

CALIFORNIA STATE BOARD OF EQUALIZATION

SUMMARY DECISION UNDER REVENUE AND TAXATION CODE SECTION 40

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4 In the Matter of the Petition for Reallocation of)
Local Tax Under the Uniform Sales and Use Tax) Case ID 466375
5 Law of:)
6 CITY OF FILLMORE) Oral hearing date: May 22, 2013
7 Petitioner)
8

9 **Representing the Parties:**

10 For Petitioner and Taxpayer¹: Alberto Torrico, Attorney
11 For Notified Jurisdictions:
12 City of Burbank Robin Sturdivant, Representative
13 City of Fresno Eric Myers, Attorney
City of Los Angeles Evelyn Fernandez-Melone, Representative
14 For Sales and Use Tax Department: Cary C. Huxsoll, Tax Counsel III (Specialist)
15 For Appeals Division: Trecia M. Nienow, Tax Counsel IV

16 **BACKGROUND**

17 Taxpayer sells items such as uniforms to its parent, Taxpayer's sole customer (Parent).
18 Taxpayer entered into a Master Sale Agreement (MSA) with Parent that obligates Parent to make
19 purchases of at least \$10,000, but not more than \$3,000,000, per month. Taxpayer receives orders and
20 maintains inventory sold to Parent outside the state, from which goods are shipped by common carrier
21 to Parent's California facilities. Taxpayer entered into a sublease with an unrelated third party (UTP)
22 for the nonexclusive use of office space that UTP leased in Fillmore. The sublease required Taxpayer
23 to pay a monthly rent of \$100 to UTP. Taxpayer also entered into an Agency Agreement with UTP
24 under which UTP performed monthly review activities (i.e., reminding Parent of the purchase limits
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27 ¹ To protect the confidential information of the Taxpayer, its name will not be disclosed herein. (See Rev. & Tax. Code, §
28 7056.)

1 under the MSA and that Parent must pay Taxpayer \$10,000 even when it ordered no goods from
2 Taxpayer).

3 LEGAL ISSUE 1

4 Whether title passed and the sales occurred inside California.

5 FINDINGS OF FACT AND RELATED CONTENTIONS

6 Petitioner contends that the sales occurred inside California in accordance with the terms of the
7 MSA, asserting that the MSA provides that title does not pass until delivery to Parent in California and
8 that the sales thus occurred upon delivery in California. That is, petitioner argues that such statements
9 effectively require delivery at destination in California under California Code of Regulations, title 18,
10 section (Regulation) 1628, subdivision (b)(3)(D). However, the provision under which Taxpayer
11 retains title until delivery is not a provision under which Taxpayer retains the obligation to deliver the
12 property at destination, and the MSA does not include an F.O.B. destination provision or otherwise
13 expressly state a requirement that Taxpayer deliver at Parent's destination.

14 APPLICABLE LAW

15 A sale is subject to sales tax only if that sale occurs in California and there is some participation
16 in the sale by a California location of the seller. (Rev. & Tax. Code, §§ 6006, 6010.5, 6051; Cal. Code
17 Regs., tit. 18, § 1620, subd. (a)(2)(A).) Where either or both of these conditions are not satisfied, the
18 sales tax cannot apply, and thus the applicable tax is use tax. (Rev. & Tax. Code, § 6201.) The same
19 rules are applicable to determine whether the local tax is sales tax or use tax. (Rev. & Tax. Code, §§
20 7202, 7203; Cal. Code Regs., tit. 18, § 1803, subd. (a)(1).)

21 Regulation 1628, subdivision (b)(3)(D) explains that title to goods can pass and the sale can
22 occur *prior* to delivery if the contract explicitly so provides, but cannot pass any later than when the
23 seller completes its performance with respect to physical delivery of the goods, any retention or
24 reservation by the seller of title after that point being limited in effect to a security interest. (Cal. U.
25 Com. Code, § 2401.) This is true without regard to when the parties agree risk of loss will pass.² If

27 ² The California Uniform Commercial Code separates risk of loss from title, meaning that a statement regarding risk of loss
28 is not a statement regarding passage of title. (See, e.g., California Annotations to Proposed U. Com. Code (1960),
Deering's Ann. Cal. U. Com. Code (2013 ed.) Div. 2 Note, item 1 ("The emphasis in the California law on title to the

1 the seller is required to send the goods to the purchaser but the contract does not *expressly* require
2 delivery at destination (e.g., pursuant to an F.O.B. destination provision), the seller completes its
3 performance with respect to physical delivery at the time and place the seller delivers the goods to the
4 common carrier for shipment. (Cal. Code Regs., tit. 18, § 1628, subd. (b)(3)(D).³) Thus, where a
5 contract is silent on the seller's delivery obligations, the seller completes its duties with respect to
6 physical delivery of the goods upon tender to the common carrier for shipment to the purchaser, and
7 title passes and the sale occurs at that time. If that contract were to provide for passage of title at
8 destination, the retention of title after the tender of the goods to the common carrier would be merely
9 as security. (Cal. U. Com. Code, § 2401; Cal. Code Regs., tit. 18, § 1628, subd. (b)(3)(D).)

10 Local sales tax is allocated to the jurisdiction of the place of sale under Regulation 1802,
11 subdivision (a), and this is usually accomplished by allocating the local sales tax directly to such
12 jurisdiction when the retailer holds (and is required to hold) a seller's permit for that location; local use
13 tax is allocated to the jurisdiction where the property at issue is put to its first functional use under
14 Regulation 1802, subdivision (d), and this is usually accomplished by allocating the local use tax
15 indirectly to such jurisdiction through its countywide pool.

16 ANALYSIS AND DISPOSITION

17 We find that title passed and the sales occurred outside California, at the time and place of
18 shipment since the MSA did not include an F.O.B. destination provision or expressly state a
19 requirement that Taxpayer deliver at Parent's destination. (Cal. Code Regs., tit. 18, § 1620, subd.
20 (a)(2)(A).) Because we conclude that the sales occurred outside California, we further conclude
21 Taxpayer incorrectly reported the local tax as sales tax to Fillmore.

22 LEGAL ISSUE 2

23 Whether the Fillmore office was a business location of Taxpayer that participated in the sales.
24

25 property in determining risk of loss, priority among creditors, etc., has been abandoned. In its place the code sets forth
26 separate rules for risk of loss, priority, etc., independent of the location of title.”); *Wilson v. Brawn* (2005) 132 Cal.App.4th
549, 555-557.)

27 ³ That is, the naming of a place to ship goods does not in and of itself create a destination contract; virtually all contracts
28 that entail the shipment of goods will necessarily give the purchaser's address for receiving the goods. (See, e.g., *Wilson v.*
Brawn (2005) 132 Cal.App.4th 549, 555-557.)

1 FINDINGS OF FACT AND RELATED CONTENTIONS

2 Petitioner contends that Taxpayer maintains an office in Fillmore where the MSA was
3 principally negotiated on November 24, 2003, and that Taxpayer participates in the sales by virtue of
4 the monthly review performed by UTP on behalf of Taxpayer at UTP's office in Fillmore. However,
5 the record of this appeal contains no evidence that, during the period at issue (beginning April 1,
6 2007), Taxpayer itself ever used the Fillmore office to conduct negotiations or to take orders. The
7 record of this appeal also contains no evidence that UTP ever had any direct contact with Parent from
8 the Fillmore office for purposes of processing the actual orders.

9 APPLICABLE LAW

10 A sale is subject to sales tax only if that sale occurs in California and there is some participation
11 in the sale by a California location of the seller. (Rev. & Tax. Code, §§ 6006, 6010.5, 6051; Cal. Code
12 Regs., tit. 18, § 1620, subd. (a)(2)(A).) Where either or both of these conditions are not satisfied, the
13 sales tax cannot apply, and thus the applicable tax is use tax. (Rev. & Tax. Code, § 6201.) The same
14 rules are applicable to determine whether the local tax is sales tax or use tax. (Rev. & Tax. Code, §§
15 7202, 7203; Cal. Code Regs., tit. 18, § 1803, subd. (a)(1).)

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18 jurisdiction when the retailer holds (and is required to hold) a seller's permit for that location; local use
19 tax is allocated to the jurisdiction where the property at issue is put to its first functional use under
20 Regulation 1802, subdivision (d), and this is usually accomplished by allocating the local use tax
21 indirectly to such jurisdiction through its countywide pool.

22 ANALYSIS AND DISPOSITION

23 We find that no California location of Taxpayer has participated in the sales since the monthly
24 review activity performed by UTP on behalf of Taxpayer at UTP's office in Fillmore does not
25 constitute negotiation or participation in the sales by a California place of business of Taxpayer and
26 Taxpayer did not conduct negotiations or take orders at a Fillmore location during the period at issue.
27 (Cal. Code Regs., tit. 18, §§ 1620, subd. (a)(2)(A).) Because we conclude that petitioner failed to
28 establish that the Fillmore office was a business location of Taxpayer that participated in the sales, we

1 further conclude Taxpayer incorrectly reported the local tax as sales tax to Fillmore.

2 ORDER

3 It is hereby ordered that the petition be denied and the disputed sales be reallocated as use tax
4 to the places of use through the respective countywide pools for the period beginning April 1, 2007.

5 Adopted at Sacramento, California, on August 13, 2013.

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7 Jerome E. Horton, Chairman

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9 Michelle Steel*, Member

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11 Betty T. Yee, Member

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13 George Runner*, Member

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15 Marcy Jo Mandel, Member**

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18 *Except as to Issue 1.

19 **For John Chiang, pursuant to Government Code section 7.9.