

**CALIFORNIA STATE BOARD OF EQUALIZATION**  
**APPEALS DIVISION SUMMARY FOR BOARD HEARING**

In the Matters of the Administrative Protest and Claim )  
for Refund Under the Sales and Use Tax Law of: )

MEDIA MANAGEMENT SERVICE, INC., dba )  
Quality Outdoor Advertising )

Account Number: SR EA 97-741075  
Case ID's 391611 and 294859<sup>1</sup>

Taxpayer

Orange, Orange County

Type of Business: Construction contractor

Audit period: 06/01/00 - 3/31/03

Claim period: 01/01/01 – 12/31/01

| <u>Item</u>                                | <u>Disputed Amount</u> |
|--|------------------------|
| Unreported purchases of materials consumed | \$764,007              |
| Finality penalty                           | \$ 5,962               |
| Amnesty double finality penalty            | \$ 5,889               |
| Amnesty interest penalty                   | \$ 7,674               |
| Claimed refund of tax                      | \$ 27,063              |

|                                   | <u>Tax</u>          | <u>Penalty</u>     |
|-----------------------------------|---------------------|--------------------|
| As determined and redetermined:   | <u>\$59,617.64</u>  |                    |
| Finality penalty                  |                     | \$ 5,961.76        |
| Amnesty double finality penalty   |                     | \$ 5,888.84        |
| Amnesty interest penalty          |                     | <u>\$ 7,674.33</u> |
| Protested                         | <u>\$59,617.64</u>  | <u>\$19,524.93</u> |
| Tax, as redetermined              | \$ 59,617.64        |                    |
| Interest through 4/30/11          | 47,238.24           |                    |
| Finality penalty                  | 5,961.76            |                    |
| Amnesty double finality penalty   | 5,888.84            |                    |
| Amnesty interest penalty          | <u>7,674.33</u>     |                    |
| Total tax, interest, and penalty  | \$126,380.81        |                    |
| Payments                          | <u>- 1,074.39</u>   |                    |
| Balance Due                       | <u>\$125,306.42</u> |                    |
| Monthly interest beginning 5/1/11 | <u>\$ 341.50</u>    |                    |

<sup>1</sup> The administrative protest and claim for refund are the subjects of separate D&R's.

## UNRESOLVED ISSUES

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2 **Issue 1:** Whether the base columns and head sections purchased by taxpayer to furnish and  
3 install in construction contracts were materials purchased for consumption or fixtures purchased for  
4 resale. We conclude that the columns and head sections were materials purchased for consumption,  
5 and that use tax is due on the purchase even if the materials later were not installed.

6 Taxpayer is a construction contractor that erects outdoor advertising signs and billboards,  
7 generally pursuant to lump sum contracts. The Sales and Use Tax Department (Department)  
8 determined that taxpayer made purchases of materials for consumption in the performance of  
9 construction contracts of \$1,579,392 for which it did not pay tax or tax reimbursement to its vendors,  
10 and that it reported taxable cost of consumables of \$788,377. Thus, the Department concluded that  
11 taxpayer understated its purchases of materials subject to use tax by \$791,015.<sup>2</sup> Taxpayer disputes the  
12 \$764,007 of this measure which represents the cost of base columns and head sections that taxpayer  
13 did not install.

14 Taxpayer entered into a lump sum construction contract with STI Outdoor, LLC (STI) to  
15 furnish and install 43 large outdoor advertising signs along certain rights-of-way. Taxpayer purchased  
16 the prefabricated base columns and head sections without paying sales tax reimbursement to the  
17 vendor, and the vendor delivered the base columns and head sections to the jobsites where they were to  
18 be installed. However, due to changes in California law and resulting legal actions, construction was  
19 halted after taxpayer had installed only about seven of the 43 base columns. According to taxpayer,  
20 the items which had not been installed, which cost \$1,102,289, were moved to storage facilities in  
21 Huntington Beach, and title to them was thereafter transferred to STI in exchange STI's agreement to  
22 pay taxpayer a \$700,000 "settlement." (Taxpayer states that STI thereafter went into bankruptcy and  
23 did not remit the \$700,000 to taxpayer.)

24 Taxpayer disputes the Department's conclusion that the subject items were materials, instead  
25 asserting that the items were fixtures. Since a construction contractor is the retailer of fixtures and  
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27 <sup>2</sup> The Notice of Determination was for a deficiency measured by \$738,350, which consists of this \$791,015 understatement  
28 plus \$2,182 in other unreported purchases of consumables, less credit measures totaling \$54,847.

1 since taxpayer did not furnish and install the items as part of the construction contract, taxpayer asserts  
2 that it has no tax liability related to the ex-tax purchases of \$1,102,289, consisting of \$764,007  
3 included in the determined understatement (case ID 391611) and \$338,282 on which taxpayer self-  
4 reported tax and filed a claim for refund (case ID 294859).

5 Taxpayer was the consumer of materials it purchased to furnish and install pursuant to its lump  
6 sum construction contract with STI. (Cal. Code Regs., tit. 18, § 1521, subd. (b)(2)(A)1.) Thus, if the  
7 items in question were materials, taxpayer is liable for use tax on the purchase price because it  
8 purchased the items for consumption (i.e., whether or not taxpayer actually installed the items, it did  
9 not purchase them for resale and incurred tax upon receiving the purchased items in California).

10 Taxpayer was the retailer of any fixtures it purchased to furnish and install pursuant to its lump sum  
11 construction contract with STI. (Cal. Code Regs., tit. 18, § 1521, subd. (b)(2)(B)1.) Thus, if the items  
12 in question were fixtures, taxpayer was liable for sales tax upon its sale of the items. Since the  
13 disputed items were not installed pursuant to the construction contract, sales tax would not have  
14 applied unless and until the items were later sold.<sup>3</sup>

15 We have generally regarded large outdoor advertising signs erected upon land as structures, and  
16 thus that the construction contractor who erects such a sign pursuant to a lump sum construction  
17 contract as the consumer of materials used to erect the sign. Taxpayer asserts that the base columns  
18 and head sections to which the signs were to be attached are fixtures. However, taxpayer concedes that  
19 these items were designed to be bolted together, and that, upon installation, they become part of the  
20 real property. We find that these items become components of structures, rather than accessories to  
21 buildings or other structures which are regarded as fixtures because they do not lose their identity when  
22 installed. Accordingly, we find that the base columns and head sections are materials. Thus, we find  
23 that taxpayer is liable for the use tax on the cost of the base columns and head sections, regardless of  
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26 <sup>3</sup> Taxpayer characterizes its later agreement under which it transferred title to the items to STI as a settlement. If such were  
27 a correct characterization of the arrangement, rather than being a sale, then taxpayer consumed the items when transferring  
28 them to STI pursuant to the agreement, and would have incurred use tax on the purchase price at that time if not having  
already incurred use tax as asserted by the Department. If the arrangement, however characterized, was actually a sale of  
the items to STI, then taxpayer incurred sales tax on the \$700,000 sale price at the time of the transfer, without regard to  
whether STI actually paid the agreed price. (Of course, if STI did not pay the amount due, taxpayer may have *thereafter*  
qualified for a bad debt deduction.)

1 whether those items were actually installed.

2 **Issue 2:** Whether relief of the finality penalty is warranted. We find no basis to recommend  
3 relief.

4 The finality penalty was automatically applied because taxpayer did not pay the determination  
5 or file a petition for redetermination before the determination became final. Taxpayer has submitted a  
6 statement signed under penalty of perjury by its corporate president requesting relief of the finality  
7 penalty on the grounds that taxpayer did not believe tax was due with respect to the disputed measure  
8 of \$764,007. Further, taxpayer states that it believed the claim for refund would be consolidated into  
9 the appeal it planned to file for the audit liability.

10 We find that taxpayer's contention that it did not timely pay the determination because it  
11 disputed the liability does not represent a basis for relief from the finality penalty, even though the  
12 Department was aware, as a result of the claim for refund, that taxpayer disputed the liability.  
13 Taxpayer was aware at the time it received the determination that, by that date, it had filed only a claim  
14 for refund of tax reported and paid on its returns and had not yet appealed the determination.  
15 Accordingly, we find there is no basis to recommend relief of the finality penalty.

#### 16 **AMNESTY**

17 Since taxpayer did not participate in the amnesty program, an amnesty double finality penalty  
18 of \$5,888.84 and an amnesty interest penalty of \$7,674.33 were added when the liability became final.  
19 Taxpayer has submitted a statement under penalty of perjury requesting relief of the amnesty penalties  
20 on the grounds that it had an honest misunderstanding of the provisions of the amnesty program during  
21 stressful circumstances in conducting its business operations. Taxpayer asserts that it had reported and  
22 paid its tax obligations based upon its financial records, and it did not believe there was an  
23 understatement for the period subject to amnesty.

24 The Department's audit report was issued in September 2004, several months prior to the  
25 March 31, 2005 deadline for applying for amnesty. Thus, taxpayer knew of the audit liability before  
26 the time of the amnesty program. Also, the Department sent a letter to taxpayer in February 2005,  
27 specifically informing it of the amnesty program and the March 31, 2005 deadline. Yet, despite having  
28 knowledge of the amnesty program and its requirements and being aware of the audited

1 understatement, taxpayer chose not to apply for amnesty or to report the understatement for the  
2 amnesty-eligible quarters. We find that taxpayer's dispute with the audit does not represent reasonable  
3 cause for its failure to participate in the amnesty program. Therefore, we find no basis to recommend  
4 relief of the amnesty double finality penalty or the amnesty interest penalty.

5 **OTHER DEVELOPMENTS**

6 None.

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8 Summary prepared by Deborah A. Cumins, Business Taxes Specialist III  
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