STATE OF CALIFORNIA **515.0018.550**

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

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

The Appeals conference in the above-referenced matter was held by Paul O. Smith, Staff Counsel on September 13, 1993, in San Diego, California.

Appearing for Petitioner: D--- E--- P---

Appearing for the Sales and Use Tax Department: Nanson Hwa, Senior Tax Representative

Michael W. Sullivan, Senior Tax Representative

Protested Item

The protested tax liability for the period July 1, 1989 through June 30, 1991, is measured by:

Item	Amount
A. Taxable editing charges.	$5,932.00

Petitioner's Contention

Petitioner contends that he contacted the Board and was told by a Board employee that editing service is a service, and therefore nontaxable.

Summary

During the period in issue petitioner D--- E--- P---, dba P--- N--- M---, was engaged in the business of taping local newscasts off the air and onto a master tape for subsequent sale to the public. A client would call petitioner and tell him of a particular story that he or she was interested in[1], and petitioner dubbed (edited) the story from the master tape onto another tape, without the commercials, weather, etc., and sold the tape to the client.[2] Petitioner states he contacted the State Board of Equalization's (Board) San Diego office and was told by some unnamed individual that editing was a nontaxable service. Consequently, petitioner only charged tax on the price of the tape.

On November 20, 1991, petitioner was contacted by the Sales and Use Tax Department's (Department) Return Review Section and requested to provide information regarding a deduction of $5,659 taken on his fiscal year 1990/1991 return. On December 3, 1991, petitioner contacted the Department and advised it that the deduction was nontaxable editing service. Petitioner was advised that his editing activity appeared to be taxable. (See Exhibit A). On December 11, 1991, the Department issued its Notice of Determination treating the deductions for editing, for the period in issue, as taxable. On December 19, 1991, petitioner timely submitted his Petition for Redetermination.

Analysis and Conclusions

Revenue and Taxation Code Section 6006, provides in relevant part that the term "sale" means and includes the producing, fabricating, or processing of tangible personal property for a consideration. (See also Sales and Use Tax Reg., § 1526, subd. (b).) In general, the sales tax is imposed on the retail sale of tangible personal property (Rev. & Tax. Code, § 6051) and not on the performance of a service. (See Gen. Elec. Co. v. State Bd. of Equalization (1952) 111 Cal.App.2d 180, 185-186.) However, services which are a part of a sale of tangible personal property are included the measure of tax. Thus, the threshold question, here, is whether petitioner's activity constituted the transfer of a video (tangible personal property) incidental to the performance of a service. (See also MCI Airsignal, Inc. v. State Bd. of Equalization (1991) 1 Cal.App.4th 1527.) If a business provides a service and the transfer of tangible personal

1 Petitioner contends that in most instances the client was referred to him by a local television station.

2 For example, a client saw a story on the news about non-alcoholic beer for pregnant women. The client then contacted petitioner and requested that petitioner prepare him a tape of the story from petitioner's master tape.

property is incidental to providing the service, the business is the consumer of the property and the transfer is not subject to sales tax. (See Sales & Use Tax Reg., § 1501.) 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 whether the real object sought by the buyer is the service per se or the property produced by the service. (See Sales and Use Tax Reg., § 1501; see also Culligan Water Conditioning v. State Board of Equalization (1976) 17 Cal.3d 86.) If the true object of the contract is the service per se, the transaction is not taxable even though some tangible personal property is transferred. (See Simplicity Pattern Co. v. State Bd. of Equalization (1980) 27 Cal.3d 900, 907-908.)

In Culligan Water Conditioning v. State Board of Equalization, supra, 17 Cal.3d at 96, the court quoting Webster's New International Dictionary, defined the term service as the performance of labor for the benefit of another. (See Culligan Water Conditioning v. State Bd. of Equalization, supra, at 96.) In People v. Grazer (1956) 138 Cal.App.2d 274, and Albers v. State Board of Equalization (1965) 237 Cal.App.2d 494, the court held that sales tax was due on the transfer of X-ray film in the former, and on drawings in the latter, because the true object of the transaction in both cases was a finished article. In A&M Records, Inc. v. State Bd. of Equalization (1988) 204 Cal.App.3d 358, a use tax was assessed on the taxpayer's sale of master tapes. In upholding the assessment, the court found that the true object of the contracts between the taxpayer and its customers was the production of the master tapes, and their transfer to a customer.

Here, petitioner explains that his clients made requests for certain portions of a newscast which petitioner edited onto a video tape, and sold to the client. Thus, petitioner was not paid to conceive or to develop any ideas, concepts, designs, or specifications, but to provide, by way of video tape, specific portions of newscasts. Since petitioner's clients did not contract solely for the personal service of petitioner, but contracted for a finished article, (video tapes), I must conclude that the true object of the activity was the property (video) produced by the service. The transfer of these video tapes is a sale for sales and use tax purposes. (See Simplicity Pattern Co. v. State Bd. of Equalization, supra.)

I now address whether the Department's oral advice regarding petitioner's activity can be the basis for relief to petitioner. Here, appellant advised the Department's representative that he was engaged in editing; editing services are nontaxable. (See Sales and Use Tax Reg., § 1529, subd. (b)(2)(A).) However, petitioner's activity involves more than editing. Thus, petitioner's verbal inquiries to the Department may not have been clear. However, even if the inquiries were clear and petitioner was given erroneous oral advice, it has been repeatedly held that oral advice given by a Department employee is not binding upon the Board. (See Rev. & Tax. Code, § 6596; see also Market Street Railway Co. v. Cal. St. Bd. of Equal. (1955) 137 Cal.App.2d 87, 103.) This result is based upon the very real fact that there is no way to accurately reconstruct how questions were phrased or what responses were actually given during the oral conversations. Revenue and Taxation Code section 6596 provides the only basis for relief when a petitioner

claims reliance upon erroneous advice from Department employees. This section requires the production of written advice from the Department to a taxpayer, which petitioner admittedly does not have. Thus, the Department properly taxed the gross receipts from the sale of the videos.

Recommendation

In Rider v. County of San Diego (1991) 1 Cal.4th 1, the California Supreme Court declared the San Diego Justice Facility Tax unconstitutional. Accordingly, if this tax was assessed in the audit, the assessment should be redetermined without the tax, and the petition should be denied in all other respects.

Paul O. Smith, Staff Counsel Date