92-SBE-027

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of MICRO D, INC., 0934878, TAXPAYER, INGRAM COMPUTER, INC., 1130770, ASSUMER AND/OR TRANSFEREE	))))))	No. 91A-0205-MC

Appearances:

For Appellant: Zane S. Averbach
Attorney at Law

For Respondent: Richard Gould
Counsel

O P I N I O N

This appeal is made pursuant to section 25666[1/] of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Micro D, Inc., 0934878, Taxpayer, Ingram Computer, Inc., 1130770, Assumer and/or Transferee, against proposed assessments of additional franchise tax in the amounts of $46,713, $3,132, and $162,581 for the income years ended October 31, 1983, December 31, 1984, and December 31, 1986, respectively.

[1/] Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the income years in issue.

Two issues are presented in this appeal. The first issue is whether appellant was entitled to a section 23606 credit for computer software it contributed to educational institutions. (Appellant contributed computer hardware for which it is undisputedly entitled to a credit.) The second issue is whether the wholesale or retail price is the correct basis for determining the allowable credit amount for appellant's contribution to educational institutions pursuant to section 23606.

Appellant was a distributor of computer hardware and commercial ("canned" as opposed to custom) computer software. It donated computer hardware and software to educational institutions during 1983 and 1984 and claimed franchise tax credits equal to 25 percent of the retail price of the hardware and software on its returns for those years. Because the credits exceeded its tax liability for the years claimed, appellant carried over the excess to 1986.

The Franchise Tax Board (FTB) determined that appellant was not entitled to a credit for the donation of the software and that the wholesale sales price, rather than the retail sales price, should have been used to determine the amount of the credit. These adjustments led to the proposed assessments which are the subject of this appeal.

Section 23606 provided for a credit equal to "25 percent of the fair market value of qualified charitable contributions" of certain tangible personal property, specifically enumerated as "a computer, scientific equipment, or apparatus" which a taxpayer contributed to schools or educational programs. The requirements for a "qualified charitable contribution" are enumerated in section 23606, subdivision (b), and appellant's contributions satisfied these requirements.

In 1985, the Legislature enacted section 23606.1, which provided a credit for contributions to schools of computer software on essentially the same terms as the section 23606 credit. This provision was effective for contributions made on or after January 1, 1986, and on or before December 31, 1987.

The first issue to consider is whether the credit is available for just hardware or both hardware and software.[2/] Section 23606 simply states that the credit is available for "a computer." Unfortunately, the term "computer" is not defined in the statute. Nor is the legislative history useful in crafting a meaning for this term.

Appellant argues that the term "computer" as used in 1982 was not nearly so refined as it is used today. It argues that the terms hardware and software were not commonly used when the law was enacted in 1982, and that the term computer meant both hardware and software. Appellant also argues that section 23606 contemplated the contribution of software along with computer hardware, as

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[2/] We use the term "software" to refer to computer applications programs such as word processing, spreadsheets, or games. We use the term "hardware" to refer to the physical components of the computer, such as the keyboard, monitor, central processing unit, and permanent data or program storage devices.

indicated by its use of the word "apparatus" in listing the property eligible for the credit. It argues that this was clearly the intent of the legislation since a donation of hardware without the software would be useless.

Respondent argues that section 23606 was modeled after a proposed federal statute that restricted the federal credit to donations of computer hardware. Respondent further argues that a new statute, section 23606.1, was necessary to make the credit available for donations of computer software. It contends that section 23606.1 was a material change in the law, and not merely a clarification of existing law. In response to this, appellant contends that the later passage of section 23606.1 was merely a clarification of section 23606.

In 1982, legislation was proposed at the federal level which would have provided for a higher percentage of income limitation for charitable contributions of computers as compared to other property. (H.R. 5573, 97th Cong., 2d Sess. (1982).) Section 23606 was enacted by the state when H.R. 5573 was not enacted. Unfortunately, the legislative history for H.R. 5573 does not contain a definition, nor even a hint of one, for the term "computer."

Respondent cites an internal memorandum by one of its staff counsel written in February of 1983 which documents a conversation the attorney had with a staff member of the Congressman who introduced the federal legislation wherein the staff person stated that the intent was not to include "software." We find this memorandum to have no probative value as to an alleged federal legislative intent due to the double hearsay it contains. However, we do note that the use of the term "software" in the memorandum tends to weaken appellant's argument that the terms "software" and "hardware" were not commonly used terms at the time the statute was enacted.

We think the strongest argument in favor of concluding that section 23606 did not apply to contributions of software was the enactment of section 23606.1. If the term "computer" as used in section 23606 was meant or intended to include software, section 23606.1 would be unnecessary. Appellant argues that section 23606.1 was merely a clarification of 23606. However, there is nothing in the enactment of section 23606.1 to indicate that it was intended to be a clarification of existing law. "The very fact that the prior act is amended demonstrates the intent to change the pre-existing law . . . ." (Clements v. T. R. Bechtel Co., 43 Cal.2d 227, 232 [273 P.2d 5] (1954).) We will not assume that the Legislature intended a statute to be declarative of existing law unless such intent is clearly expressed. (Eu v. Chacon, 16 Cal.3d 465, 470 [128 Cal.Rptr. 1] (1976); Appeal of Firestone Tire and Rubber Company, Cal. St. Bd. of Equal., May 8, 1985.) Therefore, we conclude that the term computer as used in section 23606 does not include software.

Appellant argues that the term "apparatus" as used in section 23606 was intended to include software. It cites Bruce v. Sibeck, 25 Cal.App.2d 691 [78 P.2d 741] (1938), wherein the court defined the term "apparatus" as "'a generic word of the most comprehensive significance; implements; an equipment of things provided and adapted as a means to some end'. (sic)." (Bruce v. Sibeck, supra, 25 Cal.App.2d at 696.) This definition certainly assists in ascertaining a meaning for the

word apparatus. However, it does not help in determining whether apparatus was meant to stand alone as something other than a computer or scientific equipment, or whether it was intended to modify the terms computer or scientific equipment. Even if we were to conclude that the term apparatus modified the term computer, we would need to determine if apparatus referred to computer peripherals such as printers, external hard drives and other nonessential computer hardware or if it referred to software. We do not think the existence of the word "apparatus" in the statute adds any meaning by itself. Certainly it does not add any meaning to section 23606 such that our holding that the enactment of section 23606.1 was a change in the law is erroneous. We therefore hold that the credit under section 23606 did not apply to contributions of software.

Under section 23606, appellant is entitled to a credit equal to 25 percent of the "fair market value" of the donated hardware. The second issue to consider is the fair market value of the computer hardware appellant donated. The parties' dispute revolves around the proper "market" in which to determine value.

Section 23606 provided for a credit for a qualified charitable contribution. (Rev. & Tax. Code, § 23606, subd. (a).) A qualified charitable contribution was defined as a charitable contribution of tangible personal property if certain requirements were met. (Rev. & Tax. Code, § 23606, subd. (b).) Section 24357 provides for a deduction for charitable contributions. The regulations promulgated pursuant to section 24357 provide various rules governing charitable contributions. California Code of Regulations, title 18, regulation 24357-1, subdivision (c), provides that:

> The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts. If the contribution is made in property of a type which the taxpayer sells in the course of its business, the fair market value is the price which the taxpayer would have received if it had sold the contributed property in the lowest usual market in which it customarily sells, . . .

(Cal. Code Regs., tit. 18, reg. 24357-1, subd. (c)(1).)

This regulation is nearly identical to Treasury Regulation section 1.170A-1(c), with the key difference being that the federal regulation does not contain the word "lowest." Appellant sold products in both the retail and the wholesale market, estimating that 70 percent of its sales were wholesale and the remainder retail. Appellant claimed the credit based on the retail price. Respondent argues that appellant's "lowest usual market" is the wholesale market and thus the credit should be based on the wholesale price.

Appellant contends that the proper market in which to determine value is the retail

market of the property contributed and cites to several federal cases in support of its position. (See Goldman v. Commissioner, 388 F.2d 476 (6th Cir. 1967), affg. 46 T.C. 136 (1966); Anselmo v. Commissioner, 757 F.2d 1208 (11th Cir. 1985), affg. 80 T.C. 872 (1983); and Joseph J. Tallal, Jr. v. Commissioner, ¶ 86,548 T.C.M. (P-H) (1986).) Since the federal and state regulations are nearly identical, federal precedent is useful in interpreting the state regulation. (See Andrews v. Franchise Tax Board, 275 Cal.App.2d 653, 658 [80 Cal.Rptr. 403] (1969).) Appellant also refers to the definition of fair market value found in the property tax provisions of the Revenue and Taxation Code. (Rev. & Tax. Code, § 110 (a).)

First, we agree with respondent that the cases cited by appellant are distinguishable. Each of these cases involved a person who was not a manufacturer of the product donated. Thus, the courts relied on the first sentence of Treasury Regulation section 1.170A-1(c)(2) which is identical to the first sentence of regulation 24357-1, subdivision (c)(1). However, in this case, it is the second sentence of these regulations which is applicable. Under this regulation, fair market value "is the price which the taxpayer would have received if it had sold the contributed property in the lowest usual market in which it customarily sells." Since appellant dealt primarily in the wholesale market, we agree with respondent that the wholesale price is the appropriate value to use for purposes of computing the credit pursuant to section 23606.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, pursuant to section 25667 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Micro D, Inc., 0934878, Taxpayer, Ingram Computer, Inc., 1130770, Assumer and/or Transferee, against proposed assessments of additional franchise tax in the amounts of $46,713, $3,132, and $162,581 for the income years ended October 31, 1983, December 31, 1984, and December 31, 1986, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 19th day of November, 1992, by the State Board of Equalization, with Board Members Mr. Sherman, Mr. Dronenburg, Mr. Fong, and Ms. Scott present.

Brad Sherman, Chairman

Ernest J. Dronenburg, Jr., Member

Matthew K. Fong, Member

Windie Scott*, Member

_____, Member

*For Gray Davis, per Government Code section 7.9
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