OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 20086520
	) CDTFA Case ID 151-001
OCEAN STATE DEVELOPMENT, INC.	)
	)
	)
	)

OPINION

Representing the Parties:

For Appellant: Rick Cardello, President

For Respondent: Jarrett Noble, Tax Counsel III

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Ocean State Development, Inc. (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)[1] denying appellant's petition for redetermination of the Notice of Determination (NOD) dated October 31, 2013. The NOD is for $6,427 in tax, a failure-to-file penalty of $642.70, and applicable interest, for the period August 17, 2012, through December 31, 2012 (liability period).

Appellant waived the right to an oral hearing; therefore, the matter is being decided based on the written record.

ISSUE[2]

Whether appellant's unreported purchase of an elevator is subject to tax.

[1] Sales and use taxes were formerly administered by the State Board of Equalization (BOE). In 2017, functions of BOE relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to acts or events that occurred before July 1, 2017, "CDTFA" shall refer to BOE; and when this Opinion refers to acts or events that occurred on or after July 1, 2017, "CDTFA" shall refer to CDTFA.

[2] CDTFA's Decision determined that the failure-to-file penalty should be deleted. As such, we shall not address this item further.

FACTUAL FINDINGS

1. Appellant is a California corporation engaged in the business of furnishing and installing tangible personal property on to real property. During the liability period, appellant did not hold a seller's permit or Certificate of Registration – Use Tax with CDTFA and did not file sales and use tax returns.
2. On July 25, 2012, appellant was awarded a contract by a California school district to complete an improvement at one of its schools, which included the installation of an elevator.
3. On August 13, 2012, appellant purchased an elevator without payment of tax (ex-tax) for $73,450 from an unregistered out-of-state vendor to be shipped directly to the California project site. The vendor then issued six installment sales invoices to appellant between August 17, 2012, and October 30, 2012, totaling the purchase price of $73,450. No tax or tax reimbursement was charged or paid by either appellant, the vendor, or the school district for the elevator.
4. In its compliance assessment,[3] CDTFA determined that appellant owed use tax[4] on its ex-tax purchase of the elevator because appellant furnished and installed the elevator, a fixture, in a contract to construct an improvement on to real property in California (construction contract). Because appellant purportedly did not provide its sales price of the elevator, CDTFA used appellant's purchase price of $73,450 as the measure of tax.
5. On October 31, 2013, CDTFA issued to appellant an NOD for $6,427 in tax and a 10 percent failure-to-file penalty of $642.70 for the liability period.
6. On November 7, 2013, appellant filed a petition for redetermination. In its Decision dated April 13, 2020, CDTFA deleted the failure-to-file penalty but otherwise denied the petition.
7. This timely appeal followed.

[3] A CDTFA compliance assessment is an assessment completed without the performance of an audit.

[4] The applicable tax is sales tax, rather than use tax, because appellant was a retailer required to hold a seller's permit in connection with the sale and installation of the elevator. (Cal. Code Regs., tit. 18, § 1521(b)(4).) This distinction does not affect the amount of the liability at issue in this case because the measure of tax applicable to a construction contractor's retail sale and installation of a fixture is the contractor's cost (Cal. Code Regs., tit. 18, § 1521(b)(2)(B)2), which is the measure of tax at issue herein.

DISCUSSION

California imposes sales tax on a retailer's gross receipts from the retail sale of tangible personal property in this state unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, §§ 6012, 6051.) All of a retailer's gross receipts are presumed subject to tax, unless the retailer can prove otherwise. (R&TC, § 6091.) "Gross receipts" means the total amount of the sale price of a retailer's retail sales of tangible personal property, including the cost of labor or services, as well as any services that are a part of the sale. (R&TC, § 6012(a)(2), (b)(1).) Charges for labor or services used in installing or applying the property sold are excluded from the measure of tax, but such labor and services do not include the fabrication of property in place. (R&TC, § 6012(c)(3); Cal. Code Regs., tit. 18, § 1546(a).)

A "construction contractor" is any person, who, for itself, in conjunction with, or by or through others, agrees to perform and does perform a construction contract. (Cal. Code Regs., tit. 18, § 1521(a)(2).) A construction contract means a contract to erect, construct, alter, or repair any building or other structure or other improvement on or to real property. (Cal. Code Regs., tit. 18, § 1521(a)(1).) Construction contractors are retailers of the fixtures they furnish and install in the performance of construction contracts and tax applies to their sales of fixtures. (Cal. Code Regs., tit. 18, § 1521(b)(2)(B)1.) "Fixtures" means and includes items that are accessory to a building or other structure, which do not lose their identity as accessories when installed. (Cal. Code Regs., tit. 18, § 1521(a)(5).) Examples of typical items regarded as "fixtures" include elevators, hoists, and conveying units. (Cal. Code Regs., tit. 18, § 1521, Appendix B.) If the contract states the sales price at which the fixture is sold, tax applies to that price. (Cal. Code Regs., tit. 18, § 1521(b)(2)(B)(2).) If the contract does not state the sales price of the fixture, the sales price is deemed to be the cost price of the fixture to the contractor. (*Ibid*.)

A contract to furnish and install a factory-built school building is not a construction contract but rather is a sale of tangible personal property. (Cal. Code Regs., tit. 18, § 1521(c)(4)(A).) The term "factory-built school building" (relocatable classroom) means and includes any building which is designed or intended for use as a school building and is wholly or substantially manufactured at an offsite location for the purpose of being assembled, erected, or installed on a site owned or leased by a school district or a community college district. (Cal. Code Regs., tit. 18, § 1521(c)(4)(B)1B.) The term does not include prefabricated or modular

buildings which are similar in size to, but which are not, "factory-built school buildings." (Cal. Code Regs., tit. 18, § 1521(c)(4)(B)(1).) Tax applies to 40 percent of the sales price of the building to the consumer excluding any charges for placing the completed building on the site. (Cal. Code Regs., tit. 18, § 1521(c)(4)(D)1.) A separate contract to furnish and install tangible personal property in a factory-built school building after installation of the building at the site is a construction contract and tax applies accordingly. (*Ibid*.)

If CDTFA is not satisfied with the amount of tax reported by the taxpayer, CDTFA may determine the amount required to be paid on the basis of any information within its possession or that may come into its possession. (R&TC, § 6481.) In the case of an appeal, CDTFA has a minimal, initial burden of showing that its determination was reasonable and rational. (*Appeal of Talavera*, 2020-OTA-022P.) Once CDTFA has met its initial burden, the burden of proof shifts to the taxpayer to establish that a result differing from CDTFA's determination is warranted. (*Ibid*.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid*.)

Here, it is undisputed that appellant entered into a contract to purchase an elevator to install on the project site. As such, appellant is a construction contractor and retailer of the fixtures it supplies in the course of the construction contract, and tax is due on the retail sale of the fixtures.[5] Elevators furnished and installed pursuant to construction contracts are categorized as "fixtures" because they are accessory to a building or other structure and do not lose their identity as accessories when installed. (Cal. Code Regs., tit. 18, § 1521(a)(5), Appendix B.) Therefore, the sale of the elevator appellant purchased and installed on the school campus is subject to tax, measured by appellant's sales price. However, because the record is devoid of appellant's sales price, we find CDTFA's use of appellant's purchase price of $73,450 is appropriate. (Cal. Code Regs., tit. 18, § 1521(b)(2)(B)(2).) Accordingly, we find CDTFA's determination to be reasonable and appellant has the burden to show that adjustments are warranted.

Appellant contends that the elevator is a modular elevator building and exempt from tax. However, an elevator is not a building, which is a structure with a roof and walls intended for the support, enclosure, shelter or protection of people, animals, or property. An elevator is a platform housed in a shaft that raises and lowers people or things to different levels. For

[5] Appellant contends that the school district should be held responsible for the tax. However, R&TC section 6051 provides that retailers are liable for the sales tax for the privilege of selling tangible personal property in this state.

purposes of sales and use tax law, elevators are categorized as fixtures, the sale of which is subject to tax. (Cal. Code Regs., tit. 18, § 1521(b)(2)(B)1.) For a "factory-built school building," tax applies to 40 percent of the sales price of the building. (Cal. Code Regs., tit. 18, § 1521(c)(4)(D)1.) However, the term "factory-built school building" refers specifically to structures designed to be used as a building, such as administrative buildings, storage buildings, special education units, restrooms, resource centers, remedial classes, libraries, bookstores, student project/activity centers, computer rooms, factory offices, first aid and weight rooms. (CDTFA Sales and Use Tax Annotation 190.0258.)[6] By definition, an elevator that lifts students to various floors, whether or not mandated by law, is not a factory-built school building and hence not taxed on merely 40 percent of the sales price pursuant to California Code of Regulations, title 18, (Regulation) section 1521(c)(4)(D)1.

Regulation section 1521(c)(4)(B) also states that the term "factory-built school building does not include prefabricated or modular buildings which are similar in size to, but which are not, 'factory-built school buildings.'" Regulation section 1521.4 states that gross receipts from the sale of factory-built housing, and the "sales price" of factory-built housing, sold or stored, used, or otherwise consumed in this state shall be 40 percent of the sales price of the factory-built housing to the consumer. Factory-built housing does not include fixtures which are not purchased as part of the factory-built housing package. (Cal. Code Regs., tit. 18, §1521.4(b)(2).) As discussed above, elevators are categorized as fixtures and the elevator in question was not purchased as part of a factory-built housing package. Therefore, the elevator is not factory-built housing and is not taxed on 40 percent of the sales price pursuant to Regulation section 1521.4. Accordingly, appellant has also not shown that the elevator qualifies as a factory-built school building or factory-built housing such that it is entitled to a partial exemption from tax.

[6] Annotations are not binding authority and do not have the force and effect of law. (*Appeal of Martinez Steel Corporation*, 2020-OTA-074P.) However, the Office of Tax Appeals may give some consideration to annotations and independently determine the appropriate weight to afford an annotation. (*Yamaha Corp. of America v. BOE* (1998) 19 Cal.4th 1, 15; *Appeal of Martinez Steel Corporation*, *supra*.)

HOLDING

Appellant's unreported purchase of an elevator is subject to tax.

DISPOSITION

CDTFA's action in deleting the failure-to-file penalty but otherwise denying appellant's petition is sustained.

DocuSigned by:
Josh Lambert
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Josh Lambert
Administrative Law Judge

We concur:

DocuSigned by:
Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

DocuSigned by:
Natasha Ralston
DE5000E566FD40F...
Natasha Ralston
Administrative Law Judge

Date Issued: 7/29/2021