

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION SUMMARY FOR BOARD HEARING

3 In the Matter of the Administrative Protest and)
 4 Claims for Refund Under the Sales and Use Tax)
 Law of:)
 5 JERRY PENA,) Account Number: SR EH 97-843498
 dba Ontario Tire & Accessories Zone) Case ID's 384853 and 426907
 6)
 7 Taxpayer) Ontario, San Bernardino County

8 Type of Business: Tire store

9 Audit Period: 7/1/01 – 12/31/04

10 <u>Items</u>	<u>Disputed Amounts</u>
11 Unreported gross receipts	\$1,317,502
12 Amnesty interest penalty	\$ 4,001
	<u>Tax</u>
14 As determined	\$101,990.01
15 Reaudit adjustment – Appeals Division	- 156.93
16 Protested tax	<u>\$101,833.08</u>
17 Tax liability	\$101,833.08
18 Interest (tax paid in full 10/23/08)	38,791.57
19 Amnesty interest penalty	<u>4,000.76</u>
Total tax, interest, and penalty	\$144,625.41
Payments	<u>-144,625.41</u>
Balance due	<u>\$ 0.00</u>

20 UNRESOLVED ISSUE

21 **Issue:** Whether audited unreported taxable sales are excessive. We conclude that they are not.

22 Taxpayer did not provide adequate books and records for audit, providing only his federal
 23 income tax returns (FITR's), sales invoices, bank statements, and some purchase invoices. The Sales
 24 and Use Tax Department (Department) found that the gross receipts reported on the FITR's for 2002
 25 and 2003 were \$433,563 more than reported sales to the Board for the same period. Taxpayer
 26 indicated that the sales reflected in the FITR's were based on available sales invoices, and that he had
 27 mistakenly reported his net income as his total taxable sales on his sales and use tax returns. Taxpayer
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1 provided the Department with sales invoices, bundled by date but without sales totals. The invoices
2 did not contain invoice numbers and some were missing dates.

3 The Department compiled the available sales invoices, excluding duplicate invoices, to
4 establish audited taxable sales. Since invoices were missing for four days in 2004, fourteen days in
5 2003, and two days in 2002, the Department estimated the taxable sales for those days by using
6 average daily sales in the same month from the available sales invoices. In sum, the Department
7 calculated total audited taxable sales of \$1,376,771. Upon comparison to reported taxable sales of
8 \$57,245, the Department found that taxpayer had underreported his taxable sales by \$1,319,527, or by
9 over 2,300 percent.

10 Taxpayer contends that: (1) there are additional duplicate invoices that the Department did not
11 take into account during the revised audit; (2) he was not informed that sales of used tires were taxable
12 and he should therefore not owe the tax on such sales; (3) sales tax reimbursement was included in the
13 sales price of new tires and proper credit should be allowed; and (4) the additional sales in 2003 and
14 2004 were nontaxable sales for resale.

15 We find that the Department used the best information available, actual invoices, to establish
16 total taxable sales. Only a very small portion of the sales (20 days) were based on a projection. In the
17 revised audit, the Department, with the assistance of taxpayer, identified duplicate invoices and the
18 Department excluded the duplicate invoices from the computation of audited taxable sales. At the
19 appeals conference, taxpayer indicated that there were additional duplicate invoices that had not been
20 removed from the audited measure, but he was unable to identify the specific transactions. After the
21 conference, taxpayer submitted some invoices that were made outside of the audit period, but he did
22 not provide any information in support of his claim of additional duplicate invoices. We find that all
23 the supported adjustments for duplicate invoices have been made.

24 Taxpayer contends that he should not owe tax on sales of used tires because the Board failed to
25 inform him that such sales are taxable, and that it is an industry-wide practice to not charge sales tax on
26 used tires (with respect to which taxpayer presented no evidence). Taxpayer does not contend that the
27 Board affirmatively gave him incorrect advice, just that it did not give him specific advice that sales of
28 used tires are taxable. However, the Board offers publications to assist taxpayers in understanding the

1 application of sales tax to a variety of businesses, including auto-repair garages and service stations,
2 and Board publication 25 “Tax Tips for Auto Repair Garages and Service Stations” states that sales of
3 used tires are generally taxable. Had taxpayer had any doubts, he should have obtained a copy of the
4 publication applicable to his business or requested advise from the Board. In any event, there is no
5 provision in the Sales and Use Tax Law that relieves a taxpayer from liability based on ignorance of
6 the law, and we conclude there is no basis to relieve taxpayer of the taxes he owes on his sales of used
7 tires.

8 Taxpayer has not presented any evidence showing that sales tax reimbursement was included in
9 the sale price of new tires, as he alleges. None of taxpayer’s invoices show the addition of sales tax
10 reimbursement to the sales price of the items sold, nor do they contain a statement that sales tax
11 reimbursement was included in the sale price. Furthermore, taxpayer did not post a sign in his premise
12 that all prices of taxable items include sales tax reimbursement.

13 After the appeals conference, taxpayer submitted invoices for nontaxable sales made outside of
14 the audit period. Upon review of these invoices, the Department determined that the sales to West
15 Coast Auto Sales and Freeway Smog Center, both of whom were in the business of reselling tires and
16 wheels, should be allowed as nontaxable sales for resale. Thus, the Department recommends that three
17 sales, totaling \$2,025, be allowed as nontaxable sales for resale. Other than these three sales, taxpayer
18 has not provided resale certificates, or other evidence, such XYZ confirmation letters, to show that any
19 of the additional sales were in fact nontaxable sales for resale. Therefore, we conclude that taxpayer
20 has failed to establish that he is entitled to any further adjustments other than the \$2,025 the
21 Department accepts as sales for resale.

22 Taxpayer initially filed a claim for refund in November 21, 2007, for an unspecified amount.
23 We noted that taxpayer’s claim was only timely as to payments made between May 21, 2007, and
24 November 21, 2007. Thus, we encouraged taxpayer to file a refund claim for payments made after
25 November 21, 2007. On December 17, 2008, taxpayer filed a second claim for refund for an
26 unspecified amount covering the audit period. The second claim is timely for all payments. However,
27 we conclude that only the warranted adjustment to taxpayer’s liability is for the \$2,025 of resales
28 accepted by the Department. That adjustment was made in the reaudit and, with that adjustment,

1 taxpayer has paid all amounts due without making any overpayment. Accordingly, we recommend
2 that taxpayer's claims for refund be denied.

3 **RESOLVED ISSUE**

4 The contention that the finality penalty should not apply was resolved in taxpayer's favor in the
5 Decision and Recommendation. Taxpayer submitted a statement, under penalty of perjury, that he was
6 under the mistaken belief that the auditor had filed a petition for redetermination for him or otherwise
7 arranged for an appeal of the determination. We have reviewed taxpayer's records and conclude that
8 the taxpayer's delay in filing was the result of his miscommunication with the Department staff
9 regarding the appeal process. We find that reasonable cause exists for taxpayer's failure to timely
10 petition the determination. Accordingly, we recommend that the finality penalty and the amnesty
11 double finality penalty be deleted.

12 **AMNESTY**

13 Taxpayer did not apply for amnesty, and an amnesty interest penalty of \$4,000.76 has therefore
14 been applied to the final liability in this matter. (Rev. & Tax. Code, § 7074, subd. (a).) Taxpayer has
15 filed a request for relief of the amnesty penalty, seeking relief because: (1) the audit took a long time to
16 complete; (2) there were errors on the audit, including duplicate receipts counted toward the taxable
17 measure; (3) taxpayer was not aware that sales of used tires were taxable; and (4) the Department did
18 not give him notice to file on time.

19 The Department sent out amnesty notices in January 2005, prior to the March 31, 2005,
20 deadline to apply for amnesty, to active permit holders. Since taxpayer held an active permit at that
21 time, we conclude that taxpayer received one of these specific amnesty notices. The purpose of the
22 amnesty program was to encourage taxpayers, even those who were not being audited, to report
23 unreported measure.

24 Taxpayer underreported his taxable sales by \$1,319,527, or by over 2,300 percent. Taxpayer's
25 FITR's reported sales far in excess of what was reported on his sales and use tax returns, which is
26 evidence that taxpayer should have known he was underreporting his sales to the Board. We find that
27 taxpayer should have known he was underreporting during the amnesty period and that he should have
28 applied for amnesty. Accordingly, we conclude that taxpayer has not established reasonable cause for

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relief from the amnesty interest penalty.

OTHER DEVELOPMENTS

None.

Summary prepared by John K. Chan, Business Taxes Specialist I