

STATE OF CALIFORNIA  
BOARD OF EQUALIZATION

**295.0422**

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petitions	)	
for Redetermination Under the	)	DECISION AND RECOMMENDATION
Sales and Use Tax Law of:	)	
	)	
THE P--- F---, INC.	)	Nos. SN -- XX-XXXXXXX-010
	)	
L--- S--- C---	)	SR -- XX-XXXXXXX-010
	)	
<u>Petitioners</u>	)	

The Appeals conference in the above-referenced matters was held by Staff Counsel Lucian Khan on March 8, 19XX in Culver City, California.

Appearing for Petitioners: L--- C---  
President

Appearing for the  
Sales and Use Tax Department: Hal Murray  
Supervising Tax Auditor

Tami Pistoni  
Tax Auditor

Type of Business: Organizing Parties and Special  
Events

Protested Items

The P--- F---, Inc. - Taxable sales not reported measured by \$37,167 for the audit period of July 1, 1989 through December 31, 1991.

L--- S--- C--- - Dual determination issued as predecessor liability for above audit period, based on failure to notify Board of subsequent incorporation.

### Contentions

1. No further tax is due since there was no markup, and all tangible personal property was purchased tax-paid at source.
2. If it is determined tax is otherwise due, petitioners should be relieved of liability, based on erroneous oral advice provided by a Board employee at the time of registration.

### Summary

During the audit period, petitioners were involved in the organizing of parties and special events for which meals, balloons, party favors or entertainment was furnished to clients. More recently, the activities involve acquiring entertainment only.

In the audit, tax was assessed on a portion of a fee charged to clients which the auditor deemed to relate to the sale of tangible personal property. That portion of the fee which was deemed to relate to intangibles, such as entertainment, were not taxed. The auditor verified tax was paid at source for all tangible personal property sold to clients, including meals served by caterers, who billed petitioners direct. It was also noted during the audit that petitioner, Ms. C---, had incorporated in either March or April of 1989, but did not notify the Board. A determination was issued to the corporation, and a dual determination to Ms. C--- as well.

Ms. C--- stated she believed no further tax was due, since tax was paid at source, and there was no markup of the property sold. She only acted as an agent for her clients, and charged them a fee. She stated that at the time of registration, she specifically advised a Board employee of her activities, and was told no further taxes would be due. She has no written evidence of the advice given. She admits having been more involved in nontaxable services initially, and may have stated this to the employee who advised her. She also admits she did not notify the Board of her subsequent incorporation.

The Sales and Use Tax Department (SUTD) stated that tax was only assessed on that portion of the fee which relates to the sale of tangible personal property, mainly meals served by the caterers. That portion relating to intangibles, such as entertainment, was not included in the taxable measure. SUTD argues no further adjustments are warranted.

### Analysis and Conclusions

Based on the evidence and arguments submitted, I conclude the auditor properly determined that a portion of the fee charged to clients which related to the sale of tangible personal property, is subject to tax. Revenue and Taxation Code Section 6012 entitled "Gross Receipts" is the authority for determining a total amount upon which sales tax must be

computed. It provides that "gross receipts" means the total amount of the sales price without any deduction for items such as the cost of materials used, labor or service cost, any other expenses, and it includes any services that are part of this sale. Sales and Use Tax Regulation 1603, which relates to the sale of food products, provides in subdivision (h) that a "caterer" is defined as a person engaged in the business of serving meals, food and drinks on the premises of the customers. It also provides that tax applies to the entire charge made for serving meals, food and drinks whether or not serving is done by the caterer, employees or subcontractors. Tax applies to charges for preparing and serving the meals or drinks, even though the food is not provided by the caterer.

Here, the caterers who served meals to petitioners' clients, and billed petitioners direct, were acting as subcontractors for petitioners. Although petitioners believed otherwise, a portion of the fees charged to clients related to sales of tangible personal property (the meals), and accordingly, that portion of the fee was taxable. Merely paying tax to the subcontractors (caterers) would not exempt the fee charged by petitioners; however, petitioners were entitled to, and properly given a credit for the tax paid.

I also conclude that petitioner is not entitled to relief for the alleged erroneous advice received from a Board employee at the time of registration.

Revenue and Taxation Code Section 6596 provides that if a person's failure to make a timely return or payment is due to the person's reasonable reliance on written advice from this Board, the person may be relieved from the sales or use taxes imposed and any penalty or interest added thereto. However, one of the conditions which must be satisfied in order to utilize this statute is the request in writing to the Board for advice whether a particular activity or transaction is subject to the sales or use tax. This is because when the questions and responses are oral, we cannot determine with certainty what questions were asked and what advice was given. Another requirement is that the advice be written.

Here, the alleged misinformation was only provided orally; therefore, the requirements to obtain relief have not been met. It is also noted that petitioners' activity was more service oriented at inception; therefore, there is a distinct possibility that correct advice may have been given based on the facts available at that time.

Finally, I conclude that because Ms. C--- failed to notify the Board regarding her subsequent incorporation, she is personally liable as a predecessor, for the tax liability which was later incurred by the corporation. Revenue and Taxation Code Section 6066 provides that every person desiring to engage in business as a seller in this state must file with the Board an application for a permit for each place of business. The application must set forth the name under which the applicant intends to transact business, and it must be signed by an executive officer or some person specifically authorized, in the case of a corporation.

Regulation 1699(e) provides that upon the transfer of a business, the permit holder must promptly notify the Board and deliver the permit for cancellation. To be acceptable, the notice of transfer must be received in one of the following ways:

1. Oral or written notice to a Board office or representative, accompanied by delivery of the seller's permit.
2. Receipt of the transferee's or successor's application for a seller's permit may serve to put the Board on notice of the transferor's cessation of business.

If the permit holder fails to notify the Board of the transfer or to deliver the permit to the Board for cancellation, he will be liable for taxes, interest and penalties incurred by the transferee, and the liability shall continue and include all liability incurred up to the time the Board receives notice of the transfer.<sup>1</sup>

Here, it was not until after the audit period that the Board became aware of the incorporation. Accordingly, Ms. C--- is liable for the liability incurred by the corporation during this period.

Recommendation

Deny the petitions.

\_\_\_\_\_  
Lucian Khan, Staff Counsel

4-12-95  
\_\_\_\_\_  
Date

<sup>1</sup>Revenue and Taxation Code Section 6071.1 limits liability to four quarters. However, this statute was not effective until January 1, 1994. Therefore, Ms. C--- is liable as a predecessor, for all quarters in the audit.