

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: 04/1/00 – 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	<u>- 3,433.00</u>
Balance, protested	<u>\$106,887.72</u>
Proposed tax redetermination	\$110,320.72
Interest through 12/31/11	45,469.37 ¹
Amnesty interest penalty	<u>15,395.49</u>
Total tax, interest, and penalty	\$171,185.58
Payments	<u>- 4,229.97</u>
Balance Due	<u>\$166,955.61</u>
Monthly interest beginning 1/1/12	<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.

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 contractors to furnish and install fixtures. When it furnished and installed fixtures and equipment,

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

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

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

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

12 When an amount represented as sales tax reimbursement is computed upon an amount that is
13 not taxable or is in excess of the taxable amount and is actually paid by the customer, the amount so
14 paid is excess tax reimbursement. A person who collects excess tax reimbursement must either refund
15 that excess tax reimbursement to the customers from whom it was collected, or pay it to the Board.
16 (Rev. & Tax. Code, § 6901.5, Cal. Code Regs., tit. 18, § 1700, subd. (b).) Where a person who
17 collects excess tax reimbursement also has a tax liability on the same transaction based on the transfer
18 of possession of tangible personal property, the excess tax reimbursement is offset against that tax
19 liability, and the person is required to refund any tax reimbursement after the offset or remit that
20 amount to the Board. (Cal. Code Regs., tit. 18, § 1700, subd. (b)(4).)

21 We conclude that petitioner’s prime contracts set forth the terms of those contracts, and they
22 explicitly itemized the prices charged under those contracts, *including* the specific amounts charged for
23 sales tax reimbursement.³ Each prime contract includes a clause providing that the agreement
24 constitutes the parties’ entire agreement, which cannot be amended or supplemented except in a
25 writing signed by each party. There is nothing in the record to suggest that any of the purchasers
26 agreed in writing to modify the prime contract to decrease the amount of sales tax reimbursement and
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28 ³ We note that our conclusion in the D&R is reversed in the SD&R.

1 increase another charge by the same amount, which is what petitioner effectively asserts it did.
2 Accordingly, we find that the amounts of tax reimbursement specified in petitioner's prime contracts
3 (plus or minus any effective change orders) represent the tax reimbursement petitioner collected from
4 its customers. Accordingly, we find that petitioner collected excess sales tax reimbursement, which it
5 has not refunded to its customers, and it must pay to the Board the amounts of such excess tax
6 reimbursement collected, less the offset for the sales tax reimbursement it paid to the subcontractors on
7 the same transactions. We therefore conclude no adjustment is warranted.

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

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

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

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

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RESOLVED ISSUE

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

OTHER DEVELOPMENTS

None.

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