STATE OF CALIFORNIA

BOARD OF EQUALIZATION

In the Matter of the petition for Redetermination of State and Local Sales Tax: "B" "C" Petitioner	))))))	DECISION AND RECOMMENDATION

The above-entitled matter came on regularly for hearing on Monday, September 29, 1975 in Santa Ana, California. Robert H. Anderson, Hearing Officer.

Appearing for Petitioner: _____

Appearing for the Board: W. A. Shaffer, Principal Auditor
San Diego District

M. L. Lewis, Principal Auditor
Orange County District

Protested Item

Pursuant to a dual determination issued on January 7, 1975, petitioner protests the assessment of sales tax on the retail sale of one thirty-eight foot (38') _____ cruiser vessel sold to _____. The measure of the tax, as assessed in $34,400.

Contentions

1. Petitioner acted only as an intermediary in the sale of the vessel for _____ to _____, as its agents; and

2. The sale was made directly by _____ to _____; and

3. The vessel was delivered to _____ to _____; and

4. The vessel was to be delivered to _____ who reportedly resided in Mexico, outside the United States, to wit, in Mexico; and

5. As per instructions to petitioner the sales tax was therefore not included in the sales price; and

6. The price of the vessel, less brokerage, was transmitted to _____ in San Diego.

Summary

This is a dual determination. The original assessment for tax on the vessel was issued against "A". However, at the hearing on the "A" petition, held in San Diego on May 10, 1974, "A" contended that a firm call "B" made the sale. It developed that "B" is only one of the names used by "C" also known as _____, and _____.

The dual determination was issued on the basis of findings made in the hearing held in San Diego that petitioner made the sale of the _____ cruiser.

Tax, measured by $34,400, was set up against "A", and that firm petitioned for redetermination on the ground that it did not sell the vessel. "A" contended that it was sold by "B". The petition of "A" is currently held in abeyance until the sale of the _____ is resolved.

Petitioner holds a seller's permit and is engaged in the business of selling marine hardware. In addition, petitioner sells some food on a very small volume basis, and makes brokerage sales of vessels. The permit was issued in 1962 in the name of "C".

"C" maintains business locations at Wilmington, Marina Del Rey and Newport Beach. Most of petitioner's reported gross receipts are from mooring fees and locker rental. An audit of petitioner covering the period from 10-01-68 through 06-30-71 was made on or about December 20, 1971, and a determination for understated sales was issued on January 10, 1972. The record indicates that most of the audited understatement represented receipts from two (2) boat sales and was based on a "technical legal distinction between a yacht broker and a factor".

The vessel under consideration in this petition and controversy was sold to "D" in the second quarter of 1971, but was not reported with the return due for that quarter. In fact, petitioner has not made a practice of reporting any gross receipts from sales deemed to have been from brokerage transactions.

There was a subsequent examination of petitioner's records for the period from 07-01-71 through 06-30-74 that was made on or about December 4, 1974. This examination did not result in any assessment.

Background of petitioner's relationship with "A", for purposes of this petitioner, begins on December 16, 1970 with a letter from "A" to "C", Marina Del Rey. (See Exhibit A.) In the letter "A" wrote, in part, as follows:

> This will confirm our recent conversation and my appointment of "C" to be exclusive yacht brokers for "A", in the Marina Del Rey-Los Angeles area for out stock cruisers, consisting of our 38 ft., 50 ft. and 54 ft. offshore cruisers.
>
> The selling prices are to be as follows:

38 Ft.	$ 34,400.00
50 Ft.	$ 76,500.00
54 Ft.	$110,000.00

Commissions will be a straight 10% on the 38 ft. and on the 50 ft. and 54 ft. will be 10% on the first $20,000 and 7% on the balance.

It is mutually agreed that for this exclusive brokerage arrangement you will provide slip space for demonstrators at no cost to "A". "A" will delivery said demonstrators to your facility with all get ready work performed and the vessel completed in good running, salable condition. "C" will maintain the demonstrators in clean, showable condition at their expense…

* * * *

"C" shall also participate in one-fifth of half the cost of the attached full-page ad to appear in SEA magazine, the January Boat Show issue.

"C" shall also diligently work on the sales of said vessels and in addition carry on additional advertising at their expense. "A" shall supply brochures of the three designs for sales purposes.

Also, on December 16, 1970, "A" wrote to a prospective yacht sales firm in San Diego and advised the following"

In order that an orderly and organized sales program can be set up with continuous advertising and sustaining momentum, I have come to the conclusion that it best be handled with an exclusive sales agreement with one particular office in each principal area. After considerable through and discussions, I have made exclusive appointments as follows:

(one of the names appointments was "C", Marina Del Rey.)

On April 15, 1971, "A" wrote to all of the exclusive appointees in California as well as those out of state the following:

Due to various methods in handling sales amongst the various <u>dealers</u> and to eliminate any misunderstandings it is felt that basic ground rules are necessary in connection with the sales of our boats, which I would like to enumerate as follows:

There followed nine (9) so-called ground rules (see Exhibit B) including:

1. No sale of a boat will be constituted as a sale unless an irrevocable deposit has been made with "A". A deposit held by a <u>dealer or broker</u>, will so far as "A" is concerned, not

constitute a valid sale. The reason for this; dealers and/or brokers have refunded deposits and nullified sales, hence, leaving "A" holding vessels and loss of other sales.

2. Deposit amount with "A" will be 10% of the base price, plus the total of all extras ordered.

On April 20, 1971, under a document headed "C" salesman _____ accepted an order for the vessel under consideration with a date of delivery for May 20, 1971. Exhibit C is a copy of the order.

It is to be noted that the selling price was $35,184.59 rather than $34,400 which was only the base price before so-called optional equipment. In this instance the "optional" equipment was not, in fact, optional because it was already on the vessel at the time the order was placed.

"C" accepted a $2,500 deposit from "D" who, on the order, indicated he resided at _____, Mexico.

The order contained the following provision:

> TAX; (All taxes, Federal, State or Municipal (except income taxes)) now or hereafter imposed on this purchase are to be paid by the purchaser.

"C" deposited the $2,500 in its trust account and then, using its own check, paid "A" the amount of $3,000. In other words, "C" used some of its own funds to come up with a $3,000 deposit.

On April 20, 1971 "C" prepared a document over their letterhead that set forth the proposed financing arrangement on the vessel. It was signed by "C". Basically, the proposal called for "D" to pay, on or before May 20, 1971, an additional payment (additional to the $2,500 deposit which was acknowledged) in the amount of $25,000 to "C". If not paid, "C" agreed to refund the $2,500 deposit, less any expenses incurred for their benefit.

The balance of the purchase price, set out as $7,684.59 plus 7% interest, was to be paid on April 20, 1972, and was to be secured by a second mortgage (deed of trust) in favor of "A" on some residential property owned by "D" and located in Santa Monica, California (See Exhibit D.)

"C" allegedly had indicated a willingness to go along with this arrangement. However, it turned out that "A" refused to do so, and as a result a note in the amount of $7,677.84 was prepared and issued in favor of "C". (Exhibit E) secured by a second deed of trust. It was payable on or before June 21, 1972. Mr. "C" indicated that it was finally paid, but not before it was six months past due.

Finally, on July 12, 1971, salesman _____ wrote to "A" as follows"

> Mr. "D", who purchased _____ would like to have a master carpenter's certificate as soon as possible. Three weeks ago I gave a blank certificate to _____ to give to you. Also would you please send Mr. "D" the warranty.

The foregoing letter was submitted and is entered as Exhibit F.

Conclusions

The sole question in this petition is whether the sale to "D" was made pursuant to a true brokerage transaction.

The parties to this controversy appear to use the term "broker" to refer to anyone who sells yachts, and rightfully so. The definition of "broker" in the Harbors and Navigation Cod (H-N) is as follows:

> A yacht broker is a person who, as a whole or partial vocation, sells or offers for sale, buys or offers to buy, lists, solicits prospective purchasers of, negotiates the purchase or sale or exchance of yachts or ships.
>
> A person shall be deemed to be a broker within the meaning of this section if, he does any of the acts or participates in any of the transactions herein defined, even though at some subsequent time he may obtain title to, or procure in his own name the certification or registration of, the yacht or ship in question. H-N Code, Section 76.1(a).
>
> "Yacht" or "ship' refer to any vessel for navigating in water which is propelled by machinery or sail except sailboats 12 feet or less in length. H-N Code section 76.1(f).

Both petitioner and "A" were brokers within the above definition. However, that itself does not answer the question of who sold the vessel. The question is whether petitioner's acts resulting in a sale to "D" was a true brokerage transaction. If they resulted in a true brokerage transaction, "A" would be the seller.

The heart of a true brokerage transaction is finding that the so-called broker never, at any instant, had any power or authority to cause title to pass to the buyer, never passed title directly or indirectly, never causes title to pass directly or indirectly, and was not even a conduit for passage of title.

The fact that petitioner was and is a broker does not itself dictate the conclusion that petitioner was not the seller under the Sales and Use Tax Law. After all, "A" is also a broker and someone sold the vessel to "D".

Petitioner was given an exclusive right to sell "A" vessels and under that right could cause good title to pass to buyers when "A" received was he was asking for the vessel petitioner was selling.

The base price on the vessels set by "A" was merely a way of indicating to dealer was "A" was to be paid; i.e., the base price less 10 percent. Petitioner might have sold the vessel for more than the base price as there was no prohibition against it, but it is unlikely that this would happen in a competitive market with other "A" exclusive dealerships in the surrounding areas, and the fact that there were published brochures containing base prices for the vessels.

On the other hand, petitioner could have sold the vessel for less than the base price and if this had been done "A" would still receive 90 percent of the base price. Petitioner would simply receive less profit on the sale if he were to sell under the base price.

Mr. "A" testified that he never saw any sales agreement or purchase order for the sale of the vessel. He said he had no idea what the actual selling price turned out to be. This appears to be evidenced by the fact that the San Diego auditors in auditing _____ only used the base price of $34,400 as the sale price of the vessel, when it actually sold for $35,184.59 according to the "C" Sales records.

Mr. "A" testified that he did not know "D" and had no direct contacts or dealings with them before or after the sale. He stated he did not deliver the vessel to Mr. "D" and did not handle the documentation of it for "D". All he did was present a bill of sale after he received the money he was asking for the vessel. He received the money from petitioner, not "D".

Apparently, Mr. "D" was to have the vessel enrolled with the coast guard. Customs house people generally handle this and in this instance, "A", Inc. was taking care of it. _____, Inc. sent "A" a corrected bill of sale on July 23, 1971 showing ownership and address per Mr. "D"'s instruction. If "A" had been negotiating the sale with "D" directly, it would seem that he, "D", would have had the bill of sale made out the way he wanted it in the first place or would have come directly to "A" for the correction.

Exhibit F is evidence that "D" dealt only with petitioner on their purchase. If "D" wanted the carpenter's certificate why didn't he go directly to "A" rather than go through the "C" salesman who handled the sale?

In contract to the sale to "D" there was one other sale of a "A" Marine vessel, made earlier, that originated through petitioner. This was identified as a sale to "E".

In the "E" sale, "A" took in "E"'s used vessel as a trade-in on the sale of a new 50 foot vessel and "A" was paid directly by "E". "A" in turn, paid petitioner a commission on the transaction. "A" also collected sales tax from "E" and reported it with the "A" sales tax return.

Mr. _____ the salesman who handled the "D" sales, testified that he did not add sales tax to the "C" purchase order because he though it was a brokerage sale and not taxable to anyone except "D".

In addition to all of the above points, it is to be noted and emphasized that petitioner put up $500 of its own funds to meet the down payment required by "A" in order to hold the vessel for 30 days. This would not happen in a true brokerage transaction where the buyer and seller were brought together by the broker.

Also, petitioner financed some of the sale price; i.e., put up the balance of the money due "A" that was required in order to get a bill of sale and title in Mr. "D". The amount of money put up

by petitioner and paid over to "A" for the bill of sale was greater than the profit petitioner got out of the sale. This too would not happen in a true brokerage transaction.

All of the money paid to "A", including the deposit, was paid by checks drawn on petitioner's account. Mr. "D" did not pay any money to "A".

"A" did not deliver the vessel to Mr. "D" in Mexico, San Diego or any other place; did not receive any deposit from "D"; was not paid anything by "D"; signed no agreement with "D"; and generally had nothing to do with handling the sale in any way.

In sum, there is no evidence on which to conclude that this was a true brokerage transaction. Petitioner was acting on its own behalf under the exclusive dealership arrangement it had been given by "A". The evidence points to petitioner as the actual seller of the vessel.

Finally, it appears that during the period involved (1970-1971) the Long Beach district auditors who made audits of petitioner's business may not have been aware of all the so-called brokerage activities of "C" because of their various dba's, diversified location, and the fact that petitioner has not been reporting the gross receipts (commissions) from transactions it believe qualified as brokerage sales. This practice may have changed in the ensuing years. For example, following is an extract from the Long Beach district auditor's general comments on the examination of petitioner's records made in 1974:

> Brokerage deals were traced from the records to the deal folders for the year 1973 and spot checked for 1972. All deal were found to be supported by brokerage agreements signed by the seller and the buyer.

It is to be noted that no one has produced any brokerage agreement signed by Mr. "A" and Mr. "D" in this transaction.

In summary, petitioner was the seller and was liable for the tax. The billing, instead of a dual determination, should have been made against petitioner under its account _____. It was made as a dual under the "A" account because there was no record of any seller's permit held by "B". This is understandable since "B" was one of many names used by "C".

The letterhead (Exhibit F) indicated they go by the name "_____", the purchase order (Exhibit C) indicated they go by the name "_____"; there may be others.

Be that as it may, had the dual assessment been made against "C", it would have become apparent that such an assessment was barred by the statute of limitations.

Accordingly, although petitioner made the sale and is liable for the tax on it, the collection is now barred by the statute of limitations.

Recommendation

Redetermine. Delete the assessment against "B" aka "C". Refund the money paid under protest.

_____	Oct 19, 1975
Robert H. Anderson, Hearing Officer	Date