



Monthly interest beginning 4/1/10                      \$ 1,539.36                      \$ 26.60                      \$ 1.74

**UNRESOLVED ISSUES**

**Issue 1:** Whether relief of the failure-to-file penalties is warranted. We find there is no basis for relief from the failure-to-file penalties for the period January 1, 2002, through March 31, 2007.

Petitioner is a retailer of interactive display units (high tech store fixtures and customer artwork). Petitioner's headquarters are located in Kansas City, Missouri, and petitioner has no locations in California. On December 27, 2001, petitioner submitted an Application for Certificate of Registration – Use Tax Account, and the Department issued a Certificate of Registration - Use Tax on January 14, 2002. Petitioner has been making sales to California purchasers since at least September 15, 1995. Petitioner hires manufacturing representatives in California to solicit orders on its behalf, and then installs the units for its customers in California or contracts with another company to complete the installation. Petitioner was not registered with California to collect use tax, and did not collect use tax from its customers for the period January 1, 1996, through January 3, 2002. However, as of January 4, 2002, petitioner began collecting use tax on sales to California purchasers. The Department concluded that petitioner was engaged in business in California throughout the three audit periods at issue and was therefore required to collect and remit use tax in connection with its sales to California customers. Petitioner did not provide complete records for audit, so the Department used the records that were available to estimate unreported taxable sales. Petitioner thereafter provided additional records based on which the Department agreed that adjustments were warranted. With those adjustments, petitioner no longer disputes the asserted understatement of taxable sales.

Since petitioner did not file sales and use tax returns for any of the quarters in the audit periods, the Department assessed 10 percent failure-to-file penalties on each Notice of Determination. Petitioner requested relief from the failure-to-file penalties based on the contractual obligation of its California purchasers to pay any amounts of use tax due to the California "authorities." Further, petitioner declared that, from time to time, some of its customers actually informed petitioner that they were properly handling any applicable sales and use taxes, and petitioner asserts it was unaware of any failure on the part of its customers to pay the use tax.

We find that petitioner had a good faith, but erroneous, belief that it was not obligated to collect and report tax on its sales to California customers for the period prior to December 27, 2001. Thus, we found petitioner has established reasonable cause for its failure to file returns for the period January 1, 1996, through December 31, 2001, and we recommend that the failure-to-file penalties be deleted for those periods. However, from the date petitioner applied for and was issued its Certificate of Registration – Use Tax, petitioner knew or should have known it had a duty to file sales and use tax returns. Indeed, it collected use tax from its customers during this period without reporting and paying such amounts to the Board. Petitioner has not presented any explanation that establishes reasonable cause for its failure to file those returns for the period January 1, 2002, through March 31, 2007, and we find there is no basis for relief of the failure-to-file penalties for those periods.

**Issue 2:** Whether relief from the finality penalties are warranted. We find no basis for relief.

Petitioner did not pay the liability or file a timely petition for redetermination within thirty days from the date of the Notice of Determination for either the period July 1, 2004, through December 31, 2006, or the period January 1, 2007, through March 31, 2007. Accordingly, a 10-percent finality penalty was automatically applied to each of those determinations.

Petitioner filed a request for relief of the finality penalties on the basis that it relied on its counsel to handle its appeals in a timely fashion, and it was not aware that its counsel filed the petitions for redetermination for these two matters eleven days late. Petitioner also declared that the finality penalties should be relieved because it did not intentionally fail to file timely petitions for redetermination.

Both Notices of Determination were mailed to petitioner's address of record on June 22, 2007. Accordingly, petitioner was on notice that the determinations had been issued and that additional penalties would be added if the amounts due were not paid by July 22, 2007, unless petitioner filed timely petitions for redetermination. Nevertheless, petitioner did not pay the determinations or file petitions for redetermination by July 22, 2007. Petitioner cannot avoid responsibility for its failure to do so by blaming its counsel. Accordingly we find that petitioner has not shown that its failure to timely pay the determinations was due to reasonable cause and circumstances beyond its control, and we find there is no basis for relief of the finality penalties.

## AMNESTY

Petitioner did not apply for amnesty or pay the tax and interest due for the amnesty-eligible periods by March 31, 2005, as required by the amnesty program. Therefore, the Department applied amnesty double failure-to-file penalties for the amnesty-eligible periods (through December 31, 2002). As explained above, we have concluded that the failure-to-file penalties should be relieved for the period January 1, 1996, through December 31, 2001. As a result, we recommended that the amnesty double failure-to-file penalties for that period also be deleted. However, the amnesty double failure-to-file penalty for the year 2002 of \$5,865.14 continues to apply. In addition, an amnesty interest penalty of \$33,207.48 will be applied when the liability for the amnesty-eligible period becomes final (included in the determination for the period January 1, 1996, through June 30, 2004).

Petitioner has submitted a request for relief of the amnesty penalties on the grounds that it believed, and continues to believe, that it does not owe the assessed tax. In addition, petitioner contends that it was not financially able to make any payments toward the assessed liability, noting that it was not collecting tax from its California customers at that time. Petitioner does not dispute that it received timely notification of the amnesty program. Petitioner could have, and should have, filed an application for amnesty, and entered into a payment plan if it lacked sufficient funds to pay the entire amnesty-eligible liability. Petitioner's self-described inability to pay the liability is not a basis for relief of the amnesty penalties. We find that petitioner has not established that its failure to participate in the amnesty program was due to reasonable cause and circumstances beyond its control. Thus, we find there is no basis upon which to recommend relief of the amnesty penalties.

## RESOLVED ISSUE

The Department has concluded that additional documentation petitioner submitted supports a reduction in the unreported taxable measure from \$3,725,959 to \$3,273,655 for the period January 1, 1996, through June 30, 2004, from \$2,336,712 to \$155,256 for the period July 1, 2004, through December 31, 2006, and from \$388,355.00 to \$3,883.00 for the first quarter 2007. In an email dated April 13, 2009, petitioner states that it concurs with these amounts of unreported taxable measure and no longer disputes the audited understatements of tax.

**OTHER DEVELOPMENTS**

None.

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