

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION SUMMARY FOR BOARD HEARING

In the Matter of the Petitions for Redetermination)	
And Administrative Protest under the)	
Cigarette and Tobacco Products Tax Law of:)	Account Number: CP ET 50-002981
	Case ID 331258
NGHIA NGOC NGUYEN, dba)	Account Number: CP ET 50-003100
N T Company)	Case ID's 333770, 351779
Petitioner/Taxpayer)	San Jose, Santa Clara County

Type of Business: Distribution of tobacco products

Audit period: 08/01/02 – 08/31/02 (331258)

09/01/02 – 05/31/03 (333770)

06/04/03 – 07/31/05 (351779)

<u>Item</u>	<u>Disputed Amount</u>					
	<u>331258</u>		<u>333770</u>		<u>351779</u>	
	<u>Tax</u>	<u>Penalty</u>	<u>Tax</u>	<u>Penalty</u>	<u>Tax</u>	<u>Penalty</u>
Disallowed claimed distributions in foreign commerce	\$21,727				\$285,191	
Unreported distributions			\$78,499			
Negligence penalty	\$ 1,062				\$ 13,352	
Failure-to-file penalty			\$ 3,837			
Finality penalty					\$ 13,252	
As determined and protested:	<u>\$10,622.33</u>	<u>\$1,062.23</u>	<u>\$38,378.16</u>	<u>\$3,837.82</u>	<u>\$133,523.85</u>	<u>\$13,352.39</u>
Proposed tax redetermination	\$10,622.33		\$38,378.16			
Determined tax					\$133,523.85	
Interest through 6/25/11	8,011.06		27,238.32		79,277.35	
Negligence penalty	<u>1,062.23</u>				13,352.39	
Failure-to-file penalty			<u>3,837.82</u>			
Finality penalty					<u>13,252.39</u>	
Total tax, interest, and penalty	<u>\$19,695.62</u>		<u>\$69,454.30</u>		\$239,405.98	
Payments					- 1,100.00	
Balance Due					<u>\$238,305.98</u>	
Monthly interest beginning 6/26/11	<u>\$ 61.96</u>		<u>\$ 223.87</u>		<u>\$ 772.47</u>	

UNRESOLVED ISSUES

Issue 1: Whether petitioner is liable for excise tax on the distribution of untaxed tobacco products that he purchased from out-of-state manufacturers, including those distributions for which he claimed a foreign commerce exemption. We conclude petitioner is liable.

Petitioner held tobacco products distributor's license CP ET 50-002981 from July 12, 2002, through August 31, 2002. The Board's records indicate that this license was revoked on December 18, 2002, with an effective close-out date of August 31, 2002. Petitioner's second tobacco products distributor's license, CP ET 50-003100, was opened with a start date of June 4, 2003, but the Special Taxes and Fees Division¹ of the Property and Special Taxes Department (Department) subsequently changed the effective start date for this license to September 1, 2002. Petitioner's second tobacco products distributor's license was closed effective December 31, 2005, since petitioner failed to file a renewal application for 2006.

There are three Notices of Determination in dispute, for the periods August 1, 2002, through August 31, 2002, September 1, 2002, through May 31, 2003, and June 4, 2003, through July 31, 2005. Petitioner filed timely petitions for redetermination with respect to the first two determinations (case ID's 331258 and 333770, respectively). He did not file a timely petition for redetermination with respect to the last determination, but the Department accepted his late appeal as an administrative protest (case ID 351779).

Throughout the three periods at issue, petitioner operated N T Company, a tobacco products distributor. He held tobacco products distributor's licenses, which allowed petitioner to distribute tax-paid tobacco products, but did not authorize him to distribute tobacco products purchased without the payment of tax from out-of-state vendors. For the period August 1, 2002, through August 31, 2002 and the period June 4, 2003, through July 31, 2005, petitioner filed Tobacco Products Distributor Tax Returns on which he reported distributions of tobacco products and then claimed the entire reported amount as exempt distributions in foreign commerce. For the period September 1, 2002, through May 31, 2003, petitioner did not file returns.

¹ Formerly known as the Excise Taxes Division.

1 For the first and third periods, the Department disallowed the claimed exempt distributions in
2 foreign commerce because petitioner did not provide adequate documentation to support the
3 exemption. For the second period, the Department established the audited amount of distributions of
4 tobacco products based on available records, as described in the D&R. Petitioner stated at the appeals
5 conference that he would like to submit evidence of the actual cost of his purchases for this period, but
6 also conceded that the Department's computation method seemed reasonable in the absence of actual
7 amounts. Petitioner has not provided any evidence of the actual cost of the purchases.

8 Petitioner contends that he did not sell or otherwise distribute any of the tobacco products in
9 California, but instead exported all of the untaxed tobacco products to Vietnam. In support, petitioner
10 has submitted copies of passenger tickets, baggage check receipts, and excess baggage tickets for
11 flights on various dates from Northern California to Vietnam. Petitioner has also submitted two
12 notarized affidavits in which each affiant states that he helped petitioner take boxes of tobacco
13 products to the San Francisco airport, which were to be sold in Vietnam. Petitioner also points to a
14 sworn affidavit he executed before the U. S. Immigration and Naturalization Service, when he was
15 briefly detained at the San Francisco airport, in which he stated, "I sell cigar in [V]ietnam. That is my
16 business." Petitioner has stated that he took the tobacco products to Vietnam in his checked luggage
17 but did not obtain any documentation of these products from U.S. Customs or any government agency
18 in Vietnam. Further, petitioner asserts that he does not have any documentation of his customers'
19 orders for tobacco products because he took orders solely by telephone. While petitioner asserts that
20 he did have copies of additional airline tickets and excess baggage coupons for flights to Vietnam, he
21 has provided evidence of a fire on October 6, 2003 at his residence address, and he states that all of his
22 paperwork was destroyed during that fire.

23 A distributor of tobacco products is liable for tax, based on the wholesale cost of tobacco
24 products, upon the distribution of those products in California. (Rev. & Tax. Code, §§ 30011, 30123,
25 30131.2). Unless established otherwise, it is presumed that all tobacco products acquired by a
26 distributor are untaxed tobacco products, and that all tobacco products manufactured in this state or
27 transported to this state, and no longer in the distributor's possession, have been distributed. (Rev. &
28 Tax. Code, § 30109.) As relevant here, there is an exemption from the tax with respect to tobacco

1 products that are shipped to a point outside this State, pursuant to a contract of sale, by delivery by the
2 seller to such point by means of facilities operated by the seller. (Cal. Code of Regs., tit. 18, § 4080,
3 subd. (a)(1).) Petitioner admits he did not obtain any customs documentation showing the claimed
4 exports. (See Cal. Code of Regs., tit. 18, § 4080, subd. (c).) Neither airline ticket receipts nor excess
5 baggage coupons from flights to Vietnam prove that petitioner exported the untaxed tobacco products
6 to Vietnam. Nor do we find that the affidavits or petitioner's declaration upon detention at the airport
7 are persuasive evidence of export.

8 We find the evidence is sufficient to establish that petitioner purchased untaxed tobacco
9 products from unlicensed vendors of tobacco products, and petitioner has provided no documentation
10 to support adjustments to the audited amounts of those purchases. We find that petitioner has not
11 provided evidence to overcome the presumption that the tobacco products brought into this state, and
12 no longer in petitioner's possession, were distributed in California. (Rev. & Tax. Code, § 30109).
13 Therefore we conclude petitioner is liable for excise tax on the distribution of all untaxed tobacco
14 products he purchased from out-of-state manufacturers, and we recommend no adjustment.

15 **Issue 2:** Whether petitioner was negligent for the periods August 1, 2002, through August 31,
16 2002, and June 4, 2003, to July 31, 2005. We find that he was.

17 The Department imposed the negligence penalty for the relevant periods because it concluded
18 that petitioner's failure to provide U. S. Customs records or other similar supporting documentation
19 was evidence of negligence. Petitioner has not raised any arguments specific to the negligence
20 penalty, but instead generally raises the same contentions described above.

21 Petitioner has failed to maintain any of the records necessary to support claimed exempt sales
22 in foreign commerce. Failure to maintain those records represents a failure to do what a reasonable
23 and prudent person would do under the same or similar circumstances. Further, petitioner's failure to
24 establish his entitlement to any of the claimed exemptions effectively results in an understatement of
25 100 percent. We find that the failure to maintain records and the significant understatement are
26 evidence of negligence, and that the penalties were properly applied.

27 **Issue 3:** Whether relief of the failure-to-file penalty or the finality penalty is warranted. We
28 recommend no relief.

1 For the period September 1, 2002, through May 31, 2003, petitioner did not report or pay taxes
2 on his distributions of untaxed tobacco products, and a failure-to-file penalty was automatically added.
3 For the period June 4, 2003, through July 31, 2005, petitioner did not timely pay the determination, and
4 a finality penalty was added. During the appeals conference, we explained to petitioner that he could
5 request relief from either or both of those penalties by filing a statement, signed under penalty of
6 perjury, explaining why his failure to make a timely report or payment was due to reasonable cause
7 and circumstances beyond his control. We also provided a form petitioner could use to request relief.
8 We reiterated this information in a post-conference letter. However, petitioner has not submitted a
9 request for relief from either penalty, and we therefore have no basis to consider relief.

10 **OTHER DEVELOPMENTS**

11 None.

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