

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION BOARD HEARING SUMMARY

3 In the Matter of the Petition for)
 4 Redetermination Under the Cigarette and)
 Tobacco Products Tax Law of:)
 5 ERIC ANTHONY GUIDICE, dba) Account Number: CP ET 50-002657
 6 Big Easy Studio City) Case ID 380212
 7 Petitioner) Studio City, Los Angeles County

8 Type of Business: Cigar shop

9 Audit period: 06/01/00 – 11/30/05

10 <u>Item</u>	<u>Disputed Amount</u>
11 Understated distribution of tobacco products	\$218,574
12 Failure-to-file penalty	\$ 8,030
13 Tax determined and protested	\$113,308.49
14 Interest through 02/25/12	95,771.33
15 Failure-to-file penalty	<u>8,030.29</u>
16 Total tax, interest, and penalty	\$217,110.11
17 Payments	<u>- 0.10</u>
18 Balance Due	<u>\$217,110.01</u>
19 Monthly interest beginning 02/26/12	<u>\$ 660.97</u>

20 This matter was scheduled for Board hearing in October 2011, but was postponed at
 21 petitioner's request to allow additional time to submit an opening brief.

22 UNRESOLVED ISSUES

23 **Issue 1:** Whether petitioner is liable for the tax on his purchases and subsequent distribution of
 24 untaxed tobacco products. We conclude petitioner is liable for the tax.

25 Petitioner has operated a cigar shop since May 12, 2000, but did not file tobacco products
 26 distributor's reports or tax returns for the period through September 11, 2002. He obtained a license to
 27 distribute tobacco products on September 12, 2002, and the determination does not include liability for
 28 the period September 12, 2002, through December 31, 2002, because that period was barred by the
 applicable statute of limitations when the Notice of Determination was issued. For audit, petitioner
 provided complete, organized records to the Excise Taxes Division of the Property and Special Taxes
 Department (Department). The Department found that petitioner received untaxed tobacco products

1 from various unlicensed out-of-state vendors and then distributed those tobacco products. In sum, the
2 Department assessed tax for the period June 30, 2000, through September 11, 2002, because petitioner
3 had paid no tax for that period, and assessed tax on the audited understatement for the period
4 January 1, 2003, through November 30, 2005.

5 Petitioner contends he is not liable for the determined tax because: (1) some of the vendors
6 should be characterized as distributors, making sales of tobacco products to consumers; (2) every
7 distributor owes tax on his distribution of tobacco products, regardless of where title transfers or where
8 the sale takes place; and (3) the vendors characterized as distributors were responsible for collecting
9 the tax on the distribution of tobacco products.

10 The Cigarette and Tobacco Products Tax Law imposes a tax upon every distribution of tobacco
11 products by a distributor, based on the wholesale cost of the tobacco products. (Rev. & Tax. Code, §
12 30123, subd. (b).) The term “distribution” includes the sale of untaxed tobacco products in this state
13 and the use or consumption of untaxed tobacco products in this state. (Rev. & Tax. Code, § 30008.)
14 The term “distributor” includes every person who distributes tobacco products, or who sells or accepts
15 orders for tobacco products which are to be transported from a point outside this state to a consumer
16 within this state. (Rev. & Tax. Code, § 30011, subds. (b) and (c).)

17 Petitioner apparently asserts that for the period prior to his obtaining a distributor’s license, he
18 should be treated as a consumer and that his out-of-state suppliers should be held liable for the tax.
19 Even for the period after he obtained his distributor’s license, petitioner asserts that his out-of-state
20 suppliers are liable for the tax due because they made the first distribution of tobacco products when
21 they sold those products to petitioner.

22 We reject petitioner’s arguments. Petitioner purchased products for his business, not for his
23 consumption, as reflected by the fact that all of his purchase invoices indicate that the purchases were
24 made for petitioner’s business and not for his personal use. His vendors were not the distributors of
25 the subject products under Revenue and Taxation Code section 30011, subdivision (c), because they
26 were not making sales to a consumer. With respect to the very small percentage of his purchases that
27 he might have self consumed, had petitioner established that he advised the supplier that he was
28 purchasing some specific products for his own consumption as an individual and not as a retailer of

1 tobacco products, our conclusion might be different as to that small portion of established purchases
2 for consumption, but he has not done so. With respect to the period after he obtained his distributor's
3 license, we reject petitioner's contention that every distributor owes tax on his distribution of tobacco
4 products, regardless of where title transfers or where the sale takes place. Rather, the law imposes tax
5 on the distribution *in California*. Here, the vendors completed the physical delivery of the tobacco
6 products when delivering them to common carriers outside California for shipment to petitioner in
7 California. Thus, the vendors did not make distribution of tobacco products in this state as defined in
8 section 30008, subdivision (a). Therefore, we conclude that petitioner owes that tax assessed.

9 **Issue 2:** Whether relief of the failure-to-file penalty is warranted. We find no basis for relief.

10 Petitioner has requested relief of the failure-to-file penalty stating that there was confusion as to
11 who was responsible for collecting and reporting the tax on the distribution of tobacco products, he
12 tried to comply with the reporting requirements, he fully cooperated with the auditor during the audit
13 process, and any errors made during the audit period are the result of misunderstanding rather than
14 negligence. Petitioner has not identified any reasonable cause or circumstances beyond his control that
15 resulted in his failure to file returns. Accordingly, we find no basis to recommend relief of the failure-
16 to-file penalty.

17 **OTHER DEVELOPMENTS**

18 None.

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