

STATE OF CALIFORNIA
BOARD OF EQUALIZATION
APPEALS UNIT

280.1090

In the Matter of the Petition for Redetermination Under the Sales and Use Tax Law of R. M--- W---, INC. <u>Petitioner</u>)))))))	HEARING DECISION AND RECOMMENDATION NO. SR CH XX-XXXXXXX-010
---	---------------------------------	--

The above-referenced matter came on regularly for hearing before Hearing Officer Janice M. Fallman on March 23, 1990, in --- ---, California.

Appearing for Petitioner	Appearance waived.
Appearing for the Department of Business Taxes:	Appearance waived.

Protested Item

The protested tax liability for the period April 1 1983 through March 31, 1986 is measured by:

<u>Item</u>	<u>State, Local County & BART</u>
<u>PURCHASES SUBJECT TO USE TAX:</u>	
A. Cost of samples and donations not reported. (\$10,587 less \$2,852 reaudit	\$ 7,735
B. Supply and promotional purchases from Out-of-state vendors not reported.	15,463

TAXABLE MEASURE UNDERSTATED

D.	Compilation errors in filing returns	11,387
E.	Trade-outs not included on returns. (\$9,168 less \$482 reaudit adjustment)	8,686
F.	Sales to stockholders and employees claimed as exempt resales in error. (\$24,081 less \$8,630 reaudit adjustment)	15,451
G.	Sale of assets not reported.	6,100
	Total	<u>\$ 64,822</u>

PETITIONER'S CONTENTIONSAudit Item A - Ex-Tax Purchases of Samples and Donations

1. Glass, cork, foil, and labels fabricated into bottles containing wine samples shipped out of state by petitioner are exempt from use tax.
2. Certain sales of wine by the case in connection with larger volume case sales were erroneously designated "samples" instead of discounts.

Audit Item B - Supplies and Promotional Purchases from out of State Vendors

1. Umbrellas and stands acquired from S--- Corporation were premiums, not marketing aids, and are exempt from use tax.
2. The statistical sampling using 1985 test period data was nonrepresentative and should not be applied to prior years.

Audit Item D - Computational Errors in Filing Returns

Petitioner did not receive the necessary documentation to determine how the adjustment for computational errors was derived.

Audit Item E - Trade-Outs Not Included on Returns

1. Transfer of wine to C--- J--- was not a trade-out since no services were traded.
2. All disputed trade-outs were sold "tax included."

Audit Item F - Sales to Stockholders and Employees Claimed as Resales

1. The statistical sampling as applied to 1983 is nonrepresentative and invalid.
2. All sales to stockholders and employees were sold "tax included."

Audit Item G - Sale of Assets Not Reported

The sale of two pieces of machinery utilized to construct the winery were exempt occasional sales.

BACKGROUND

Petitioner is a corporation licensed and operated within the State of California. In April 1983 petitioner acquired its seller's permit. This is petitioner's first audit.

The factual bases for this Hearing Decision and Recommendation were derived from the audit workpapers, correspondence between the parties, and petitioner's written submission attached to its Response to Notice of Hearing.

Audit Item A - Cost of Samples and Donations.

SUMMARY

The auditor asserted use tax for bottles, corks, labels, and foil which were fabricated into containers for self-consumed wine. He scheduled purchase invoices for 1985 to determine the respective cost per bottle of these items. He determined that some bottles were consumed for wine tasting at petitioner's facilities and others were given away as samples and donations.

The Department of Business Taxes (hereinafter the DBT) contended that petitioner owed use tax for self-consumption of these items because it had issued resale certificates and then used them for samples and donations.

Petitioner contends that the disputed items fabricated into wine containers were necessary to protect the integrity of the wine. Petitioner states that if the sale of the contents in interstate commerce is exempt, then the container in which the exempt item is shipped should also have been exempt. Because it was impossible to ship the wine samples without the containers, petitioner contends that application of use tax on items incorporated into the containers restricts and interferes with interstate commerce.

Petitioner referred to invoices 40972 and 40972-A which reflected that 200 cases and 40 cases of B--- B--- wine, respectively, were shipped out of state to V--- L--- in ---, Illinois, on or about October 11, 1984. The 40 case shipment was annotated "samples" to be shipped to V--- L---. The 200 cases were also shipped to V--- L--- whose name appeared as the buyer. The 40 cases annotated "samples" on Invoice No. 40972-A reflected a unit price of \$25.62 even though the tax auditor confirmed that no payment was expected nor received for them.

Petitioner contended that a clerical employee erroneously included the word "sample" on Invoice No. 40972-A and that the 240 cases reflected on the two invoices were shipped in conjunction with and referred to each other. Petitioner contended that use of an "-A" after the same invoice number clearly cross-referenced the 40 cases with the 200 cases and proved that the 40 cases were intended to be a discount for purchasing the 200 cases.

Petitioner contends that Sales and Use Tax Regulation 1589(b)(1)(c) is applicable to the donations and samples sent out of state in that the wine was exempt from use tax because it was derived primarily from exempt food products. According to petitioner, the "[c]ontents and container material are therefore an inseparable unit. The container as such has no separate value to either the donor or the donee except as a necessary enclosure of the contents which are given away."

Petitioner further contends that the auditor's determination that the samples sent out of state were "gifts" subject to Sales and Use Tax Regulation 1670 is erroneous because "wine samples and their necessary container materials are not to be 'gifts' to the customer but an immanent (sic) part of the sales transaction. As a food product, wine cannot be sold without a taste sample to the commercial buyer."

Petitioner further contends that the samples shipped out of state represented advances on shipments of wine to be subsequently sent upon receipt of a first order. Petitioner alleged that it did not give wine away "just for the fun of it," and that it expected something in return. "We give wine in exchange for the clients (sic) time and effort in evaluating our wine. In legal terms, this is called consideration. It practically involves a sale. His time and opinion for our product (sic). Therefore, out of state samples are really sales and should be exempt."

Citing Business Taxes Law Guide Annotations 280.0620 and 280.0640, petitioner alleges that any self-consumption, if these samples and donations were gifts, did not take place in this state. Petitioner alleges that “self consumption” occurred where the donee received a gift. Petitioner alleges that the first out-of-state recipient was not the “donee.” Instead, the out-of-state recipient’s retail customer who tasted the wine sample before purchasing a bottle of the wine was the true “donee.”

ANALYSIS AND CONCLUSIONS

As a preliminary issue, petitioner on several occasions in its pleadings attempted to construe as sales, the disposition of items determined by the tax auditor to have been samples and donations.

Black’s Law Dictionary, Revised Fourth Edition, defines “donation” as a gift and a “sample” as follows:

“Sample. A specimen; a small quantity of any commodity, presented for inspection or examination as evidence of the quality of the whole; as a sample of cloth or of wheat.”

According to Cal. Civil Code Section 1142, a gift is defined as a “transfer of personal property, made voluntarily, and without consideration.” The essential elements of a valid gift are donative intent, effectual transfer of title and delivery, and actual or imputed acceptance by the donee. [Turnbull v. Thomsen, (1959) 171 Cal.App.2d 779.] A gift is perfected by delivery of possession even though unsupported by consideration. [Burkett v. Doty 1917) 32 Cal.App. 337.] Delivery may be actual or symbolic and acceptance may be actual or imputed. The gift requires complete divestment of all control by the donor and a lack of consideration in return. [Hyman v. Tarplee, (1941) 64 Cal.App.2d 805.]

1. Revenue and Taxation Code section 6006(a) defines a sale as “[a]ny transfer of title or possession, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for consideration. ‘Transfer of possession’ includes only transactions found by the Board to be in lieu of the transfer of title, exchange, or barter.” The terms “sale” and “gift” are mutually exclusive since a sale requires the exchange of consideration while a gift precludes the donor from extracting consideration from the donee. [Revenue and Taxation Code §6006; Civil Code §1142.]

Consideration for a sale is “an act or return promise, bargained for and given in exchange for a promise giving a benefit to the promisor or imposing a detriment on the promisee.” [Peterson Tractor Company v. State Board of Equalization, (1962) 199 Cal.App.2d 662, 670.] Petitioner’s attempt to construe samples and donations as “sales” by alleging that consideration was received in the form of potential future purchases by recipients is contentious.

Petitioner has provided no evidence that any of the samples or donations were bargained for in exchange for any express promise by the recipient. Petitioner may have anticipated that the donation or sample would generate future sales, but petitioner had no enforceable right in law or equity to hold the recipient liable for the value of the sample or to require the recipient’s purchase of any wine. Furthermore, petitioner has provided no contracts or bookkeeping entries indicating that it received monetary or any other consideration for any disputed sample and donation. These samples and donations were clearly gifts. Petitioner will not be presumed to have engaged in unfair trade practices in violation of 15 D.S.C. §45(a)(1) and 39 D.S.C. §3009 by attempting to mail “samples” or “donations” as unsolicited merchandise and then to have dunned the recipient.

Petitioner’s reliance on Sales and Use Tax Regulation 1589 (b)(1)(c) is misplaced. This regulation applies only to containers “when sold with the contents.” While it is true that wine must be placed in some type of container for shipping and that state, federal, or local laws may require labeling of the contents of any such container, the fact remains that these containers were given away and not sold. California has nexus to tax petitioner’s use of these containers as self-consumed tangible personal property. They were acquired ex-tax by issuance of resale certificates, but instead of being resold, petitioner used them as donations or gifts which occurred within this state.

Revenue and Taxation Code sections 6094 and 6244 provide that use tax applies when tangible personal property is purchased under a resale certificate and then is used for any ~~other~~ purpose other than retention, demonstration, or display prior to resale in the regular course of business. The bottles, corks, labels, and foil were all stored within the state pending their use as containers for bottled wine. Petitioner next converted the items to self-consumed taxable use when it removed them from inventory to make a gift instead of a sale. By using these items as part of containers to ship merchandise which was not sold, no consideration passed from the donees for the containers. There was no retail sale of the contents or the bottles by petitioner. The bottles, etc., were consumed by petitioner in furtherance of promoting good will and its business activities, but not in connection with a sale.

Petitioner made a gift of the containers and their contents within this state. To perfect a gift, there had to have been delivery. Delivery occurred in this state when petitioner deposited the containers into the possession of an independent shipper for transportation to the donee. Such delivery is constructive delivery and acceptance of the gift is implied. [Burkett and Hyman, supra.]

Petitioner's subjective anticipation that the recipient of the sample or donation might order wine at some future time did not create a contract. Any such future order was contingent and had not been prenegotiated. Petitioner never booked any invoice bearing the annotation "samples" or "donations" as a sale by entering a corresponding account receivable.

Business Taxes Law Guide Annotation 280.0640 is applicable to this case. It provides as follows:

"280.0640. Gifts Purchased Under Resale Certificates. A donor is liable for use tax when he makes a gift in-state of merchandise purchased under a resale certificate, or outside the state. There is no exception on account of a subsequent shipment of the property outside the state. 3/15/60."

See also Business Taxes Law Guide Annotation 280.0540 which provides:

"280.0540. Free Goods. A person distributing containers and matches without charge is the consumer thereof and the sales tax or use tax, as the case may be, applies with respect to the purchase of the merchandise. 5/19/54."

Petitioner's reliance on Business Taxes Law Guide Annotation 280.0620 is misplaced. That annotation provides:

"280.0620. Gifts Mailed Out-of-State. Where a gift is purchased and the purchaser directs the vendor to ship it to an out-of-state donee, the sale occurs in interstate commerce.

Petitioner did not purchase these samples and donations from a third party vendor whom petitioner instructed to ship the gifts out-of-state.

For these reasons, petitioner owes use tax on the purchase price of the components of containers petitioner used to ship samples and donations as set forth in the reaudit. [Sales and Use Tax Regulation 1670(a).]

2. With respect to the 40 cases of B--- B--- wine shipped out of state to V--- L---, Inc., Sales and Use Tax Regulation 1670(c) provides as follows:

"PREMIUM DELIVERED WITH GOODS SOLD. When a person delivers tangible personal property as a premium together with other merchandise sold, and the obtaining of the premium by the purchaser is certain and not dependent upon chance or skill, the transaction is a sale of both articles. Tax applies to the gross receipts received from the purchaser for the goods and the premium except when the premium is delivered along with a food product for human consumption or other exempt item. In such case tax applies to the gross receipts from the sale of the premium, which will be regarded as the cost of the premium to the retailer,

in the absence of any evidence that the retailer is receiving a larger sum. If there is no such evidence, and if sales tax or use tax has been paid, measured by the sale price of the premiums to the retailer, no further tax is due.” [Emphasis added.]

A 200-case purchase by an Illinois distributor of a California boutique wine appears to be a significant purchase. It is a well-recognized practice in the winery industry to discount by 10% purchases by the case. Forty cases, however, would be 20% discount on a 200-case sale, which would be an excessive premium, in light of petitioner’s documented business practice of also providing free samples to out-of-state vendors. Twenty of the 40 cases shipped to V--- L--- should be allowed as a premium to accommodate for the industry practice of discounting for case purchases. The remaining 20 cases should be treated as samples to which use tax is applicable calculated as petitioner’s purchase price of the bottles, labels, cork, and foil.

Audit Item B - Supply and Promotional Purchases From Out-of-State

SUMMARY

The tax auditor determined that petitioner expended \$11,025 to acquire 300 umbrellas and stands ex-tax from S--- Corporation. The tax auditor asserted use tax was due in the quarter in which these items were acquired based upon petitioner’s having allegedly given the items away for promotional purposes.

Petitioner contended in its November 1987 letter that the tax auditor made a blanket assumption that 260 umbrellas and stands were used as promotional items out of state and that this erroneous assumption did not reflect the true nature of the transaction. Petitioner alleged that the umbrellas and stands were sold to retailers under a program which provided that when a purchaser acquired 30 cases of wine, an umbrella was provided with the 30 cases of wine at no additional cost. Petitioner did not provide a schedule of the dates when and to whom the premiums were sold.

In the reaudit, DBT agreed that petitioner properly purchased the umbrellas for resale as premiums. DBT concluded that petitioner was liable for sales tax on these sales, and presumed that the gross receipts from these sales equalled petitioner’s cost so no adjustment to the audit measure of tax was made. Petitioner was instructed to take a tax-paid purchases resold deduction if and when the remaining 40 umbrellas are resold.

The tax auditor also determined that there was an \$1,100 purchase of gaskets in the first quarter of 1985 and a \$378 purchase of “XX” oil in that same quarter. The tax auditor concluded that the gaskets and oil were recurring purchases and projected them quarterly throughout the reporting period in dispute.

Petitioner contended that these two isolated purchases of oil and gaskets were the only instances in which petitioner erroneously purchased items ex-tax for personal consumption that the tax auditor had found in 1985. Thus, petitioner contended that projecting these items on a quarterly basis to preceding and subsequent years created a distorted and erroneous percent of error.

Petitioner contended that the winery was under construction during most of 1983; therefore, it alleged that no projection of error should be made for that year. Next, petitioner contended that the auditor should have reviewed the cash disbursement files for 1984 and 1986 separately because the nature of the petitioner's operations completely changed during those periods. Petitioner contended that the two isolated ex-tax purchases of oil and gaskets in 1985 were the exceptions rather than the rule, as demonstrated by the fact that petitioner did not issue resale certificates "to save money" during the construction of its winery.

ANALYSIS AND CONCLUSIONS

1. Sales and Use Tax Regulation 1670(c) quoted above is dispositive of this issue. There is no dispute that the umbrellas and stands were premiums. Petitioner has failed to produce any documentation to demonstrate that the 260 umbrellas and stands included in the measure of tax, or any part of them, were sold as part of a sale for which petitioner reported and paid sales tax. Petitioner has provided no evidence that any sale with which a premium was sent would have qualified for exemption from sales tax as a sale in interstate commerce.

For interest calculation purposes, however, a reaudit is necessary to determine the actual quarter in which the 260 umbrellas and stands were sold. Petitioner owes sales tax based on its purchase price of the umbrellas and stands. In the event petitioner's records do not reflect the exact dates of sale of these premiums, the 260 umbrellas and stands should be prorated equally over each quarter in this reporting period.

As for the remaining 40 umbrellas and stands, they should be deleted from the measure of tax because they were not sold as premiums during this reporting period.

2. Petitioner was informed that a sampling of accounts payable for a one-year test period would be used to project a percent of error for ex-tax purchases over the entire reporting period. Petitioner selected 1985 for the test period. After adjustments in the reaudit, two items totaling \$1,478 (one purchase of gaskets and one purchase of oil) were determined to have been acquired ex-tax for self-consumption. The tax auditor determined that the "XX" oil purchased from A--- R---, Inc., and the inflatable gaskets purchased from S--- M--- P--- appeared to be the type of items which petitioner would acquire on a recurring basis and, therefore, should be projected over the reporting period. These recurring purchases, when projected on a quarterly basis, amounted to \$370 per quarter of unreported ex-tax purchases.

Petitioner provided no schedule of ex-tax purchases for the remaining quarters not included in the test period to demonstrate that the tax auditor's projection was erroneous. A taxpayer seeking exemption from tax must prove entitlement with more than mere allegation. Credible evidence to support the exemption must be provided. [Paine v. State Board of Equalization (1982) 137 Cal.App.3d 438.] The taxpayer has the burden of proving not only that the Board's determination, based on his/her own books and records is incorrect, but also of producing evidence from which another and proper determination may be made. [People v. Schwartz, (1947) 31 Cal. 2d 59.] The Board is not required to accept as conclusive the taxpayer's books and records, where, in conducting the audit, the Board used a recognized and standard accounting procedure and determined from its audit that the books and records did not reflect all taxable sales or disclose the correct tax liability. [Riley B's Inc., v. State Board of Equalization, (1976) 61 Cal. App. 3d 610.] The burden of proof is on the taxpayer to explain the disparity between the taxpayer's books and records and the results of the Board's audit. [Id.] Based upon petitioner's failure to produce any rebuttal evidence whatsoever on this issue, the tax auditor's findings will stand.

Audit Item D - Computational Errors in Filing Returns

SUMMARY

Petitioner utilized a double-entry system of bookkeeping supported by original or source documents. Its inventory accounting system was initially created by a receptionist. During the audit in 1987, petitioner's current books of accounts and records still demonstrated that there were significant problems in inventory accounting. Inventory controls were first instituted in July 1986. However, for the prior two years that petitioner was in operation, petitioner's sales invoices were originated in the warehouse and often were not entered into its sales journals until the shipping date or later, if at all. Postings appeared as much as three months after shipping.

The tax auditor was unable to trace many of the invoices to the sales journal or to trace from the sales journals to the tax returns in some quarters of this reporting period. He therefore reconstructed petitioner's sales by using original and source documents. Invoices upon which sales tax reimbursement was charged for the period January 1, 1984, through March 31, 1986, were compared to petitioner's filed returns. That comparison resulted in a determination that there was 6.56 percent of error, which was projected retroactively to the inception of petitioner's business in 1983.

ANALYSIS AND CONCLUSIONS

Petitioner has presented a generalized argument against the compilation errors but has presented no substitute documentation of the underlying transactions to refute the tax auditor's computations. Notes in the audit workpapers disclosed that petitioner's comptroller was given copies of all audit workpapers and schedules months prior to the hearing in this matter. Petitioner failed to allege and prove any errors in this audit item and no adjustment is warranted. [Paine, supra., and Schwartz, supra.]

Audit Item E – Trade-outs Not Included on Returns

SUMMARY

Petitioner engaged in “trade-outs,” e.g., merchandise or services purchased by petitioner were paid for with cases of wine. Petitioner did not include “trade-outs” on its returns based upon information derived from its cash register receipts, journals, and sales invoices which the tax auditor reviewed.

The tax auditor determined that petitioner had engaged in nine trade-outs during the reporting period. After the reaudit, three disputed trade-outs were excluded. C--- J---’ name appeared on several disputed items included as trade-outs. The tax auditor was initially informed that certain transactions involving C--- J--- were the trade-out of wine for services. Petitioner later contended that Mr. J--- had a contract to promote petitioner’s wine and that no services were traded. Petitioner further contended that all of the remaining disputed trade-outs were sold “tax-included.”

The tax auditor’s examination of the sales invoices involving the trade-outs disclosed that no separately stated sales tax reimbursement was charged or mentioned on invoices. The tax auditor’s review of petitioner’s retail sales invoices disclosed that petitioner routinely charged separately stated sales tax reimbursement on in-state sales.

ANALYSIS AND CONCLUSIONS

1. Revenue and Taxation Code section 6006(a) defines a sale to include any transfer of title or possession, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration. “Transfer of possession” includes only transactions found by the Board to be in lieu of the transfer of title, exchange, or barter. This definition is broad enough to include the exchange of wine as tangible personal property for the provision of goods and services under the contract petitioner alleged it entered into with Mr. J--- to promote its wine.

“Consideration” passed when petitioner promised to pay J--- wine in exchange for J---’ promise to promote the sale of petitioner's wine. J---’ promise conferred a benefit on petitioner and imposed a detriment on him. [Peterson Tractor Company, supra.] Petitioner’s transfer of wine as tangible personal property to J--- constituted valid consideration to support a sale by barter. [Revenue and Taxation Code Section 6006(a.)]

A sale to be taxable need not be made with the intention of making a profit; the definition of a “business” expressed in Revenue and Taxation Code section 6013 is an activity engaged in “gain, benefit or advantage,” not “profit.” [Market Street Railway Company v. State Board of Equalization, (1955) 137 Cal.App.2d 87.] While petitioner may not have been guaranteed that Mr. J--- promotional efforts would be successful or profitable, the payment of wine in return for J---’ attempts to promote its product was an activity relating to its business that conferred a

benefit on petitioner. Petitioner has provided no evidence inconsistent with this finding. Trade-outs to J--- were taxable sales.

2. Petitioner contended that all trade-outs were sold “tax-included.” With reference to a trade-out to K--- -FM, petitioner stated, “[t]here is no way we would have traded services dollar for dollar, only to have to pay additional money for sales taxes that were incorrectly not included on the invoice. If sales tax were not intended to be included, we would have increased our trade and lowered the amount of product given.”

Revenue and Taxation Code section 6051 is applicable to all retail sales of tangible personal property in this state. It encompasses bartering the exchange of services for tangible personal property which would include petitioner’s bartering of wine for commercial air time on K--- -FM or other promotional consideration. [Revenue and Taxation Code section 6006(a).] The incidence of sales tax is imposed on the retailer, not the consumer. A presumption is created under Cal. Civil Code Section 1656.1 that when a retailer adds sales tax reimbursement to an invoice, the buyer agreed to reimburse the retailer for the retailer’s sales tax liability. Inclusion of sales tax reimbursement on an invoice raises the presumption of such an agreement absent a finding to the contrary. Failure to include sales tax reimbursement, however, does not raise the presumption of agreed reimbursement. Neither does it mandate an alternative conclusion that the parties agreed that sales tax was included in the gross receipts.

Revenue and Taxation Code section 6012 provides, in pertinent part, as follows:

“For purposes of the sales tax, if the retailers establish to the satisfaction of the board that the sales tax has been added to the total amount of the sale price and has not been absorbed by them, the total amount of the sale price shall be deemed to be the amount received exclusive of the tax imposed. Section 1656.1 of the Civil Code shall apply in determining whether or not the retailers have absorbed the sales tax.”

There was no evidence that any sign was posted on petitioner’s premises stating that sales tax was included in the sales price. [Sales and Use Tax Regulation 1700(a)(2)(C).] Petitioner failed to provide proof that any such notices appeared on its invoice for the trade-outs or in any advertisement for or solicitation of the trade-outs. Nor has petitioner provided any contemporaneous written agreement between itself and K--- -FM radio to demonstrate that they agreed that tax was included in the trade-out, or that petitioner provided the radio station with prior notice in writing that sales tax was included.

Further, throughout the reporting period, petitioner’s invoices for retail sales routinely reflected sales tax reimbursement. Petitioner’s books and records reflected that not all retail sales were reported on its returns. Petitioner has failed to provide credible evidence that (1) the tradeouts were sold “tax-included,” and (2) that if they were sold “tax-included,” sales tax for those transactions was properly reported on and paid with its returns. Petitioner has further provided no reasonable explanation why tax was included in the sales price for trade-outs but was not included in the sales price for its other in-state retail sales.

Audit Item F - Sales to Stockholders and Employees

SUMMARY

To verify claimed sales for resale, which included sales to stockholders and employees, the tax auditor examined petitioner's invoices from January 1, 1984, through March 31, 1986. The resulting percent of error was applied retroactively to the quarters in 1983 in which petitioner operated. Petitioner contended that this percent of error was erroneous because during 1983, the winery was primarily under construction and any such sales would have been significantly less than in the test period. A formal wine tasting facility was not installed until the summer of 1984 when a mobile trailer was leased for that purpose.

ANALYSIS AND CONCLUSIONS

As noted in the discussion of compilation errors above, petitioner's system of inventory control prior to July 1986 was at times nonexistent and at other times inconsistent and sporadic. Petitioner has provided no evidence whatsoever to refute the tax auditor's calculation of the percent of error. The burden is on the taxpayer not only to prove from its own books and records that the tax auditor's calculation is erroneous, but also to proffer evidence by which to compute the tax correctly. [Schwartz, supra.] Petitioner has merely challenged the tax auditor's findings without submitting any relevant evidence to compute what it alleges to be the correct tax due.

Petitioner's allegation that sales to employees and stockholders, for which no resale certificates were taken, were made "tax-included" is inconsistent with its normal business practice. Petitioner routinely included sales tax reimbursement on its retail sales invoices. Petitioner provided no credible evidence to refute that these were taxable sales or to explain why it changed its policy on sales tax reimbursement only in connection with sales to shareholders, employees and trade-outs.

Audit Item G – Sale of Assets not Reported

Summary

The tax auditor determined that in November and December 1983, petitioner sold containers and a corker for \$1,400 and \$4,700, respectively. These sales were not reported as taxable sales on petitioner's return.

Petitioner contends that these sales were not part of its normal business operation. According to petitioner, this equipment was located at and sold from a construction site approximately a mile from its main offices in Oakland shortly after construction of the winery was completed. Petitioner contends that the 1983 site where the corker and bottles were sold represented a division whose sole responsibility was to build the winery building and that the separate location allowed the division to operate with a great deal of independence, e.g., the division had its own checking account with separate signing authorities. Petitioner contends that

the DBT should look to the purchasers of the bottles and corker for use tax, not to it for sales tax. Petitioner concludes that these sales were casual or occasional sales.

ANALYSIS AND CONCLUSIONS

Petitioner has apparently misidentified the assets sold as construction equipment. The times sold were not assets used to build the winery; they were bottles and a corker. They were assets used in the preparation and production of wine. In prior allegations, petitioner admitted that the tasting facility and winery were not completed until the summer of 1984. Thus, the disputed sales were not dispositions of construction equipment after a corporate division ceased operations.

Since these were assets used directly in connection with the production of wine for sale, which is petitioner's primary business function, the sales do not qualify as exempt occasional sales [Revenue and Taxation Code §60006.5.] Sales tax is due from petitioner on the retail sale of assets used in its trade or business. [Sales and Use Tax Regulation 1595(b)(1).]

Recommendation

--- District is to perform the reaudit in accordance with the above-stated conclusions.

Janice M. Fallman, Hearing Officer

July 31, 1990

Date