

**CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION BOARD HEARING SUMMARY**

In the Matter of the Petition for Redetermination)
 Under the Sales and Use Tax Law of:)
 TRIMARK RAYGAL, INC.) Account Number: SR EAA 24-644507
) Case ID 257881
 Petitioner)
 _____) Irvine, Orange County

Type of Business: Construction contractor

Audit period: 04/1/00 – 03/31/03

<u>Item</u>	<u>Disputed Amount</u>
Measure of excess tax reimbursement	\$1,340,123
Amnesty interest penalty	\$ 15,395
Tax as determined and proposed to be redetermined	\$110,320.72
Less concurred	- 3,433.00
Balance, protested	<u>\$106,887.72</u>
Proposed tax redetermination	\$110,320.72
Interest through 03/31/12	46,549.78 ¹
Amnesty interest penalty	<u>15,395.49</u>
Total tax, interest, and penalty	\$172,265.99
Payments	- 4,229.97
Balance Due	<u>\$168,036.02</u>
Monthly interest beginning 04/01/12	<u>\$ 623.47</u>

This matter was scheduled for Board hearing on October 27, 2011, but was postponed because the afternoon session of the Board meeting was cancelled. The matter was rescheduled for hearing on December 15, 2011, but was postponed at petitioner’s request for medical reasons.

UNRESOLVED ISSUES

Issue 1: Whether petitioner has collected excess tax reimbursement that it must either refund to its customers or pay to the state. We find that it has.

Petitioner is a construction contractor. During the audit period, petitioner entered into prime contracts with its customers and sometimes entered into subcontracts with other construction

¹ This amount *excludes* interest of \$48,719.81 for which we recommend relief.

1 contractors to furnish and install fixtures. When it furnished and installed fixtures and equipment,
2 petitioner computed sales tax reimbursement on the retail selling price. When a subcontractor
3 furnished and installed fixtures and equipment, the subcontractor made the retail sale to petitioner, and
4 it collected sales tax reimbursement from petitioner and reported the sales tax to the Board.
5 Petitioner's contracts separately stated amounts for: (1) fixtures, equipment, and other tangible
6 personal property (including a markup when such property was installed by subcontractors);
7 (2) delivery, installation, freight, and warranties; and (3) sales tax computed on the charges for
8 fixtures, equipment, and other tangible personal property. Subsequently, petitioner issued sales
9 invoices to its customers for the total contract prices provided in the respective prime contracts (plus or
10 minus change orders). On each invoice, petitioner separately itemized amounts related to tax as:
11 (1) "sales tax," "city tax," or "transit tax," representing sales tax reimbursement on *petitioner's* retail
12 sales of fixtures and equipment; and (2) "tax paid purchases," which represented sales tax
13 reimbursement on the *marked up* charges petitioner made for tangible personal property for which its
14 subcontractors were the true retailers, the total of which equaled the amount of sales tax reflected in the
15 contracts. However, the amount of tax petitioner reported to the Board equaled only the amounts
16 shown as "sales tax," "city tax," and "transit tax" on its invoices, which was less than the amount
17 separately itemized as tax reimbursement on petitioner's contracts.

18 The Sales and Use Tax Department (Department) concluded that the "tax paid purchases"
19 reflected on petitioner's invoices represented excess tax reimbursement collected from its customers.
20 Since petitioner did not refund such amounts to its customers, the Department found that the excess tax
21 reimbursement, less an offset for the sales tax reimbursement petitioner paid to the subcontractors on
22 its purchases of the same property, must be paid to the Board. Petitioner contends that its invoices
23 reflect the correct amount of sales tax reimbursement it collected from customers.²

26 ² Petitioner has implied that it should be relieved of liability because it relied on previous audit advice, but it has not filed a
27 statement under penalty of perjury setting for the factual basis for the apparent claim. (See Rev. & Tax. Code, § 6596,
28 subd. (c)(2).) In any event, petitioner is not eligible for relief since it *collected* tax reimbursement rather than having failed
to collect tax reimbursement from its purchasers in reasonable reliance on advice from the Department.

1 It is undisputed that the prime contracts were construction contracts providing, among other
2 things, for the furnishing and installation of items defined as fixtures. (Cal. Code Regs., tit. 18, § 1521
3 subd. (a)(5).) It is also undisputed that petitioner’s prime contracts specified amounts as “sales tax”
4 measured by the sum of the amounts petitioner charged for: sales of tangible personal property; and
5 fixtures furnished and installed by subcontractors (which included the amount petitioner paid the
6 subcontractors plus a markup). Further, it is undisputed that, in its invoices, petitioner segregated the
7 “sales tax” shown on the contracts into two portions: (1) “sales tax” which petitioner reported on its
8 sales and use tax returns, and (2) “tax paid purchases” which petitioner did not report on its sales and
9 use tax returns and which was equal to the applicable tax rate applied to petitioner’s marked up charges
10 for the fixtures furnished and installed by subcontractors. Nor is there any dispute that petitioner, as
11 the retailer of the fixtures and equipment it furnished and installed, was liable for the amounts shown
12 as “sales tax” on its invoices, and the subcontractors, as the retailers of the fixtures and equipment they
13 furnished and installed, were liable for the sales tax on their sales to petitioner.

14 We conclude that petitioner’s prime contracts set forth the terms of those contracts, and they
15 explicitly itemized the prices charged under those contracts, *including* the specific amounts charged for
16 sales tax reimbursement. Each prime contract includes a clause providing that the agreement
17 constitutes the parties’ entire agreement, which cannot be amended or supplemented except in a
18 writing signed by each party. There is nothing in the record to suggest that any of the purchasers
19 agreed in writing to modify the prime contract to decrease the amount of sales tax reimbursement and
20 increase another charge by the same amount, which is what petitioner effectively asserts it did. We
21 thus find that the amounts of tax reimbursement specified in petitioner’s prime contracts (plus or minus
22 any effective change orders) and collected from its customers represent excess tax reimbursement
23 which has not been refunded to petitioner’s customers and must therefore be pay to the Board, less the
24 offset for the sales tax reimbursement petitioner paid to the subcontractors on the same transactions.
25 Accordingly, we conclude no adjustment is warranted.

26 **Issue 2:** Whether relief of the amnesty interest penalty is warranted. We find the relief is not
27 warranted.

1 Petitioner filed an application for amnesty and entered into a qualifying installment payment
2 plan, which it has completed, with respect to the concurred tax of \$3,367.00. The liability in dispute
3 here was not covered by petitioner's amnesty application, nor did petitioner file a separate amnesty
4 application for the disputed liability. Therefore, an amnesty interest penalty of \$15,395.49 will be
5 imposed when the liability becomes final.

6 In response to our post-SD&R letter, petitioner's representative has submitted a request for
7 relief of the amnesty interest penalty on petitioner's behalf on the grounds that the circumstances
8 underlying the complexity of the amnesty program were beyond petitioner's control, and that it
9 expected a favorable result in its appeal. Petitioner also asserts that it anticipated refunding the excess
10 tax reimbursement if the decision were not in its favor, but states that it is unlikely it will be able to
11 make such refunds at this point because of the delays in resolving the case.

12 Petitioner was obviously aware of the amnesty program, and since the determination was issued
13 to it in 2004, petitioner was aware of the amount of the understatement long before the end of the
14 amnesty period (March 31, 2005). Thus, petitioner could have filed for amnesty with respect to the
15 entire understatement, but it chose not to do so. Petitioner's hope to have prevailed in its appeal does
16 not represent reasonable cause for failing to apply for amnesty with respect to the disputed liability
17 since the amnesty program was adopted to encourage payment of such amounts. We find relief of the
18 amnesty interest penalty is not warranted.

19 **RESOLVED ISSUE**

20 We recommend relief of the interest applicable to the disputed tax for the period November 1,
21 2005, through September 2, 2010, which the Department has computed as \$48,719.81, based on an
22 unreasonable delay by employees of the Board in processing this appeal.

23 **OTHER MATTERS**

24 None.

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