

STATE OF CALIFORNIA
 BOARD OF EQUALIZATION

In the Matter of the request)
 for Administrative Hearing) DECISION AND RECOMMENDATION
 Under the Sales and Use Tax Law of:)
)
)
Taxpayer)

The preliminary hearing on the above taxpayer's request for administrative hearing was held on December 9, 1986, in Sacramento, California.

Hearing Officer: James E. Mahler

Appearing for Petitioner: _____

Appearing for the Board: Kurt Kunert
 Petition Unit

Protested Item

The protested tax liability for the period October 1, 1979, through March 31, 1984, is measured by:

<u>Item</u>	<u>State, Local and County</u>
Ex-tax purchases of four helicopters	\$481,630

The determination includes a ten percent penalty in the amount of \$2,801.16 for failure to file returns.

Taxpayer's Contentions

1. Any applicable taxes are sales taxes on the vendors and not use tax on petitioner.
2. The determination is partially barred by the statute of limitations.
3. The penalty for failure to file returns should not apply.

Summary

Petitioner is a partnership which was engaged in a number of business activities, including farming, aircraft rentals, farm equipment rentals, and sales of grape cuttings through a nursery. It did not hold a seller's permit or file sales and use tax returns during the periods in question. However, it appears that some sales by petitioner were reported on returns filed by a related corporation, _____, which held seller's permit _____.

On October 4, 1979, petitioner purchased helicopter _____, for use in its business, for a price of \$270,000. _____ held a seller's permit issued by this Board to engage in business as "leasing company with occasional sales of farm equipment, trucks, vehicles". _____ did not charge tax reimbursement or report tax on the sale to petitioner. Tax was asserted against petitioner in an audit.

On April 28, 1982, petitioner traded helicopter _____ to _____ for two smaller helicopters for use in its business operations. The auditor treated this transaction as a purchase of the two smaller helicopters by petitioner for \$173,572, which was the book value of helicopter _____ at the time.

The Board has no record of a seller's permit issued under the name _____. The auditor spoke to a _____, and concluded that _____ was not in the business of selling helicopters. Nevertheless, the audit also found that "the seller" had reported tax measured by \$60,000 on this transaction. We therefore assume that _____ held a permit and reported taxes under a different name.

The audit asserted tax against petitioner measured by the \$173,572 purchase price, less a credit for the taxes reported by _____ for a net measure of \$113,572.

On August 17, 1982, petitioner purchased a third helicopter from _____ for use in its business, for \$76,265. Neither _____ nor petitioner reported any tax with respect to this transaction, and tax was asserted against petitioner in the audit.

Finally, the audit also asserted tax against petitioner on the purchaser or a "wing strap" (presumably a helicopter) _____ for \$21,793. At the preliminary hearing, petitioner's representative conceded that the use tax was properly asserted. Accordingly, this transaction will not be discussed further.

Analysis and Conclusion

Revenue and Taxation Code Section 6401 authorizes an exemption from the use tax when the purchaser establishes to the satisfaction of the Board that the gross receipts from the sale of the property were included in the measure of the sales tax. Petitioner contends that the sales by _____ were subject to sales tax, so that petitioner should not be held liable for use tax. The audit, on the other hand, found that the sellers were entitled to an exemption from sales tax under Revenue and Taxation Code 6283, so that petitioner would not be entitled to an exemption from the use tax. We agree with the audit.

Section 6283 authorizes a sales tax exemption for certain sales of vehicles, vessels and aircraft. By its terms, the exemption does not apply if the retailer is “required to hold a seller’s permit...by reason of the number, scope, and character of his or her sales of those vehicles, vessels, or of aircraft, as the case may be.” As a general rule, a person is required to hold a seller’s permit if he or she makes “three or more sales for substantial amounts in a period of twelve months...” (Sales and Use Tax Regulation 1595(a)(1); see also Rev. & Tax. Code, § 6019.)

Purchase from _____. Petitioner points out that _____ held a seller’s permit for sales of vehicles, among other things. Accordingly, petitioner believes that the 6283 exemption should not apply to any sales of aircraft by _____.

Petitioner’s argument would require us to ignore the words “those...as the case may be” in Section 6283. This we cannot do. As we read the statute, a sale of an aircraft qualifies for the sales tax exemption unless the retailer is required to hold a permit for aircraft sales, even if the retailer is required to hold a permit for sales of vehicles or vessels.

At the preliminary hearing, petitioner’s representative stated that _____ is a finance company which repossesses and sells many types of property. He suspected that _____ “must have” repossessed and sold many aircraft in addition to the helicopter involved herein. He offered to investigate the matter further and forward any evidence to the hearing officer, but as of this date, no such evidence has been received.

Lacking evidence that _____ was required to hold a seller’s permit by reason of aircraft sales, we conclude that the transaction was not subject to sales tax, and that petitioner is therefore not entitled to a use tax exemption under Section 6401.

Purchase from _____. Petitioner points out that it purchased a total of three helicopters from _____ within a 12-month period. Petitioner argues that _____ therefore was required to hold a seller’s permit under the “three or more” rule of Regulation 1595. We disagree.

The Board has consistently applied the “three or more” rule on a transaction-by-transaction basis, rather than on an item-by-item basis. That is, a person who only makes one sale transaction in a 12-month period is generally not required to hold a seller’s permit, even if a number of items are sold in that one transaction.

This policy is based on Revenue and Taxation Code Section 6014, which defines “seller” as a person who is “engaged in the business” of selling certain types of tangible personal property. A person who makes three or more sales transaction per year may reasonable be viewed as engaged in business as a seller. On the other hand, a person who makes one or two sales transactions per year is not necessarily engaged in business, even if several items are sold in each sale transactions.

Of course, a person who makes one or two sales transactions per year may nonetheless be engaged in business as a seller, if he holds himself out to the public as being engaged in a selling business. The typical example is a shipyard which is capable of building and selling only one

vessel per year. Such a person is a seller and is required to hold a seller permit, despite the limited number of sales transactions.

At the preliminary hearing, petitioner's representative argued that _____ holds itself out to the public as a seller of helicopters. The basis for this allegation is that the word "helicopter" appears in _____ business name. However, the staff advises that the word "helicopter" appears in the business name only because _____ is engaged in the business of repairing helicopters, and that _____ is not engaged in the business of helicopter sales.

We requested petitioner's representative to compile additional evidence, such as advertising materials, to show that _____ held itself out to the public as a seller of helicopters. As of this date, no such evidence has been presented. Lacking evidence that _____ made more than two sales transactions during a 12-month period, or was otherwise engaged in the business of selling aircraft, we conclude that the transactions in question qualified for a sales tax exemption and that petitioner is therefore liable for use tax.

2. Revenue and Taxation Code Section 6487 includes a statute of limitations for deficiency determinations. As a general rule, a determination must be issued within three years of the due date of the return on which it has determined taxes should have been reported. In the case of failure to file returns, however, the limitations period is eight years from the due date of the return.

The purchase from _____ is within the eight-year period but outside the three-year period. Petitioner argues that the three-year period applies on the ground that some of its tax liability was reported on returns filed by a related taxpayer. However, petitioner itself did not hold a seller's permit or file returns. In our opinion, therefore, the eight-year period applies and the tax was timely determined.

3. Revenue and Taxation Code Section 6592 provides that a person requesting relief from a penalty for failure to file returns must submit a statement signed under penalty of perjury setting forth the facts on which the request is based. We advised petitioner's representative of this requirement at the preliminary hearing and he indicated that an appropriate statement would be submitted. As of this date, none has been received. Accordingly, we cannot recommend relief from the penalty.

Recommendation

It is recommended that relief from the jeopardy assessment not be granted.

James E. Mahler, Hearing Officer

10/14/87