BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA
In the Matter of the Petition for Redetermination Under the
Sales and Use Tax Law of:

Key Events, Inc.
dba USA Hosts/Key Events
Case ID's: 600095 & 953675

Memorandum and Dissenting Opinions

Appearances

For Petitioner:	Jesse McClellan, attorney Heather Keenan Priscilla Burpee, witness
For California Department of Tax and Fee Administration, Business Taxes and Fee Division:	Kevin Smith, Tax Counsel
For California Department of Tax and Fee Administration, Appeals Bureau:	Jeffrey G. Angeja, Tax Counsel IV

MEMORANDUM OPINION

LEGAL ISSUE

Whether additional adjustments to the measure of unreported taxable sales are warranted.

FINDINGS OF FACT AND RELATED CONTENTIONS

Petitioner operated as a destination management company (DMC) from July 2001 through July 2014, when it sold the business. During the audit period, petitioner did not operate as a caterer, and did not provide services for weddings. As a DMC, petitioner arranged various activities desired by its customers, including corporate getaways, meetings, seminars, dining, and tours, and made reservations at hotels, restaurants, transportation companies, and other businesses to provide services, products, venue rental, and transportation.

The restaurants and caterers that petitioner used in its dining program billed petitioner for the food and beverages served to petitioner's customers, applied mandatory gratuities to the total food and beverage charges, and added sales tax reimbursement to the total bill. Petitioner paid the restaurants and other vendors for all of the tangible personal property, gratuities, and tax, and billed those amounts, along with an added markup on the tangible personal property, in its final

invoicing to its customers upon the completion of the DMC events. In addition to those charges, petitioner billed its customers a management fee, but did not add sales tax reimbursement to any of its fees.

Upon audit, the Business Tax and Fee Division (BTFD) of the California Department of Tax and Fee Administration (CDTFA), formerly the Business Tax and Fee Department of the Board of Equalization, found that petitioner, rather than the restaurants, was the retailer of the tangible personal property it transferred to its clients, and also found that the management fees that petitioner billed to its customers were taxable when those fees were a part of petitioner's gross receipts from taxable sales of food and beverages. After making an allowance for tax-paid purchases resold, BTFD then determined that petitioner's unreported taxable sales were $629,492 for Case ID 600095, and $469,751 for Case ID 953675.

In addition, for Case ID 600095 BTFD assessed tax on a measure of $136,510, reflecting purchases of supplies and fixed assets subject to use tax (which petitioner concedes), and for Case ID 953675, BTFD assessed tax on a measure of $158,729, reflecting disallowed claimed tax-paid purchases resold deductions (which petitioner also concedes). Finally, for Case ID 600095, an amnesty-interest penalty will be applied to this matter (Rev. & Tax. Code, § 7074), although staff has recommended that the penalty be relieved if petitioner satisfies the standard conditions (i.e., within 30 days of the date of the Notice of Redetermination, petitioner pays in full the tax and interest due for amnesty-eligible periods, or enters into a qualifying installment payment agreement for the same which provides for payment in full within 13 months, and petitioner successfully completes the plan).

Petitioner argues that it should be treated as a consumer and not a retailer of tangible personal property. According to petitioner, the true object of its contracts with its customers was the services it provided in creating, planning, and coordinating events. Petitioner contends that although meals and other incidental goods were provided as part of some of the events, they were not the true object of the transactions.

APPLICABLE LAW

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 from taxation by statute. (Rev. & Tax. Code, § 6051.) A "retailer" includes every seller who makes any retail sale or sales of tangible personal property. (Rev. & Tax. Code, § 6015, subd. (a)(1).) A "retail sale" means a sale for any purpose other than resale in the regular course of business. (Rev. & Tax. Code, § 6007, subd. (a)(1).) 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. (Rev. & Tax. Code, § 6006, subd. (a).) All gross receipts are presumed to be subject to tax until the contrary is established, and the retailer has the burden of proving otherwise. (Rev. & Tax. Code, § 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." (Rev. & Tax. Code, § 6012, subds. (a)(2), (b)(1).)

The providing of a service that is not part of a sale of tangible personal property is not subject to sales tax. In such a case, the person rendering the service is the consumer, not the retailer, of any tangible personal property that the person uses incidentally in rendering the service. (Cal. Code Regs., tit. 18, § 1501.) Whether a particular transaction involves the sale of tangible personal property or merely the transfer incidental to the performance of a service is generally determined by the true object of the contract – that is, whether the purchaser's real purpose is to acquire the service per se or the tangible personal property produced by the services. (*Ibid.*) If the true object is the service, the transaction is not subject to tax even though some tangible personal property is incidentally transferred. (*Ibid.*)

With regard to sales of prepared food, as relevant herein, tax applies to sales of meals or hot prepared food products furnished by restaurants. (Cal. Code Regs., tit. 18, § 1603, subd. (a)(2)(A).) Additionally, sales of meals or hot prepared food by restaurants and similar establishments to persons such as event planners or party coordinators, which buy and sell on their own account, are sales for resale. (*Ibid.*) A "caterer" for sales and use tax purposes means a person engaged in the business of serving meals, food, or drinks on the premises of the customer, or on premises supplied by the customer, including premises leased by the customer from a person other than the caterer. (Cal. Code Regs., tit. 18, § 1603, subd. (i)(1). When a caterer sells meals, food, or drinks, and the serving of them, to other persons such as event planners or party coordinators, who buy and sell the same on their own account or for their own sake, it is a sale for resale. (Cal. Code Regs., tit. 18, § 1603, subd. (i)(3)(C)(2).) A person is buying or selling for his or her own account, or own sake, when such person has his or her own contract with a customer to sell the meals, food, or drinks to the customer, and is not merely acting on behalf of the caterer. (*Ibid.*)

ANALYSIS AND DISPOSITION

Here, we conclude that as a DMC, petitioner was a service provider that arranged various activities desired by its customers, and is considered the consumer of property transferred in connection with the services. Accordingly, we conclude that petitioner's transfers of tangible personal property, as well as the related service charges, are not subject to tax.

ORDER

Pursuant to the analysis of the law and facts above, the Board ordered that the measure of unreported taxable sales be deleted. Accordingly, for Case ID 600095 the Board ordered that the measure of tax be reduced to $136,510, reflecting purchases of supplies and fixed assets subject to use tax, and that the amnesty-interest penalty be relieved if, within 30 days of the date of the Notice of Redetermination, petitioner pays in full the remaining tax and interest due for amnesty-eligible periods, or enters into a qualifying installment payment agreement for the same which provides for payment in full within 13 months and petitioner successfully completes the plan. For Case ID 953675, the Board ordered that the measure of tax be reduced to $158,729, reflecting disallowed claimed tax-paid purchases resold deductions.

Adopted at Culver City, California, on November 14, 2017.

Diane Harkey, Chairwoman

George Runner, Member

Fiona Ma, Member

DISSENTING OPINION

Jerome Horton, Member (dissenting).

I respectfully dissent.

The majority's finding that petitioner is a consumer rather than a retailer of tangible personal property is not consistent with the applicable law and facts. It is undisputed that petitioner did not gift the tangible personal property nor did petitioner sell it for less than 50% of the cost; rather, petitioner contracted with its customers for transfers of food and beverages and other property in exchange for consideration, including a markup as well as a mandatory service fee in connection with the sale. Pursuant to Revenue and Taxation Code section 6006, subdivision (a), petitioner's transfers of the food and beverages for consideration are sales at retail and are subject to tax. Hence, petitioner is the retailer of the food and beverages and other property it transferred to its customers and thus owes tax measured by its gross receipts from those sales. (Rev. & Tax Code, §§ 6015, 6051.)

Furthermore, California Code of Regulations, title 18, section (Regulation) 1603, subdivision (a)(2)(A), specifically states that sales of meals by restaurants to event planners or party coordinators, who buy and sell on their own account, are sales for resale. Petitioner purchased the food and beverages on its own account, and thus, the restaurants' sales of food and beverages (as well as any caterers' sales of food and beverages) to petitioner were sales for resale. Therefore, I find no legal or factual basis to treat petitioner as a consumer of the tangible personal property it purchased and resold; instead, petitioner's customers are the factual consumers of the food and beverages. Nevertheless, I do empathize with petitioner because of the Department's egregious delay in this case by providing petitioner with inaccurate information and false hopes that legislation would be enacted to exempt Destination Management Companies (DMC) from sales tax.

For purposes of relieving interest, however, I do find merit in petitioner's argument that the Department's guidance and actions of the Board Members misled the DMC industry to conclude that sales tax was not due or that they would eventually be relieved of the tax, thus causing unreasonable error and delay that prevented petitioner from complying with its sales tax obligations. Further, the initial misguidance from the Department to this business sector led to *Fun is First*, another DMC appeal which the Board heard and granted on October 31, 2013. To be clear, I am not of the belief that petitioner may rely on the *Fun is First* decision, as it was not

precedential; rather, it is the aftermath of that decision that caused utter confusion to the industry and its practitioners as to its sales tax obligations.

Much to my dismay, after the Board's decision in *Fun is First*, appeals by DMCs, including petitioner's appeal, were held in abeyance. During this time, the Department released "Tax Guide for Destination Management Companies," which is simply a restatement of prior agency decisions and provided no further clarity. After approximately three years, the deferrals were subsequently lifted, and the DMC appeals moved forward with no change to the rules applicable to DMCs. It is unclear why the Department failed to take formal action, but it was widely believed, based on the statements made at the *Fun is First* appeals hearing, that the abeyance was to allow members of the Board to obtain a legislative solution, which never came to fruition.

The failure to effect changes in the rules governing DMCs, despite such suggestions made at the *Fun is First* hearing, together with the unjustified long abeyance, led the industry down the garden path to its detriment. In other words, the utter confusion caused by the lack of guidance from the agency, compounded with the *Fun is First* decision and the statements made at that hearing, prevented the DMCs from knowing what their sales tax obligations were and frustrated their means to comply. Holding the DMC appeals cases in abeyance without action to adopt a formal rule or policy unreasonably delayed the resolution of the instant case, causing petitioner to incur unnecessary interest, which should be relieved in its entirety. That is to say, even though there is no sufficient legal basis to relieve petitioner of its sales tax liability, Department's negligence in properly advising the DMCs serves as more than adequate grounds to relieve petitioner of the accrued interest.

Accordingly, I dissent from the majority opinion.

Jerome Horton, Member

Joined by:

Yvette Stowers, Member*

*For Betty Yee, pursuant to Government Code section 7.9.