STATE OF CALIFORNIA
BOARD OF EQUALIZATION

295.1484
11/13/91

In the Matter of the Petition for Redetermination Under the Sales and Use Tax Law of:	)	DECISION AND RECOMMENDATION No. ----
Petitioner	)	

The above-referenced matter came on regularly before Anthony I. Picciano on July 11, 1991 in San Francisco, California.

Appearing for Petitioner: --- ---

Appearing for the Sales and Use Tax Department: --- ---

Protested Item

The protested tax liability for the period July 1, 1987 through December 31, 1989 is measured by:

Item	State, Local and County
B. Taxable administration fees not reported. Monthly administration fees in connection with the sale of tangible personal property was not reported. Developed a taxable percentage for each client each year.	$ XXXX

Petitioner's Contentions

B. Petitioner contends that the administrative service that she provides is not taxable. The petitioner contends that she should not have to pay interest on the tax that the Board now claims that she owes.

Summary

The petitioner is a sole proprietor who has been doing business under the name and style of·--- since 1982. The petitioner is a graphic artist who also provides the service of media placement. She specializes in artwork for magazine advertisements and brochures for interior design companies. There has been no prior audit of the petitioner.

The petitioner does not have written contracts with her clients. However, she contracts to provide administrative services on a monthly basis. The administrative service in question is petitioner's provision of supervision over various projects for her customers. The clients that contract for that service receive a specific number of hours each month for a flat retainer fee. The petitioner charges her time against those hours during the course of the month. Petitioner's invoices separately state the amount of time expended towards supervision from charges for other items, such as the sale of tangible personal property. At the end of each month, the petitioner bills for the administrative time expended. The petitioner, in some instances, charges by the hour for time expended over and above the amount that the customer contracts for, in other cases there is no charge for extra time expended.

Some of the projects for which the administrative time is charged include only the provision of tax free services, while others include the transfer of tangible personal property, i.e. finished artwork. Where there is a transfer of tangible personal property, that item is separately stated on petitioner's invoices and sales tax reimbursement is charged on the sale of that property.

The taxable measure of audit item B was arrived at through the use of a test of the sales to each of petitioner's clients for August, September and October 1987, the second quarter of 1988 and May, June and July of 1989. (See schedule 12B pages 5 through 12 of the audit working papers.) The test conducted on each client provided the basis for the calculation of a percentage of sales to that, client for administrative service that was associated with the resultant transfer of tangible personal property. Only those invoices for sales of administrative supervision that also involved the transfer of tangible personal property were considered taxable. Each client's individual percentages were then applied to administrative service fees charged that client for that particular year to provide the annual amount of taxable administrative service fees for that client. All of the taxable administrative service fees were then summed in order to arrive at the taxable measure of Audit Item B.

The Sales and Use Tax Department's (Department) position is that the administration fees are related to both taxable and nontaxable activities. Only that portion of administrative service that was identified with the production of tangible personal property was considered taxable. Taxable sales were determined through the examination of invoices and sales ledgers. The department argued that the administrative service was a service that was part of the sale of tangible personal property in those instances and was taxable as such.

The petitioner stated the administration fee was· paid to her for the overseeing of various projects on behalf of her clients. She agreed that some of the projects resulted in the production of tangible personal property. However, this production was not 'the result of her involvement. She argued the administrative time spent resulted in no end product.

The petitioner also felt that it is inappropriate to charge interest on the taxes now imposed. She argued that she did everything within her power to see that she was correctly applying and paying tax on sales. She said that she, early on, made numerous phone calls to

obtain direction as to how, and to what, sales tax should be applied in her business. The petitioner received advice from various Board employees over the phone. Some of the advice received was at variance with other advice. The petitioner expressed her disappointment that after all of her efforts she is now being charged both the sales tax and the interest on that tax.

Analysis and Conclusions

Section 6051 of the Revenue and Taxation Code imposes the sales tax on retailers for the privilege of selling tangible personal property at retail. The measure of tax is based on gross receipts from the retail sales in this state of tangible personal property. Revenue and Taxation Code section 6012 provides in pertinent part:

> "… (a) 'Gross receipts' mean the total amount of the sale or lease or rental price, as the case may be, of the retail sales of retailers, valued in money, whether received in money or otherwise, without any deduction on account of any of the following:
>
> * * *
>
> "(b) (1) Any services that are part of the sale."

The petitioner is a graphic artist who sells finished art. In conjunction with such sales of tangible personal property, the petitioner also provides what she terms "administrative time". The Department is correct in its assessment that the service the petitioner provides, when connected with the sale of tangible personal property is taxable. This result is consistent with the direction provided in the above cited code section that provides that services which are part of the sale of tangible personal property should be included in the gross receipts of a retailer, in this case, the petitioner. See also Sales and Use Tax Regulation 1540 (b) (4) (D) and 1540 (b) (4) (K). A copy of that Regulation was provided to the petitioner at the time she received her permit.

Petitioner's contentions in regard to oral communications with the Board must be addressed. Reliance upon an oral communication from Board employees does not suffice to prove any fact or to prove entitlement to an exemption from the tax. Moreover, even if the petitioner was informed that no tax was due on sales, it has been repeatedly held that oral advice given by a Board employee is not binding upon the Board. (Rev. and Tax. Code, section 6596; Market Street Railway Co. v. State Board of Equalization (1955) 137 Cal.App.2d. 87, 103.) This reasoning is based upon the very real fact that there is no way of accurately reconstructing how the 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 in a situation wherein the petitioner claims reliance upon erroneous advice from Board employees. The section provides as follows:

> "(a) If the board finds that 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 of the taxes imposed by sections 6051 and 6201 and any penalty or interest added thereto...." (Emphasis added.)

As noted by the emphasized text, only written communications from Board employees are sufficient to make a case for reliance upon erroneous advice. Absent a writing of some sort being produced by petitioner to document the advice given, there is no basis for relief.

Lastly, the petitioner suggested that she be excused from the application of interest on the tax due. Any person who fails to pay any tax when due to the state within the time required shall pay, in. addition to the tax, interest. See Revenue and Taxation Code 6482. The Sales and Use Tax Law does not authorize the abatement or cancellation of interest on a tax deficiency. Therefore, the request for the abatement of interest should be denied.

Recommendation

Redetermine without adjustment.

_____	Nov. 13, 1991
Anthony I. Picciano, Staff Counsel	Date