

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 S & C MOTORS) Account Number: SR X BH 98-014652
 6) Case ID 468140
)
 6 Petitioner) City and County of San Francisco

7 Type of Business: Vehicle dealer

8 Audit period: 07/01/01 – 12/31/02

9 <u>Item</u>	<u>Disputed Amount</u>
10 Disallowed claimed exempt sales in interstate commerce	\$2,714,990
11 Relief of interest	Unstated
12 Tax determined and protested	\$214,572.66
13 Interest through 11/30/12	<u>186,238.29</u>
13 Total tax and interest	<u>\$400,810.95</u>
14 Monthly interest beginning 12/1/12	<u>\$1,072.86</u>

15 This matter was scheduled for Board hearing in July 2010, but was postponed because
 16 petitioner filed a settlement proposal. The settlement discussions have concluded without resolution.

17 **UNRESOLVED ISSUES**

18 **Issue 1:** Whether petitioner was the retailer for the sales at issue. We find that it was.

19 Petitioner was a new vehicle dealer until November 26, 2006. For some sales made by
 20 petitioner, another retailer, Sportsmobile West (Sportsmobile) converted new van chassis, either from
 21 petitioner's inventory or shipped directly from the manufacturer, into finished vans. Petitioner
 22 prepared the sales contracts, sales invoices, and Department of Motor Vehicles (DMV) Report of Sale
 23 (ROS) forms. The purchasers arranged to accept delivery of the conversion vans from Sportsmobile.
 24 For some of the transactions of this nature, petitioner reported the sales tax to the Board. However,
 25 petitioner and Sportsmobile regarded the 43 sales at issue as exempt sales in interstate commerce, and
 26 neither business reported sales tax.

27 The Sales and Use Tax Department (Department) conducted an audit of Sportsmobile for the
 28 period October 1, 1999, through December 31, 2002, and concluded there was insufficient evidence to

1 support an exemption in interstate commerce for the 43 sales in question. It further concluded that
2 Sportsmobile was the retailer for those sales, and it issued a Notice of Determination to Sportsmobile
3 assessing tax on the transactions. Sportsmobile filed a petition for redetermination, and we concluded
4 in a D&R dated July 11, 2007, that Sportsmobile was not the retailer. The Department thereafter
5 issued the Notice of Determination to petitioner at issue here.

6 Petitioner contends that it was not the retailer with respect to these 43 transactions, but it has
7 not specifically asserted that Sportsmobile was the retailer. Petitioner stated at the appeals conference
8 that the chassis used for the conversions were shipped directly from the manufacturer to Sportsmobile
9 after the chassis' price was negotiated with petitioner. Petitioner asserted that it never met with the
10 purchasers and that Sportsmobile set the retail price for the converted vans. According to petitioner, its
11 role was to order the van chassis from the manufacturer, process the ROS forms and forward them to
12 DMV, and remit the sales tax on the sales for which sales tax reimbursement was collected from the
13 purchasers (generally collected by Sportsmobile).

14 For the transactions at issue, the contract of sale was between petitioner and the end-user
15 purchasers. The other critical documents, such as the sales invoices and the ROS forms, also show
16 petitioner as the retailer. Further, for the identical type of transactions for which there was no claim of
17 exemption, it was petitioner who reported the sales as taxable, consistent with the contracts of sale.
18 We find that the evidence shows that petitioner was the retailer with respect to the 43 sales at issue.

19 **Issue 2:** Whether an adjustment is warranted to the amount of disallowed exempt sales in
20 interstate commerce. We recommend no adjustment.

21 During the audit of Sportsmobile for the period October 1, 1999, through December 31, 2002,
22 Sportsmobile provided documents for some of the 43 sales that purportedly supported a finding that
23 the sales were exempt. The Department reviewed the documents provided and concluded that they did
24 not support an exemption, for various reasons. For some transactions, the documents showed that the
25 vehicles were delivered to the purchasers in California. For others, the documentation was insufficient
26 to show delivery to the purchaser to an out-of-state location by the seller or by a common carrier.
27 Thus, the Department disallowed the exemption for the transactions at issue.

1 At the appeals conference, petitioner conceded that 14 of the 43 transactions were correctly
2 disallowed because of an absence of supporting documentation. With respect to 10 of the remaining
3 29 transactions, petitioner submitted additional documentation showing that the purchasers were out-
4 of-state residents or the vehicles were registered out-of-state, or both. Petitioner did not assert that the
5 evidence provided during the audit or the additional documentation was sufficient to establish out-of-
6 state delivery. Instead, petitioner claimed that the Department's basis for disallowing the exemption
7 for the 29 transactions was "vague" and asserted that, where reasonable doubt exists, the exemption
8 should be allowed.

9 The retailer bears the burden of proving that a retail sale is exempt from tax, and must provide
10 credible evidence to do so. The available documentation does not establish that the vehicles were
11 required to be shipped and were shipped by the retailer to the purchasers at locations outside this state.
12 Accordingly, we find petitioner has not provided sufficient documentation to show that any of the 29
13 disputed sales were exempt sales in interstate commerce. We conclude no adjustment is warranted.

14 **Issue 3:** Whether relief is warranted under Revenue and Taxation Code section 6596 because
15 petitioner's failure to remit the tax was due to its reasonable reliance on written advice from the Board.
16 We find such relief is not warranted.

17 Petitioner has requested relief under section 6596 on the grounds that its failure to report the tax
18 with respect to these sales was the result of its reasonable reliance on the Board's written advice in the
19 form of the audit history of Sportsmobile. Petitioner asserts that all prior audits accepted
20 Sportsmobile's handling of both in-state and out-of-state sales and notes that the Department, in its
21 audit of Sportsmobile for the period in question, regarded Sportsmobile as the retailer with respect to
22 the 43 sales at issue. Petitioner asserts that its decision to not report tax on the 43 sales at issue was the
23 result of its reliance on those audit findings.

24 The prior audit of petitioner covered the period October 1, 1990, through September 30, 1993.
25 Petitioner has explained that it began its business dealings with Sportsmobile in the mid-1990's. Thus,
26 the prior audit of *petitioner* could not have addressed the facts and issues presented in this appeal.
27 Relief is not available to petitioner based on prior audits of another person, Sportsmobile. (Cal. Code
28 Regs., tit. 18, § 1705, subd. (c).) We find that petitioner's failure to remit the tax due was not based on

1 its reasonable reliance on written advice it received from the Board in response to its written request
2 for such advice (which would include the presentation of *its* books and records for *its* audit). Thus, we
3 conclude that relief is not warranted under section 6596.

4 **Issue 4:** Whether relief of interest is warranted under section 6593.5. We find relief is not
5 warranted.

6 Petitioner has requested relief of interest for the period March 1, 2003, through June 30, 2007,
7 on the grounds that there was an unreasonable error or delay by a Board employee. Petitioner states
8 that this period begins the month after the Department first questioned the alleged exempt transactions
9 and ends the month before the D&R was issued in the Sportsmobile appeal.

10 Interest may be relieved under specific circumstances, including unreasonable error or delay by
11 a Board employee. As relevant here, an error or delay by a Board employee is deemed to have
12 occurred only if no significant aspect of the error or delay was attributable to an act of, or a failure to
13 act by, the taxpayer. Petitioner has not identified any specific delays during any of the stages of the
14 audit and appeals process in the Sportsmobile matter. Further, if there was any delay in resolving the
15 question of who the retailer was, it was attributable to Sportsmobile's delays in providing
16 documentation, not to actions by the Department or the Appeals Division. Accordingly, we find there
17 was no unreasonable delay or error by a Board employee, and no relief of interest is warranted.

18 **RESOLVED ISSUE**

19 Petitioner did not file an application for amnesty with respect to this liability, all of which was
20 incurred during the amnesty-eligible period. Accordingly, an amnesty interest penalty of \$24,187.65
21 will be applied when the liability becomes final. Petitioner has filed a request for relief of this penalty
22 pursuant to section 6592, on the grounds that, at the time amnesty was available, it believed, based on
23 the finding of the Department, that Sportsmobile (rather than petitioner) was liable for this tax.

24 We find there is no evidence that petitioner was informed prior to the expiration of the amnesty
25 period that it would be regarded as the retailer with respect to the sales at issue. Based on the facts in
26 this matter, we find that, prior to March 31, 2005, petitioner had a reasonable basis for believing it had
27 no tax liability with respect to these transactions, and for believing there was no cause to apply for
28 amnesty. Therefore, we recommend relief of the amnesty interest penalty provided that, within 30

1 days from the Notice of Redetermination, petitioner either pays in full the tax and interest due or enters
2 into a qualifying installment payment agreement to pay the full tax and interest due within 13 months,
3 and successfully completes that agreement.

4 **OTHER MATTERS**

5 None.

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