

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION FINAL ACTION SUMMARY

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

Type of Business: Cigar shop
 Audit period: 06/01/00 – 11/30/05

<u>Item</u>	<u>Disputed Amount</u>		
Understated distribution of tobacco products	\$206,659		
Failure-to-file penalty	\$ 8,030		
		<u>Tax</u>	<u>Penalty</u>
As determined		\$113,308.49	\$8,030.29
Post-Board hearing adjustment		- 5,589.82	<u>00.00</u>
Proposed redetermination, protested		<u>\$107,718.67</u>	<u>\$8,030.29</u>
Proposed tax redetermination		\$107,718.67	
Interest through 07/25/12		95,474.22	
Failure-to-file penalty		<u>8,030.29</u>	
Total tax, interest, and penalty		\$211,223.18	
Payments		- 0.10	
Balance Due		<u>\$211,223.08</u>	
Monthly interest beginning 07/26/12		<u>\$ 538.59</u>	

The Board held a hearing regarding this matter on February 1, 2012, and it ordered the Excise Taxes Division of the Property and Special Taxes Department (Department) to make adjustments for transactions for which there was an exchange of tobacco products in California. We recommend a reduction of tax of \$5,589.82, as explained under Post-Hearing Developments.

UNRESOLVED ISSUES

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

Petitioner has operated a cigar shop since May 12, 2000, but did not file tobacco products distributor's reports or tax returns for the period through September 11, 2002. He obtained a license to

1 distribute tobacco products on September 12, 2002, and the determination does not include liability for
2 the period September 12, 2002, through December 31, 2002, because that period was barred by the
3 applicable statute of limitations when the Notice of Determination was issued. For audit, petitioner
4 provided complete, organized records to the Department. The Department found that petitioner
5 received untaxed tobacco products from various unlicensed out-of-state vendors and then distributed
6 those tobacco products. In sum, the Department assessed tax for the period June 30, 2000, through
7 September 11, 2002, because petitioner had paid no tax for that period, and assessed tax on the audited
8 understatement for the period January 1, 2003, through November 30, 2005.

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

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

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

26 We reject petitioner’s arguments. Petitioner purchased products for his business, not for his
27 consumption, as reflected by the fact that all of his purchase invoices indicate that the purchases were
28 made for petitioner’s business and not for his personal use. His vendors were not the distributors of

1 the subject products under Revenue and Taxation Code section 30011, subdivision (c), because they
2 were not making sales transported from outside California to a consumer. With respect to the very
3 small percentage of his purchases that he might have self consumed, had petitioner established that he
4 advised the supplier that he was purchasing some specific products for his own consumption as an
5 individual and not as a retailer of tobacco products, our conclusion might be different as to that small
6 portion of established purchases for consumption, but he has not done so. With respect to the period
7 after he obtained his distributor's license, we reject petitioner's contention that every distributor owes
8 tax on his distribution of tobacco products, regardless of where title transfers or where the sale takes
9 place. Rather, the law imposes tax on the distribution *in California*. Here, except as discussed under
10 Post-Hearing Developments, the vendors completed the physical delivery of the tobacco products
11 when delivering them to common carriers outside California for shipment to petitioner in California.
12 Thus, petitioner, and not the vendors, made the taxable distributions in this state.

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

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

21 POST HEARING DEVELOPMENTS

22 During the Board hearing, the Department conceded that an adjustment is warranted with
23 respect to exchanges of tobacco products made by representatives of General Cigar Company in
24 California but stating that this adjustment would only be for periods before petitioner was a licensed
25 distributor. Applying this rule would have resulted in an adjustment of \$58.75. However, the
26 Department indicates that petitioner is actually entitled to a much larger adjustment because it had
27 stated the rule backwards: petitioner is entitled to the adjustment for the period *after* he was licensed,
28 when most of the exchanges occurred, rather than before he was licensed. The Department explains

1 that, for the period before petitioner was a licensed distributor, tax was incurred when he placed
2 products into his retail stock or otherwise consumed them. When General thereafter made an exchange
3 within California, that did not relieve petitioner from the tax he had already incurred on his distribution
4 of the original product, so does not support a reduction to the tax due. However, once petitioner was a
5 licensed distributor, he was able to possess untaxed products in his inventory, and was not regarded as
6 making a taxable distribution until the product was sold. When General thereafter made an exchange,
7 the initial product petitioner purchased (and exchanged) had never been distributed so no tax had been
8 incurred. When General transferred product within California in exchange for the product returned by
9 petitioner, General made the taxable distribution of that property and it owes the applicable tax. When
10 petitioner thereafter sold the product it received in exchange within California, it was not making the
11 taxable distribution. We agree and thus recommend a reduction in tax due of \$5,589.82.

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