

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION SUMMARY FOR BOARD HEARING

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3 In the Matter of the Petition for Reallocation)
4 of Local Tax Under the Uniform Local Sales)
5 and Use Tax Law of:)
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Petitioner _____)

Case ID 472921

9 Taxpayer: Construction contractor
10 Date of knowledge: June 26, 1997
11 Allocation Period: January 1, 1996 – June 30, 1996
12 Estimated amount in dispute: \$245,798¹
13 Notifications required: County of Sacramento²

BACKGROUND

15 The petition in this appeal was filed on June 26, 1997. An appeals conference was held by the
16 Local Tax Appeals Auditor within the Sales and Use Tax Department (Department), and he issued his
17 Decision and Recommendation denying the appeal on October 5, 2000. He found that the petition was
18 barred by Revenue and Taxation Code section 7209 and that the local tax was correctly distributed³ to
19 the Sacramento countywide pool because the construction contractor elected not to obtain a sub-permit
20 for the jobsite. Petitioner timely appealed that decision to Board Management, who issued its decision
21 denying the appeal on April 18, 2002. On January 21, 2009, the Board found that petitioner’s appeal
22 remained open and granted petitioner’s request for hearing.

25 ¹ The amount that would be reallocated from the Sacramento countywide pool if petitioner were to prevail is \$367,236, a
26 portion of which petitioner already received as its share of the pool. If petitioner were to prevail, it would receive the
27 amount reallocated from the pool less the amount petitioner already received as its share of that pool which, based on the
28 Sales and Use Department’s 2008 Pool Notification Threshold List, the Department calculates as \$121,438. Thus, the
estimated net redistribution if petitioner were to prevail is \$245,798 (\$367,236 -\$121,438).

² Pursuant to California Code of Regulations, title 18, section 1807, subdivision (d)(2).

³ “Distribution” and “allocation” are used interchangeably, as are “redistribution” and “reallocation.” For consistency, for
the remainder of the summary, we use the terms “distribution” and “redistribution.”

UNRESOLVED ISSUES

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2 **Issue 1:** Whether petitioner is statutorily barred from obtaining a redistribution. Without
3 regard to whether the tax was correctly distributed or not, we conclude that the petition is barred by
4 Revenue and Taxation Code section 7209.

5 Section 7209 provides that a redistribution of local sales or use tax “shall not be made as to
6 amounts originally distributed earlier than two quarterly periods prior to the quarterly period in which
7 the board obtains knowledge of the improper distribution.” The taxpayer performed a construction
8 contract within the City of Sacramento during the first and second quarters of 1996. Based on the
9 taxpayer’s returns for those quarters, the local tax was originally distributed directly to the County of
10 Sacramento on June 7, 1996 (for the first quarter 1996) and on September 6, 1996 (for the second
11 quarter 1996). The date of knowledge here, that is, the date the petition was filed, was June 26, 1997.
12 This is more than two quarters after the original distributions, and it is not disputed that the petition
13 was not timely to dispute these distributions made to the County of Sacramento on June 7, 1996, and
14 September 6, 1996.

15 Upon review after the original distributions, the Department noticed a significant increase in
16 the distribution to the County of Sacramento. After communicating with the taxpayer, the Department
17 determined that the increased local tax distribution was from a construction contract performed at a
18 jobsite for which the taxpayer had not obtained a sub-permit. The Department requested that the
19 taxpayer file corrected returns, which it did on September 25, 1996. Based on these corrected returns,
20 the Department redistributed the subject local taxes to the Sacramento countywide pool (petitioner
21 received a portion of that local tax as part of its share of this countywide pool). The Department
22 cannot provide the specific date of redistribution because that information was not retained when the
23 Board’s Integrated Revenue and Information System was implemented. However, since distributions
24 are made four times per year, on the first Friday of March, June, September, and December, the first
25 date on which the redistribution could have been made after the September 25, 1996 filing of the
26 corrected returns was December 6, 1996. Whether the redistribution occurred on this date or later, the
27 petition was filed within two quarters of the redistribution.
28

1 Petitioner contends that its petition was timely to dispute the redistribution. Relying on
2 Business Taxes Law Guide annotation 702.1010 (5/25/94; 1/7/97),⁴ the Department indicates that a
3 redistribution of local tax should be treated as “originally distributed” for purposes of section 7209.
4 Thus, the Department agrees that the petition was timely to dispute the redistribution.

5 Despite the agreement of the Department, we find, quite simply, that a *redistribution* is not an
6 “original distribution.” The analysis supporting the annotation indicates that the author first concluded
7 that a redistribution is *not* an original distribution, but that, based on ambiguity in the statutory
8 language, it was not unreasonable to find that a redistribution can be an original distribution. We do
9 not see any ambiguity in the statute. Nevertheless, we also recognize that the opinion was issued at a
10 time prior to any regulatory guidance on processing disputes regarding distribution of local tax. We
11 can imagine certain circumstances where such an interpretation was required as a matter of fairness,
12 where a jurisdiction lost funds in a redistribution, and unless such redistribution taking funds away
13 from that jurisdiction were an original distribution as to such jurisdiction, it could never appeal or
14 dispute that redistribution. The facts here, however, are not such that it would be unfair to interpret
15 “original distribution” literally. Petitioner received no funds in the original distribution, so it was
16 impossible for it to lose any funds in the redistribution. Had there been no redistribution, it would be
17 unequivocally true that an appeal after more than two quarters had passed would have been barred.
18 Here, however, there was a redistribution of the original distribution where petitioner *gained* funds
19 (through the pool). That is, by the happenstance that there was a redistribution that distributed local
20 tax to petitioner where it had received none in the original distribution, petitioner asserts that its
21 petition *of the redistribution* was timely. We do not believe that a strained interpretation of “original
22 distribution” is required as a matter of fairness in this matter. In any event, we note that any reason for
23 such an interpretation has been superseded by the provisions of California Code of Regulations, title
24 18, section (Regulation) 1807, as amended.⁵

26 ⁴ Annotations are summaries of legal opinions by the Board’s attorneys, and are intended as research tools to provide
27 guidance regarding the interpretation of the law with respect to specific factual situations; annotations do not have the force
and effect of law. (Cal. Code Regs., tit. 18, § 5700, subs. (a)(1), (c)(2).)

28 ⁵ We do not mean to suggest that the regulation should be applied retroactively on this point if the Board were to find that
the petition was otherwise timely. We include this discussion to place petitioner’s contention in context of the regulation.

1 Regulation 1807 now brings all appeals of a distribution or redistribution within a single
2 administrative appeal. Where a jurisdiction files a petition of an original distribution, any jurisdiction
3 who is “substantially affected” by a decision of the Department or the Appeals Division is notified of
4 that decision and is given the opportunity to appeal within that administrative process. (Cal. Code
5 Regs., tit. 18, § 1807, subds. (b)(5)-(8), (c)(1), (c)(5), (c)(6).) When neither the petitioner nor any
6 notified jurisdiction appeals a decision to the next level, that decision is final as to the petitioner and all
7 notified jurisdictions. (Cal. Code Regs., tit. 18, § 1807, subds. (b)(6), (b)(8), (c)(2)(D), (c)(8).)
8 Additionally, if such an appeal is scheduled for a Board hearing, any jurisdiction that might be
9 substantially affected by the Board’s decision is notified and may participate in the hearing. (Cal.
10 Code Regs., tit. 18, § 1807, subds. (d)(2), (d)(3).) Once the process winds its way through the Board
11 hearing, the Board’s final decision exhausts all administrative remedies for all jurisdictions. (Cal.
12 Code Regs., tit. 18, § 1807, subd. (d)(5).) Thus, where there is a redistribution resulting from a petition
13 filed by an aggrieved jurisdiction, the “rule” stated in the annotation cannot apply.

14 The other manner in which a redistribution occurs is where the Department triggers the
15 redistribution itself, based on information it obtains indicating that an original distribution was
16 incorrect. As with redistributions made as a result of a jurisdiction’s petition, a redistribution made by
17 the Department at its own instigation cannot “be made as to amounts originally distributed earlier than
18 two quarterly periods prior to the quarterly period in which the board obtains knowledge of the
19 improper distribution.” (Rev. & Tax. Code, § 7209.) Where the Department makes such a
20 redistribution, a jurisdiction losing funds as a result is notified and may appeal the redistribution within
21 30 days of the notification; such an appeal is a “petition” under Regulation 1807, subdivision (a).
22 When such a jurisdiction losing funds as a result of a redistribution does *not* appeal within 30 days, the
23 redistribution is final as to that jurisdiction. (*Ibid.*) That is, such a jurisdiction is *not* allowed another
24 bite at the apple to file a new petition after the 30-day period has passed, claiming that the petition was
25 valid as to the redistribution because filed within two quarters.

26 Thus, under current Regulation 1807, the only jurisdiction and only circumstance for which the
27 regulation does not unequivocally preclude application of the rule stated in annotation 702.1010 would
28 be a redistribution made by the Department at its own instigation and a jurisdiction who does *not* lose

1 funds as a result. However, the purpose of the provision cited above in Regulation 1807, subdivision
2 (a), was to provide a specific mechanism for a jurisdiction losing funds as a result of a redistribution to
3 appeal that specific redistribution, within the overall intent of the regulation to limit all administrative
4 appeals of a particular distribution to one administrative process, starting either with a petition or with
5 the Department's instigation of a redistribution. To allow a jurisdiction who was not harmed by a
6 redistribution to challenge it after the matter is final as to the parties actually harmed by the
7 redistribution would be contrary to the regulation.

8 Thus, we believe that the annotation was wrong when published and, at least for appeals filed
9 after the effective date of the amendment to Regulation 1807, has now been wholly superseded by that
10 regulation.

11 **Issue 2:** Whether the local tax from a construction contract of \$5,000,000 or more should be
12 distributed directly to petitioner. We conclude that the local tax was correctly distributed to the
13 Sacramento countywide pool because the construction contractor elected not to obtain a sub-permit for
14 the jobsite.

15 The jobsite is a construction contractor's place of business for purposes of distributing local
16 sales tax and the place of use for purposes of distributing local use tax in connection with a
17 construction contract. There is no dispute here that the place of business (local sales tax) and place of
18 use (local use tax) related to the subject construction contract was the City of Sacramento. However,
19 as explained in Compliance Policy and Procedures Manual (CPPM) section 260.020, "Since its
20 inception, local tax generated by the sale or use of tangible personal property at construction sites has
21 been added to the countywide unallocated pool as the most practical method for allocating tax to each
22 jurisdiction." That section goes on to explain that, pursuant to a resolution the Board adopted effective
23 January 1, 1995, there is a specific exception to this general rule, under which the local tax is directly
24 distributed to the jurisdiction of the jobsite if both of the following conditions are satisfied: 1) the
25 construction contract is for \$5,000,000 or more; *and* 2) the construction contractor elects to obtain a
26 sub-permit for that jobsite. However, "local tax must still be allocated countywide for jobsites which
27 have contracts of \$5,000,000 or more where the contractor has elected not to obtain a
28

1 sub-permit.” (CPPM, § 260.020, Field Audit Manual (FAM), § 1207.25.) In fact, even where a
2 construction contractor does obtain a sub-permit for a qualifying jobsite, if the sub-permit is obtained
3 after local tax has been incurred for prior periods, “no local tax will be reallocated for periods prior to
4 the reporting period for the start date of the sub-permit.” (CPPM, § 260.020; FAM, § 1207.25.)

5 Petitioner argues that once the Department knows a construction contract *could* qualify for
6 direct distribution, the local tax must be so distributed even if the construction contractor does not
7 make the necessary election which is a condition for such direct distribution. Petitioner is wrong: the
8 authorities cited above are not ambiguous and leave no room for interpretation under the facts here.
9 Since the contractor did not obtain a sub-permit for the location, the local tax must be distributed to the
10 place of sale and place of use through the countywide pool, as was done here. Thus, the tax was
11 correctly distributed, and there is no basis for a further redistribution. Accordingly, we recommend
12 that the petition be denied.

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