

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 HALL'S WINDOW CENTER, INC.,) Account Number: SR KH 100-369766
 dba Renewal By Andersen) Case ID 486260
 6)
 7 Petitioner) Sacramento, Sacramento County

8 Type of Business: Window sales and installation

9 Audit Period: 04/01/04 – 03/31/07

10 <u>Item</u>	<u>Disputed Amount</u>
11 Unreported measure	\$371,841
12 Tax as determined	\$34,702.21
13 Less concurred	<u>-5,884.50</u>
13 Protested	<u>\$28,817.71</u>
14 Proposed redetermination	\$34,702.21
15 Interest through 4/30/11	<u>15,440.52</u>
Total tax and interest	\$50,142.73
16 Payments	<u>-6,251.50</u>
Balance due	<u>\$43,891.23</u>
17 Monthly interest beginning 5/1/11	<u>\$165.96</u>

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19 UNRESOLVED ISSUE

20 **Issue:** Whether petitioner is entitled to relief from the tax and interest at issue based on its
 21 alleged reliance upon written advice received during the prior audits of its predecessor. We conclude
 22 that relief is not warranted.

23 Petitioner, a California corporation, is engaged in business as a construction contractor who
 24 installs and makes over-the-counter retail sales of windows and screens. This business was previously
 25 operated by petitioner's president as a partnership. The partnership's seller's permit was closed out on
 26 December 31, 2003, and petitioner obtained its seller's permit effective January 1, 2004. The
 27 partnership business was previously audited twice: April 1, 1996, through March 31, 1999, and April
 28 1, 2000, through March 31, 2003.

1 During the audit of petitioner, the Sales and Use Tax Department (Department) conducted a
2 material accountability test which included a shelf test for over-the-counter retail sales and sales for
3 resale. The shelf test disclosed a markup of 56.2 percent for retail sales and 127.3 percent for sales for
4 resale. Petitioner also conducted a taxable segregation test which resulted in taxable sales ratio of
5 3.082 percent. From the results of these tests, the Department established that petitioner understated its
6 reported taxable measure by \$371,941 for the audit period.

7 Petitioner does not dispute the Department's audit methodology. Petitioner asserts that its
8 failure to collect tax reimbursement on over-the-counter retail sales of windows and screens was based
9 on its reliance on the predecessor's business practices of not collecting sales tax reimbursement on
10 such sales. Petitioner alleges that the reason the predecessor did not collect sales tax reimbursement on
11 those sales is because the Department erroneously treated over-the-counter retail sales of windows and
12 screens as nontaxable sales during the two prior audits of the predecessor's records. Petitioner points
13 out that the two prior audits of the predecessor's records did not disclose any unreported taxable sales
14 of windows and screens. Since the over-the-counter retail sales of windows and screens were
15 significant during the two prior audit periods, petitioner alleges that such sales could not have been
16 overlooked. Petitioner also argues that the Department failed to advise or give guidance to the
17 predecessor during the predecessor's prior audits that the predecessor was obligated to collect sales tax
18 reimbursement on its over-the-counter retail sales of windows and screens.

19 Petitioner also points out that the Department's Index to Audit Working Papers shows two
20 schedules titled "Taxable Sales Reconciliation" and "Taxable Trim Sales." Petitioner argues that two
21 different types of retail sales were examined. Petitioner appears to argue that the Department singled
22 out trim sales on a different basis from petitioner's other retail sales, which suggests that over-the-
23 counter retail sales of windows were also examined. Petitioner also argues that the Department
24 examined the predecessor's income statements and contract files for the second prior audit, which
25 contain entries for over-the-counter retail sales of windows. Thus, petitioner argues that the
26 Department should have recognized that the predecessor had over-the-counter retail sales of windows.
27 However, petitioner argues, even with these records, the Department failed to assess any tax on such
28 sales that occurred during the two prior audit periods. Based on the foregoing, petitioner argues that

1 relief of the tax and interest due on the unreported taxable measure determined by audit is warranted
2 pursuant to Revenue and Taxation Code section 6596.

3 Since petitioner is a legal successor to the partnership that previously operated the business and
4 was the subject of the prior audits, it may rely on the advice provided during those prior audits to the
5 same extent as its predecessor. We have examined the workpapers for the two prior audits and were
6 unable to find any written evidence within them showing that the Department examined the
7 predecessor's over-the-counter retail sales of windows. The verification comments in one of the prior
8 audits indicated that the Department was not aware that the predecessor made any over-the-counter
9 retail sales of windows. The Department described the predecessor as lump sum construction
10 contractor who replaced and installed windows and doors, with minimal over-the-counter retail sales of
11 window trims and window casings. The verification comments did not mention any retail sales of
12 windows when describing petitioner's over-the-counter sales. We find that this omission suggest that
13 the Department was unaware during those prior audits that petitioner made any over-the-counter retail
14 sales of windows.

15 With respect to the income statement for the second prior audit of the predecessor, we note that
16 there were separate line items under "Income" for "Windows – installed" and for "Windows – DIY."¹
17 Although this should have alerted the Department to investigate further what the line item "Windows –
18 DIY" included, we find that, since the predecessor's business was described as a construction
19 contractor with minimal over-the-counter retail sales of window trims and casings, and there was no
20 line item for window trims and casings, the Department may have considered this line item as sales of
21 window trims and casings. Additionally, even if the Department knew or should have known that
22 petitioner made over-the-counter retail sales of windows based on the income statements, we have no
23 evidence that the Department reviewed any sales invoices for retail sales of windows and therefore
24 knew that petitioner did not collect tax reimbursement on such sales, or that petitioner did not report
25 such sales as taxable on its returns.

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27 _____
28 ¹ DYI stands for Do It Yourself - indicating that the items were sold for installation by the customer.

1 With respect to the two schedules that petitioner alleges show that the Department examined
2 two types of retail sales, one of which may have included the over-the-counter retail sales of windows,
3 we find that there is nothing in these schedules to suggest that the Department was aware that the
4 predecessor made over-the-counter retail sales of windows.

5 We also find unpersuasive petitioner's argument that the Department would have examined
6 over-the-counter retail sales of windows because such sales were significant during the two prior audits
7 (petitioner estimates that these sales were 15 percent of its predecessor's business). The Department
8 found that petitioner's over-the-counter retail sales accounted for 3.082 percent of petitioner's total
9 business, and there is nothing in the record to suggest a significantly higher percentage in prior periods.
10 Thus, we believe that petitioner's estimate of its predecessor's over-the-counter retail sales is
11 significantly overstated, and that the predecessor had a percentage of over-the-counter sales similar to
12 petitioner's. As such, we do not believe that the percentage was so significant that it should be
13 assumed the Department must have examined these transactions in the prior audits.

14 With respect to petitioner's assertion that, during the prior audits, the Department should have,
15 but did not, provide the predecessor with guidance regarding its obligation to collect tax
16 reimbursement on over-the-counter retail sales of windows, this assertion actually undercuts
17 petitioner's request for relief. While we understand the Department's goal is to provide advice when
18 appropriate, the failure to give advice is not a basis for relief. Rather, relief under section 6596
19 specifically requires reasonable reliance on written advice regarding the subject transaction. Thus, if
20 petitioner is correct that the Department failed to advise it regarding the application of tax to over-the-
21 counter sales, then that would establish that relief is not warranted. Based on our review of the record,
22 that is exactly what we believe happened, that the Department did not give advice regarding the
23 application of tax to over-the-counter retail sales of windows, which is consistent with our belief that
24 the Department was not aware of such over-the-counter retail sales of windows during its prior audits
25 of the predecessor.

26 OTHER DEVELOPMENTS

27 None.

28 Summary prepared by Rey Obligacion, Retired Annuitant