

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION BOARD HEARING SUMMARY

In the Matters of the Petition for Redetermination)
and Claim for Refund Under the Sales and Use Tax)
Law of:)
) Account Number: SR EA 99-959363
BRANDI R. PARIS, dba Vital Medical) Case ID's 423064 & 491278
)
Petitioner/Claimant) Newport Beach, Orange County

Type of Business: Retailer of medical equipment

Audit period: 10/1/02 – 12/31/05

<u>Item</u>	<u>Disputed Amount</u>
Unreported sales of nonexempt medicine	\$663,195 ¹
Interest	Unspecified
Tax determined	\$85,940.03
Adjustments - Sales and Use Tax Department	- 4,973.88
- Appeals Division	<u>- 13,631.09</u>
Proposed tax redetermination	\$67,335.06
Less concurred	<u>- 15,937.45</u>
Balance, protested	<u>\$51,397.61</u>
Proposed tax redetermination	\$67,335.06
Interest	<u>31,393.67</u>
Total tax and interest	\$98,728.73
Payments	<u>-80,608.03</u>
Balance Due	<u>\$18,120.70</u>

UNRESOLVED ISSUES

Issue 1: Whether petitioner has established that her sales of aqua therapy pumps were exempt sales of medicines. We find that petitioner has not.

During the audit period petitioner claimed exemptions and exclusions totaling \$2,963,975. The Sales and Use Tax Department (Department) used a block sample of the fourth quarter 2005, based on which it computed that petitioner had overstated her claimed exemptions by \$663,195. Petitioner does

¹ Petitioner disputes an unknown portion, so for purposes of this table, we treat the entire amount as disputed.

1 not contest the audit methodology, but disputes the Department's disallowance of sales of aqua therapy
2 pumps, contending these sales qualified as exempt sales of medicines.

3 The applicable exemption is provided by Revenue and Taxation Code section 6369,
4 subdivision (c)(3), which exempts sales of orthotic devices designed to be worn on the person. As
5 explained in Regulation 1591, subdivision (b)(4), to qualify for exemption, the device must be
6 designed to be fully worn on the person of the user. The aqua therapy pumps at issue consist of a
7 pump and reservoir, which are designed to pump hot or cold liquid through a bladder worn by the
8 patient on his or her knees, elbows, hands, or other parts of the body. The circulation of either hot or
9 cold liquid is designed to improve blood circulation and reduce the pain associated with diabetes,
10 arthritis, edema, and other conditions. The bladder is worn by the patient while the pump and reservoir
11 sit on a table or the floor. It does not appear that the pump and reservoir are designed to be, or are
12 capable of being, worn on the person. Therefore, we find that the aqua therapy pumps do not qualify
13 as a medicine subject to exemption.

14 **Issue 2:** Whether petitioner has established that she is entitled to relief of interest. We
15 conclude that petitioner has not.

16 The Department started the audit in November 2005, a preliminary audit report was completed
17 in November 2006, and following petitioner's submission of additional documentation a revised audit
18 report was prepared in April 2007. Petitioner's representative, Ms. Margaret Quick, met with the
19 District Principal Auditor on June 28, 2007, at which time she contended that the deficiency was
20 excessive. Although the District Principal Auditor thought that an adjustment might be warranted and
21 gave Ms. Quick the opportunity to submit documentation to support an adjustment, she did not do so.
22 Accordingly, the Notice of Determination was issued on September 20, 2007, without further
23 adjustments. Petitioner filed a timely petition, but then, in November 2007, Ms. Quick informed the
24 Department that petitioner no longer contested the determination, and the audit was processed as
25 concurred. Following discussions between petitioner, Ms. Quick, and the Department, the appeal was
26 reopened in March 2008 and assigned to the Board's Settlement Division. The parties did not reach a
27 settlement, and the matter was returned to the appeals process in March 2009. While the matter was
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1 under settlement consideration, an error in the audit work papers was found, based on which the
2 Department prepared a reaudit in July 2009 to reduce the deficiency.

3 Petitioner contends she is entitled to interest relief because there were delays in completing the
4 original audit and in discovering the audit error, she had significant problems communicating with one
5 of the Department's auditors who she alleges did not seem to understand petitioner's business, and she
6 would have incurred less interest had the audit been completed properly and in a timely manner.

7 Relief from interest may be available under section 6593.5 if the failure to make a timely
8 payment was the result of an unreasonable error or delay by a Board employee acting in his or her
9 official capacity, and no significant aspect of the error or delay was attributable to an act of, or failure
10 to act by, the taxpayer. Based on our examination of the relevant records, there does not appear to be
11 evidence of any unreasonable delay on the part of a Board employee. While there was one significant
12 error in the audit, we do not find that the single data entry error was unreasonable. Furthermore, the
13 delay in discovering the error appears to have resulted from the Department's inability to obtain
14 additional documentation requested from Ms. Quick, and other delays appear to have resulted from
15 difficulties the Department encountered attempting to contact Ms. Quick. The 13 months (March 2008
16 through March 2009) that the case was in the settlement stage is not unusual, and in any event, the
17 matter was in the settlement process solely at petitioner's choosing.

18 We conclude that the interest that accrued on the tax liability prior to petitioner's payment of
19 the tax due was not caused by an unreasonable error or delay by a Board employee, and that relief is
20 thus not warranted.

21 **Issue 3:** Whether petitioner is entitled to a refund of any of the amounts paid. We conclude no
22 refund is warranted.

23 Petitioner filed protective claims for refund for payments totaling \$77,592.48. With
24 adjustments, there remains an amount due. Thus, we conclude that there has been no overpayment,
25 and that the claim for refund should be denied.

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RESOLVED ISSUE

Petitioner's sales of ankle foot gauntlets have been accepted as exempt sales of medicines.

OTHER DEVELOPMENTS

None.

Summary prepared by Pete Lee, Business Taxes Specialist II