

Off-Shore Delivery and 90 Days in Mexico Guarantees Nothing

By Thomas A. Alston

In a recent ruling by an attorney for the Board of Equalization, a taxpayer's purchase of a vessel was held to be taxable. This was done in spite of support that an off-shore delivery occurred and the vessel remained in Mexico and outside California for more than 90 days. [\(note 1\)](#)

For those of you in the yacht brokerage business, as well as those thinking about purchasing a yacht, this case can have a profound impact on your transactions. In Southern California the myth has been running rampant for years that as long as the purchaser took delivery "off-shore," and then sailed to Mexico for a continuous period of at least 90 days [\(note 1\)](#), the transaction would be exempt of sales tax upon return to California.

Many yacht club members have said this information was provided to them by a staff member of the Board of Equalization. Often yacht brokers who have been in the business for decades have argued the same point with me. In general, they have gone their merry way believing that anyone who spoke differently "didn't know what he was talking about."

For those of you who wish to hang on to your misconception at all costs, the following will provide some data for you to absorb. No actual names will be listed as this violates their rights to privacy.

In a recent ruling, the petitioner (purchaser) was required to pay tax on a vessel purchase. In his ruling the Tax Counsel agreed that:

1. The vessel was brokered on behalf of the sellers by Broker A.
2. Broker A employed a captain to deliver the vessel off-shore.
3. The buyer signed a penalty of perjury statement that he took delivery offshore.
4. The buyer produced a document signed by a Mexican government official that supported the date the vessel arrived in Mexico.
5. The Board of Equalization did not dispute that the buyer passed the 90-day test outlined in Regulation 1620. In spite of the taxpayer's support of his position pursuant to Regulation 1620, however, the transaction was held to be taxable. This is the point where taxpayers usually become enraged and shout, "They can't do that! I will take them to court!"

This is also the point where a good taxpayer's representative would attempt to calm the client down. However, all that can be said is, the entire appeal process is within the Board. This means they can act as the judge, jury and executioner. The only hope one has is to pay the tax, then sue in civil court to obtain a refund.

Experience shows that running through the entire appeal process inside the Board, then paying the tax so that you can purchase your day in court is very expensive. Unless the cash to the pay tax bill would fill a large suitcase with pictures of Ben Franklin, it is a path of diminished return. Often it could cost more in legal services than it would to just pay the tax.

So, what's the solution you might ask? Does this mean the 90 day hotel in Ensenada is about to lose its future business? Not at all. The solution is having complete knowledge of the weakness in the above mentioned case, and being represented by someone who knows how to deal with the Board.

The Hearing officer held this transaction to be taxable based on his interpretation of California law. He cited the following:

"A purchase occurs with the seller's transfer to the purchaser of title to, and/or possession in lieu of title of, the vessel (REV. % Tax Code Section 6006(a), and Reg. 1628(b)(3)). Revenue and taxation Code section 6010.5 provides that the place of purchase of a vessel is the place where it is physically located at the time the act constituting the purchase takes place. Subdivision (b)(3)(D) of the California Code of Regulations, title 18, section 1628 provides that when no prior or contemporaneous written contract provides otherwise, the sale occurs at the time and place at which the seller completes its performance with reference to the physical delivery of the vessel to the petitioner (Cal. Code regs., tit 18 & 1628, subd. (B)(3)(D); see also Comm. Code 2401).

The law of agency provides that an agent represents his principal for all purposes within the scope of his actual or ostensible authority (Civ Code section 2330). Actual authority is that which the principal intentionally confers upon the agent, or intentionally or by want of ordinary care, allows the agent to believe himself to possess (Civ Code section 2316). Ostensible authority is that which the principal intentionally, or by want of ordinary care causes or allows a third person to believe the agent possesses (Civ Code section 2317). Where an agent has neither actual nor ostensible authority, his act may nevertheless be rendered valid and binding upon the principal who later ratifies it, with full knowledge of the material facts at the time the principal learns of the unauthorized act, and was in a position to reject it (Civ Code sections 2707 and 2310; Witkins Summary [9th ed.] 89).

Here, the petitioner has failed to produce any evidence of actual or ostensible authority that indicates [Broker A] was acting as the sellers' agent in arranging the offshore delivery. Petitioner submitted a statement from [Broker A], who claims he was the exclusive agent 'to sell/deliver' the vessel for the sellers. However, this is not the sellers statement but rather an unsubstantiated opinion of the broker [Broker A]. In order to prove that the [captain] had authority to make the out-of-state delivery we must have corroboration from the sellers' of such authority..."

Even though Broker A was the seller's agent for the purpose of the sale, in the absence of a specific agreement that Broker A was acting as the seller's agent for the purpose of making the off-shore delivery, the Hearing Officer held that Broker A had become the agent of the buyer for the purpose of the off-shore delivery. In his opinion he concluded as follows:

"[Broker A] had to be acting as the agent for one of the parties when he hired the Captain to deliver the vessel to Mexico. Therefore, we conclude that he was acting as petitioner's agent. Thus, the place of the sale was the place the vessel was physically located at the time the act constituting the sale took place. At the time of the sale, the vessel was located in California."

This decision might make an interesting novel entitled Whose Agent are You? However, taxpayers seldom find it amusing or interesting when a tax agency chooses to ignore the facts when they differ from the tax agency's preconceived notion of the truth. Here it appears that the Hearing Officer decided after the fact that the broker magically changed sides in the middle of the transaction in order to support the Board's position that it could collect the tax.

The brutal truth is that tax was assessed because, even though the purchaser knew he needed help from a broker when it comes to buying a vessel, he failed to exercise the same good judgment when it comes to California taxes. As far as the Board of Equalization is concerned there are two equal components to each transaction. They are the form as well as the substance.

The substance is what you actually did. In this case the buyer actually took an off-shore delivery and kept the vessel outside California for the necessary time. The form is the document trail provided to support your actions. In this case the buyer got his tax advice from his friends and the people involved in the transaction. Their advice failed. No one informed the buyer about the legal requirements surrounding an agent (broker). It cost him dearly.

In the absence of making sure the off-shore delivery was required as part of the sale agreement, and having the seller's signature on the contract, the Board will assess tax every time. Only a qualified taxpayers' representative would possibly know that.

(note 1) The test period has been extended from 90 days to 12 months during the period of October 1,2004 to June 30,2007