

CALIFORNIA STATE BOARD OF EQUALIZATION

APPEALS DIVISION FINAL ACTION SUMMARY

In the Matter of the Administrative Protest and)
 Claim for Refund under the Sales and Use Tax)
 Law of:)
 ANDREW STEVEN ROGANSON, dba) Account Number SR AC 100-762518
 Design Lighting and Installations) Case ID's 538417, 737457
 Taxpayer/Claimant) Woodland Hills, Los Angeles County

Type of Business: Electrical construction contractor

Audit period: 06/08/06 – 12/31/08

<u>Item</u>	<u>Disputed Amount</u>	<u>Tax</u>	<u>Penalties</u>
Unreported taxable sales	\$76,708		
As determined		\$14,573.32	\$ 441.40
Finality penalty added			1,457.33
Pre-D&R adjustment		- 7,186.18	- 945.71
Post-D&R adjustment		<u>00.00</u>	<u>- 738.71¹</u>
Adjusted liability		\$7,387.14	\$ 214.31
Less concurred		<u>-1,058.72</u>	<u>00.00</u>
Balance, protested		<u>\$6,328.42</u>	<u>\$ 214.31</u>
Adjusted tax		\$7,387.14	
Interest through 10/31/14		3,186.98	
Failure-to-file penalty		214.31	
Finality penalty		<u>738.71</u>	
Total tax, interest, and penalty		\$11,527.14	
Payments		<u>- 3,600.00</u>	
Balance Due		<u>\$ 7,927.14</u>	
Monthly interest beginning 11/01/14		<u>\$ 18.94</u>	

The Board heard these matters on June 25, 2014, granting relief of the failure-to-file penalty. However, with respect to the amount of unreported taxable sales and conditional relief of the finality penalty, the Board's order was not expressly verbalized, since the last few words of the motion were not directly stated. Based on its understanding of the not fully complete motion, the Sales and Use Tax

¹ Since the D&R recommends conditional relief of the finality penalty, we have deleted the penalty in this portion of the table. However, in the table below, we show the finality penalty, since the conditions for relief have not yet been met, and the penalty will be included in the notice of final decision regarding this appeal.

1 Department (Department) issued a Statement of Liability Balances,² making no further adjustment to
2 the amount of unreported taxable sales, deleting the failure-to-file penalty, and granting relief of the
3 finality penalty, on the condition that taxpayer paid the tax liability within thirty days of the date the
4 Statement of Liability Balances was issued. Taxpayer filed a timely petition for rehearing, asserting
5 that the Board did not directly vote on the issue of whether adjustments are warranted to the amount of
6 unreported taxable sales and, thus, that the Department acted without direction from the Board when it
7 redetermined the amount of tax with no further adjustments.

8 On September 23, 2014, the Board considered the petition for rehearing. The Board found that
9 the motion made on June 25, 2014, was not sufficiently clear, and that its June 25, 2014 vote was an
10 incomplete action (i.e., that the issues of whether to grant finality penalty relief and whether any
11 further adjustments to the amount of unreported taxable sales were effectively deferred). Accordingly,
12 the Board directed that the Statement of Liability Balances be disregarded, with no action taken on the
13 petition for rehearing. Instead, the Board directed that the appeal be brought back for consideration at
14 the October Board meeting.

15 Before the Board takes action on this matter, we recommend that the Board first vote to rescind
16 its June 25, 2014 motion and the resulting vote in this matter, and expunge the record. Then, once the
17 June 25, 2014 vote is rescinded and the record expunged, we recommend that the Board vote on a new
18 motion that would clearly address all of the unresolved issues in this matter.

19 UNRESOLVED ISSUES

20 **Issue 1:** Whether adjustments are warranted to the amount of unreported taxable sales. We
21 find no further adjustment is warranted.

22 Taxpayer is an electrician who designs, manufactures, and installs custom-made lighting
23 systems on real property. Taxpayer purchases materials and fixtures tax-paid, and he entered into oral
24 contracts with his customers to design and install lighting systems with no sales tax reimbursement
25

26 ² Since taxpayer did not file a timely petition for redetermination, a Notice of Redetermination has already been issued.
27 Thus, this appeal is an administrative protest, and for purposes of determining the deadline for filing a petition for rehearing
28 or determining the relevant date for the conditions for relieving the finality penalty, the Statement of Liability Balances is
the notice of the Board's decision. (Cal. Code Regs., tit. 18, §§ 5560, subd. (a)(1), 5561, subd. (a).).

1 charged or collected. Taxpayer's sales invoices separately stated the amounts he charged the customer
2 for time, materials, and lighting fixtures. On his sales and use tax returns for the audit period, taxpayer
3 claimed all reported sales as nontaxable or exempt.

4 The Department reviewed the available sales invoices and computed that sales of fixtures
5 represented 24.83 percent of total sales for 2006 and 18.58 percent of total sales for 2007 and 2008.
6 The Department applied those percentages to recorded total sales to establish taxpayer's sales of
7 fixtures. The Department then conducted a shelf test in which it computed a markup of 103 percent,
8 which taxpayer does not dispute.³ The Department used the audited markup to compute the cost of
9 fixtures, which it regarded as tax-paid purchases resold. The Department reduced audited sales of
10 fixtures by the amount of tax-paid purchases resold to establish unreported taxable sales of \$76,708.

11 Taxpayer contends that he is liable for tax on the cost of fixtures (which tax he paid at the time
12 of purchase), asserting that he was the consumer, not the retailer of the lighting fixtures. On that issue,
13 taxpayer asserts that he had lump-sum contracts with his customers, even though the contracts were not
14 in writing and his sales invoices were prepared on a time-and-materials basis, with no separately stated
15 amount of tax.

16 First, we note that construction contractors (other than United States construction contractors)
17 are retailers, not consumers, of fixtures. Therefore, sales tax applies to a construction contractor's
18 sales of fixtures. Accordingly, taxpayer's assertion that he was the consumer of the lighting fixtures is
19 incorrect.

20 The parties agree that taxpayer did not purchase the light fixtures in a completed condition, and
21 that it was necessary for him to modify and customize every light fixture prior to installation. In
22 addition, there were no written contracts that stated the selling price of the light fixtures. Therefore,
23 the sales price is deemed to be the cost price of the fixture to the contractor. (Cal. Code Regs., tit. 18,
24 § 1521, subd. (b)(2)(B)2a.) As relevant here, because taxpayer is the manufacturer of the fixtures, the
25 cost price is deemed to be the amount stated in taxpayer's records (i.e., other records of the contractor).

27 ³ The Department had computed a markup of 185 percent in the audit, but it reduced the markup to 103 percent in a pre-
28 conference reaudit, based on additional documentation provided by taxpayer.

1 (Cal. Code Regs., tit. 18, § 1521, subd. (b)(2)(B)2b.) There is no dispute that taxpayer's records show
2 he added a markup of 103 percent to the cost of his purchases of fixtures that were not in a completed
3 condition at the time of purchase. Further, the recorded sale price of the fixtures included taxpayer's
4 jobsite fabrication labor and a prorated share of manufacturing overhead, which must be included in
5 the sale price of fixtures manufactured by the contractor. (Cal. Code Regs., tit. 18, § 1521, subd.
6 (b)(2)(B)2.) Therefore, taxpayer owes sales tax on the difference between the tax-paid purchase price
7 of the uncompleted fixtures and the recorded sale price of the fixtures. Since the Department has
8 computed that amount using taxpayer's own records,⁴ we find there is no basis for adjustment.

9 Since we recommend no further adjustments to the amount of unreported taxable sales, and the
10 amount paid does not exceed the amount due, we recommend that the claim for refund (which was
11 filed April 16, 2013 and was timely for payments totaling \$700.00) be denied.⁵

12 **Issue 2:** Whether relief of the failure to file penalty is warranted. We find relief is not
13 warranted.

14 Since taxpayer did not timely file a sales and use tax return for 2008, a failure-to-file penalty
15 was imposed. After the adjustments recommended in the D&R, the amount of that penalty is \$214.31.
16 Taxpayer has filed a request for relief of the failure-to-file penalty, which is based on the same
17 arguments we have addressed, and rejected, under Issue 1. In addition, we note that during the appeals
18 conference, taxpayer conceded audit item 2, measuring \$12,833, which consists entirely of ex-tax
19 purchases subject to use tax that taxpayer purchased from one vendor. Petitioner has not established
20 reasonable cause for failing to report tax on these purchases. Accordingly, we find that relief of the
21 failure-to-file penalty is not warranted.

22 **RESOLVED ISSUE**

23 Since taxpayer did not pay the Notice of Determination (NOD) within 30 days of its issuance,
24 or file a petition for redetermination within that time, a finality penalty was applied. After the
25

26 ⁴ Although the figures were not transcribed directly from taxpayer's records, the Department used the available invoices to
27 compute percentages of fixtures to total sales and used information from taxpayer's records to compute the markup, which
the Department used to compute the amounts of tax-paid purchases resold.

28 ⁵ As noted in the D&R, a claim for refund is not ripe for consideration unless the tax due for one or more entire reporting
periods has been fully paid. Since the entire amount due for 2006 (approximately \$3,072) has been paid, the claim is now
ripe for consideration.

1 adjustments recommended in the D&R, the amount of that penalty is \$738.71. Taxpayer filed a
2 request for relief of the finality penalty, stating that he did not receive the NOD until after it had
3 become final because he was in Utah from mid-March until April 25, 2010, for mandatory visitation
4 with his son, who was undergoing care at a residential treatment facility.

5 We find that taxpayer's required presence in Utah constitutes reasonable cause for his failure to
6 timely pay the NOD or file a petition for redetermination. Also, we note that taxpayer has paid the
7 conceded portion of this liability in full. Accordingly, we find that relief of the finality penalty is
8 warranted provided that taxpayer pays the tax liability in full within 30 days of the mailing of the
9 notice of the final decision in this appeal.

10 **OTHER MATTERS**

11 None.

12 Summary prepared by Lisa Burke, Business Taxes Specialist III