

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

295.0702.500

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition)
for Redetermination Under the) DECISION AND RECOMMENDATION
Sales and Use Tax Law of:)
)
B--- L. L---) No. SR -- XX XXXXXX-010
)
)
Petitioner)

The Appeals conferences in the above-referenced matter were held by Staff Counsel Lucian Khan on August 10, 1993 in Culver City, California, and September 20, 1993 in Sacramento, California.

Appearing for Petitioner:

B--- L. L---
(September 20, 1993)

Appearing for the
Sales and Use Tax Department
(SUTD):

George Ito
Supervising Tax Auditor I
(August 10, 1993)

Kevin Hanks
Senior Tax Auditor
(September 20, 1993)

Protested Item

Petitioner protests tax assessed on service charges, which the auditor determined to be taxable delivery charges. The audit covered the period October 1, 1986 through December 31, 1989, and the protested measure is undetermined at this time.

Contentions

1. The auditor erroneously assessed nontaxable service charges as taxable delivery charges.
2. Petitioner relied on erroneous advice from Board personnel.

Summary

Petitioner operates a business involving the retail sale and delivery of balloons and party decorations. If a customer so requests, a singing telegram may be included with the delivery. Deliveries are made, and customers are located, both in and outside California. In some circumstances, petitioner will contract with another provider to perform this service. Where this occurs, an additional charge is made by petitioner for the referral service. His operation is similar to that of a florist.

The auditor disallowed claimed sales in interstate commerce (item B) after finding these deductions involved transactions where petitioner received an order from an out-of-state customer, and delivery was made in California. The auditor also disallowed deductions for claimed shipping charges (item C) where delivery was made by petitioner's own facilities, and title did not pass prior to delivery.

Petitioner filed an undated petition for redetermination, arguing he should be relieved of all liability based on erroneous advice received from SUTD. Apparently, the information he sought related to out-of-state deliveries, and delivery charges. He also argues delivery charges were separately stated on the invoices, and delivery occurred after the sale. Customer orders were placed over the phone, and money was electronically transferred prior to delivery.

The August 10, 1993 conference went forward despite petitioner's absence. Previous postponements were granted based on petitioner's need for ongoing medical treatment. At that conference, Mr. Ito of SUTD stated the claimed sales in interstate commerce (item B) were disallowed because of evidence showing all deliveries were made in California. Only the customers (who placed orders and made payment) were located outside California. At best, only the delivery charge may be exempt; however, since petitioner made the deliveries, charges were not separately stated, and no evidence was presented showing title passing before delivery, these charges are taxable as well. The other disputed transactions (item C) involved sales where both the customer and the delivery were in California. Delivery charges were separately stated; however, petitioner did not provide evidence to prove that title passed prior to delivery.

Mr. Ito denies there is any credible evidence proving petitioner ever received erroneous advice from SUTD. Petitioner never submitted a written request for information, nor did he receive erroneous written advice from SUTD.

At the September 20, 1993 conference, petitioner stated he only disputes audit items B and C, as it relates to delivery charges. What the auditor assessed as delivery charges were in fact service charges for performing singing telegrams in conjunction with balloon deliveries. For this service, a separate \$15 charge was made, and it was separately stated on the invoices. Delivery charges were already included with the price of the balloons, and therefore are not in

dispute. (Apparently, his argument only relates to audit item C - where the separate charges were made.)

Because this issue was now being raised for the first time, and the auditor at the conference did not conduct the audit, I allowed petitioner until October 8, 1993 to submit copies of any invoices showing the disputed \$15 service charge. Petitioner stated there may be some problems recovering the invoices because some were discarded and others ruined from flood damage.

I reviewed the audit, and all prior written correspondence between petitioner and SUTD. Nowhere is it mentioned petitioner informed the auditor that the separate charge on the invoice represented a nontaxable optional service (singing telegram) as opposed to delivery.

Analysis and Conclusions

Based on petitioner's statements at the September 20, 1993 conference, he no longer disputes the disallowed claimed sales in interstate commerce, or delivery charges deemed taxable, either because they were not separately stated, or title did not pass prior to delivery. Therefore, the only remaining issues are whether the charges assessed by the auditor were for transportation, or services unrelated to delivery, and whether petitioner ever received erroneous written advice from SUTD.

Every seller must keep records, receipts, invoices, and other pertinent papers as the Board may require. The records must be adequate, complete, and show the gross receipts from all sales, as well as deductions allowed by law and claimed in filing returns. (Revenue and Taxation Code Section 7053; Regulation 1698(a)(1) and (2).)

Since petitioner claims the \$15 charge is for services and not delivery, he is required to submit documentation (invoices) on this issue. There is no evidence this issue ever arose during the audit discussions. Petitioner bears the burden of proof for any deductions; thus the records (invoices) must be submitted.

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 the 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.

Here, petitioner argues he received oral advice upon which he relied. SUTD denies erroneous advice was given, and petitioner has submitted no evidence showing written advice was received from SUTD. Therefore, the requirements of the statute have not been met; thus, relief cannot be granted.

Recommendation

Deny the petition.

Lucian Khan, Staff Counsel

Date