

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION BOARD HEARING SUMMARY

3 In the Matter of the Claim for Refund)
 4 Under the Sales and Use Tax Law of:)
 5 ARTURO ROJAS CASTANEDA, dba) Account Number SR EH 100-510979
 6 Barranca Motors) Case ID 556722
 7 Claimant) Montclair, San Bernardino County

8 Type of Business: Used car dealership

9 Audit period: 07/01/05 – 10/31/07

10 Claim period: 07/10/05 – 09/30/06

11 <u>Item</u>	<u>Disputed Amount</u> ¹
12 Claim for refund due to financial hardship	\$ 35,687.85
13 Unrecorded taxable sales	\$173,779.00 ²
13 Unreported taxable sales (in excess of recorded amounts)	\$278,497.00

14 Claimant filed a claim for refund for \$35,687.85, which was collected by levy on February 11,
 15 2010, and applied to the Notice of Determination (NOD) issued for the period July 1, 2005, through
 16 September 30, 2006.

17 **Issue 1:** Whether claimant is entitled to a refund of tax paid pursuant to Board levy, due to
 18 financial hardship created by the levy. We find that claimant is not entitled to a refund.

19 Claimant operated a used car dealership from January 2005 through October 2007. The Sales
 20 and Use Tax Department (Department) conducted an audit of the period July 1, 2005, through
 21 October 31, 2007. The understatement established by audit was determined against claimant in two
 22 NOD's, for the periods July 1, 2005, through September 30, 2006 (the earlier period), and October 1,
 23 2006, through October 31, 2007 (the later period).³

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 25 ¹ In the D&R, the finality penalties and the collection cost recovery fee are also listed as disputed amounts. We do not list
 them as disputed here because claimant has not filed the requisite requests for relief signed under penalty of perjury.

26 ² The amounts of unrecorded taxable sales and unreported taxable sales (in excess of recorded amounts) represent
 27 understatements established in an audit of the period July 1, 2005, through October 31, 2007, which were determined
 against claimant in NOD's issued for the periods July 1, 2005, through September 30, 2006, and October 1, 2006, through
 October 31, 2007. In addition to his primary contention that the collection by levy created a financial hardship, claimant
 also argues that adjustments are warranted to those audited understatements.

28 ³ The details of the understatements established by audit are addressed under Issue 2.

1 On January 27, 2010, a Notice of Levy was served on a Wells Fargo bank (WFB) account
2 belonging to claimant. On February 11, 2010, the Department received \$35,687.85, which was applied
3 to the NOD for the earlier period, in the amounts of \$22,874.85 tax, \$8,237.99 interest, and \$4,575.01
4 penalties (a negligence penalty of \$2,287.52 and a finality penalty of \$2,287.49). The NOD for the
5 earlier period was then paid in full. Subsequently, the Department prepared a reaudit, which reduced
6 the amounts determined in both NOD's. After the adjustments in the reaudit, there was an
7 overpayment of \$16,718.66 for the earlier period which was applied to the NOD for the later period.⁴

8 Claimant spoke with the Department and met with Department representatives in person,
9 stating that he was financially destitute and had lost his auto dealership business. He also asserted that
10 the levy proceeds had been collected from his retirement account, but he did not provide evidence to
11 support that assertion. The Department requested that claimant provide financial information,
12 including an Individual Financial Statement, but he did not do so. On October 28, 2010, claimant filed
13 a claim for refund in the amount of \$35,687.85 to recover the levied funds, claiming financial hardship
14 and asserting that the levied funds were taken from his retirement account. As evidence, claimant
15 provided a statement for his WFB Retirement Savings Account (RSA) for the period April 1, 2010,
16 through June 30, 2010; a statement from his WFB savings account for the period July 1, 2010, through
17 August 31, 2010; a statement from a Chase Bank account for the period January 23, 2010, through
18 June 18, 2010; and a Supplemental Security Income statement from the Social Security Administration
19 dated November 2, 2010. The Department found that the documentation did not provide evidence that
20 the levied funds came from claimant's retirement account and concluded that claimant was not
21 suffering financial hardship as a result of the levy because he had \$18,000 remaining in his bank
22 accounts after the Board's levy. The Department therefore denied the claim for refund, and claimant
23 appealed that decision and requested an appeals conference.⁵

24 In his appeal of the Department's denial of the claim, claimant contends that he suffered
25 financial hardship due to the Board's levy and that the funds levied consisted of retirement funds,
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27 ⁴ Currently, the liability for the later period includes tax of \$3,616.90, penalty of \$371.30, and accrued interest.

28 ⁵ Claimant also disputed the audit findings, and the Department conducted a reaudit. Claimant continues to dispute the understatements established in the reaudit, as addressed under Issue 2.

1 which are exempt from levy. Claimant states that he rolled over funds totaling \$49,230.46 from his
2 401K retirement account into a WFB RSA in 2008. He asserts that his RSA was levied by the Board
3 in early 2009 in the amount of \$54,387.19, and that the levied funds were returned to him when he
4 protested that the funds were exempt from levy. Claimant states that he then deposited those funds
5 into another WFB savings account that was not designated as an RSA. The \$35,687.85 was then
6 collected by levy from that WFB savings account. Following this levy of funds, claimant withdrew the
7 remaining funds from the savings account, approximately \$18,000. Claimant provided various
8 documents to show this chain of events.⁶

9 We first examine whether the Department properly executed the Notice of Levy to WFB. The
10 Department served the Notice of Levy on January 27, 2010, in compliance with Revenue and Taxation
11 Code section 6703, subdivision (a) and (e). The Department mailed a copy of the Notice of Levy,
12 together with a BOE-425 form, Exemptions from the Enforcement of Judgments, to claimant. WFB
13 complied with the Notice of Levy by removing funds in the amount of \$35,687.85 and paying those
14 amounts to the Board, who then applied those funds to claimant's liability effective January 29, 2010.
15 We find that the Department followed the proper procedures and executed the levy consistent with the
16 legal requirements.

17 Next, we must determine whether the funds levied from claimant's WFB account constituted
18 retirement benefits exempt from levy pursuant to the Code of Civil Procedure, section 704.115,
19 subdivision (b). Claimant has documented that he rolled over funds from his 401K retirement account
20 totaling \$49,230.46 into a WFB RSA in 2008. Although claimant asserts that the Board levied the
21 RSA in 2009, the Department has no record of such levy. The Department has explained that the
22 check returning these funds to claimant was issued by the Franchise Tax Board (FTB), rather than the
23 Board. Thus, we find that it was the FTB, rather than the Board, that levied the WFB RSA account in
24 2009 and then returned the funds to claimant because they had been collected from retirement funds.

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27 ⁶ Claimant also states that he experienced difficulties in contacting the Department to learn procedures for filing a claim for
28 refund and that the Department continued to contact him even after he had filed a power of attorney appointing Arturo
Carrillo as his representative. Claimant states that the Department's continued contact directly with him (rather than the
representative) resulted in confusion because of his limited proficiency in English and various health issues. Since those
assertions are not germane to the issue of financial hardship, we will not address them further.

1 When he received the refund from FTB, claimant deposited the funds into a WFB savings account that
2 was not designated as a retirement savings account. At that point, the funds lost their exempt status as
3 they were no longer held, controlled, or in the process of distribution by a private retirement plan
4 pursuant to Code of Civil Procedure, section 704.115, subdivision (b). Accordingly, the funds paid to
5 the Board by WFB pursuant to the Board's January 29, 2010 Notice of levy were not retirement funds
6 exempt from levy.

7 Finally, we consider claimant's contention that he suffered financial hardship as a result of the
8 levy of his savings account in the amount of \$35,687.85. Claims of financial hardship are usually
9 evaluated at the time the levy is presented to the bank, which permits the Department to determine
10 whether a levy should be released or modified before the bank remits the funds to the Board. In this
11 instance, claimant filed his claim for refund on October 28, 2010, nine months after the levied funds
12 were remitted to the Board. Claimant then provided some bank statements and other financial records
13 to the Department on December 22, 2010, nearly eleven months after the levy was executed.

14 However, claimant did not submit an Individual Financial Statement or otherwise provide the
15 Department with detailed information regarding claimant's income, assets, and expenses, which is
16 required to determine whether the levy caused financial hardship. Although we requested the same
17 documentation after the conference, claimant's representative has explained that he has been unable to
18 obtain the requested information and records from claimant. The limited financial records previously
19 provided by claimant disclose that he had at least \$18,000 remaining in his WFB savings account after
20 the Board's levy. Based on that limited financial data, we find that, at the time of the levy, claimant
21 did not suffer financial hardship as a result of the levy. Consequently, we recommend that the claim
22 for refund be denied.

23 **Issue 2:** Whether adjustments are warranted to the understatements of reported tax established
24 by audit of the period July 1, 2005, through October 31, 2007. We find no adjustment is warranted.

25 In the reaudit, the Department found an understatement of recorded taxable sales of \$173,779, a
26 difference between recorded and reported taxable sales of \$278,497, an unreported cost of vehicles
27 withdrawn from inventory for personal use of \$17,505, and bad debts of \$43,352 that had not been
28 claimed on returns. Claimant protests the first two understatements, \$173,779 and \$278,497.

1 The Department reviewed all available sales contracts, Reports of Sales provided by the
2 Department of Motor Vehicles (DMV), and sales confirmations provided by finance companies. The
3 Department contacted seven financing companies that had provided financing for claimant's sales
4 during the audit period, but only two companies responded. The Department compared the sales
5 information provided by the financing companies to claimant's recorded sales for which the customers
6 had used those two financing companies. The Department found that sales totaling \$178,210 had not
7 been recorded by claimant. However, after the NOD's were issued, claimant provided evidence that
8 \$39,945 of that amount represented sales that were never consummated or were canceled. Thus, the
9 Department reduced the amount of unrecorded sales from those two companies to \$138,265. The
10 Department divided \$138,265 by the total amount of sales identified by the two companies of
11 \$2,582,272 to compute an understatement in recorded sales of 5.35 percent.⁷ The Department applied
12 5.35 percent to the total recorded sales for which claimant's customers had used the seven financing
13 companies to compute an understatement of recorded taxable sales of \$173,779. The Department also
14 found that recorded taxable sales exceeded reported taxable sales by \$278,497.

15 Claimant contends that adjustments are warranted to both the understatement of recorded
16 taxable sales and the amount of recorded, but not reported, taxable sales. He states that the auditor
17 lacked experience in auditing car dealerships and failed to contact the financial institutions that
18 financed claimant's auto sales. Also, claimant asserts that one of the financial institutions the
19 Department did contact was uncooperative and failed to provide reliable information.

20 The Department contacted all seven of the financing companies used by claimant's customers,
21 and only two of those companies replied. Accordingly, the Department used the available information
22 from the two companies to compute a percentage of error which it applied to recorded sales from the
23 seven companies to compute unrecorded taxable sales of \$173,779. We find that the Department's
24 audit method was appropriate. (See Sales and Use Tax Department Audit Manual, § 0405.20).

26 ⁷ We note that the Department should have divided the \$138,265 by the amount of *recorded* sales for which its customers
27 used these two financing companies, which would have been \$2,444,007 (\$2,582,272 - \$138,265). Thus, the percentage of
28 error should have been 5.65 percent. However, since the difference is minor and benefits the taxpayer, we do not
recommend any adjustment.

1 Further, we note that claimant has provided no evidence that the information provided by one of the
2 two finance companies was not reliable. Consequently, we find no adjustment is warranted to the
3 understatement of recorded taxable sales.

4 With respect to the difference between recorded and reported taxable sales, the Department
5 compiled recorded taxable sales from the DMV Report of Sale books and compared the total to the
6 amount reported on claimant's returns during the audit period. Claimant has not identified any errors
7 in the information compiled by the Department, and we find no adjustment is warranted.

8 **OTHER MATTERS**

9 We informed claimant that he could request relief of the finality penalties added to the two
10 NOD's and the collection cost recovery fee (CCRF) imposed against claimant because of his failure to
11 pay the NOD issued January 14, 2010, for the period October 1, 2006, through October 31, 2007. We
12 subsequently received an unsigned request for relief on which claimant had marked the box for
13 penalty, but had not marked the box for the CCRF. Although we requested that claimant submit a
14 signed request for relief, he has not done so. Accordingly, we have no basis to consider relief of either
15 the finality penalties or the CCRF.⁸

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18 Summary prepared by Deborah A. Cumins, Business Taxes Specialist III

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27 ⁸ We note that the grounds stated in claimant's unsigned request for relief--that he has been disputing the charges for both
28 periods, has lost his business, and is unemployed--are not sufficient to establish reasonable cause for his failure to timely
pay the NOD's or file petitions for redetermination. Thus, we find nothing in the record that would warrant relief of the
finality penalties or the CCRF, even if the request for relief had been signed under penalty of perjury.