

Tuesday, September 11, 2007

The Board met at its offices at 450 N Street, Sacramento, at 10:00 a.m., Ms. Yee, Chairwoman, Ms. Chu, Vice Chair, Mr. Leonard and Ms. Steel present, Ms. Mandel present on behalf of Mr. Chiang in accordance with Government Code section 7.9.

CORPORATE FRANCHISE AND PERSONAL INCOME TAXES HEARINGS

Accounting Solutions, 378329

2000, \$1,058,419.12 Assessment

For Appellant:

Wendy Abkin, Attorney

For Franchise Tax Board:

Christopher Parker, Tax Counsel

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Issue: Whether, for purposes of the built-in gains tax, respondent properly determined that appellant's value was \$15 million on the effective date of appellant's S-corporation election.

Appellant's Exhibit: Miscellaneous Documents (Exhibit 9.1)

Respondent's Exhibit: Miscellaneous Documents (Exhibit 9.2)

Action: Upon motion of Ms. Chu, seconded by Ms. Mandel and unanimously carried, Ms. Yee, Ms. Chu, Mr. Leonard, Ms. Steel and Ms. Mandel voting yes, the Board submitted the appeal for decision.

Exhibits to these minutes are incorporated by reference.

Taiheiyo Cement USA, Inc., 332855

1998, \$1,668,152.00 Claim for Refund

1998, \$273,149.00 Claim for Refund

For Appellant:

David Robertson, Plant Manager

Jess B. Penilla, Attorney

Steve West, CPA

Chris Schutz, Attorney

For Franchise Tax Board:

Ann Hodges, Tax Counsel

Contribution Disclosures pursuant to Government Code section 15626: No disqualifying contributions were disclosed.

Issue: Whether appellant has shown that property it expensed in the appeal years is qualified property for purposes of the enterprise zone sales and use tax credit.

Appellant's Exhibit: Miscellaneous Documents (Exhibit 9.3)

Action: Upon motion of Ms. Chu, seconded by Ms. Mandel and unanimously carried, Ms. Yee, Ms. Chu, Mr. Leonard, Ms. Steel and Ms. Mandel voting yes, the Board submitted the claims for decision.

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James Fischer Montgomery and Diane Montgomery, 309423

1996, \$206,706.00 Assessment

1997, \$2,530,277.00 Assessment

1998, \$203,228.00 Assessment

1999, \$144,762.00 Assessment

For Appellant:

James Fischer Montgomery, Taxpayer

Charles J. Moll, III, Attorney

For Franchise Tax Board:

John Penfield, Tax Counsel

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Issue: Whether the Franchise Tax Board correctly determined that appellants were residents of California during the years covered by this appeal.

Appellant's Exhibit: Miscellaneous Documents (Exhibit 9.4)

Action: Upon motion of Ms. Chu, seconded by Mr. Leonard and unanimously carried, Ms. Yee, Ms. Chu, Mr. Leonard, Ms. Steel and Ms. Mandel voting yes, the Board submitted the appeals for decision.

The Board recessed at 12:25 p.m. and reconvened at 1:35 p.m. with Ms. Yee, Ms. Chu, Mr. Leonard, Ms. Steel and Ms. Mandel present.

SALES AND USE TAX APPEALS HEARINGS

John K. Lewis, 308137 (UT)

2-8-03, \$17,132.00 Tax

For Petitioner:

John Lewis, Taxpayer

For Sales and Use Tax Department:

Christine Bisauta, Tax Counsel

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Issue: Whether petitioner purchased the vessel at issue for use in California.

Action: Upon motion of Ms. Chu, seconded by Ms. Mandel and unanimously carried, Ms. Yee, Ms. Chu, Mr. Leonard, Ms. Steel and Ms. Mandel voting yes, the Board ordered that the petition be submitted for decision.

Shahrokh Matin, 308003 (CH)

1-1-01 to 12-31-03, \$56,452.72 Tax, \$6,375.88 Negligence Penalty

For Petitioner:

Shahrokh Matin, Taxpayer

Marianne Stirling, Office Manager and
Bookkeeper

For Sales and Use Tax Department:

Kevin Hanks, Hearing Representative

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Issues: Whether adjustments are warranted for bad debts, returned merchandise, discounts paid to finance companies, and erroneous recorded amounts.

Whether petitioner was negligent.

Action: Upon motion of Ms. Chu, seconded by Ms. Mandel and unanimously carried, Ms. Yee, Ms. Chu, Mr. Leonard, Ms. Steel and Ms. Mandel voting yes, the Board ordered that the petition be submitted for decision and directed the Department to review the taxpayer's information and report its findings later in the day.

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Cardinal Health 110, Inc., 97990, 160722, 326200 (OHA)

10-1-96 to 9-30-99, \$293,380.99 Tax

10-1-96 to 9-30-99, \$125,000.00 Claim for Refund

For Petitioner:

Richard E. Nielsen, Attorney

Anthony Ott, Representative

For Sales and Use Tax Department:

Robert Tucker, Tax Counsel

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Issues: Whether petitioner's sales to hospitals and other health facilities of diabetic diagnostic supplies were exempt pursuant to California Code of Regulations, title 18, section (Regulation) 1591.1, subdivision (b)(5).

Whether petitioner has established that the disallowed claimed exempt sales of certain creams and lotions were exempt sales of medicines.

Whether petitioner has established that the use tax applicable to certain ex-tax purchase transactions was paid by the vendor of the tangible personal property.

Action: Upon motion of Ms. Yee, seconded by Ms. Mandel and unanimously carried, Ms. Yee, Ms. Chu, Mr. Leonard, Ms. Steel and Ms. Mandel voting yes, the Board ordered that the claim and petition be postponed, and other pending cases with the same issue of diabetic diagnostic supplies be deferred, pending the outcome of the court's decision.

Local Tax Reallocation Hearing

City of Brisbane, City of Los Angeles, City of San Diego, City of San Jose, 384183

1-1-01 to 9-30-07, \$1,914,483.00 Tax

For Petitioner City of Brisbane:

Clayton Holstine, City Manager

Sepi Richardson, City Counsel Member

Al Koch, Attorney

Robert Cendejas, Attorney

For Sales and Use Tax Department:

Carole Ruwart, Tax Counsel

For Affected Jurisdiction City of Los Angeles:

Evelyn Fernandez Melone, Tax Auditor

For Affected Jurisdiction City of San Jose:

David McPherson, Deputy Director of Finance

For Affected Jurisdiction City of San Diego:

No Appearance

Issues: Whether the retailer's sales shipped to California consumers from warehouses outside California were subject to sales tax that should have been allocated directly to petitioner.

Whether the proper allocation of local tax for sales delivered from California warehouses is covered by the present petition or otherwise properly before the Board for decision.

Whether the local tax for sales delivered from inside California should be reallocated.

Whether local tax for DVD rentals should be reallocated.

Petitioner's Exhibit: Letter in Response to BOE Questions (Exhibit 9.5)

Action: Upon motion of Ms. Chu, seconded by Ms. Mandel and unanimously carried, Ms. Yee, Ms. Chu, Mr. Leonard, Ms. Steel and Ms. Mandel voting yes, the Board ordered that the petition be submitted for decision.

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SPECIAL TAXES APPEALS HEARING

Atlantic Richfield Company, 348075, 158211, 167993 (MT)

1998, \$2,182,414.79 Claim for Refund

1999, \$2,108,009.50 Claim for Refund

2001, \$3,385,304.58 Fee

BP West Coast Products, LLC, 216210, 264250, 307637, 349423 (MT)

2002, \$3,799,831.67 Fee

2003, \$3,454,392.43 Fee

2004, \$3,523,283.18 Fee

2005, \$3,646,660.15 Fee

BP Products North America, Inc., 306843 (MT)

2004, \$23.30 Fee

For Petitioner:

Sean O. Morris, Attorney

For Department of Health Services:

Tim Ford, Representative

For Property and Special Taxes Department:

Carolee Johnstone, Tax Counsel

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Issue: Whether the regulations adopted by the Department of Health Services to implement the Childhood Lead Poisoning Prevention Act are invalid because the fees to be collected from motor vehicle fuel distributors do not accurately reflect their responsibility for environmental lead contamination.

Action: Upon motion of Ms. Chu, seconded by Ms. Mandel and unanimously carried, Ms. Yee, Ms. Chu, Mr. Leonard, Ms. Steel and Ms. Mandel voting yes, the Board ordered that the claims and petitions be submitted for decision.

The Board recessed at 3:30 p.m. and reconvened at 3:35 p.m. with Ms. Yee, Ms. Chu, Mr. Leonard, Ms. Steel and Ms. Mandel present.

FINAL ACTION ON CORPORATE FRANCHISE AND PERSONAL INCOME TAXES HEARINGS HELD SEPTEMBER 11, 2007

Accounting Solutions, 378329

Final Action: Ms. Chu moved that the Appeals Division work with the parties on a value that calculates the mean and median multipliers, with no discount and assumes a \$1 million salary. The motion was seconded by Ms. Yee but failed to carry, Ms. Yee and Ms. Chu voting yes, Mr. Leonard and Ms. Steel voting no, Ms. Mandel abstaining.

This appeal remained submitted for decision until the following day.

Tuesday, September 11, 2007

Taiheiyo Cement USA, Inc., 332855

Final Action: Upon motion of Ms. Chu, seconded by Ms. Mandel and duly carried, Ms. Yee, Ms. Chu and Ms. Mandel voting yes, Mr. Leonard and Ms. Steel voting no, the Board sustained the action of the Franchise Tax Board.

Upon motion of Ms. Chu, seconded by Ms. Yee and duly carried, Ms. Yee, Ms. Chu and Ms. Mandel voting yes, Mr. Leonard and Ms. Steel voting no, the Board ordered the appeal be submitted for written opinion sustaining the action of the Franchise Tax Board. The Board's decision on this matter shall not become final until the matter is brought back to the Board for adoption of the proposed opinion.

James Fischer Montgomery and Diane Montgomery, 309423

Final Action: Ms. Chu moved to sustain the action of the Franchise Tax Board. The motion failed for lack of a second.

Ms. Yee moved that the appellants were California residents until October 1, 1997. The motion was seconded by Ms. Chu but failed to carry, Ms. Yee and Ms. Chu voting yes, Mr. Leonard, Ms. Steel and Ms. Mandel voting no.

This appeal remained submitted for decision until the following day.

CORPORATE FRANCHISE AND PERSONAL INCOME TAXES HEARING

Bobby L. Sanders, Sr., 378102

2004, \$7,847.00 Tax, \$3,923.50 Failure to File and Notice and Demand Penalties

For Appellant: No Appearance

For Franchise Tax Board: Suzanne Small, Tax Counsel

Contribution Disclosures pursuant to Government Code section 15626: No contribution disclosure forms were filed. The Members noted that their records disclosed no contributions from this taxpayer, his agent or participants.

Issues: Whether appellant has demonstrated error in Franchise Tax Board's (FTB) proposed assessment.

Whether there is reasonable cause for appellant's failure to file a timely return and failure to file upon the FTB's notice and demand.

Whether the Board should impose a frivolous appeal penalty.

Action: Upon motion of Ms. Chu, seconded by Ms. Mandel and unanimously carried, Ms. Yee, Ms. Chu, Mr. Leonard, Ms. Steel and Ms. Mandel voting yes, the Board sustained the action of the Franchise Tax Board and imposed a \$1,000.00 frivolous appeal penalty.

FINAL ACTION ON SALES AND USE TAX APPEALS HEARINGS HELD SEPTEMBER 11, 2007

John K. Lewis, 308137 (UT)

Final Action: Upon motion of Ms. Mandel, seconded by Ms. Chu and unanimously carried, Ms. Yee, Ms. Chu, Mr. Leonard, Ms. Steel and Ms. Mandel voting yes, the Board ordered that the petition be redetermined as recommended by the Appeals Division.

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Shahrokh Matin, 308003 (CH)

Final Action: Upon motion of Ms. Yee, seconded by Mr. Leonard and unanimously carried, Ms. Yee, Ms. Chu, Mr. Leonard, Ms. Steel and Ms. Mandel voting yes, the Board ordered that the petition be submitted for decision, granting the petitioner 30 days to file supporting documents, the Department 30 days to respond, and the Appeals Division 30 days thereafter to review the petitioner's supporting documents, the Department's response and provide its recommendation to the Board.

SALES AND USE TAX APPEALS HEARINGS

Naveed Asghar, 42045 (KH)

1-1-96 to 12-31-98, \$103,898.95 Tax, \$25,974.78 Fraud Penalty

For Petitioner: Appearance Waived

For Sales and Use Tax Department: Kevin Hanks, Hearing Representative

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Issues: Whether the audited understatement of reported taxable sales is excessive.

Whether the 25 percent penalty for fraud was properly imposed.

Whether adjustments to the amount of interest are warranted.

Action: Upon motion of Ms. Chu, seconded by Mr. Leonard and unanimously carried, Ms. Yee, Ms. Chu, Mr. Leonard, Ms. Steel and Ms. Mandel voting yes, the Board ordered that the petition be redetermined as recommended by the Appeals Division.

Robert E. Barabino, 296178 (UT)

4-26-02, \$8,294.00 Tax

For Petitioner: Appearance Waived

For Sales and Use Tax Department: Carla Caruso, Tax Counsel

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Issue: Whether petitioner purchased the subject motor home for use in California.

Action: Upon motion of Ms. Mandel, seconded by Ms. Chu and unanimously carried, Ms. Yee, Ms. Chu, Mr. Leonard, Ms. Steel and Ms. Mandel voting yes, the Board ordered that the petition be redetermined as recommended by the Appeals Division.

FINAL ACTION ON SALES AND USE TAX APPEALS HEARING HELD SEPTEMBER 11, 2007

City of Brisbane, City of Los Angeles, City of San Diego, City of San Jose, 384183

Final Action: Upon motion of Ms. Chu, seconded by Ms. Yee and unanimously carried, Ms. Yee, Ms. Chu, Mr. Leonard, Ms. Steel and Ms. Mandel voting yes, the Board ordered that the petition be denied as recommended by the Appeals Division.

Tuesday, September 11, 2007

FINAL ACTION ON SPECIAL TAXES APPEALS HEARING HELD SEPTEMBER 11, 2007

Atlantic Richfield Company, 348075, 158211, 167993 (MT)

BP West Coast Products, LLC, 216210, 264250, 307637, 349423 (MT)

BP Products North America, Inc., 306843 (MT)

Final Action: Upon motion of Ms. Mandel, seconded by Ms. Chu and duly carried, Ms. Yee, Ms. Chu and Ms. Mandel voting yes, Ms. Steel voting no, Mr. Leonard abstaining, the Board ordered that the claims for refund and the petitions be denied.

The Board adjourned at 4:30 p.m.

The foregoing minutes are adopted by the Board on October 24, 2007.

Note: The following matter was removed from the calendar prior to the meeting: *Nissan North America, Inc., 303581.*