

**Wednesday, October 24, 2007**

The Board met at its offices at 450 N Street, Sacramento, at 9:30 a.m., with 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.

### **SALES AND USE TAX APPEALS HEARINGS**

The Auto Store of Merced, Inc., 168200 (KH)

7-1-98 to 6-30-01, \$937,289.23 Tax, \$93,728.95 Penalty

For Petitioner:

Jakrun S. Sodhi, Attorney

Dan Davis, Accountant

Abdul Jawad, Taxpayer

For Sales and Use Tax Department:

Robert Tucker, Tax Counsel

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

Issues: Whether further adjustments are warranted to the audited understatement of reported taxable sales.

Whether petitioner was negligent.

Action: Upon motion of Mr. Leonard, seconded by Ms. Steel 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.

Stephen Charles Borkenhagen, 302079 (GH)

10-1-00 to 12-31-03, \$50,357.41 Tax, \$5,035.76 Negligence Penalty

Eulipia, Inc., 300130 (GH)

10-1-00 to 12-31-03, \$50,357.41 Tax, \$5,035.76 Negligence Penalty

Los Gatos Restaurants, Inc., 299490 (GH)

1-16-01 to 12-31-03, \$41,662.32 Tax, \$4,166.28 Negligence Penalty

For Petitioner:

Kathleen Borkenhagen, Taxpayer

For Sales and Use Tax Department:

Kevin Hanks, Hearing Representative

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

*Issue in the matter of 302079 only:*

Whether petitioner Stephen Charles Borkenhagen is personally liable for the unpaid tax liability of Eulipia, Inc. for the period October 1, 2000, through December 31, 2003.

*Issues in the matters of 300130 and 299490:*

Whether the amounts of taxable sales computed in the audit are excessive.

Whether the additional measure of tax for self-consumption should be deleted because petitioners allegedly reported them on the sales and use tax returns.

Whether the measure of tax for mandatory tips for Eulipia should be deleted because Eulipia already reported tax on mandatory tips.

Whether petitioners were negligent.

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Action: Upon motion of Mr. Leonard, 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 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.

J & H Jewelry Mart, Inc., 304042 (GH)

David H. Levine, Tax Counsel, Appeals Division, Legal Department, reported the Appeals Division's revised recommendation.

Herminio Bustos, petitioner in this matter, requested a postponement.

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 postponed to the November Sacramento Board Meeting.

## CHIEF COUNSEL MATTERS

### RULEMAKING

#### **Proposed Amendments to Sales and Use Tax Regulation 1521, *Construction Contractors***

Robert Tucker, Tax Counsel, Business Taxes Division, Legal Department, reported on the proposed amendments to Sales and Use Tax Regulation 1521, *Construction Contractors*, stating that since no comments were received during the 15-day public comment period, no further action is required by the Board and the proposed amendments will be forwarded to the Office of Administrative Law.

Regulation 1521, *Construction Contractors*, is proposed to be amended to provide that photovoltaic cells, solar panels, and solar modules should be considered materials when they function in the same manner as other materials such as roofing shingles, skylights, wall panels or windows, but that other photovoltaic cells, solar panels, and solar modules are accessory to a building and should be considered fixtures. (Exhibit 10.23.)

Exhibits to these minutes are incorporated by reference.

#### **Proposed Amendments to Sales and Use Tax Regulation 1802, *Place of Sale and Use for Purposes of Bradley-Burns Uniform Local Sales and Use Taxes***

Carole Ruwart, Tax Counsel, Business Taxes Division, Legal Department, made introductory remarks regarding Regulation 1802, *Place of Sale and Use for Purposes of Bradley-Burns Uniform Local Sales and Use Taxes*, is proposed to be amended to provide that all sellers who are required to collect local use tax on transactions of \$500,000 or more shall report the local use tax revenues derived there from directly to the jurisdiction where the property is first functionally used. (Exhibit 10.24.)

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Speakers: Fran Mancina, Director of Government Relations, Muni Services  
Robert Cendejas, Special Counsel, Muni Services  
David R. Doerr, Chief Tax Consultant, California Taxpayers' Association

Action: Upon motion of Ms. Yee, seconded by Mr. Leonard and duly carried, Ms. Yee, Mr. Leonard and Ms. Steel voting yes, Ms. Mandel abstaining, Ms. Chu voting no, the Board adopted the proposed amendments to Sales and Use Tax Regulation 1802 as published.

**Proposed Amendments to Regulation 5000 et seq, *Board of Equalization Rules for Tax Appeals***

Bradley Heller, Tax Counsel, Business Taxes Division, Legal Department, made introductory remarks regarding Board approval of staff changes subsequent to Board adoption of the *Board of Equalization Rules for Tax Appeals* (Cal. Code of Regs., tit. 18, § 5000 et seq.) on September 11, 2007. (Exhibit 10.25.)

Ms. Yee directed Chief Counsel to provide a report on the legal requirements of the Office of Administrative Law and the Board of Equalization's practices regarding regulations.

**OTHER CHIEF COUNSEL MATTERS**

**Request for Filing Amicus Curiae Brief, *Wunderlich v. County of Santa Cruz*, Santa Cruz County Superior Court, Case No. CV154719**

Anthony Epolite, Tax Counsel, Legal Affairs Division, Legal Department, made introductory remarks regarding the request for filing amicus curiae brief, *Wunderlich v. County of Santa Cruz*, Santa Cruz County Superior Court, Case No. CV154719. (Exhibit 10.26.)

Speakers: Stephen H. Bennett, CPA, Letwak and Bennett  
David R. Doerr, Chief Tax Consultant, California Taxpayers' Association

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 approved Chief Counsel's request.

Mr. Leonard noted for the record that he would issue a brief in support of the taxpayer.

**Status Report on Multistate Tax Commission Amicus Brief, *CSX Transportation, Inc. v. State Board of Equalization of the State of Georgia, et al.*, Docket No. 06-1287, U.S. Supreme Court**

Robert Lambert, Acting Assistant Chief Counsel, Tax and Fee Programs Division, Legal Department, reported the status of Multi-State Tax Commission Amicus Brief, *CSX Transportation, Inc. v. State Board of Equalization of the State of Georgia, et al.*, Docket No. 06-1287, U.S. Supreme Court. (Exhibit 10.27.)

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**Request for Filing Amicus Curiae Brief, *Steinhart v. County of Los Angeles*, Court of Appeal, Second Appellate District, Case No. B190957**

Mr. Epolite made introductory remarks regarding the request for filing Amicus Curiae Brief, *Steinhart v. County of Los Angeles*, Court of Appeal, Second Appellate District, Case No. B190957. (Exhibit 10.28.)

Speakers: William Carter, Supervising Deputy Attorney General, Attorney General's Office  
Stephen H. Bennett, CPA, Letwak and Bennett

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 approved Chief Counsel's request.

Mr. Leonard noted for the record that he would issue a brief in support of the taxpayer.

**ADMINISTRATIVE SESSION****ADMINISTRATIVE MATTERS, CONSENT**

With respect to the Administrative Matters, Consent Agenda, upon a single motion of Mr. Leonard, seconded by Ms. Chu and unanimously carried, Ms. Yee, Ms. Chu, Mr. Leonard, Ms. Steel and Ms. Mandel voting yes, the Board made the following orders:

Action: Adopt the following resolutions extending its best wishes on their respective retirements and its appreciation for their service to the State Board of Equalization and the State of California (Exhibit 10.29).

Louie Chapman, Supervising Property Appraiser, State-Assessed Properties  
Division, Property and Special Taxes Department, Headquarters  
Haven M. Kimura, Associate Tax Auditor, Norwalk District Office  
Shirley C. Konya, Business Taxes Specialist I, Norwalk District Office  
Valerie Smith, Tax Technician III, Van Nuys District Office  
Irene P. Tse, Associate Tax Auditor, West Covina District Office  
David B. Weld, Jr., Supervising Tax Auditor I, Norwalk District Office

Action: Approve the Board Meeting Minutes of August 14, 2007 and September 11-12, 2007.

Action: Approve the 2008 Hazardous Substances Program Fees and Occupational Lead Poisoning Prevention Fee (Exhibit 10.30).

Action: Approve the 2008 Board Workload Plan (Exhibit 10.31).

**Wednesday, October 24, 2007**

With respect to the Administrative Matters, Consent Agenda, 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 made the following order:

Action: Postpone the matter of sales tax prepayment rate on motor vehicle fuel, diesel fuel and jet fuel to the November Sacramento Board Meeting (Exhibit 10.32).

#### **ADOPTION OF BOARD COMMITTEE REPORTS AND APPROVAL OF COMMITTEE ACTIONS**

##### **Legislative Committee**

Action: Upon motion of Mr. Leonard, seconded by Ms. Chu and unanimously carried, Ms. Yee, Ms. Chu, Mr. Leonard, Ms. Steel and Ms. Mandel voting yes, the Board approved the Legislative Committee report and the actions therein (Exhibit 10.33).

Committee votes were as follows:

A position to support, as a non-urgency measure, proposed amendments to section 15609 of the Government Code to require the Members of the Board to meet monthly in the State but not exclusively in Sacramento unanimously passed with Ms. Yee, Ms. Chu, Mr. Leonard, Ms. Steel and Ms. Mandel voting yes.

#### **OTHER ADMINISTRATIVE MATTERS**

##### **Executive Director's Report**

Ramon Hirsig, Executive Director, introduced Anna Brannen, Chief Information Officer of the Technology Services Division, who provided a report of her vision.

Mr. Hirsig reported the unveiling of the Board of Equalization headquarters building assessment web page; provided an update on the headquarters building; and, thanked staff for their unwavering diligence in performing their daily work during these conditions. In addition, Mr. Hirsig reported that a resolution will be prepared to formally thank the Franchise Tax Board for their continued support in accommodating displaced Board of Equalization employees.

The Board extended sincere thanks to staff for their perseverance and ability to do their respective jobs even during relocation.

##### **Deputy Director's Report**

David Gau, Acting Deputy Director, Administration Department, provided an update regarding the Department of Finance response to BOE unallocated reduction exemption request.

The Board directed Mr. Gau to draft a memorandum to appeal the staff reduction to the Governor.

Mr. Gau provided an update regarding CEA salary compaction issues.

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### **ANNOUNCEMENT OF CLOSED SESSION**

The Board recessed at 12:10 p.m. and reconvened immediately in closed session with Ms. Yee, Ms. Chu, Mr. Leonard, Ms. Steel and Ms. Mandel present.

### **CLOSED SESSION**

The Board met to discuss pending litigation (Gov. Code § 11126(e)), and personnel matters (Gov. Code § 11126(a)).

The Board recessed at 1:48 p.m. and reconvened immediately in open session with Ms. Yee, Ms. Chu, Mr. Leonard, Ms. Steel and Ms. Mandel present.

Mr. Hirsig announced that the Board made decisions on personnel matters and that he will be informing the applicants of those decisions.

The Board adjourned at 1:50 p.m.

*The foregoing minutes are adopted by the Board on February 1, 2008.*

Note: The following matter was removed from the calendar prior to the meeting: *ABC-NACO, Inc., 167411 (OH)*