

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION SUMMARY FOR BOARD HEARING

3 In the Matter of the Application for Administrative)
 4 Hearing on a Jeopardy Determination and Petition)
 5 for Redetermination Under the Cigarette and)
 6 Tobacco Products Tax Law of:)

7 MARK S. HARRIS,)
 8 dba The Hut)

Account Number: CP ET 50-004097
 Case ID's 382766, 382767

9 Applicant)

Oakland, Alameda County

10 Type of Business: Distributor of tobacco products

11 Audit Periods: 10/01/02 – 12/31/03 (Case ID 382766)
 12 01/01/04 – 04/30/06 (Case ID 382767)

13 Item13 Disputed Amount

	<u>382766</u>	<u>382767</u>
14 Unreported purchases of tobacco products	\$7,547	\$27,447
15 Failure-to-file penalty		\$ 1,192
16 Failure-to-secure license penalty		\$ 3,209
17 Finality penalty		\$ 1,283

	<u>382766</u>		<u>382767</u>		<u>Total</u>	
	<u>Tax</u>	<u>Penalty</u>	<u>Tax</u>	<u>Penalties</u>	<u>Tax</u>	<u>Penalties</u>
18 As determined, protested	\$3,624.76	\$362.49	\$12,834.25	\$4,492.03	\$16,459.01	\$4,854.52
19 Adjustment: Appeals Division		-362.49		-91.66		-454.15
20 Proposed redetermination	<u>\$3,624.76</u>	<u>\$0.00</u>	<u>\$12,834.25</u>	<u>\$4,400.37</u>	<u>\$16,459.01</u>	<u>\$4,400.37</u>
21 Proposed tax redetermination	\$3,624.76		\$12,834.25		\$16,459.01	
22 Interest to 11/25/10	2,347.09		6,114.01		8,461.10	
23 Penalty for failure to file a return			1,191.84		1,191.84	
24 Penalty for failure to secure license			3,208.53		3,208.53	
25 Finality penalty			<u>1,283.43</u>		<u>1,283.43</u>	
26 Total tax, interest, and penalties	\$5,971.85		\$24,632.06		\$30,603.91	
27 Payment			<u>-1,000.00</u>		<u>-1,000.00</u>	
28 Balance due	<u>\$5,971.85</u>		<u>\$23,632.06</u>		<u>\$29,603.91</u>	
29 Monthly interest beginning 11/26/10	<u>\$21.14</u>		<u>\$69.03</u>		<u>\$90.17</u>	

30 This matter was scheduled for Board hearing on August 25, 2010, but applicant did not
 31 respond to the Notice of Hearing. Accordingly, the Board Proceedings Division informed petitioner
 32 that this matter will be presented to the Board for decision without oral hearing. Subsequently,
 33 applicant requested a Board hearing.

UNRESOLVED ISSUES

1
2 **Issue 1:** Whether relief of the tax, interest, and penalties is warranted because applicant's
3 failure to report the tobacco products distribution taxes was the result of his reliance on allegedly
4 erroneous oral advice from the Board. We conclude that relief is not warranted.

5 Applicant was a retailer and distributor of tobacco products during the period October 1, 2002,
6 to April 30, 2006. For that entire period, he held seller's permit SR CH 97-538108, which was in
7 effect from May 7, 1999, through March 31, 2007. During the periods in issue, applicant did not hold
8 a tobacco products distributor's license and did not report or pay any tobacco products distribution
9 taxes.

10 The Excise Taxes Division of the Property and Special Taxes Department (Department)
11 obtained information from the United Parcel Service that applicant received numerous shipments from
12 the House of Oxford, an out-of-state vendor of tobacco products, from October 1, 2002, through
13 April 30, 2006.¹ In addition, the Department obtained invoice summary registers maintained by the
14 House of Oxford from the New York Department of Taxation. The invoice summary registers include
15 the wholesale costs of the tobacco products sold by the House of Oxford to applicant during the
16 periods in issue. Based on these records, the Department estimated that applicant distributed untaxed
17 tobacco products totaling \$7,547 for the period October 1, 2002, through December 31, 2003, and
18 \$27,447 for the period January 1, 2004, through April 30, 2006.

19 The Department issued applicant a cigarette and tobacco products distributor's account number
20 (CP ET 50-004097) with an effective start date of October 1, 2002, and an effective close-out date of
21 April 30, 2006, for the purpose of issuing a Jeopardy Notice of Determination (JNOD) and a Notice of
22 Determination (NOD) to applicant. On October 31, 2006, the Department issued a JNOD to applicant
23 for the period January 1, 2004, through April 30, 2006, for tax of \$12,834.25, plus applicable interest,
24 a 10-percent failure-to-file penalty of \$1,283.50, and a 25-percent penalty of \$3,208.53 for failing to
25 secure a cigarette and tobacco products distributor's license. Applicant filed an appeal on November
26

27
28 ¹ The House of Oxford, a New York-based tobacco products vendor, does not sell California tax-paid tobacco products. The company's website (<http://www.houseofoxford.com/terms.pdf>) indicates that "customers are responsible for all local and state tobacco and sales taxes."

1 20, 2006, which was rejected by the Department as a petition for redetermination because it was not
2 filed within 10 days of the notice date. Instead, the Department treated the appeal as a request for
3 administrative hearing. Since the JNOD was final, a 10 percent penalty for failure to timely pay or
4 petition the determination was automatically imposed. On November 9, 2006, the Department issued a
5 NOD to applicant for the period October 1, 2002, through December 31, 2003, for \$3,624.76 tax, plus
6 applicable interest, and a 10-percent failure-to-file penalty of \$362.49. Applicant filed a timely
7 petition for redetermination on November 20, 2006.

8 Applicant does not dispute the tax liability established by the Department, but argues that he
9 should be relieved of the tax, interest, and penalties because he reasonably relied on erroneous advice
10 provided by the Board. Applicant alleges that, on or about March 1, 2002, he informed a Board
11 employee at the Board's district office in Oakland that he would be purchasing tobacco products for
12 resale from the House of Oxford located in Astoria, New York. Applicant asserts that the Board
13 employee responded that applicant could sell the tobacco products in California so long as he reported
14 sales tax for these sales, but that applicant was *not* informed that he was required to report or pay any
15 tobacco products distribution taxes for the sales. As evidence that the Department was aware he was
16 making purchases from House of Oxford, applicant provided a printout from the Board's computerized
17 records that he obtained on November 30, 2006, which reflects that applicant's supplier of cigars is
18 "House of Oxford Cigars," information applicant asserts he provided to the Board in 2002.

19 The Board may relieve a taxpayer of the tax and interest due under certain circumstances where
20 the taxpayer failed to pay the tax due in reasonable reliance on written advice from the Board in
21 response to a written request for advice by the taxpayer that disclosing all relevant information. (Rev.
22 & Tax. Code, § 30284; Cal. Code Regs., tit. 18, § 4098.) Applicant alleges only that he received oral
23 advice, and does not even allege that such advice was erroneous. Petitioner does not allege he was
24 advised he did not have to pay any tobacco products distribution taxes, nor that he received any advice
25 in writing. There is no authority that provides for relief from taxes based on erroneous *oral* advice
26 given by the Board to individual taxpayers, or the failure to give advice (orally or in writing).

27 The printout applicant obtained is not written advice for these purposes because the entry in the
28 Board's computerized records was made only for the Board's internal use. Further, even if the printout

1 could somehow be regarded as written advice, it was neither provided in response to a written request
2 for advice including all relevant facts, nor could applicant's failure here have resulted from his
3 reasonable reliance on the printout given to him after he had failed to pay the tax when due. Finally,
4 applicant is not entitled to relief under section 30284 just because the Board failed to advise applicant
5 of the requirements of law. The Board has no affirmative duty to inform applicant of its reporting
6 requirements, even when informed of its choice to purchase tobacco products from an unlicensed out-
7 of-state vendor. Applicant, not the Board, is familiar with its business and it is incumbent on applicant
8 to determine, with reasonable inquiry, whether to purchase its tobacco products tax-paid from suppliers
9 licensed in California or from suppliers such as the House of Oxford, who do not sell California excise
10 tax-paid tobacco products. As a result, we find no basis for relief under section 30284.

11 **Issue 2:** Whether relief of the failure-to-file penalties assessed in the JNOD and NOD is
12 warranted. We recommend relief of the penalties assessed for the period October 1, 2002, through
13 June 30, 2005, but not for the period July 1, 2005, through April 30, 2006.

14 The Department imposed a 10 percent penalty for failure to file returns because applicant did
15 not report or pay taxes on his distribution of the tobacco products purchased from the House of Oxford.
16 Applicant submitted a request for relief of the penalty, signed under penalty of perjury pursuant to
17 Revenue and Taxation Code section 30282, asserting that he was not informed by the Board that he
18 was required to report or pay taxes on his distribution of tobacco products, even though he had
19 informed a Board employee that he was purchasing such items from the House of Oxford. He asserts
20 that, as a result, he was not aware he was required to report or pay taxes on his distributions of the
21 tobacco products.

22 Since applicant had a seller's permit, he would have received Tax Information Bulletins
23 (TIB's) that provided information about tax reporting responsibilities for all taxpayers. We have
24 reviewed the TIB's issued during the periods in issue, and we found an article in the September 2005
25 issue that clearly states that, if a retailer purchases cigarettes or tobacco products from a vendor located
26 outside of California that does not collect California excise tax, the retailer owes the excise tax. Since
27 we did not find similar articles in earlier issues of the TIB, we conclude applicant had credible
28 argument that, through September 30, 2005, he was not aware excise taxes were due upon his

1 distributions of tobacco products in California. However, for the periods beginning September 2005,
2 applicant should have been aware of his obligation to report and pay distribution taxes. Accordingly,
3 we find relief of the penalty is warranted for the period October 1, 2002, through June 30, 2005. Since
4 applicant was informed by way of the TIB article of his duty to report tax on his distribution of tobacco
5 products prior to the date his tobacco tax return should have been filed for the third quarter 2005, we
6 recommend no relief of the penalty for periods on and after July 1, 2005.

7 **Issue 3:** Whether the penalty for failure to obtain a distributor's license assessed for the period
8 January 1, 2004, to April 30, 2006, should be waived. We find the penalty should not be waived.

9 Since applicant did not apply for a distributor's license, the Department assessed a 25-percent
10 penalty in accordance with section 30211, which the Board can waive upon the taxpayer's showing
11 that the failure to secure a license was due to reasonable cause. Applicant provided a written
12 declaration making the same argument as addressed under Issue 2.

13 Every person desiring to engage in the sale of cigarettes or tobacco products as a distributor
14 must file an application for a distributor's license. (Rev. and Tax. Code § 30140.) Assembly Bill
15 (AB) 71, which went into effect on January 1, 2004, established a deadline of June 30, 2004, for all
16 distributors selling cigarettes or tobacco products in California to obtain a distributor's license.
17 Articles informing permit holders such as applicant of the requirement to obtain a distributor's license
18 by the June 30, 2004 deadline were included in the December 2003 and June 2004 TIB's. Thus, we
19 conclude applicant should have been aware of the requirement and that the penalty should not be
20 waived.

21 **Issue 4:** Whether relief of the finality penalty assessed for the period January 1, 2004, through
22 April 30, 2006, is warranted. We find relief is not warranted.

23 Applicant filed a request for relief of the finality penalty pursuant to section 30282 stating that
24 he informed a Board employee on or about March 1, 2002, that he would be purchasing tobacco
25 products from the House of Oxford, located in New York, and that the Board employee said it "would
26 be alright." However, applicant's declaration does not explain why he did not pay the JNOD before it
27 became final. Since applicant has provided no explanation, reasonable or otherwise, for his failure to
28 pay the JNOD before it became final, we find no basis for relief.

OTHER DEVELOPMENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

None.

Summary prepared by Rey Obligacion, Retired Annuitant