OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **ARCA RECYCLING, INC.,** **dba Appliance Smart**	OTA Case No.: 231014632 CDTFA Case ID: 1006523

OPINION

Representing the Parties:

For Appellant: Virland Johnson, CEO

For Respondent: Courtney Daniels, Attorney
Jarrett Noble, Attorney

For Office of Tax Appeals: Nguyen Dang, Attorney

S. KIM, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, ARCA Recycling, Inc. dba Appliance Smart (appellant) appeals a Decision and a Supplemental Decision issued by respondent California Department of Tax and Fee Administration (CDTFA)[1] denying appellant's timely petition for redetermination of a Notice of Determination (NOD) issued on April 13, 2017. The NOD is for tax of $4,132,272.61, plus applicable interest, for the period January 1, 2011, through September 30, 2014 (liability period).

Appellant waived the right to an oral hearing; therefore, the matter was submitted to the Office of Tax Appeals (OTA) on the written record pursuant to California Code of Regulations, title 18, section 30209(a).

ISSUE

Whether appellant's sales of appliances were sales for resale.

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

FACTUAL FINDINGS

1. Appellant operated a business recycling used household appliances through appliance exchange programs offered by the Southern California Public Power Authority (Power Authority) and the Southern California Gas Company (Gas Company).
2. Power Authority is a joint powers authority consisting of 11 municipal utilities and one irrigation district, including the Los Angeles Department of Water and Power (LADWP), Burbank Water and Power (BWP), and the City of Colton (Colton). Power Authority is a separate government agency created by its members for the purpose of pooling resources to create operational efficiencies, cost savings, and collaborative advocacy.
3. During the liability period, LADWP, BWP, and Colton offered a refrigerator exchange program which allowed income-qualified customers (end customers) to exchange old used refrigerators for new energy efficient models. During the liability period, Gas Company also operated a similar appliance exchange program for washing machines. The purpose of these appliance exchange programs was to promote energy efficiency and reduce the service demands placed on the participating utilities' resources.
4. Pursuant to an agreement entitled "Appliance Delivery and Recycling Services Agreement," Power Authority, on behalf of LADWP, BWP, and Colton, contracted with appellant to implement the refrigerator exchange program by purchasing and warehousing the new refrigerators, then delivering and installing the new refrigerators at end customers' locations. Appellant was also responsible for removing, recycling, and disposing of the old refrigerators, which end customers were required to exchange for the new refrigerators. Pursuant to an agreement entitled "Southern California Gas Company Standard Service Agreement for Labor and/or Services," Gas Company contracted with appellant to provide similar services for its washing machine exchange program.
5. Power Authority and Gas Company compensated appellant based on the number of appliances installed. Appellant asserted and CDTFA accepted that the cost of the appliances plus a 13 percent markup fairly represented the selling price of the appliances.
6. For the liability period, appellant reported the entirety of its gross receipts as nontaxable sales for resale.
7. CDTFA determined that a portion of appellant's gross receipts constitute taxable sales of appliances and related charges.
8. CDTFA issued the NOD to appellant for the liability period reflecting this determination.

9. Appellant filed the petition for redetermination, which CDTFA denied in a Decision dated March 8, 2023, and a Supplemental Decision dated October 10, 2023.
10. Appellant timely filed this appeal.

DISCUSSION

California imposes sales tax on a retailer's retail sales of tangible personal property sold in this state measured by the retailer's gross receipts, unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, §§ 6012, 6051.) A "retail sale" means a sale for a purpose other than resale in the regular course of business in the form of tangible personal property, including the use of that property. (R&TC, §§ 6007(a)(1), 6009.) For the purpose of the proper administration of the Sales and Use Tax Law and to prevent the evasion of the sales tax, the law presumes that all gross receipts are subject to tax until the contrary is established. (R&TC, § 6091.) The seller has the burden of proving that a sale of tangible personal property is not a retail sale, unless the seller timely takes in good faith a certificate from the purchaser that the property is purchased for resale. (Cal. Code Regs., tit. 18, § 1668(a).)

It is undisputed that appellant did not receive resale certificates for its sales of appliances, and thus, appellant bears the burden of proving that the sales were for resale.

Where the seller does not timely obtain a resale certificate, the seller will be relieved of liability for tax only where the seller shows that the property: (1) was in fact resold by the purchaser and was not used by the purchaser for any purpose other than retention, demonstration, or display while holding it for sale in the regular course of business; (2) is being held for resale by the purchaser and has not been used by the purchaser for any purpose other than retention, demonstration, or display while holding it for sale in the regular course of business; (3) was consumed by the purchaser and tax was reported directly to CDTFA by the purchaser on the purchaser's sales and use tax return; or (4) was consumed by the purchaser and tax was paid to CDTFA by the purchaser pursuant to an assessment against or audit of the purchaser. (Cal. Code Regs., tit. 18, § 1668(e)(1-4).)

A taxpayer bears the burden of proving entitlement to an exemption or exclusion and must provide some credible evidence of that entitlement. (*Appeal of Thomas Conglomerate*, 2021-OTA-030P.) The applicable burden of proof is by a preponderance of the evidence, that is, a party must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Ibid*.)

A "sale" means and includes 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. (R&TC, § 6006(a).) "'Transfer of possession' includes only transactions found to be in lieu of a transfer of title, exchange or barter." (*Ibid*.) Appellant contends that it sold the appliances to Power Authority and Gas Company, and that Power Authority (or its members) and Gas Company resold the appliances to the end customers. However, despite CDTFA's apparent concession that appellant sold the new appliances to Power Authority/Gas Company who then provided the appliances to the end customers, the agreements between appellant and Power Authority/Gas Company show no indication that appellant transferred title of the new appliances to Power Authority/Gas Company and that Power Authority/Gas Company then transferred title of the new appliances to the end customers. The agreements are silent as to the transfer of title of the new appliances.[2]

Furthermore, the agreements refer only to services provided by appellant, including the purchase, warehousing, delivery, uncrating, setup, and installation of new appliances, as well as the removal and recycling of old appliances. Appellant was in possession of the new appliances at all relevant times, from purchase through final delivery and installation at the end customers' locations, upon which possession of the new appliances was transferred to the end customers for their use. There was only one transfer of possession of the new appliances resulting from the agreements between appellant and Power Authority/Gas Company. Moreover, consideration is any benefit conferred, or agreed to be conferred, upon the promisor, *by any other person*, to which the promisor is not lawfully entitled as an inducement to the promisor. (Civ. Code, § 1605, italics added.) Accordingly, the end customers' trade-in of old appliances and any compensation paid by Power Authority/Gas Company are both part of the consideration paid for the transfer of possession, or "sale" of new appliances from appellant to the end customers. The record does not show that Power Authority/Gas Company purchased appliances for the purpose of resale,[3] or that there was a sale of appliances to Power Authority/Gas Company at all. Based on the foregoing, OTA concludes that appellant has not satisfied its burden of proving that its sales of appliances were for resale.

The sales price is the total amount for which tangible personal property is sold, valued in money, whether paid in money or otherwise, and includes any services that are a part of the sale. (See R&TC, § 6011(a)(2), (b).) However, the provision of a service that is not part of a sale of tangible personal property is not subject to tax. (See Cal. Code Regs., tit. 18, § 1501;

[2] The agreement with Power Authority states that title of the old appliances passes from the end customers to appellant.

[3] There is no evidence that Power Authority/Gas Company held seller's permits or sold appliances in the regular course of business.

Appeal of Thomas Conglomerate, *supra*.) Persons engaged in the business of rendering service are consumers, not retailers, of the tangible personal property which they use incidentally in rendering the service. (Cal. Code Regs., tit. 18, § 1501.) Accordingly, tax applies to the sale of the property to them. (*Ibid*.) If in addition to rendering service they regularly sell tangible personal property to consumers, they are retailers with respect to such sales and they must obtain permits, file returns and remit tax measured by such sales. (*Ibid*.) The basic distinction in determining whether a particular transaction involves a sale of tangible personal property or the transfer of tangible personal property incidental to the performance of a service is one of the true object of the contract; that is, is the real object sought by the buyer the service per se or the property produced by the service. (*Ibid*.) If the true object of the contract is the service per se, the transaction is not subject to tax even though some tangible personal property is transferred.

Appellant asserts that there are two separate transactions at issue here: (1) a sale between appellant and Power Authority/Gas Company; and (2) a sale between Power Authority/Gas Company and the end customers. As discussed above, only one sale of tangible personal property took place, from appellant to the end customers. As apparent from the language of the agreements, the sales between appellant and Power Authority/Gas Company were not sales of tangible personal property, but sales of services. However, both sales (of services and of tangible personal property) arise out of a single contract (appellant's agreements with Power Authority/Gas Company) and are thus inextricably tied together as one transaction.

The purpose of the appliance exchange programs was to promote energy efficiency and reduce the service demands placed on the participating utilities' resources. To accomplish these goals, it was necessary for end customers to cease the use of their old inefficient appliances. While it was possible for appellant to provide the service of collecting and recycling old appliances without providing new appliances, it seems highly unlikely that the end customers would have participated in the appliance exchange programs and turned in their old appliances to be recycled if they did not receive the new energy efficient appliances in return. Since appellant needed to provide new appliances to incentivize the recycling of old appliances and achieve the goals of promoting energy efficiency and reducing service demands, the true object of the contracts was the tangible personal property produced by the service and not the service itself. Therefore, appellant was the retailer of the appliances and is liable for the sales tax measured by the sales price of the new appliances.

HOLDING

Appellant's sales of appliances were not sales for resale.

DISPOSITION

CDTFA's action is sustained.

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Steven Kim
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Steven Kim
Administrative Law Judge

We concur:

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

DocuSigned by:
Shula Pacheco
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For Suzanne B. Brown
Administrative Law Judge

Date Issued: 12/9/2025