

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION BOARD HEARING SUMMARY

In the Matter of the Petition for Redetermination)
Under the Sales and Use Tax Law of:)
BODY WISE INTERNATIONAL, LLC) Account Number SR EA 100-570183
Case ID 552589
Petitioner) Irvine, Orange County

Type of Business: Weight loss and nutrition product sales

Audit period: 04/01/05 – 12/31/09

<u>Item</u>	<u>Disputed Amount</u>
Excess tax reimbursement collected	\$62,862 (tax)

	<u>Tax</u>	<u>Penalty</u>
As determined	\$2,362,207.01	\$236,220.74
Pre-D&R adjustments	-1,499,046.28	-149,904.66
Post-D&R adjustments	- 756,118.48	- 86,316.08
Proposed redetermination	\$ 107,042.25	<u>\$ 00.00</u>
Less concurred	- 44,180.25	
Balance protested	<u>\$ 62,862.00</u>	
Proposed tax redetermination	\$ 107,042.25	
Interest through 01/31/17	<u>67,599.84</u>	
Total tax and interest	<u>\$ 174,642.09</u>	
Monthly interest beginning 02/01/17	<u>\$ 624.41</u>	

UNRESOLVED ISSUE

Issue: Whether excess tax reimbursement that petitioner collected on sales in interstate or foreign commerce must be paid to the Board. We find that it must.

Petitioner has sold weight loss and nutrition products through its Internet website and through independent multi-level marketing representatives throughout North America since January 2005. Petitioner states that its customers place orders through a California call center or through petitioner's website and the orders are shipped from its California warehouse by common carrier.

Records that petitioner provided for audit showed that during the liability period, petitioner collected sales tax reimbursement of \$3,730,441 from all customers within and outside of California. In the pre-D&R reaudit, the Business Tax and Fee Department (Department) reduced this amount by the amount of sales taxes paid to other states and the amount of sales tax paid on its California sales

1 and use tax returns, and computed excess tax reimbursement collected by petitioner and not reported to
2 any taxing jurisdiction of \$859,897. The Department concluded that petitioner, a California retailer,
3 collected amounts that it represented to be sales tax reimbursement on transactions consisting primarily
4 of interstate and international sales, and that, absent proof that the excess tax reimbursement had been
5 refunded to the customers or paid to another taxing jurisdiction, those amounts could not be retained
6 by petitioner, and therefore, were required to be remitted to the Board.

7 In support of arguments made in the RFR, petitioner provided documentary evidence to show
8 that some of the sales tax reimbursement recorded in petitioner's records represented Goods and
9 Services Taxes (GST) collected from customers by its Canadian subsidiary and remitted to the Canada
10 Revenue Agency (CRA). Adjustments to allow for the GST in the post-D&R reaudits resulted in a
11 reduction to the amount of excess tax reimbursement collected by petitioner and not reported to any
12 taxing jurisdiction from \$756,118 to \$103,779, which represents taxable measure of \$1,302,676.¹

13 Petitioner only disputes \$62,862 of the \$103,779 in excess tax reimbursement, and concedes
14 that the remaining \$40,917 represents sales tax reimbursement that it properly collected from
15 California customers, but failed to remit. Petitioner contends that the Board's authority to collect
16 excess tax reimbursement is limited to California sales tax reimbursement that is collected by the
17 retailer in excess of the amount of tax actually owed to the Board. Petitioner argues that the
18 Department asserted a right to sales tax reimbursement that petitioner owed to the jurisdictions in
19 which the sales occurred, thus exposing petitioner to a risk of double taxation. Petitioner also asserts
20 that it is entitled to additional adjustments for GST paid to the CRA.

21 We find that sales tax reimbursement collected on nontaxable sales in interstate and foreign
22 commerce meets the definition of excess tax reimbursement contained in California Code of
23 Regulations, title 18, section (Regulation) 1700, subdivision (b)(1), and that subdivision (b)(2)
24 prescribes the actions undertaken by the Department here. In addition, we find that the Board has a
25 responsibility under the Sales and Use Tax Law to prevent unjust enrichment, and the fact that these

27 ¹ The Department converted the tax amount of \$103,779 to a taxable measure of \$1,302,676 by dividing the tax by the
28 applicable tax rate in Irvine.

1 sales were sales in interstate and foreign commerce does not negate that responsibility.² We thus find
2 that amounts collected by petitioner on interstate and foreign commerce sales in excess of amounts
3 paid to the taxing authorities of jurisdictions or refunded to customers must be paid to the Board in
4 accordance with Regulation 1700. We also find that petitioner has not established that it is entitled to
5 any additional reductions for taxes paid to other jurisdictions. Accordingly, we recommend no further
6 reductions to the measure of tax.

7 **RESOLVED ISSUES**

8 The Department imposed the negligence penalty on the grounds that petitioner negligently
9 failed to report taxes due, which resulted in a significant understatement. In the Supplemental D&R,
10 we found that the understatement was substantially reduced in the post-D&R readuits, and that the
11 error rate is not significantly large considering that this was petitioner's first audit. Thus, we find that
12 petitioner should be given the benefit of the doubt, and recommend that the negligence penalty be
13 deleted.

14 **OTHER MATTERS**

15 None.

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18 Summary prepared by Gary A. Lomazzi, Business Taxes Specialist III
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28 ² We also note that petitioner is a California retailer with a California seller's permit, and thus the Board has the jurisdiction to ensure petitioner's compliance with California's sales and use tax laws.