OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 20025821
	) CDTFA Case ID 484728
DISH NETWORK CALIFORNIA SERVICE CORPORATION	)
	)
	)
	)

OPINION

Representing the Parties:

For Appellant: Jeff Malloy, Sales and Use Tax Manager

For Respondent: Chad T. Bacchus, Tax Counsel IV

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Dish Network California Service Corporation (appellant) appeals a January 9, 2020 Decision issued by respondent California Department of Tax and Fee Administration denying appellant's petition for redetermination of the June 29, 2018 Notice of Determination (NOD) for $70,587 in tax, plus accrued interest, for the period January 1, 2012, through December 31, 2014 (liability period).[1] The NOD was based on an audit that determined an aggregate deficiency measure of $848,026 consisting of three items, only one of which remains in dispute: audit item 1, unreported sales of low noise block feed-horns (LNBFs) sold to Dish Network, LLC (Dish) and installed by appellant for Dish customers who purchased (as opposed to leased) Dish receivers (subject transactions), measured by $566,632.[2]

This matter is being decided based on the written record because appellant waived its right to an oral hearing.

[1] Sales and use taxes (and other business taxes and fees) were formerly administered by the State Board of Equalization (BOE). In 2017, the California Legislature transferred functions of BOE relevant to this case to respondent. The effective date of the transfer of all but adjudicatory functions was July 1, 2017. (Adjudicatory functions were transferred to the Office of Tax Appeals effective January 1, 2018.) Thus, when this Opinion refers to events that occurred before July 1, 2017, "respondent" shall refer to BOE.

[2] The measure of these sales was originally determined to be $282,592 but was increased to $566,632. The file shows the total amount of tax at issue for all audit items as $94,497, but it does not show the amount of tax at issue for audit item 1 only. Appellant has not made an argument or offered evidence contesting the gross receipts from these sales.

ISSUES

1. Does appellant owe tax in connection with the subject transactions?
2. If appellant does owe tax in connection with the subject transactions, did Dish collect sales tax reimbursement from its customers in connection with those same transactions, thus entitling appellant to an offset?

FACTUAL FINDINGS

1. Dish provides satellite television services to its customers. Dish contracted with appellant to provide and install a satellite television system (system) at Dish's customers' locations.[3]
2. The installed systems generally consisted of a satellite antenna (reflector), which received the satellite signal, an LNBF, which was attached to the reflector to convert the signal into digital data that could be transmitted to a receiver via cable, a receiver (with smart card), a remote control, and related material, including cable, wire, and brackets or other hardware for attaching the reflector and LNBF to the structure.
3. The method of attachment typically involved the attachment of a mounting bracket to the structure using screws and the mounting of the reflector and LNBF to the bracket, with a cable running from the LNBF to the receiver.
4. The work performed by appellant for Dish was pursuant to a "construction contract," as that term is defined by California Code of Regulations, title 18, (Regulation) section 1521.[4] Thus, appellant was a construction contractor when it installed the systems.
5. In the audit, respondent found that the subject transactions were taxable retail sales.

[3] Appellant and Dish are separate but related entities.

[4] According to respondent, appellant has indicated that there was no formal agreement between appellant and Dish. Instead, intercompany journal entries were made to recognize the costs incurred by appellant as revenue to appellant and as expenses to Dish.

6. Respondent determined a deficiency for audit item 1 measured by $281,592 for unreported sales of LNBFs and issued the June 29, 2018 NOD to appellant.[5]
7. Appellant filed a timely petition for redetermination dated July 25, 2018. The parties participated in an appeals conference, during which the appeals attorney questioned respondent's calculation of the measure for audit item 1. The parties ultimately agreed that the correct audited measure for item 1 would be $566,632 if the subject transactions are taxable. Appellant continues to argue that they are not.
8. On January 9, 2020, respondent issued its Decision denying appellant's petition. This timely appeal followed.

DISCUSSION

Issue 1: Does appellant owe tax in connection with the subject transactions?

California imposes sales tax on all of a retailer's retail sales of tangible personal property (TPP) in this state, unless the sale is exempt or excluded from tax. (R&TC, § 6051.) The sales tax is imposed upon retailers for the privilege of selling TPP at retail in this state. (R&TC, § 6051.) A retailer may collect sales tax reimbursement from the purchaser if the contract of sale so provides. (Civ. Code, § 1656.1(a).) Sales tax is measured by a retailer's gross receipts, and all gross receipts are presumed taxable until proven otherwise, unless the retailer timely and in good faith takes from the purchaser a certificate to the effect that the property is purchased for resale. (R&TC, §§ 6051, 6091, 6092; Cal. Code Regs., tit. 18, § 1668(a).) When sales tax does not apply, use tax applies to the storage, use, or other consumption of TPP purchased from any retailer for storage, use, or other consumption in this state, measured by the sales price, unless that use is specifically exempted or excluded by statute. (R&TC, §§ 6201, 6401.)

Regulation section 1521(a)(2) provides that 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. A "construction contract" is a contract to erect, construct, alter, or repair any building or other structure or other improvement on or to real property (realty). (Cal. Code Regs., tit. 18, § 1521(a)(1).)

[5] Appellant does not dispute audit items 2 and 3, so we need not discuss them further. There is also no dispute regarding appellant's sales of LNBFs and reflectors it furnished and installed for customers who *leased* receivers from Dish.

Appellant is a construction contractor, and appellant's contracts with Dish were construction contracts, with sales or use tax applicable pursuant to Regulation section 1521. Regulation section 1521 segregates property that is furnished and attached to or incorporated into realty in connection with a construction contract into three categories, two of which are relevant to our discussion: materials and fixtures.[6]

In general, construction contractors are consumers of the materials they furnish and install when they perform construction contracts, and either sales tax or use tax applies to the sale of materials to, or the use of materials by, the construction contractor. (Cal. Code Regs., tit. 18, § 1521(b)(2)(A)1.) "Materials" includes "construction materials and components, and other TPP incorporated into, attached to, or affixed to [realty] by contractors in the performance of a construction contract and which, when combined with other TPP, loses its identity to become an integral and inseparable part of the [realty]." (Cal. Code Regs., tit. 18, § 1521(a)(4).) A list of examples includes conduit, electrical wires and connections, ducts, roofing, and fittings. (Cal. Code Regs., tit. 18, § 1521, Appendix A.)

Construction contractors are usually the retailers of the fixtures they furnish and install in the performance of construction contracts and tax applies to their sales of fixtures.[7] (Cal. Code Regs., tit. 18, § 1521(b)(2)(B)1.) "Fixtures" 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).) A list of examples includes burglar alarm fixtures, lighting and plumbing fixtures, and television antennas. (Cal. Code Regs., tit. 18, § 1521, Appendix B.) To determine whether an item is a fixture, we look to the nature of the property in the hands of the seller. (*Gen. Elec. Co. v. State Bd. of Equalization* (1952) 111 Cal.App.2d 180, 185; *Richard Boyd Industries, Inc. v. State Bd. of Equalization* (2001) 89 Cal.App.4th 706, 714.) Integration of the TPP into or onto the realty is not determinative. (See, for example, *Coast Elevator Co. v. State Bd. of Equalization* (1975) 44 Cal.App.3d 576 (disapproved on other grounds in *Culligan Water Conditioning v. State Bd. of Equalizatio*n (1976) 17 Cal.3d 86) [rejecting an argument that certain parts of an elevator system are materials by virtue of their integration into the building].)

[6] The third category is machinery and equipment.

[7] Tax applies to a contractor's retail sales of TPP that the contractor does not attach to the realty, such as the Dish receivers in this case. (Cal.Code Regs., tit. 18, § 1521(b)(3).)

Appellant's appeal to the Office of Tax Appeals argues that appellant properly collected sales tax from customers on the sales of LNBFs. We interpret that to mean that appellant disputes the entire measure of audit item 1 and all tax determined due for that audit item.[8] Because we have nothing in the file to indicate that appellant has abandoned any of the arguments raised during respondent's internal appeals process and discussed in respondent's Decision, we will address those here.

Appellant asserts that the State Board of Equalization (BOE) correctly decided the same issue in appellant's favor following an August 30, 2017 oral hearing on appellant's petition for redetermination issued for an earlier period, and that we are required to follow that decision.[9]

Appellant also contends that when it furnished and installed LNBFs, the transactions did not represent sales of fixtures subject to sales tax; but instead, such transactions were nontaxable sales of TPP to Dish for resale, like the receivers that appellant sold to Dish and set up for Dish's customers. In this regard, appellant contends that an LNBF does not meet the definition of a "fixture" because it is not attached directly to the realty; rather, the mounting hardware, treated as "materials" under Regulation section 1521, is the only item attached to the realty, and the LNBF can easily be removed from the reflector and the reflector can easily be removed from the mounting hardware without changing the realty at all. Quoting from the case of *Standard Oil v. State Bd. of Equalization* (1965) 232 Cal.App.2d 91, 97 (*Standard Oil*), appellant argues that when deciding whether an item is a fixture attached as an improvement to realty, "intention is the most significant, but the manner of annexation and the use to which the property is put are relevant in determining such intention." (*Standard Oil*, *supra*, 232 Cal.App.2d at p. 98.) Appellant asserts that the fact that the customer cannot use an LNBF to convert signals from any other provider's transmission is a clear indication that the customer intended the LNBF to be indirectly attached to the realty temporarily and for only as long as the customer chose to buy satellite television services from Dish. On that basis, appellant contends that the LNBFs were not materials or fixtures.

Finally, appellant argues that if we find that it made retail sales of the LNBFs subject to sales tax, it should receive an offset for any sales tax reimbursement collected and remitted by

[8] As stated above, appellant does not dispute the gross receipts from these sales. It disputes that the sales were taxable.

[9] Appellant argued that respondent was required to follow BOE's decision, but the question is whether that decision is either binding or persuasive here.

Dish when Dish sold the LNBFs to its customers. Appellant asserts that the agreements between Dish and its customers provided that the customers were buying or leasing reception equipment that included a receiver, smart card, remote, and antenna, and would also include an LNBF when required, that all of the provided equipment was required to receive the satellite television services, and that, therefore, all of the equipment, including the LNBFs, were included in the single charge for the "receiver," which Dish sold to the subject customers. Appellant contends that because Dish collected sales tax reimbursement from its customers measured by the charge for the receivers and remitted that tax to the state, appellant is entitled to an offset for such remitted sales tax that is attributable to the sale (or lease) of the LNBFs.

Regarding appellant's contention that BOE correctly decided the issue following the August 30, 2017 oral hearing, and that respondent was – and we are – bound to follow that decision, we note that BOE did not issue a precedential decision in that matter. Since BOE did not designate that decision as precedential, it is not binding precedent and cannot be cited as controlling. (Gov. Code, § 11425.60(a).) On that basis, we reject appellant's argument that we are required to follow BOE's decision in that earlier case.[10]

Regarding appellant's argument that the LNBFs were not fixtures but were simply TPP (like the receivers) which were sold to Dish for resale to Dish's customers, appellant's position implies that the attachment of the LNBFs to the realty was so insubstantial that we should treat the LNBFs as if they were not attached, thus warranting a tax treatment similar to that allowed for the receivers. But the fact that, pursuant to the agreement between appellant and Dish, certain equipment was attached to the realty is key to our analysis. It is what determines the law that we apply here. It cannot be ignored.

The LNBFs fit within the regulatory definition of fixtures. They were accessories that were attached to buildings or other structures and did not lose their identity as accessories when installed. (Cal. Code Regs., tit. 18, § 1521(a)(5).) The receivers that Dish sold to its customers, on the other hand, were never attached to realty. Furthermore, and contrary to appellant's conclusion, Regulation section 1521 does not require that a fixture be attached directly or permanently to the realty. In fact, fixtures are often attached to realty (using screws, bolts, mounting brackets, or other means) in a way that allows their removal without doing any noticeable damage to the realty. Appellant's reliance on the method of attachment, arguing that

[10] Appellant did not provide a copy of, or a useful citation to, BOE's written decision in the earlier matter, if one even exists; accordingly, we could not consider it for whatever persuasive value it held.

the temporary or impermanent method of attachment of the LNBFs shows that they were not fixtures, is misplaced.[11] Under these facts, where LNBFs were attached to reflectors, which were attached to realty with mounting brackets, screws, or other material, the method of attachment supports the conclusion that the LNBFs were fixtures.[12] Accordingly, we conclude that the LNBFs at issue were fixtures.

The evidence also does not support appellant's assertion that it sold the LNBFs to Dish for resale to Dish's customers. As previously stated, we must presume that appellant's sales of the LNBFs to Dish were retail sales and subject to tax until proven otherwise. (R&TC, § 6091.) The burden of proof is on appellant unless the evidence shows that appellant timely and in good faith took a valid resale certificate from Dish, and even then, the presumption is not rebutted unless the evidence also establishes that Dish intended to lease the LNBFs in place as TPP pursuant to R&TC section 6016.3 and to pay tax measured by rental receipts. (*Ibid*.; Cal. Code Regs., tit. 18, § 1521(b)(2)(B)3 and (b)(6).)

There is no evidence that appellant took a resale certificate from Dish. In addition, Dish's Residential Customer Agreements indicate that Dish customers must purchase or lease equipment needed to receive Dish's services and that the LNBFs remain the property of Dish, and it is undisputed that appellant installed the LNBFs at the service locations; but the sample invoices that appellant provided to respondent during the appeals process do not show a charge for leased equipment.[13] Appellant argued that Dish calculated sales tax on the measure that included the cost of the purchased receivers plus the charges for all other items required for the effective delivery of Dish's services and that the reference in invoices to "receiver" actually refers to the receiver and everything required to receive Dish's services. However, Dish's own

[11] Appellant's reliance on the *Standard Oil* case is likewise misplaced. That case involved the question whether sales tax was due in connection with the sale of multiple service station properties. The properties included affixed "trade fixtures," such as gas pumps, lifts, hoists, compressors, and other equipment, and BOE determined that sales tax was due in connection with the sale of those fixtures. The Court did not apply Regulation section 1521, as we do here. While the Court referred to the "rule" from which appellant pulled its quotation, above, the Court did not approve of or apply that rule, questioning the value of "mechanical fixtures tests for all problems." (*Standard Oil, supra*, 232 Cal.App.2d, at p. 98.) The Court ultimately concluded that tax was due in connection with the sales of the trade fixtures.

[12] We also note that the reflector and LNBF are comparable to an antenna to receive radio frequency waves. A television antenna is a fixture. (See Cal. Code Regs., tit. 18, § 1521, Appendix B.)

[13] These documents are among the exhibits to the December 9, 2016 Decision and Recommendation issued in the agency-level appeal from the NOD issued for the prior audit period, which is an exhibit to respondent's Decision from which this appeal arises.

agreements use the word "equipment" to collectively describe the various devices needed to receive Dish's services, and we find no evidence in the record to support appellant's argument that Dish either collected sales tax reimbursement measured by the cost of the LNBFs or that Dish remitted such tax to the state.

We find that Dish was the ultimate consumer of the LNBFs, which it used to enable its customers to utilize its services, and that appellant's sales of the subject LNBFs to Dish were not sales for resale. We also find that appellant owes tax in connection with its sales of LNBFs, which it furnished to and installed (pursuant to construction contracts) for Dish customers who also purchased receivers from Dish.

Issue 2: If appellant does owe tax in connection with the subject transactions, did Dish collect sales tax reimbursement from its customers in connection with those same transactions, thus entitling appellant to an offset?

Having found that appellant owes tax in connection with the subject transactions, we will now address appellant's contention that it is entitled to an offset for sales tax remitted by Dish in connection with its sales of receivers to the customers in question. Respondent agrees that if the evidence establishes that Dish collected sales tax reimbursement from its customers in connection with its sales of LNBFs, it should be regarded as having paid sales tax on such sales, and appellant should be allowed an offset for such payment.[14] (See respondent's Decision, p. 9, line 25 – p. 10, line 4.) Appellant has the burden of proving that Dish in fact collected sales tax reimbursement on the same transactions for which we find appellant liable. (Cal. Code Regs., tit. 18, § 1700(b)(4).)

We have already found that appellant was the retailer of the LNBFs and that it owed tax on its sales to Dish. Dish was not responsible for tax on the sale. Nevertheless, respondent has conceded that if Dish had collected sales tax reimbursement in connection with its transfer of the LNBFs to its customers, appellant would be entitled to an offset. However, as we have also already found, above, the evidence does not show that Dish collected sales tax reimbursement (or use tax) in connection with its sales of LNBFs to its customers who purchased receivers. Consequently, we find that no offset is warranted.

[14] Although respondent refers to "sales," the same would be true of leases if Dish had paid use tax measured by rental charges. (Cal. Code Regs., tit. 18, §§ 1660(b)(1) and 1521(b)(2)(B)3 and (b)(6).)

In summary, we find that the LNBFs were fixtures, that appellant furnished and installed them as a construction contractor, making retail sales on which appellant owed tax, and that no offset is warranted. Thus, we find that appellant owes sales tax on its sales of the LNBFs at issue.

HOLDING

Appellant owes tax in connection with its sales of LNBFs, which it furnished to and installed (pursuant to construction contracts) for Dish customers who also purchased receivers from Dish, and because Dish did not collect sales tax reimbursement from its customers in connection with those same transactions, appellant is not entitled to an offset.

DISPOSITION

Respondent's denial of appellant's petition for redetermination is sustained.

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Michael F. Geary
Administrative Law Judge

We concur:

DocuSigned by:
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Suzanne B. Brown
Administrative Law Judge

DocuSigned by:
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Teresa A. Stanley
Administrative Law Judge

Date Issued: 8/6/2021