

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION BOARD HEARING SUMMARY

3 In the Matter of the Petition for Redetermination)
 4 Under the Sales and Use Tax Law of:)
 5 NORTHBAY WELLNESS GROUP) Account Number SR JH 101-296648
) Case ID 526954
 6 Petitioner) Santa Rosa, Sonoma County

7 Type of Business: Medical marijuana dispensary

8 Audit period: 10/1/05 – 12/31/06

9 Item Disputed Amounts

10 Unreported taxable sales \$6,507,222.00

11 Tax as determined and protested \$504,309.75

12 Interest through 8/31/12 257,424.28

13 Failure-to-file penalty 50,430.96

13 Total tax, interest, and penalty \$812,164.99

14 Monthly interest beginning 9/1/12 \$2,521.55

15 This matter was scheduled for Board hearing in June 2012, but was postponed at petitioner's
 16 request to allow additional time to submit an opening brief.

17 **UNRESOLVED ISSUES**

18 **Issue 1:** Whether petitioner's sales of medical marijuana qualify as exempt sales of medicine.

19 We conclude they do not.

20 Petitioner began selling medical marijuana on April 11, 2005, and incorporated July 12, 2005.
 21 Petitioner was assigned a seller's permit effective October 1, 2005, through December 31, 2006, but
 22 did not file sales and use tax returns. Petitioner recorded total sales of \$6,507,222 on its profit and loss
 23 statements for the liability period, claimed deductions totaling \$539,188 on its 2005 and 2006 Federal
 24 Income Tax Returns for sales taxes included in gross receipts, and listed sales taxes payable of
 25 \$136,035 and \$712,669 as current liabilities on its federal returns for 2005 and 2006. Based on
 26 petitioner's own financial documents, the Sales and Use Tax Department (Department) concluded that
 27 petitioner knew its sales of medical marijuana were taxable, and established sales tax liability
 28 measured by the total sales reported on the profit and loss statements.

1 Petitioner contends that its sales of medical marijuana were exempt from tax in accordance
2 with the Compassionate Use Act of 1996. Petitioner argues that it is a caregiver, not a retailer, and that
3 it is a collective engaging only in the exchange of medical marijuana with simple cost recovery. Thus,
4 petitioner asserts that its transactions involving medical marijuana are not taxable because these
5 transactions comprised exchanges and not sales. In the alternative, petitioner argues that Mr. Michael
6 Kenneth Beyries, petitioner's former attorney and member of petitioner's board of directors, should be
7 held solely responsible for the tax because he advised petitioner that its sales were not subject to tax.

8 Petitioner sold medical marijuana to purchasers pursuant to a physician's recommendation,
9 which satisfied part of the requirements for exemption under Revenue and Taxation Code section
10 6369. However, petitioner's sales of medical marijuana do not satisfy all requirements for exemption
11 under section 6369 because petitioner was not a registered pharmacist, physician, surgeon, dentist,
12 podiatrist, or a health care facility. The application of sales tax to petitioner's sales of medical
13 marijuana does *not* conflict with the Compassionate Use Act of 1996, the provisions of which do not in
14 any way relate to or address the application of sales tax to sales of medical marijuana. We also reject
15 petitioner's argument that there were no sales because the marijuana was "exchanged" for mere cost
16 recovery. Even if this were true, a sale is any transfer of title or possession, exchange, or barter ... of
17 tangible personal property for a consideration. (Rev. & Tax. Code, § 6006, subd. (a).) Petitioner
18 transferred possession of the marijuana for consideration. Thus, petitioner sold the marijuana. Since
19 petitioner's sales did not qualify for exemption, we find that tax was properly assessed.

20 The subject tax was assessed against petitioner, which is a corporation. That petitioner may
21 have been given incorrect advice by its own attorney or board member is not a basis for relieving
22 petitioner of liability. Petitioner made the subject taxable sales, and thus petitioner is the person liable
23 for the sales tax due on those sales. Accordingly, we find that the assessment was properly issued to
24 petitioner, and that petitioner is liable for the tax due.

25 **Issue 2:** Whether petitioner is entitled to relief based upon reliance on erroneous written advice
26 supplied by the Board. We conclude that petitioner is not.

27 Petitioner claims that in April 2005, Ms. Dona Frank, petitioner's president and chief financial
28 officer, visited the Board's Santa Rosa District Office and was told that there was no tax and no

1 seller's permit required for sales of medical marijuana. The Department, however, indicates that, in
2 accordance with its established procedure in April 2005, Ms. Frank was likely informed that such sales
3 were subject to tax but that the Board would not issue a seller's permit specifically for the sale of
4 medical marijuana.

5 Relief from tax may be granted under Revenue and Taxation Code section 6596 if a person's
6 failure to pay taxes due is the result of the person's reliance on written advice received from the Board
7 in response to a written request for such advice which included all relevant information. At the appeals
8 conference Ms. Frank indicated that her request and the advice she recalls having received was entirely
9 oral. Further, in contrast, we note that petitioner's own records (e.g., profit and loss statements and
10 federal returns) contain evidence that it was aware that its sales of medical marijuana were subject to
11 tax. Accordingly, we find that there is no basis for relief under the provisions of Revenue and
12 Taxation Code section 6596.

13 **OTHER MATTERS**

14 The Notice of Determination includes a 10 percent penalty for failure to file tax returns.
15 Although we explained at the appeals conference that relief of the penalty may be granted under
16 specific circumstances and provided petitioner a form which it could use to request relief, it has not
17 done so. We therefore have no basis to consider recommending relief of this penalty.

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19 Summary prepared by Pete Lee, Business Taxes Specialist II
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