be treated as having acquired a house car, i.e., an inseparable camper from the truck for purposes of imposition of the tax. Since Veh. Code section 243 specifically excludes from the definition of a vehicle any camper having one axle or less, and there has been no showing that the camper acquired by petitioners would not qualify for this exclusion, petitioners' purchase of a removable camper must also be excluded from taxation under Revenue and Taxation Code section 6272 because it is not a vehicle. Therefore, for purposes of resolving this preliminary issue, it is irrelevant whether petitioners negotiated for and obtained separate bills of sale for the camper and the truck. By statutory definition, the removable nature of the camper precluded it from being licensed as a vehicle; therefore it was excluded from taxation as a vehicle under Revenue and Taxation Code sections 6201 and 6275 unless it can be shown to have been otherwise acquired in a retail sale. No evidence has been presented to demonstrate that the sale of the camper by _____ was not exempt from tax as an occasional sale under Revenue and Taxation Code section 6006.5.

Issue II - What was the fair market value of the truck?

The reported selling price of the vehicle was \$14,200 according to the Notice of Release of Liability submitted to the DMV by the seller (Exhibit B). The Department relied on the reported values in the Kelley Blue Book to corroborate that the pickup's fair market value was \$14,200 instead of the \$7,000 reported by petitioners to the DMV. (Exhibit G.) Petitioners enjoy a rebuttable presumption that the selling price was the fair market value. (Revenue and Taxation Code section 6276.) I find that the Department and the evidence presented have rebutted the presumption.

First, I note that there are some unexplained inconsistencies in the testimony at the hearing and the documents submitted by petitioners. For instance, petitioners alleged that they accompanied the seller to his bank and that they tendered a certified check which was deposited

into _____ account and was used to payoff a lien against the vehicle. Exhibit A, the ownership certificate, reflects, however, that the lienholder had signed off the title on January 10, 1986, over three and one-half years before this sale. Since petitioners alleged that the camper was not financed, there was seemingly no other lender in possession of the title document. It is difficult to perceive why there would have been any delay in registering the vehicle as proffered in the Statement of Facts to the DMV. (Exhibit C.) Nevertheless, this discrepancy does not recognizably impact on the determination of the fair market value of the truck at its time of sale.

The next inconsistency is the entry of the date "June 12, 1989," next to the seller's signature on the ownership certificate. (Exhibit A.) The petitioners' signatures on the back of the certificate reflect that they signed it on May 9, 1989. They appear to have been subsequently altered or amended to read June 12, 1989. The \$7,000 sales price entered on Exhibit A is in the same handwriting as the "June 12" date entries which were subscribed over the prior May 9 date entries. The source of those after-the-fact entries is unidentified. The Bills of Sale for the camper and the truck were also both dated May 9, 1989. (Exhibits E and F.) One must query why the seller would endorse and tender a Bill of Sale for the camper and the pickup and would allow the buyers to subscribe their names on the certificate of Ownership for the truck unless full payment had been tendered. It is also difficult to reconcile petitioners' contention of delay in Exhibit C in recording title, since their signatures were subscribed initially on May 9, 1989, on the title documents. The unidentified source of the June 12 date entries and the \$7,000 sales price entry on the Exhibit A render that document untrustworthy to determine fair market value. (Exhibit A).

I note a readily cognizable similarity in the signatures of _____, the seller, as they appear on the certificate of Ownership (Exhibit A), the Notice of Release of Liability (Exhibit B), and the Bill of Sale for the pickup (Exhibit E). The signature on the alleged Bill of Sale for the camper (Exhibit F), however, is sufficiently dissimilar to the other three signatures to raise a doubt as to its authenticity. I find that Exhibit F therefore lacks credibility to prove the value of the fair market value of the camper.

It also appears that whoever signed the name "_____" on the footnoted annotation below the Bill of Sale for the truck (Exhibit E) appears to have subscribed signature on the Bill of Sale for the camper (Exhibit F). As already noted, the source of the signature on Exhibit F is in doubt. Exhibit E, the Bill of Sale for the truck, appears to have had the \$7,000 sales price entered by the same person who completed the rest of the buyer's and seller's information. These entries do not appear to have been in _____'s writing. Entries by either petitioner on a document signed in blank by the seller are self-serving. To the extent that they are inconsistent with the \$14,200 sales price placed on the vehicle by (the seller, on the Release of Liability (Exhibit B), I find them untrustworthy. I give Exhibit E no weight in determining the fair market value of the truck.

No explanation was provided as to why _____ would have sold the truck at less than the wholesale price of the vehicle. (Exhibit G.) Nor have petitioners explained why they paid more for a 12-year-old camper than they did for the four-year old truck to which it was affixed.

I believe, however, that _____ sold both a truck and a camper to petitioners. The Notice of Release of Liability submitted by the seller was dated May 9, 1989, and reflects a selling price

of \$14,200, which appears to have included the value of the camper (Exhibit B). While the best evidence of the sales price is the seller's statement in Exhibit B, a document that appears to have been created solely by the seller and was subject to the seller's exclusive possession and control, it includes the value of an item which is not subject to use tax. I thus find that the fair market value of the truck was \$10,700, the Kelley Blue Book retail value of the truck with no allowance for mileage and/or equipment, and that the value of the camper was \$3,500.

Based upon petitioner _____ familiarity with and reliance on the Vehicle Code as a sheriff and the fact that the truck was properly registered as a commercial vehicle, which entitled petitioners to exclude the value and weight of the camper, the negligence penalty should be deleted. Exhibit A is the type of document which passes through numerous hands at the DMV and afforded its employees with the opportunity to annotate the information upon it which rendered it partially unreliable. My decision not to rely on certain documents should not be construed as any inference of fraud on the part of petitioners. The \$7,000 sales price entered on the Bill of Sale for the truck (Exhibit E) was self-serving, but fraud will not be presumed. Ehrlich v. Commissioner, (1958) 32 T.C. 536 1540. The test for negligence is whether the conduct of the petitioners met the standard of care that a reasonably prudent businessperson would exercise under attendant circumstances. Southeastern Finance Company v. Commissioner, (5th Cir. (1946)) 153 F.2d 205. Petitioners' valuation of the truck has not been shown to be unreasonable or negotiated in bad faith with _____. It merely appears to have been a sales price that did not truly reflect the fair market value of the truck.

The discrepancies between the signatures of _____ appearing on Exhibits E and F and those signatures appearing on Exhibits A and B, are not so dissimilar that they may have resulted from a rushed signing of the document and/or from authorization of an agent (perhaps a spouse) to subscribe it on behalf of the seller.

Recommendation

Redetermine the sales price of the vehicle to be \$10,700 and delete the negligence penalty. Assert the finality penalty on the adjusted measure of tax.

Janice M. Jolley, Hearing Officer

April 11, 1991
Date