

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION BOARD HEARING SUMMARY

In the Matter of the Administrative Protest)
Under the Sales and Use Tax Law of:)
T & M STEEL SERVICES, INC.) Account Number SR EH 100-366668
Taxpayer) Case ID 530730
Rialto, San Bernardino County

Type of Business: Fabricator, installer, and retailer of structural steel
Audit period: 10/1/05 – 09/30/08

<u>Item</u>	<u>Disputed Amount</u>
Disallowed claimed nontaxable labor	\$844,733
Tax as determined and protested	\$ 62,894.47
Interest through 02/28/13	33,235.51
Finality penalty	<u>6,289.45</u>
Total tax, interest, and penalty	<u>\$102,419.43</u>
Monthly interest beginning 03/01/13	<u>\$ 314.47</u>

UNRESOLVED ISSUE

Issue: Whether adjustments are warranted to the amount of disallowed claimed nontaxable labor. We find no adjustment is warranted.

Taxpayer fabricates structural steel to its customers' specifications. Taxpayer sometimes installs the fabricated steel pursuant to lump sum construction contracts and sometimes makes retail sales of the steel fabricated to customers' specifications. Taxpayer provided records for audit that were adequate for sales and use tax purposes.

The Sales and Use Tax Department (Department) examined taxpayer's claimed nontaxable labor on an actual basis and noted that the majority of the claimed nontaxable labor charges represented the amount of lump sum construction contracts in excess of the cost of materials consumed in those contracts. The Department found those amounts to be properly claimed. However, the Department found that other claimed nontaxable labor charges related to contracts in which taxpayer fabricated steel for other contractors, who then installed the fabricated steel pursuant to contracts with their customers. In other words, for those transactions, taxpayer was not a party to the construction

1 contracts and did not install, or have responsibility for the installation of, the steel it fabricated. In
2 short, taxpayer's customers were contractors who had hired taxpayer only to fabricate the steel
3 pursuant to their customer's specifications. The Department concluded that taxpayer sold the
4 fabricated steel in those transactions, and, since its customers had not issued resale certificates to
5 taxpayer, the sales of steel were at retail and subject to tax. Accordingly, the Department found that
6 the labor charges associated with those sales represented taxable fabrication labor, and it computed the
7 amount of that labor at \$844,773 for the audit period.

8 In its administrative protest and at the appeals conference, taxpayer contended it was the
9 consumer of the raw materials used to fabricate the steel in the transactions at issue because the steel
10 was ultimately installed pursuant to lump sum construction contracts. However, after the Department
11 explained to taxpayer's attorney that the steel was actually installed by taxpayer's customers, the
12 attorney did not pursue that argument. He asked, however, whether the transactions might have been
13 nontaxable sales for resale of the steel. The Department responded that the sales could be nontaxable
14 sales for resale under certain circumstances, but noted that taxpayer's customers had not provided
15 resale certificates and that taxpayer had not provided evidence that its customers resold the steel
16 purchased from taxpayer.

17 There is no dispute that, with respect to the transactions at issue, taxpayer did not install the
18 steel it fabricated and furnished to its customers, who installed the steel pursuant to lump sum
19 construction contracts, and that taxpayer was not contractually obligated to perform those installations.
20 Also, it is undisputed that taxpayer delivered the steel to its customer via common carrier, and title to
21 the steel transferred when taxpayer delivered the steel to the common carrier. Accordingly, we find
22 taxpayer was not a construction contractor with respect to the disputed transactions, but was instead a
23 retailer of the steel. Since there is neither argument nor evidence that any other exception or
24 exemption from tax applies, we find taxpayer owes sales tax measured by the selling price in the
25 disputed transactions, which includes both the cost of materials and the labor to fabricate the steel to
26 customers' specifications. Thus, we find no adjustment is warranted to the disallowed claimed
27 nontaxable labor.

OTHER MATTERS

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2 Since taxpayer did not timely pay the Notice of Determination or file a petition for
3 redetermination, a finality penalty was added. In its administrative protest, taxpayer acknowledges that
4 it received the Notice of Determination but asserts that the Department failed to send a copy to
5 taxpayer's attorney of record even though its attorney had previously provided the Department with a
6 signed power of attorney and had received other notices from the Board in the past. Taxpayer asserts
7 that it did not realize there was a deadline for responding to the Notice of Determination, and, in any
8 event, it believed its attorney would handle whatever needed to be done.

9 At the appeals conference, we explained to taxpayer that it could request relief of the finality
10 penalty by providing a statement, signed under penalty of perjury, explaining the reason for its failure
11 to pay the determination when it became due or to file a timely petition for redetermination. We also
12 provided a form taxpayer could use to request relief, but taxpayer has not returned the form or
13 otherwise provided the requisite statement under penalty of perjury. Accordingly, we have no basis
14 upon which to consider recommending relief of the finality penalty.

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