

STATE OF CALIFORNIA
BOARD OF EQUALIZATION
APPEALS DIVISION

295.1661
1/30/91

In the Matter of the Claim for)
Refund Under the Sales and Use)
Tax Law of)
)
) HEARING
) DECISION AND RECOMMENDATION
) No. ----
)
)
Petitioner)

The above-referenced matter was scheduled for hearing before Hearing Officer Janice M. Jolley on January 15, 1991, in Van Nuys, California. By letter dated January 3, 1991, claimant notified the hearing officer that it wished to withdraw its claim.

Appearing for Claimant: --- ---

Appearing for the Department of Business Taxes: --- ---

Protested Item

The protested tax liability for the period October 1, 1984, through December 31, 1987, is measured by:

<u>Item</u>	<u>State, Local County & LACT</u>
B. Premium fee charged subject to sales tax as additional gross receipts	\$38,706

Claimant's Contentions

Claimant contends that the "premium" fees it charged at auctions, particularly those held at should be exempt as charitable donations to the university and not taxed as part of its gross receipts. In the alternative, if the "premium fees" are subject to tax, the claimant alleges that it should be relieved from liability because it was misinformed about the taxability of the "premium fees."

Finally, the claimant states that it is entitled to relief from the finality penalty because it tried to file a timely petition for redetermination, but its petition was not received by the Board's staff;

Summary

Claimant is a retailer/wholesaler of numismatics and also an auctioneer. The Department of Business Taxes (hereinafter, the DBT) issued a Notice of Determination on September 19, 1988, in which it asserted a deficiency in claimant's taxes for the audit period from October 1, 1984, through December 31, 1987, in the amount of \$5,778.94. A finality penalty under Revenue and Taxation Code Section 6591 was applied when claimant's payment of taxes was not received on or before October 19, 1988.

On October 17 and November 7, 1988, claimant tendered checks each in the amount of \$2,074.78. By letter dated November 8, 1988, claimant alleged to have filed a petition for redetermination in a cover letter dated October 13, 1988, that allegedly accompanied the October 17, remittance. The records of the DBT do not reflect the receipt of any such correspondence from claimant. On December 13, 1988, the supervisor of the Petition Section informed claimant of statutory claims procedure and its legal recourse in a letter. (Exhibit A.)

On July 6, 1989, claimant filed a claim for refund at which time it made a payment of \$3,804.54. According to the DBT, the taxpayer's claim for refund was only timely for the payment made July 6, 1989. This payment was applied as follows:

Tax	\$1,683.38
Interest	1,748.05
Penalty	<u>373.11</u>
Total	\$3,804.54

Any claim for refund of the difference between the tax due of \$2,515.89 on the protested measure of tax in the Notice of Determination, and the \$1,683.38 above, was allegedly barred by the statute of limitations. Claimant did not file a claim within six months of the date of each payment.

The DBT's audit investigation disclosed that claimant added what it termed a "premium fee" of generally 10% of the sale price to the invoice of all property sold at auction, particularly on sales at the campus of --- while the claimant alleged that it told its customers the fee was tax deductible as a charitable donation, the DBT determined that the "premium fee" represented additional taxable gross receipts received by petitioner to reimburse itself for the charge made by the university to hold the auction on the --- campus. The university made no other charge to the claimant.

The DBT further contended that the claimant was not entitled to relief from the liability under section 6596 on the grounds of estoppel because claimant did not seek or receive any written advice from the DBT regarding the application of tax to the "premium fees." I have reviewed the claimant's central file maintained in the DBT's headquarters building in Sacramento and found no written request for legal advice, or any other written document purporting to elicit an opinion from the DBT on the taxability of the 10% premium/donation at issue.

The claimant has not filed the required request for relief from the finality penalty under Revenue and Taxation Code Section 6591 which has to be signed under penalty of perjury. [Revenue and Taxation Code Section 6592.]

Analysis and Conclusion

Having reviewed the claimant's files and the audit workpapers in this case and based upon the information currently available, I concur in the tax auditor's conclusion that the 10% "premium fees" charged by claimant were taxable gross receipts derived from the sale of tangible personal property in this State. (Revenue and Taxation Code Section 6051.) There is no provision under Revenue and Taxation Code Section 6012 for exclusion of these charges from claimant's taxable gross receipts.

I concur that the statute of limitations in Revenue and Taxation Code §6902 bars any claim for refund for any disputed taxes paid covering the period of this audit except for the July 6, 1989, payment as set forth above.

I further concur that claimant is not entitled to relief from taxes, interest, and penalty under Revenue and Taxation Code §6596 since it failed to demonstrate any reasonable reliance on written advice from the Board.

The claimant is advised that because the statute of limitations is tolled on its claim concerning the finality penalty, it may be entitled to relief from that penalty. To obtain relief, however, claimant must comply with Revenue and Taxation Code §6592 and submit a request in writing, stating grounds for relief, that is signed under penalty of perjury before relief may be considered and granted. Any such request received by the hearing officer within 30 days from the date that this Hearing Decision and Recommendation is mailed to claimant will be treated as a Request for Reconsideration on that issue.

Recommendation

Deny claim.

Janice M. Jolley, Hearing Officer

1/30/1991
Date

(with Exhibit A)