STATE OF CALIFORNIA
BOARD OF EQUALIZATION
BUSINESS TAXES APPEALS REVIEW SECTION

395.0135
4/12/94

In the Matter of the Claim	)	
for Refund Under the	)	
Sales and Use Tax Law of:	)	
	)	DECISION AND RECOMMENDATION
	)	No. ----
	)	
Claimant	)	

The Appeals conference in the above-referenced matter was held by telephone by Staff Counsel Lucian Khan on January 20, 1994 in Sacramento, California.

Appearing for Claimant:

Appearing for the
Sales and Use Tax Department: Michael Kitchen
Senior Tax Auditor

Subject of Claim

Tax assessed on the sale of fixtures and equipment measured by $447,524 for a close-out audit covering the period January 1, 1988 through July 31, 1989.

Contention

The sale of the fixtures and equipment was an exempt occasional sale.

Summary

According to the Sales and Use Tax Department (SUTD), claimant entered into contracts with the U.S. Navy for providing base-operating services at the U.S. Naval Weapons Center at the Navy's China Lake facility. Services included janitorial, garbage pickup, maintenance of buildings, roads, and equipment, and miscellaneous repairs. In July 1989, claimant sold certain assets at this facility to --- Generally, the assets sold consisted of numerous vehicles, office equipment, small appliances, building improvements and buildings.

In a close-out audit covering the above period, a measure of $2,444,622 was attributed to the sale of fixtures and equipment. This measure was based on a review of a portion of an asset purchase agreement which was provided by claimant. On February 13, 1991, a determination was issued, and on March 21, 1991, claimant made payment of the amount determined and simultaneously filed a claim for refund. In the written claim, claimant argued the measure attributed to the sale of the assets was excessive, and an occasional sale.

Claimant then provided additional documentation which indicated the book value of the assets as $447,524, and SUTD adjusted the measure to this amount in a reaudit report dated September 9, 1991. The adjustments related to various vehicles for which the purchaser paid use tax directly to the Department of Motor Vehicles, adjustments for real property included in the sale, and adjustments to reflect the current book value of the remaining assets.

At the conference, claimant indicated there was no disagreement with the measure as adjusted in the reaudit of September 9, 1991. Therefore, the sole issue is whether the sale of the assets was an occasional sale. SUTD argues that the sale of the assets was not an occasional sale because claimant routinely sold auto parts to the U.S. Government. This was confirmed by --- as well as the traffic manager who worked for claimant. Claimant's contract with the Navy is lump sum and requires it to supply filters, tires, batteries, etc. --- indicated approximately 93 percent of the auto parts were transferred to the U.S. Government with the remaining seven percent self-consumed by claimant for its own vehicles. Although the sales to the U.S. Government would be exempt, those sales must be considered along with the sale of the assets, to determine whether the sale of the assets was occasional. Here, because of the sales to the U.S. Government, claimant's sale of the assets would not qualify as occasional.

Claimant argues that its only business was to perform maintenance of buildings, roads, and equipment. No sales of parts were ever made to the U.S. Government. Claimant only held a permit to pay use tax on auto parts which were purchased from outside California and installed in its own vehicles. Claimant disputes that --- or the traffic manager ever told the auditor that auto parts were sold to the U.S. Government.

Claimant was allowed until February 20, 1994 to submit further evidence in support of its argument, which consists of the following:

1. Copy of its contract with the U.S. Government, to determine if the contract provides for supplying of auto parts.

2. An affidavit from --- or the traffic manager as to whether statements were made to the auditor that auto parts were sold to the government.

In reviewing the Board's records, it was noted that for the second quarter 1989, claimant reported sales, and took a corresponding deduction in the amount of $3,209,304. For the third quarter 1989, claimant reported sales and took a corresponding deduction in the amount of $1,062,917.

Analysis and Conclusions

Tax applies to all retail sales of tangible personal property including capital assets whether they are sold in one transaction or a series of sales, held or used by a seller in the course of an activity for which a seller's permit is required. (Revenue and Taxation Code Section 6051, Sales and Use Tax Regulation 1595 (a) (1).)

Every' person engaged in the business of selling tangible personal property of a kind the gross receipts from the .retail sale of which are required 'to be included in the measure of sales tax, is required to hold a seller's permit. This permit is required notwithstanding the fact that sales to the United States or its instrumentalities are exempt. (Rev. & Tax. Code §§ 6066, 6381;

Regs. 1595(a) (1), 1699(a) and (b).) Even where equipment has been used in an activity of making sales for resale to a federal instrumentality. the sale of the equipment used in the activity would be taxable. (Business Taxes Law Guide Annotation 395.0420.)

The term "occasional sale" includes a sale of property not held or used by a seller in the course of activities for which he or she is required to hold a seller's permit provided the sale is not one of a series sufficient in number, scope and character to constitute an activity for which a seller's permit is required. (Rev. & Tax. Code § 6006.5, Reg. 1595(a) (1).) One who customarily makes sales at retail and holds a seller's permit is subject to retail sales tax on the sale of all capital assets used in operating the business. The sale of the business assets in such a case is not an occasional sale. Each sale in question is one of a series of sales sufficient in number, scope and character to constitute an activity requiring a holding of a seller's permit. (U.S. Industries. Inc. v. State Board of Equalization (1962) 198 Cal.App.2d 775.)

Based on the facts and the above authority, we conclude the sale of the fixtures and equipment would not qualify as an exempt occasional sale. For the second and third quarters of 1989, petitioner made substantial sales to the U.S. Government. Although the sales were exempt, petitioner was required to, and did hold a seller's permit. For tax to apply on the sale of assets, the sale need only be one of a series sufficient in number and scope. There is no requirement that sales preceding the sale of assets must be taxable retail sales. Accordingly, tax applies. It is noted, however, that claimant made payment on March 31, 1991 for the total amount billed in the determination of February 13, 1991. Since the time of that payment, SUTD has reduced the measure from $2,244,122 to $447,524. Therefore, petitioner is entitled to a refund of the tax, penalty and interest which relates to the September 9, 1991 adjustment.

Recommendation

Grant the claim for refund to the extent the payment made on March 31, 1991 exceeds the measure of $447,524 in the reaudit dated September 9, 1991.

__________________________ 4/12/94

Lucian Khan, Staff Counsel Date