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By M. Milbourne, Deputy Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

11	WIMATEX, INC.,)	No. 34-2008-00001968-CU-MC-GDS
12)	
13	Plaintiff,)	<u>Notice of Intended Decision</u>
14)	Trial Date: February 23, 2009
15	v.)	Dept.: 45
16)	Before the Honorable Alan G. Perkins
17	STATE BOARD OF EQUALIZATION,)	
18	Defendant.)	

INTRODUCTION

The evidentiary part of the trial occurred on February 23, 2009, before the Honorable Alan G. Perkins, Judge, presiding. Plaintiff Wimatex, Inc. (Wimatex) appeared by its counsel, Alan I. Kaplan. Defendant State Board of Equalization (SBE or the Board), appeared by its counsel, Jeffrey A. Rich, Deputy Attorney General. Upon conclusion of the testimony the court established a schedule for the filing of post-trial briefs. The matter was deemed submitted as of May 9, 2009.

The dispute arises from a question regarding the applicability of sales and use taxes. The First Amended Complaint alleges that in 2001 Wimatex was given a written exemption by SBE

1 from certain sales and use taxes after Wimatex had filed a written application for such an
2 exemption. The First Amended Complaint further alleges that SBE responded in writing
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4 on January 29, 2001, informing Wimatex that it was eligible for the exemption. The First
5 Amended Complaint then alleges that Wimatex relied on this written advice to purchase
6 equipment but, in 2004, SBE conducted an audit and concluded that Wimatex was not eligible
7 for the exemption. The First Amended Complaint also alleges that Wimatex then filed an
8 application pursuant to Revenue & Taxation Code § 6596¹ for relief from the tax but that SBE
9 ultimately denied the application. Wimatex then filed its complaint, which seeks to be treated as
10 a Petition for Writ of Mandate if the court concludes that review of the application for relief
11 under § 6596 is not available by way of a traditional civil complaint. SBE generally denied
12 Wimatex's allegations and asserted various affirmative defenses.

13 DISCUSSION

14 **I. What Standards Apply to Review the Decision by the Defendant on** 15 **Wimatex's Application?**

16 The controversy does not involve a review of the decision that Wimatex was subject to
17 the taxes in question. The First Amended Complaint alleges in paragraph 2 that it is brought
18 under the authority of §§ 6932 and 6933, but it also makes clear that the decision being
19 challenged is the failure to grant relief under § 6596. Moreover the post-trial submissions
20 confirm that the decision in question is the decision on the § 6596 request.

21 The decision at issue is shown in trial Exhibit # 6, by which a majority of the Board
22 ordered that Wimatex's petition for relief under § 6596 be redetermined, as recommended by the
23 Appeals Division. The recommendation of the Appeals Division is included in trial Exhibit # 7.
24 The Appeals Division recommended SBE deny the request for relief. The basis for the denial
25 was the conclusion that Wimatex did not, in its initial application materials to SBE, fully
26 describe the specific facts and circumstances regarding its request for advice. (See Ex. 7 at 6:20-
27 7:18.)

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¹ All further references will be to the Revenue & Taxation Code unless otherwise indicated.

1 The initial question before the court is whether such a decision is subject to review by
2 way of Complaint or Petition for Writ of Mandate. With regards to a pretrial motion for
3 judgment on the pleadings and opposition to Wimatex's request for leave to amend the
4 complaint, SBE asserted, among other grounds, that a tax refund action cannot be based on §
5 6596. In ruling on the motion, Judge McMaster stated that the court was not persuaded that
6 SBE's discretionary actions are completely insulated from judicial review or that there was no
7 method by which the Wimatex could establish an abuse of discretion. Those rulings did not fully
8 address whether the relief must be by way of Complaint or by way of a Petition for Writ of
9 Mandate.

10 The First Amended Complaint in this action alleged that it was brought under the
11 authority of Revenue & Taxation Code §§ 6932 and 6933. Those statutes are part of Chapter 7
12 of the Revenue & Taxation Code. They apply to the recovery of taxes alleged to have been
13 erroneously or illegally determined or collected. Section 6931 of the same Chapter prohibits the
14 issuance of injunctions or writs of mandate to prevent or enjoin the collection of any tax required
15 to be collected. One could argue that none of these sections apply because the tax was not
16 erroneously or illegally determined or collected, and the action is not seeking to prevent or enjoin
17 the collection of a tax. If § 6932 does not apply because the tax here was proper, and the action
18 was not seeking an injunction, then it would seem that a writ of mandate would be a proper
19 remedy.

20 On the other hand, if relief under § 6596 should have been granted, then one could argue
21 the tax was "erroneously" collected, which would seem to make a complaint under § 6932 et seq.
22 a proper remedy.

23 Under the facts and circumstances of this case the distinction would not seem to make a
24 difference. The First Amended Complaint also sought relief by a Writ of Mandate and the
25 administrative remedies were exhausted here. Moreover the decision before the court concerns
26 the legal consequences of uncontested facts. Therefore, while the Court had earlier concluded
27 that Wimatex's complaint could possibly be a proper remedy, the Court also now concludes that
28 it would reach the same result if the complaint were construed as a petition for writ of mandate.

1 **II. The Elements for Relief Under § 6596.**

2 Section 6596, subsection (a) provides that if a person's failure to make a timely payment
3 or return is due to the person's "reasonable reliance on written advice from the board," the SBE
4 "may" relieve the person of the taxes imposed and any penalties and interest added thereto. (Cal.
5 Rev. & Tax. Code § 6596.)

6 Subsection (b) then establishes a several part requirement before a failure shall be
7 considered to be due to written reliance from the Board. The statute provides that a person's
8 failure to make a timely return or payment "shall"² be considered to be due to reasonable reliance
9 on written advice from SBE "only if" SBE finds: (1) the taxpayer made a written request for
10 advice to the board, fully describing the specific facts and circumstances of the particular activity
11 or transaction; (2) SBE responded in writing advising the taxpayer whether the particular activity
12 or transaction was subject to tax or stating the conditions under which the activity or transaction
13 is subject to tax; (3) in reasonable reliance on SBE's written advice, the taxpayer either failed to
14 charge or collect sales/use tax from a customer or failed to pay a use tax; and (4) the tax liability
15 applies to a transaction or activity occurring either before SBE rescinded/modified its written
16 advice or before a change in the law rendering the board's earlier advice no longer valid. (*Id.*)
17 Once that threshold showing has been made, the statute, by use of the term "may" in subsection
18 (a), appears to give the Board discretion to determine whether or not relief should be granted
19 under § 6596.

20 In this case there is no dispute that most of the elements of § 6596 were met. The basic
21 facts are discussed in detail in the written decision and recommendation, found in trial Exhibit 7,
22 by the Appeals Division of the Board. (For ease of reference, the four exhibits attached to trial
23 Exhibit 7 shall hereafter be referred to separately as Exhibits 7-1, 7-2, 7-3, and 7-4.) The parties
24 do not dispute that Wimatex fulfilled the requirements of § 6596, subsections (b)(2), (b)(3), and
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27 ² The statute does not indicate, and the parties did not address, whether the use of the term "shall" established a
28 minimum threshold for reasonable reliance or only defined what must be considered to be reasonable reliance
without limiting what other facts could be considered to be reasonable reliance. Because the latter interpretation
would impose no standards by which to judge the Board's action, the court is adopting the former interpretation for
the purpose of this matter.

1 (b)(4). The parties also do not dispute that Wimatex submitted written request for advice, as
2 required by subsection (b) (1). (See Exhibit 7-1, as supplemented by Exhibits 7-2 and 7-3.)

3 What the parties do dispute is whether the Wimatex met the requirements of § 6596 (b)
4 (1) that the written request to the Board for advice fully and accurately describe the specific facts
5 and circumstances of the activity or transaction. (See Ex. 7 at 6:20-7:18.)

6 **III. The Board Erred in Concluding that Wimatex's Application Did Not Meet**
7 **the "Fully and Accurately" Description Requirement of § 6596 (b) (1).**

8 As described above, subsection (b) (1) imposes a requirement that the request for advice
9 from the Board fully and accurately describe the "specific facts and circumstances of the activity
10 or transaction..." Unfortunately, the statute does not define the terms "activity" or "transaction".
11 It is not clear whether the terms apply to: 1) the underlying type of activity of the business (in
12 this case garment manufacturing), 2) the type of transaction that resulted in the formation of the
13 business (see Ex. 1 at question 19, listing dates between lines 10 & 19), 3) both of those
14 definitions, or 4) all of the aforementioned definitions and perhaps more types of activity.

15 The nature of the statements made in Exhibit 7-1 and the follow-up correspondence in
16 Exhibits 7-2 and 7-3 are discussed in detail in the Appeals Division's decision in trial Exhibit 7
17 and in Mr. Colman's recommendation that relief be granted (Exhibit 7-4).

18 The Appeals Division found persuasive the fact that the application and follow-up
19 documents did not fully disclose the details of the acquisition by Wimatex of assets from Lira
20 Fashions, Inc.³ Consequently, the Board concluded that Wimatex was not eligible for relief under
21 § 6596.

22 The Board has legitimate concerns regarding applications for written advice. It should not
23 be placed in the position of having a great duty of inquiry in the face of ambiguous or incomplete
24 information from an applicant. The rules should not encourage applicants to deceive the Board or
25 fail to disclose information to it and then be rewarded with the ability to use § 6596 as a shield
26 against payment of legitimate taxes.

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28 ³ There was no dispute that the assets were transferred from Lira to Wimatex without consideration. It is also
undisputed that the Board's form, Exhibit 7-1, asked for details on the "purchase" of an existing business as opposed
to asking for details on any type of acquisition of assets of an existing business.

1 Nonetheless, taxpayers, especially those seeking to determine whether they should invest
2 significant sums to start or resume a business venture, also have a legitimate interest in being
3 able to rely upon written advice from the Board when there has been a sufficient disclosure of
4 information as specified by § 6596.

5 Based on the evidence presented, the Court concludes that there was a sufficient
6 disclosure of information in this case.

7 Mr. Colman's July 28, 2004 decision sets forth much of the background information
8 regarding the history of Lira Fashion, Inc. The form provided by the Board asked, in Section IV,
9 about the details of a purchase of an existing business. Here Lira had already stopped doing
10 business and its assets were transferred without consideration. Consequently, it was reasonable to
11 conclude that Section IV did not apply. When that fact is coupled with: 1) the statement of "yes"
12 in line 24 that the applicant had previously engaged in a trade or business, 2) the naming of Lira
13 Fashion, Inc. in line 25, 3) the specification of "GARMENT MANUFAC/KNITTING" in line
14 27, and 4) the response in line 23 that the applicant was currently engaged in garment
15 manufacturing, it was apparent from the application that Wimatex was going to be engaged in at
16 least some of the same activities as Lira.

17 The decision and recommendation of the Appeals Division focuses on the failure of the
18 applicant to disclose the nature of the transfer of the assets from Lira to Wimatex. However, that
19 discussion misses the mark. Here the Applicant was a corporate entity: Wimatex. By answering
20 "yes" to question 24 and then identifying Lira Fashion, Inc. in line 25, Wimatex stated, in
21 essence, that it was (or had been) Lira.

22 As it turns out, that information was not correct because Wimatex was a successor entity
23 to Lira Fashion, Inc. Nevertheless, by representing to SBE that it was the same entity as Lira,
24 Wimatex necessarily disclosed sufficient facts for the Board to determine that Wimatex was not
25 a "new" trade or business qualified to receive the exemption. While the answer was, in a legal
26 sense, likely not correct, one cannot say that it did not advise the Board that Wimatex was taking
27 over for Lira. Therefore, the Board erred in concluding that Wimatex's application did not meet
28 the requirements of § 6596 (b)(1).

1 **IV. Because the Board Concluded That it Did Not Have the Power to Grant**
2 **Relief Under § 6596 the Board's Decision Should Be Set Aside.**

3 As stated above, § 6596 has at least two components. The first step is that an applicant
4 must show that it is eligible for relief. Once that showing has been made the Board then must
5 determine whether or not to grant relief of the taxes, penalties and/or interest.

6 In their memoranda the parties disputed whether, if the four preconditions are met, relief
7 under § 6596 is permissive or mandatory. SBE contends because the statute provides the
8 taxpayer "may" be relieved of the taxes imposed, relief is discretionary, meaning that Wimatex is
9 only entitled to judicial relief if it demonstrates that SBE abused its discretion in denying section
10 6596 relief. Wimatex suggests that the court should review de novo whether the taxpayer's
11 failure to make a timely return or payment was due to the person's "reasonable reliance" on
12 erroneous written advice from the board. If so, Wimatex suggests, the taxpayer *must* be relieved
13 of the taxes, penalties, and interest imposed.

14 There do not appear to be any published court decisions, or any published administrative
15 interpretation, resolving whether the SBE is required to grant relief under § 6596 (a) if it finds
16 that the requirements of § 6596 (b) have been met. Section 6596 was adopted by the Legislature
17 in 1984 to enhance the certainty of State tax laws by implementing a formal process by which a
18 taxpayer could obtain an interpretation concerning the tax treatment of a specific transaction or
19 activity. (*See Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 23; *see*
20 *also* Stats. 1984 ch. 1728, § 2.) The statute in effect codifies an estoppel doctrine into the sales
21 and use tax law. (See concurring and dissenting opinion in *People ex rel. Franchise Tax Bd. v.*
22 *Superior Court* (1985) 164 Cal.App.3d 526, 564.)

23 On the one hand, if the Legislature had intended § 6596 to be mandatory, it presumably
24 would have used the term "shall" or "must." That it did not do so could suggest that the
25 Legislature merely intended to give SBE the discretion to grant relief where SBE determined it
26 was appropriate to do so. (*See Mughrabi v. Suzuki* (1988) 197 Cal.App.3d 1212, 1215 [when
27 "shall" and "may" appear in close proximity in particular context, inference as proper that
28 Legislature intended mandatory and discretionary meanings, respectively].)

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2 On the other hand, there also is some support for Wimatex's position. Although the term
3 "may" ordinarily is construed as permissive, where there is a clear legislative intention to impose
4 a mandatory duty, or where members of the public have an interest in having an act done by a
5 public body for the sake of justice or as a matter of public policy, the word "may" sometimes has
6 been construed to mean "shall" or "must." (*Hayes v. County of Los Angeles* (1893) 99 Cal. 74,
7 80 [language providing board "may" order refund of taxes paid more than once was construed as
8 mandatory]; *Hofacker v. Bd. of Supervisors* (1968) 264 Cal.App.2d 290, 293-294 [language
9 providing board of supervisors may call election if board of directors fails to hold regular
10 election was construed as mandatory]; *Johnson v. Mead* (1987) 191 Cal.App.3d 156, 159 [word
11 "shall" does not always import that its provisions are mandatory].) Because treating § 6596 as
12 permissive may result in a failure of justice to persons who reasonably relied on erroneous
13 written advice from the SBE and who would otherwise be without any legal remedy, there are
14 reasons why the word "may" as it is used in § 6596 should be interpreted to mean "shall" or
15 "must."

16 Further, in *Yamaha*, the California Supreme Court apparently assumed § 6596 was
17 mandatory in nature: "if a person's failure to make a timely payment or return 'is due to the
18 person's reasonable reliance on written advice from the [B]oard,' that person *would be* relieved of
19 certain payment obligations." (*Yamaha Corp., supra*, at p.23 [emphasis added]).

20 Alternatively, because the statute apparently was adopted for the purpose of codifying an
21 estoppel doctrine, it is conceivable the Legislature intended to strike some middle ground
22 between imposing a ministerial duty and giving the Board unfettered discretion to grant or deny
23 relief by invoking the common law balancing test used to determine whether equitable estoppel
24 should be applied against a governmental entity.

25 As noted in Section III above, the Board never reached the question of whether or not it
26 should grant relief under § 6596 (a) because it adopted the decision of the Appeals Division,
27 which found that Wimatex was not eligible for relief due to the failure to meet the criteria set
28 forth in § 6596 (b). Therefore it is unclear what the SBE would have done with regards to the

1 granting of relief under § 6596, subsection (a) had it not erroneously concluded that Wimatex
2 failed to meet the prerequisites set forth in § 6596, subsection (b).

3 This proceeding is in the nature of a review of administrative action. Because the agency
4 has never interpreted the scope of its powers under circumstances similar to this case, the court
5 believes that proper deference to the administrative agency requires that it should be given the
6 first chance to apply the rest of the statute to the facts of this case. The matter therefore will be
7 remanded to the SBE for further proceedings.

8 In the further proceedings ordered by this court the SBE shall determine whether to grant
9 relief pursuant to § 6596 (a) to relieve Wimatex of the taxes imposed by §§ 6501 and 6502
10 and/or any penalty or interest added thereto. Should SBE decline to grant relief it shall set forth
11 the basis for its decision, and the application of its interpretation of the law to the facts of this
12 case in sufficient level of detail to allow judicial review.

13 **CONCLUSION**

14 Therefore, IT IS HEREBY ORDERED that the decision of the Board is set aside and the
15 matter is remanded to the Board for further proceedings consistent with this Court's decision.
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STATEMENT OF DECISION

If either party timely requests a Statement of Decision, this notice of intended decision will be the statement of decision unless within 10 days, either party specifies controverted issues or makes proposals not covered herein. California Rules of Court Rule 3.1590(c). If a separate Statement of Decision is required, counsel for Wimatex shall prepare the proposed Statement of Decision.

If this notice of intended decision becomes the statement of decision, counsel for Wimatex is directed to prepare an appropriate order and judgment. California Rules of Court 3.1312.

IT IS SO ORDERED.

DATED: August 3, 2009

ALAN G. PERKINS

HON. ALAN G. PERKINS
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO

Gordon D Schaber Courthouse
720 Ninth STREET
Sacramento, CA 95814-1311

SHORT TITLE: WIMATEX, INC VS. STATE BOARD OF EQUALIZATION

CLERK'S CERTIFICATE OF SERVICE BY MAIL

CASE NUMBER:
34-2008-00001968-CU-MC-GDS

I certify that I am not a party to this cause. I certify that a true copy of Clerk's Certificate of Service by Mail was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at Sacramento, California, on 08/04/2009.

Clerk of the Court, by: /s/ M. Milbourne, Deputy

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