

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
Petitioner) Case ID 257881
Irvine, Orange County

Type of Business: Construction contractor

Audit period: 04/1/100 – 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 10/31/11	44,400.57 ¹
Amnesty interest penalty	<u>15,395.49</u>
Total tax, interest, and penalty	\$170,116.78
Payments	- 4,229.97
Balance Due	<u>\$165,886.81</u>
Monthly interest beginning 11/1/11	<u>\$ 534.40</u>

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 who furnishes and installs restaurant fixtures and equipment. During the audit period, petitioner entered into contracts with its customers (prime contracts) and sometimes entered into contracts with other construction contractors (subcontracts) to furnish and install fixtures. When it furnished and installed fixtures and equipment, petitioner computed sales tax reimbursement on the retail selling price. When a subcontractor furnished and

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

1 installed fixtures and equipment, the subcontract made the retail to petitioner, and it collected sales tax
2 reimbursement from petitioner and reported the sales tax to the Board. With respect to fixtures and
3 equipment installed by subcontractors, petitioner billed its customers an amount that included both the
4 amount it paid to the subcontractor and a markup. In its contracts, petitioner separately stated amounts
5 for: (1) fixtures, equipment, and other tangible personal property, whether installed by subcontractors
6 or not; (2) delivery, installation, freight, and warranties; and (3) amounts as sales tax computed on the
7 charges for fixtures, equipment, and other tangible personal property. Subsequently, when petitioner
8 completed its prime contracts, it issued sales invoices to its customers for the total contract prices
9 provided in the respective prime contracts (plus or minus change orders). On the invoice, petitioner
10 separately itemized amounts related to tax as: (1) “sales tax,” “city tax,” or “transit tax,” representing
11 sales tax reimbursement on *petitioner’s* retail sales of fixtures and equipment; and (2) “tax paid
12 purchases,” which represented sales tax reimbursement on the *marked up* charges petitioner made for
13 tangible personal property for which its subcontractors were the true retailers. The total of these
14 amounts equaled the amount of sales tax reflected in the contracts. However, the amount of tax
15 petitioner reported to the Board equaled only the amounts shown as “sales tax,” “city tax,” and “transit
16 tax” on its invoices, which was less than the amount separately itemized as tax reimbursement on
17 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 it had collected from its
20 customers, and that such amounts must either be refunded to the customers or paid to the Board, less
21 an offset for the sales tax reimbursement petitioner paid to the subcontractors on its purchases of the
22 same property. Since petitioner did not refund such amounts to its customers, the Department found
23 that the excess tax reimbursement less the offset must be paid to the Board. Petitioner contends that its
24 invoices reflect the correct amount of sales tax reimbursement it collected from customers.²

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27 ² Petitioner has implied that it should be relieved of liability because it relied on previous audit advice, but it has not filed a
28 statement under penalty of perjury setting for the factual basis for the apparent claim. (See Rev. & Tax. Code, § 6596,
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 are 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 specify amounts of "sales tax"
4 measured by the sum of the amounts petitioner charged for: (1) sales of tangible personal property; and
5 (2) 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 installed, was liable for the amounts shown as
12 "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 When an amount represented by a person to a customer as sales tax reimbursement is computed
15 upon an amount that is not taxable or is in excess of the taxable amount and is actually paid by the
16 customer, the amount so paid is excess tax reimbursement. A person who collects excess tax
17 reimbursement must either refund that excess tax reimbursement to the customers from whom it was
18 collected, or pay it to the Board. (Rev. & Tax. Code, § 6901.5, Cal. Code Regs., tit. 18, § 1700, subd.
19 (b).) Where a person who collects excess tax reimbursement also has a tax liability on the same
20 transaction based on the transfer of possession of tangible personal property, the excess tax
21 reimbursement is offset against that tax liability and the person is required to refund any tax
22 reimbursement after the offset or remit that amount to the Board. (Cal. Code Regs., tit. 18, § 1700,
23 subd. (b)(4).)

24 In the D&R, we concluded that the amount of sales tax itemized on the invoices, rather than the
25 amounts itemized on the contracts, were the amounts represented to petitioner's customers as sales tax
26 reimbursement. In the SD&R, we conclude that petitioner's prime contracts set forth the terms of
27 those contracts, and they explicitly itemized the prices charged under those contracts, *including* the
28 specific amounts charged for sales tax reimbursement. Each prime contract includes a clause

1 providing that the agreement constitutes the parties' entire agreement, which cannot be amended or
2 supplemented except in a writing signed by each party. There is nothing in the record to suggest that
3 any of the purchasers agreed in writing to modify the prime contract to decrease the amount of sales
4 tax reimbursement and increase another charge by the same amount, which is what petitioner
5 effectively asserts it did.. Accordingly, we find that the amounts of tax reimbursement specified in
6 petitioner's prime contracts (plus or minus any effective change orders) represent the tax
7 reimbursement petitioner collected from its customers. Since those amounts exceeded the amount of
8 sales tax for which petitioner was liable with respect to its retail sales of fixtures and equipment, we
9 find that petitioner collected excess sales tax reimbursement. Since petitioner has not refunded any
10 amounts of excess tax reimbursement to its customers, we find that it must pay to the Board the
11 amounts of such excess tax reimbursement collected, less the offset for the sales tax reimbursement it
12 paid to the subcontractors on the same transactions. We therefore conclude no adjustment is
13 warranted.

14 **Issue 2:** Whether relief of the amnesty interest penalty is warranted. We find no basis for
15 relief.

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

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

27 Petitioner was obviously aware of the amnesty program, and since the determination was issued
28 to it in 2004, petitioner was aware of the amount of the understatement long before the end of the

1 amnesty period (March 31, 2005). Thus, petitioner could have filed for amnesty with respect to the
2 entire understatement, but it chose not to do so. Petitioner's hope to have prevailed in its appeal does
3 not represent reasonable cause for failing to apply for amnesty with respect to the disputed liability
4 since the amnesty program was adopted to encourage payment of such amounts. We find relief of the
5 amnesty interest penalty is not warranted.

6 **RESOLVED ISSUE**

7 In the SD&R, we found that there was an unreasonable delay by employees of the Board in the
8 processing of this matter, from November 1, 2005, through September 2, 2010. On that basis, we
9 recommend relief of the interest applicable to the disputed tax for that period, which the Department
10 has computed as \$48,719.81.

11 **OTHER DEVELOPMENTS**

12 None.

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