

## 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 R-TEK COMMUNICATIONS, INC. ) Account Number: SR KH 100-966218  
 ) Case ID 461499  
 6 Petitioner ) Stockton, San Joaquin County

7 Type of Business: Construction Contractor

8 Liability Period: 02/05/04 – 06/30/06

9 Item Amount in Dispute

10 Unreported cost of materials consumed \$602,976  
 11 Penalty for failure-to-file returns \$1,037

	<u>Tax</u>	<u>Penalty</u>
12 As determined, protested	<u>\$51,661.51</u>	<u>\$1,037.06</u>
13 Proposed tax redetermination	\$51,661.51	
14 Interest through 11/30/10	24,288.78	
15 Failure-to-file penalty	<u>1,037.06</u>	
15 Total tax, interest, and penalty	<u>\$76,987.35</u>	
16 Monthly interest beginning 12/1/10	<u>\$301.36</u>	

17 **BACKGROUND**

18 During the audit of a vendor of construction materials, the Sales and Use Tax Department  
 19 (Department) noted that the vendor had accepted a resale certificate from R-Tek Communications (R-  
 20 Tek). Subsequently, on November 27, 2006, the Department informed R-Tek that it had been selected  
 21 for audit. After several attempts, an audit was conducted. R-Tek was engaged in business as a  
 22 subcontractor who furnished and installed materials, specifically coaxial and other communications  
 23 wire and cable, in new home construction projects, under lump sum contracts with prime contractors  
 24 who sold the new homes to the public. During the audit, the Department found that R-Tek was  
 25 originally operated as a sole proprietorship, owned by Mr. Rodney Place, and that the business had  
 26 been incorporated on February 5, 2004 as R-Tek Communications, Inc. (petitioner), with Mr. Place as  
 27 the president. Thus, while the audit period commences July 1, 2003, the period covered by the Notice  
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1 by another corporation known only as “Comm360,” which absorbed petitioner and took over  
2 petitioner’s business. Petitioner argues that Comm360’s purchase of petitioner’s business absolves  
3 petitioner from the liability asserted in the determination. Petitioner also argues that Mr. Place’s  
4 signature was forged on the resale certificates bearing the sole proprietorship’s seller’s permit number  
5 in order to purchase materials without payment of tax or tax reimbursement in the name of petitioner.  
6 Petitioner submitted several documents which allegedly evidence the forged signature.

7 We find that the signatures on the allegedly forged documents appear to be very similar to the  
8 signatures on other documents signed by Mr. Place, such as his application for his seller’s permit and  
9 the Waiver of Limitations. Additionally, petitioner has not reported such alleged forgery to any law  
10 enforcement agencies, or creditors. Thus, we reject petitioner’s contention that it is the victim of  
11 forgery.

12 Since petitioner acquired materials from vendors under resale certificates, it owes use tax on its  
13 use of such materials.<sup>1</sup> The evidence is that petitioner consumed all such materials. Accordingly, it  
14 owes use tax on its purchase price of all such materials. We note that under very limited  
15 circumstances, a construction contractor acting as a subcontractor may obtain an offset against the  
16 taxes it owes for the taxes paid by the general contractor. (Cal. Code Regs., tit. 18, § 1700, subd.  
17 (b)(5)(B).) However, petitioner has the burden of proving that the prime contractor did in fact pay tax  
18 to the state. (Cal. Code Regs., tit. 18, § 1700, subd. (b)(4).) Not only has petitioner not done so, based  
19 on the facts as we understand them, it appears clear that the circumstances could not come within the  
20 offset provisions. Petitioner states that it performed the construction contracts for prime contractors  
21 who sold the new homes. Our experience is that it is highly unlikely that prime contractors who sell  
22 homes as part of real estate transactions would collect an amount as sales tax from the new home  
23 purchasers and remit such amounts to the Board. In any event, there is no evidence to support an  
24 offset, and we thus conclude no offset is warranted.

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27 <sup>1</sup> Since petitioner was not in the business of selling materials, it was not entitled to purchase them under resale certificates.  
28 However, for the dispute here, the only issue in this context is whether petitioner did purchase property under resale  
certificates, not whether it issued the resale certificates improperly. Since we find petitioner did make the purchases  
pursuant to resale certificates, it owes use tax on its use of such property.

1 Similarly, petitioner has not submitted any evidence, other than Mr. Place's statements, to  
2 support its second argument, that Comm360 acquired its operations and took over its business on  
3 April 1, 2004, and thus, Comm360 became liable for the tax at issue. The evidence shows that the  
4 business was operated by petitioner through the end of the liability period, and we therefore conclude  
5 that no adjustments are warranted for this argument.

6 **Issue 2:** Whether the penalty for failure to file returns for the period January 1, 2006, through  
7 June 30, 2006, should be relieved. We find relief is not warranted.

8 We explained to petitioner that it could request relief of the penalty and provided a form it  
9 could use to do so. Petitioner failed to respond. Thus, we have no basis to consider recommending  
10 relief of the penalty.

11 **OTHER DEVELOPMENTS**

12 None.

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14 Summary prepared by Rey Obligacion, Retired Annuitant  
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