

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION SUMMARY FOR BOARD HEARING

3 In the Matter of the Petition for Redetermination)
 4 Under the Sales and Use Tax Law of:)
 5 BERKELEY PATIENTS' GROUP, INC.) Account Number: SR CH 100-972576
 6) Case ID 426761
)
 6 Petitioner) Berkeley, Alameda County

7 Type of Business: Medical marijuana dispensary

8 Audit Period: 07/01/04 – 06/30/07

9 Item Disputed Measure

10 Disallowed claimed exempt sales of marijuana \$51,167,447
 11 Relief of interest \$1,962,096

12 Tax as determined, protested \$4,477,185.00

13 Proposed tax redetermination \$4,477,185.00

14 Interest through 2/28/11 2,004,275.49

15 Total tax and interest \$6,481,460.49

16 Monthly interest beginning 3/1/11 \$26,116.91

17 UNRESOLVED ISSUES

18 **Issue 1:** Whether petitioner's sales of marijuana qualify as exempt sales of medicine. We
 19 conclude they do not.

20 Petitioner operates a medical marijuana dispensary in Berkeley, California. Petitioner asserts
 21 that the marijuana it sells qualifies as a medicine furnished pursuant to physicians' prescriptions.

22 Petitioner further asserts that its facility is similar to a clinic, and thus meets the definition of a health
 23 facility pursuant to California Code of Regulations, title 18, section (Regulation) 1591,

24 subdivision (a)(4)(B). As such, petitioner contends that its sales of marijuana are exempt from tax
 25 under Revenue and Taxation Code section 6369, subdivision (a)(3).

26 There is no dispute that medical marijuana is a medicine for purposes of section 6369 and
 27 Regulation 1591 or that a physician's recommendation for medical marijuana may meet the definition
 28 of prescription if the recommendation contains all of the components listed in subdivision (a)(7) of
 Regulation 1591. The issue here is whether petitioner's facility qualifies as a clinic for purposes of the

1 exemption. Petitioner concedes that its facility is not licensed as a clinic by the California Department
2 of Public Health, but argues that licensure is not required for it to qualify as a clinic for purposes of the
3 exemption, and that it does so qualify. We find, however, that the definition of “clinic” in Health and
4 Safety Code section 1200 must be read in the context of the other provisions in the same chapter of the
5 Health and Safety Code. That is, a clinic as defined in Health and Safety Code section 1200 must
6 comply with the licensing provisions contained in other sections of that same chapter of the Health and
7 Safety Code. Since Health and Safety Code section 1205 requires that an entity obtain a license for a
8 clinic, a facility lacking such license does not constitute a clinic or health facility as defined in Health
9 and Safety Code section 1200 or, in turn, under Revenue and Taxation Code section 6369. Thus, since
10 petitioner’s facility is not licensed, it does not meet the definition of “clinic” pursuant to Health and
11 Safety Code section 1200, and its sales of marijuana do not qualify for the section 6369 exemption.

12 **Issue 2:** Whether petitioner has established that the Board should be estopped from collecting
13 the amount due pursuant to the doctrine of equitable estoppel. We find that estoppel does not apply.

14 Petitioner argues that the Board is barred by the doctrine of equitable estoppel from issuing a
15 determination against petitioner for the disallowed sales of medical marijuana or, at a minimum, the
16 Board should be estopped from imposing the assessment for the period prior to October 5, 2005, when
17 the Board began issuing seller’s permits to medical marijuana dispensaries. Petitioner asserts that the
18 four elements of the doctrine of estoppel have been met: (1) the Board was apprised of the facts; (2)
19 the Board intended that its conduct be acted upon, or acted such that petitioner had a right to believe it
20 was so intended; (3) petitioner was ignorant of the true state of facts; and (4) petitioner relied upon the
21 conduct to its injury.

22 The doctrine of estoppel can only be asserted in a suit in equity, and this Board lacks equity
23 powers and instead is bound by statute. Thus, we conclude that petitioner’s equitable estoppel defense
24 does not apply to this case. Furthermore, we find that petitioner has not met all four elements of
25 equitable estoppel. In particular, the Board never informed petitioner or the public that the sale of
26 medical marijuana is not subject to tax. To the contrary, the Board has issued several announcements
27 that the sale of medical marijuana is subject to tax. Thus, we find that the Board has not acted such
28 that petitioner had a right to believe that its sales of marijuana constituted exempt sales of medicine.

1 Accordingly, we find that that the Board is not barred by the doctrine of equitable estoppel from
2 issuing a determination against petitioner for the disallowed sales of medical marijuana.

3 **Issue 3:** Whether petitioner has established that the transactions include non-taxable services
4 that were not part of the sales of tangible personal property. We find that petitioner has not.

5 Petitioner contends that the disallowed sales included charges for nontaxable transactions such
6 as medical advice, counseling, treatment, acupuncture therapy, hospice services, fitness advice and
7 counseling, massage therapy, and yoga. Petitioner states that those services were offered in
8 combination with the sales of medical marijuana, and that both the services and the products are
9 valuable components of the transactions. At the appeals conference, we asked petitioner to provide
10 documentary evidence in support of its position. However, none was provided. Thus, we conclude
11 petitioner has not established that a portion of the disallowed transactions included charges for
12 nontaxable services.

13 **Issue 4:** Whether petitioner has established reasonable cause sufficient to relieve the interest.
14 We conclude that petitioner has not.

15 Petitioner filed a request for relief of interest, signed under penalty of perjury pursuant to
16 section 6593.5, claiming that its failure to pay tax on its retail sales of medical marijuana for the period
17 in issue resulted from unreasonable error or delay by the Board in informing petitioner that sales of
18 medical marijuana were subject to tax, by accepting its sales and use tax returns claiming a deduction
19 for such sales as “medicine,” and by failing to timely audit petitioner. We conclude petitioner’s
20 arguments are without merit. There is no legal basis for relieving tax or interest based upon a
21 taxpayer’s misunderstanding of the law, and petitioner could have, of course, submitted a written
22 request for advice regarding whether sales tax applied to its sales of medical marijuana, but did not do
23 so. Nor is there any basis for relief because petitioner was incorrectly claiming deductions on its
24 returns. Indeed, one of the reasons for the Department to conduct an audit is to verify the accuracy of
25 the deductions a taxpayer claims on its returns, which is exactly what the Department did here. Upon
26 discovering the deficiency, the Department issued a Notice of Determination within the time
27 authorized by law. We find there was no delay or mistake justifying relief of interest, and therefore
28 recommend the request for relief be denied.

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OTHER DEVELOPMENTS

None.

Summary prepared by Rey Obligacion, Retired Annuitant