

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION SUMMARY FOR BOARD HEARING

In the Matter of the Petition for Redetermination)
Under the Underground Storage Tank)
Maintenance Fee Law of:)
))
R&R GREENE LIVING TRUST) Account Number: TK MT 44-042197
) Case ID: 221089
))
Petitioner) Oakhurst, Madera County
_____)

Type of Business: Retail Service Station

Audit Period: 1/1/95 – 12/31/02

<u>Items</u>	<u>Disputed Amounts</u>	
Underground Storage Tank Maintenance Fee	\$406,578	
Failure-to-Pay Penalty	\$ 40,658	
Interest	\$366,897 (through 3/25/09)	
	<u>Fee</u>	<u>Penalty</u>
As determined	\$408,613.05	\$40,861.30
Adjustments:		
Property and Special Taxes Department	+ 6,783.81	+ 678.37 ¹
Appeals Division	<u>- 8,818.92</u>	<u>- 881.88</u>
Proposed redetermination, protested	<u>\$406,577.94</u>	<u>\$40,657.79</u>
Proposed fee redetermination	\$406,577.94	
Interest through 3/25/09	366,896.68	
10 percent penalty for failure to pay	<u>40,657.79</u>	
Total fee, interest, and penalty	\$814,132.41	
Payments	<u>- 10,491.26</u>	
Balance due	<u>\$803,641.15</u>	
Monthly interest beginning 03/26/09	<u>\$2,640.58</u>	

Petitioner did not attend the appeals conference, instead submitting a letter brief dated June 21, 2006, for our consideration. This matter was scheduled for Board hearing on January 30, 2008, but the

¹ On September 28, 2004, the Department issued a Claim for Increase letter to petitioner, increasing the fee disclosed in the determination by \$12,140.07. Thereafter, the Department revised its recommended increase down to \$6,783.81. Petitioner was notified of this revised Claim for Increase of Determination by letter dated November 30, 2005.

1 hearing was postponed because petitioner submitted a settlement offer. The settlement negotiation was
2 not successful, and thus, this matter has been rescheduled for Board hearing.

3 UNRESOLVED ISSUES

4 **Issue 1:** Whether petitioner has established that it is entitled to relief from the fee liability
5 because it allegedly relied on the Board's failure to advise it during a prior audit that it was required to
6 pay underground storage tank maintenance (USTM) fees. We conclude that petitioner is not entitled to
7 relief.

8 Petitioner does not dispute that it owned the subject real properties and the underground storage
9 tanks located on those properties, and that it is therefore liable for the USTM fees. Instead, petitioner
10 contends that it should be relieved from liability for the assessed fees because it relied on a previous
11 "no-change audit" for sales and use tax purposes conducted for the period September 1, 1991, through
12 October 30, 1994, during which it was not advised of the requirement to obtain a USTM permit from
13 the Board and pay these fees.

14 A person may be relieved of liability when its failure to pay the fee due is the result of its
15 reasonable reliance on written advice from the Board in response to a written request for advice
16 including all relevant information. (Rev. & Tax. Code, § 50112.5, subd. (b)(1), (2).) A written audit
17 report can qualify as the written advice from the Board. (See, e.g., Cal. Code Regs., tit. 18, § 1705,
18 subd. (c).)

19 Here there is no evidence, written or otherwise, that the auditors who conducted a sales and use
20 tax audit also reviewed whether petitioner had a USTM permit from the Board or whether petitioner
21 was required to pay USTM fees. Where, as here, the Department does not address an issue (i.e., an
22 error of omission), the Department cannot be said to have examined the issue *nor* provided any advice
23 with respect thereto. Consequently, errors of omission do not qualify as erroneous advice for which
24 relief is available under the statute or regulation. Regulation 1212, subdivision (d), also specifically
25 provides that ignorance of the fee is no basis for relief.

26 We also note that, although there is no statutory or regulatory authority requiring the Board to
27 notify fee payers of a fee, the Department made numerous attempts to notify owners of underground
28 storage tanks of the requirement to register and pay the applicable fee via mailing Tax Information

1 Bulletins to holders of seller's permits. Petitioner, who held sales and use tax seller's permits for the
2 properties (SR KHO 22-836223 from July 1, 1991, through September 30, 1998 (as R&R Greene
3 Living Enterprises), and SR KHO 97-288117 from October 1, 1998, through the present (as Robert C.
4 Greene, et. al.)) should have received these notices and should have been aware of the requirements to
5 register and pay the applicable fees. We find that there is no basis for relief.

6 **Issue 2:** Whether petitioner has established that the three-year statute of limitations should
7 apply in this case. We conclude that petitioner has not.

8 The Department assessed USTM fees for an eight-year period because petitioner had not filed
9 any USTM fee returns. Petitioner contends that the use of an eight-year statute of limitations for this
10 audit is excessive and therefore the determination is "grossly overstated." Petitioner does not,
11 however, specify what other statute of limitations should be applied, nor does it provide any legal basis
12 substantiating its belief that the application of the eight-year statute of limitations is erroneous.
13 Instead, petitioner makes the same arguments as above regarding the Board's fault in failing to notify
14 petitioner during the audit that such a fee existed, much less that petitioner was responsible for its
15 payment.

16 Revenue and Taxation Code section 50113.1 provides that in cases of failure to make a report
17 or return, the notice of determination shall be mailed within eight years after the date the amount of the
18 report or return was due. Here, petitioner does not dispute that it failed to file any USTM fee returns as
19 required by statute. In fact, petitioner concedes that it failed to do so since petitioner argues that it was
20 unaware of this requirement. Furthermore, there is no statutory or regulatory basis upon which to
21 recommend the application of a shorter statute of limitations based on the Board's failure to notify
22 feepayers of these fees. Accordingly, since petitioner failed to file any USTM fee returns, the eight-
23 year statute of limitations applies. (As discussed below under "Resolved Issues," we do recommend
24 an adjustment because one quarter of the determined liability is barred by the eight-year statute of
25 limitations.)

26 **Issue 3:** Whether petitioner has established reasonable cause to relieve the failure-to-pay
27 penalty. We conclude that relief is not warranted.

1 Petitioner filed a declaration under penalty of perjury requesting relief from the failure-to-pay
2 penalty based on the same arguments noted above, that the Board was at fault in failing to notify
3 petitioner during the sales and use tax audit that such a fee existed, much less that petitioner was
4 responsible for its payment. Petitioner has not, however, presented evidence to support that its failure
5 to timely pay the fee was due to reasonable cause and circumstances beyond petitioner's control (see
6 Rev. & Tax. Code, § 50112.2), and we thus find that relief is not warranted.

7 **Issue 4:** Whether the interest owed on the USTM fees should be relieved. We conclude that
8 relief of interest is not warranted.

9 Petitioner contends it should not be held responsible for payment of interest for the same
10 reasons discussed above. In addition, petitioner contends that since over three years has lapsed since
11 petitioner filed its petition for redetermination on May 19, 2003, it is unfair to collect interest on this
12 delay.

13 There are three statutes that are relevant to the relief of interest. There has been no allegation
14 of a qualifying disaster and we thus conclude that relief under section 50112.3 is not applicable. For
15 the same reasons discussed above with respect to relief of the fee, we conclude that relief of interest
16 under 50112.5 is inapplicable because petitioner's failure to pay the fee was not the result of its
17 reliance on qualifying written advice from the Board. The only remaining possible basis for relief is
18 provided by Revenue and Taxation Code section 50112.4, where the failure to pay the fees was due to
19 an unreasonable delay or error by a Board employee. Relief under this provision is available only if no
20 significant aspect of the error or delay is attributable to an act of, or a failure to act by, the feepayer
21 (Rev. & Tax. Code, § 50112.4, subd. (b)), and is limited to interest accruing on fees incurred on and
22 after January 1, 2000 (Rev. & Tax. Code, § 50112.4, subd. (d)). Thus, here, the interest accrued on the
23 fees incurred for the period January 1, 1995, through December 31, 1999, is not eligible for relief
24 under section 50112.4, and only the interest that accrued on the fees incurred for the period January 1,
25 2000, through December 31, 2002, is eligible for consideration of relief under section 50112.4.

26 There is no statutory or regulatory authority requiring the Board to notify feepayers of a fee,
27 but the Department did make numerous attempts to notify owners of UST's of the requirement to
28 register and pay the applicable fee, such by including such information in Tax Information Bulletins

1 sent to holder's of seller's permits. Petitioner should have received these notices and should have been
2 aware of the requirements to register and pay the applicable fees. With respect to the period after the
3 petition for redetermination was submitted, the petition was moving through the administrative appeals
4 process as detailed in the D&R, and petitioner has not shown that there was any unreasonable error or
5 delay by a Board employee, with no significant aspect of the error or delay attributable to petitioner.
6 (The delay in resolution since the matter was scheduled for hearing in January 2008 resulted from
7 petitioner's unsuccessful attempts to negotiate a settlement.) We find that there is no basis for relief of
8 any interest.

9 **RESOLVED ISSUES**

10 The Department concluded that the notice of determination should have been based on
11 quarterly reporting rather than the annual reporting basis used. Based on annual reporting, the notice
12 of determination was timely issued (within eight years) for the entire audit period. However, based on
13 quarterly reporting, the notice was not timely for the first quarter 1995. We agree with the Department
14 thus recommend deleting the fees assessed for the period of January 1, 1995, through March 31, 1995.
15 We also concluded that the fees should be recalculated based on the amount of fuel petitioner placed
16 into its underground storage tanks located at the Madera location for the period of January 1, 1995,
17 through December 31, 1997, using the 49-percent ratio reflected in petitioner's work papers rather than
18 the 50-percent ratio the Department used. These adjustments reduce the deficiency by \$8,818.92, from
19 \$415,396.86 (as asserted by the Department in its revised asserted increase) to \$406,577.94

20 **OTHER DEVELOPMENTS**

21 None.

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24 Summary prepared by Rey Obligacion, Business Taxes Specialist III.
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