

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)
 4 Law of:)
 5 JERRY PENA,) Account Number: SR EH 97-843498
 6 dba Ontario Tire & Accessories Zone) Case ID's 384853 and 426907
 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>
13 As determined	\$101,990.01
14 Reaudit adjustment – Appeals Division	-156.93
14 Protested tax	<u>\$101,833.08</u>
15 Tax liability	\$101,833.08
16 Interest (tax paid in full 10/23/08)	38,791.57
16 Amnesty interest penalty	<u>4,000.76</u>
17 Total tax, interest, and penalty	\$144,625.41
17 Payments	<u>-144,625.41</u>
18 Balance due	<u>\$0.00</u>

19 This matter was scheduled for Board hearing on April 29, 2009, but was postponed because
 20 petitioner had car trouble and was lost on his way to the Culver City Board meeting location.

21 UNRESOLVED ISSUE

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

23 Taxpayer did not provide adequate books and records for audit, providing only his federal
 24 income tax returns (FITR's), sales invoices, bank statements, and some purchase invoices. The Sales
 25 and Use Tax Department (Department) found that the gross receipts reported on the FITR's for 2002
 26 and 2003 were \$433,563 more than the sales reported to the Board for the same period. Taxpayer
 27 indicated that the sales reflected in the FITR's were based on available sales invoices, and that he had
 28 mistakenly reported his net income as his total taxable sales on his sales and use tax returns. Taxpayer

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 advice 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 as XYZ confirmation letters, to show that
19 any of the additional sales were in fact nontaxable sales for resale. Therefore, we conclude that
20 taxpayer 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 We conclude that only the warranted adjustment to taxpayer’s liability is for the \$2,025 of
23 resales accepted by the Department. That adjustment was made in the reaudit and, with that
24 adjustment, taxpayer has paid all amounts due without making any overpayment. Accordingly, we
25 recommend that taxpayer’s claims for refund be denied.

26 **RESOLVED ISSUE**

27 Taxpayer submitted a request for relief of the finality penalty, signed under penalty of perjury,
28 stating hat he was under the mistaken belief that the auditor had filed a petition for redetermination for

1 him or otherwise arranged for an appeal of the determination. We have reviewed taxpayer's records
2 and conclude that the taxpayer's delay in filing was the result of his miscommunication with the
3 Department staff regarding the appeal process. We find that reasonable cause exists for taxpayer's
4 failure to timely petition the determination. Accordingly, we recommend that the finality penalty and
5 the amnesty double finality penalty be deleted.

6 **AMNESTY**

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

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

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

24 **OTHER DEVELOPMENTS**

25 None.

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