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CALIFORNIA STATE BOARD OF EQUALIZATION

SUMMARY DECISION UNDER REVENUE AND TAXATION CODE SECTION 40

In the Matter of the Claims for Refund Under the Sales and Use Tax Law of:) Case ID's: 773995, 801742
) Oral hearing date: August 30, 2017¹
) Decision rendered: November 29, 2017
) Publication due by: March 29, 2018
Zimmer US, INC.)
)
Claimant)

Representing the Parties:

For Claimant: Susan Bittick
Brian Browdy

For California Department of Tax and Fee Administration, Business Tax and Fee Division: Brad Heller, Tax Counsel IV
Robert Tucker, Assistant Chief Counsel
Dario Romano, Business Taxes Administrator III

For California Department of Tax and Fee Administration, Appeals Bureau: Jeffrey G. Angeja, Tax Counsel IV

LEGAL ISSUE:

Whether a refund of use tax reported and paid on the cost of medical instruments shipped to California medical facilities is warranted.

FINDINGS OF FACT AND RELATED CONTENTIONS

Claimant sold orthopedic implants (e.g., knee, shoulder, and hip) to surgical facilities throughout California from July 2002 through September 2013, when the business was reorganized. Claimant also purchased instruments that were necessary for the implant surgeries from out-of-state sellers, and shipped most of the instruments by common carrier from Warsaw, Indiana to California sales representatives, who then delivered the instruments to medical facilities. Claimant also shipped a

¹ At the oral hearing, Members Harkey, Runner, and Ma voted to grant the claims for refund. Member Stowers voted to deny the claim, and Member Horton abstained.

1 small percentage of the instruments from Warsaw, Indiana directly to the medical facilities.

2 The Business Tax and Fee Division (BTFD) of the California Department of Tax and Fee
3 Administration, formerly the Business Tax and Fee Department of the Board of Equalization, noted
4 that claimant depreciated the instruments for federal income tax purposes, and determined that
5 claimant maintained ownership of the instruments at all times, as evidenced by a sample purchase
6 agreement stating that the instruments remained claimant’s property at all times and that they were to
7 be returned to claimant upon termination of the agreement. In addition, claimant’s written agreement
8 with the independent sales representatives indicated that the instrument inventory held by the sales
9 representatives remained the property of claimant and that all inventory was to be returned to claimant
10 upon its request. The BTFD determined that claimant made a taxable use of the instruments by
11 loaning the instruments to California medical facilities, and denied the claims for refund.

12 Claimant contends that it is not liable for use tax because it did not store, use or consume the
13 instruments in California, but instead, made an out-of-state gift of the instruments when it delivered the
14 instruments to a common carrier in Indiana for delivery to California. While claimant acknowledges
15 that it retained ownership of the instruments and that it was entitled to request that the instruments be
16 returned, claimant asserts that it only requested that the instruments be returned under exceptional
17 circumstances. According to claimant, it intended that the instruments would remain with the
18 designated facilities indefinitely, until the instruments either broke or became obsolete. And while
19 claimant concedes that it retained title to the instruments, it argues that a gift occurred because it
20 transferred the “use” of the instruments to the medical facilities, pointing to California Civil Code,
21 section 1146, which defines the term “gift” to mean a transfer of personal property, made voluntarily,
22 and without consideration, with no reference to a transfer of title.

23 APPLICABLE LAW

24 Use tax, owed by the purchaser, applies to the storage, use, or other consumption in this state of
25 tangible personal property purchased for use and used in California, unless that use is specifically
26 exempt or excluded from tax by statute. (Rev. & Tax. Code, §§ 6201, 6202, subd. (a).) “Use”
27 includes the exercise of any right or power over tangible personal property incident to the ownership of
28 that property. (Rev. & Tax. Code, § 6009.)

1 ANALYSIS AND DISPOSITION

2 In reliance on Business Taxes Law Guide annotation 280.0670 (5/14/84), we find that claimant
3 made a conditional gift of the instruments. Specifically, although claimant expressly retained title to
4 the instruments and also retained the right to take, and took, depreciation (a significant incident of
5 claimant's retention of ownership), and although its customers were at times required to return the
6 instruments (a requirement consistent with claimant's express retention of title), claimant's customers
7 were entitled to destroy the instruments themselves upon obsolescence (assuming they had not been
8 required to return the instruments to claimant). In other words, we conclude that the customers
9 essentially received title when they received the instruments.

10 Since it is undisputed that claimant shipped the instruments to its California customers via
11 common carrier from an out-of-state location, we conclude that claimant completed the gifts outside of
12 California, and that such gifts are not subject to use tax. (See *Yamaha Corp. of America v. State Board*
13 *of Equalization* (1999) 73 Cal.App.4th 338, 364; Rev. & Tax. Code, § 6009.)

14 ORDER

15 Pursuant to the analysis of the law and facts above, the Board ordered that the claims for refund
16 be granted.

17 Adopted at Sacramento, California, on December 11, 2017.

18 Diane Harkey _____, Chairwoman

19 George Runner _____, Member

20 Fiona Ma _____, Member