STATE OF CALIFORNIA
BOARD OF EQUALIZATION

330.3453

In the Matter of the Petition for Redetermination of State and Local Sales and Use Tax;	)	DECISION AND RECOMMENDATION
Petitioner.	)	

The above-entitled matter was set for hearing on Thursday, December 22, 1983, in Covina, California before Robert H. Anderson.

Appearing for Petitioner: --- --- --- [1]

Appearing for the Board: Mr. R. Kingsbury
Auditor
Covina Branch Office

Protest

Petitioner was audited for the period from 1-1-79 through 3-31-82, and a determination for tax and interest calculated through July 14, 1982 was issued on July 14, 1982.

Petitioner protests the assessment for tax on unreported receipts from leases of plants. The measure of tax is $37,457.

Contentions

Petitioner contends that the unreported receipts represent charges for maintenance of plants that were leased and that the maintenance agreement was optional.

Petitioner contends that in 1979 they inquired at the Covina office of the Board of Equalization about the application of tax on maintenance receipts and were told that such receipts were exempt from tax.

[1] A notice of the time, date and place of hearing was sent to petitioner at the address of record on November 28, 1983. Petitioner did not respond to the notice and no appearance was made by petitioner or anyone to represent petitioner. Thus, this matter is written up based on information in the file and audit work papers.

Petitioner operates an individual proprietorship business that commenced in the first quarter of 1979. Petitioner sells and leases plants and maintains plants that are leased. The audit under consideration in this petition is the first by the Board of Equalization of the business.

This controversy is over a charge for maintenance of plants that are leased; no tax was reported and paid on the maintenance portion of the charge for reasons set forth in petitioner's contentions.

Petitioner used a two-page "Plant Lease Agreement" form, copies of which are in the audit work papers. Section 2 of the agreement covered the charge and when it is to be paid. The charge was always entered as a lump sum on a monthly basis; payments were not necessarily made monthly, however.

Section 3 covered, in general terms, items the lessor agreed to provide.

Section 4 provided as follows:

> The lessor is to maintain all plants, which includes feeding, watering, pruning, insect inspection, polishing and treatment encompassing general care and special treatment of foliage.

Section 7 provided as follows:

> Maintenance service to be conducted once weekly upon a mutually agreeable day during normal business hours, and at least one employee must be in building for services to be rendered. All plants and containers remain the property of --- --- --- at all times.

The foregoing is the only reference to maintenance in the lease agreement, except on the second page there was a breakdown of the monthly charge between what is billed for maintenance and what is billed for plant and container lease.

The auditor examined as many contracts as were made available, and he found no evidence of straight lease contracts without maintenance provisions. Also, he saw no evidence of a separate agreement on maintenance alone. In other words, he saw nothing that would indicate that maintenance was optional to the lessee.

At a district level discussion of the audit findings with a --- petitioner's accountant, --- was asked whether there were any lease contracts without the maintenance agreement; he did not think that there were any. Accordingly, the audit staff concluded that the maintenance was automatic and consisted of a service that was provided with the lease (continuing sale) of the plants.

Petitioner submitted letters from three customers containing statements that the maintenance on plants they leased was an optional feature. This evidence was noted but was not given any weight because the letters were obtained after the fact and were obviously self serving.

Conclusions

The records petitioner maintained do not support a conclusion that the maintenance feature of the plant leases was optional to the lessees.

The letters from three customers appear to be self serving if for no other reason than the fact customers would stand to be billed for tax on the entire monthly charge under the Plant Lease Agreement.

The lease is a type of sale (continuing sale) as defined in section 6006(g) of the Sales and Use Tax Law since none of the exceptions under (g) (1) through (5) apply.

Accordingly, section 6011 (Sales Price) is applicable. Sales price is defined under the section to mean the total amount for which tangible personal property is sold, leased or rented as the case may be, valued in money, whether paid in money or otherwise ... Subsection (b) (1) of the definition provides that the total amount for which the property is sold or leased or rented includes… "any services that are a part of the sale".

This means that the maintenance service is a part of the sale and any charge for the maintenance is part of the sale price.

We cannot say with any degree of certainty that petitioner was given erroneous advice about how the tax applied to the lease of plants or the maintenance service feature that was a part of the lease because we do not know: (1) how the question was phrased; and (2) how the answer was phrased.

The allegation that petitioner was told that no tax applied to a charge for maintenance services raises the issue of estoppel. This was answered by the Court as long ago as 1955 in the case of *Market Street Railway* v. *State Board of Equalization,* (1955) 137 Cal.App.2d 87, and more recently in *Fischback & Moore, Inc*. v. *State Board of Equalization*, (1981) 117 Cal.App.3d 627. The courts held that state employees do not have the power to estop the Board from collecting a validly owed tax. It was determined that a taxpayer must pay from its own funds as much as would have been paid originally, but for the erroneous information. Thus, we cannot use petitioner's allegation as a basis for recommending to the Board that there be relief of tax that we conclude is legally owed the State.

Recommendation

Redetermine without adjustment.

_____ Feb 21, 1984

Robert H Anderson, Hearing Officer Date

Reviewed for Audit:

_____ _____

Principal Tax Auditor Date