

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

100.0071

APPEALS DIVISION

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

The above-referenced matter came on regularly for hearing on April 23, 1991, before Hearing Officer Janice M. Jolley in Downey, California.

Appearing for Petitioner: Ms. L--- A. D---
Mr. G--- D---, Spouse

Appearing for the
Sales and Use Tax Department: Ms. Lena F. Ng
Supervising Tax Auditor

Ms. Kati W. Feng
Tax Auditor

Protested Item

The protested tax liability for the period October 1, 1981, through June 30, 1989, is measured by:

<u>Item</u>	<u>State, Local and County</u>
A. Taxable sales of comprehensive Layouts not reported	\$ 131,952
B. Tax-paid purchase resold credits related to Audit Item A	<u>- 3,954</u>
TOTAL	\$ 127,998

Petitioner's Contentions

No tax is due from petitioner because:

1. Petitioner was an employee, not an independent contractor.
2. Amounts received from petitioner were fees for services, not gross receipts from sales.

Petitioner also asserts that the failure to file penalty should be abated because she did not know the law and was misled by the purchaser concerning petitioner's tax liability.

Summary

Petitioner is a commercial artist who received assignments from P--- --- --- (hereinafter "P---") to create or to correct yellow pages advertising layouts. Petitioner created penciled work sketches using paper, borders, and other fabrication materials provided by P---. Petitioner provided her own pencils and also some supplies used on the layouts.

Petitioner prepared the artwork at her residence and was free to schedule her work hours at her convenience so long as the assigned work was completed by P---'s stated deadline. Petitioner was not supervised by P--- employees. Petitioner stated that P--- repeatedly told her that she was selling her time, not tangible property. Petitioner claimed self-employment income from these activities on Schedules C of her personal income tax returns. P--- never withheld for state, federal or local taxes on its remittances to petitioner for her preparation of the pencil layouts. Petitioner stated that no invoicing occurred; instead, P--- required its own accounting department employees to list work assignments given to outside artists and to remit payment upon completion of the work. The work was priced by unit, and pricing was based on layout size and the amount of estimated time required to complete a rough layout. All prices were determined by P---. Petitioner could accept or reject any work assignments offered by P---. The artists had no control whatsoever on pricing.

Petitioner alleged that a fundamental confusion exists between the actual practices of commercial artists, their professional terminology, and the definition of "preliminary art" as it pertains to the revenue and taxation codes. These discrepancies allegedly lead to misinterpretations and misunderstandings by artists, accountants, lawyers, and even auditors. In petitioner's case, she stated that the work she performed for P--- is commonly designated by artists as comprehensive pencil layouts. Petitioner stated that by no stretch of the imagination was this work a finished piece of art. According to petitioner, it was only preliminary step in the process to create camera-ready art. It had to undergo several transformations after her services were provided before it was ready for the camera. Petitioner stated that any arguments regarding of preliminary art were inapplicable to the product she rendered.

Petitioner stated that there was never any question of title to the pencil layouts transferring from her to P--- because she never considered the work as her own property. Petitioner stated she provided a service for which she received a fee and that the fee had nothing to do with the transfer of tangible personal property.

Petitioner stated that for seven years prior to contracting directly with P---, she was employed by a company that prepared pencil layouts for P---. Petitioner explained that from her personal knowledge and experience working for that company and from talking to other artists creating pencil layouts for P---, neither her prior employer nor the other commercial artists considered themselves retailers nor paid sales taxes. After petitioner obtained a seller's permit and started billing P--- for sales tax as a result of this audit, petitioner stated that P--- contacted her by phone to inquire why she was the only commercial artist charging sales tax.

Petitioner contended that an eight-year audit was manifestly unfair and overly burdensome. Petitioner alleged that she was targeted for audit as a result of a P--- audit because P--- had created a rubber stamp it placed on its invoices which stated, "Vendor contacted to apply sales tax and refused." Petitioner alleged that P--- always informed her that this statement was appropriate because she was only providing a service, not selling any property. Exhibit A is petitioner's declaration under penalty of perjury alleging grounds for relief from the failure to file penalty.

Analysis and Conclusion

1. Petitioner's contracts with P--- resulted in taxable sales at retail.

Revenue and Taxation Code section 6051 imposes a tax on the seller for the privilege of selling tangible personal property at retail in this state. Revenue and Taxation Code section 6091 creates a presumption that all gross receipts from such sales are subject to tax until the contrary is established. The burden of proving that a sale was not at retail is on the seller unless the seller accepts, in good faith, a timely resale certificate issued by the purchaser. (Revenue and Taxation Code section 6091 and Sales and Use Tax Regulation 1668.)

Revenue and Taxation Code section 6006(b) defines a sale as:

“(b) The producing, fabricating, processing, printing, or imprinting of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the producing, fabricating, processing, printing, or imprinting.” (Emphasis added.)

P--- has not been shown to have resold the pencil layouts prepared by petitioner to third parties prior to its use of them and petitioner has alleged that P--- further processed her work for use as photoready copy. [Sales and Use Tax Regulation 1541(d).] Petitioner has not presented any timely resale certificate issued to her by P---. Therefore, P--- was a consumer and petitioner was a retailer.

Sales and Use Tax Regulation 1540(c) provides as follows:

“(c) **COMMERCIAL ARTISTS AND DESIGNERS.** The tax applies to the entire amount charged by commercial artists or designers for items of tangible personal property such as drawings, paintings, designs or sketches transferred to the client, whether or not the property is suitable for display or is useful for actual reproduction by photo-mechanical or other processes.

“Tax does not apply to separate charges for preliminary art as defined in (b)(4)(A).”

Petitioner’s pencil layouts, according to her own admissions, do not qualify as preliminary art under Sales and Use tax Regulation 1540(b)(4)(A). Petitioner was liable for sales tax measured by the gross receipts she received for preparing pencil layouts for P---.

II. Petitioner was an independent contractor engaging in taxable retail sales, not an employee of P---.

The courts have consistently held that an important factor in determining whether or not an employer-employee relationship exists is the employer’s right to control. (Automatic Canteen Co. v. State Board of Equalization (1965) 238 Cal.App.2d 372.) An independent contractor is one who renders service in the course of an independent employment or occupation, who follows the employer’s desires only as to the results to be achieved, and not as to the means of accomplishing it. (Id.) While the terms or designations given by each of the parties are not controlling, consideration is given to formation of the contract between the parties, as well as their conduct while the work is being performed. (Id.)

I find that petitioner was self-employed, not an employee. Convincing evidence of her self-employment arose from petitioner’s exclusive discretion to self-determine her day-to-day business activities and practices, her reporting of gross receipts from P--- as self-employment income, and her ability to accept or to decline projects offered by P---. Petitioner was not supervised by P--- employees in the performance of her work. She required little or no training from P---. Her work was not integrated into the day-to-day business activities at P---’s work site. Both she and P--- were free to terminate their relationship at the end of each contract. Petitioner was not subject to review of her work habits by P---, nor was she eligible for advancement in P--- as the result of her work or performance. P--- could not set her hours of work, and no guarantees were made by P--- as to when, if ever, the next assigned job would be forthcoming.

The amount of annual remuneration petitioner received from P--- depended, in part, upon petitioner's unilateral decision to accept or reject offered contracts. Each contract between petitioner and P--- was complete upon tendering the finished product to the specifications set forth by P--- at the time the contract was negotiated. Petitioner was not precluded by accepting a contract with P--- from accepting work from unrelated persons or entities. While these are not all the factors that courts have considered, they are strong and persuasive evidence of an independent contractor relationship and refute petitioner's generalized allegation that she was an employee of P---.

Because petitioner was an independent contractor and not an employee of P---, her transactions constitute statutory sales. (See Revenue and Taxation Code Section 6006(b).)

III. Relief from the failure to file penalty is merited under the facts of this case.

Based on the allegations set forth in Exhibit A, relief from the failure to file penalty is merited. It appears that P--- may have provided erroneous or misleading advice to petitioner as to the tax consequences of her business activities with P---. Petitioner's reliance on this advice was justifiable.

Relief from tax and interest, however, can only be granted based on erroneous advice provided to a taxpayer in writing by the Board. (Revenue and Taxation Code section 6596.) After reviewing petitioner's central file located at the Board's headquarters in Sacramento, it appears that no such advice was ever sought by petitioner nor provided by the Board.

Recommendation

Delete failure-to-file penalty and redetermine without further adjustment.

Janice M. Jolley, Hearing Officer

May 22, 1991

Date

(w/Exhibit A.)