

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:)
GARO APO GARABEDIAN,) Account Number SR AP 97-971519
dba Vartini Sunclass & More) Case ID 522650
Petitioner) Glendale, Los Angeles County

Type of Business: Optometrist

Audit period: 01/01/05 – 02/15/08

<u>Item</u>	<u>Disputed Amount</u>	
Unreported taxable sales	\$444,212	
Unreported purchases of ophthalmic materials	\$146,533	
Disallowed tax-paid purchases resold deduction	\$ 15,797	
Negligence penalty	\$ 5,004	
	<u>Tax</u>	<u>Penalty</u>
As determined	\$52,039.11	\$5,203.91
Post-D&R adjustment	<u>- 1,999.32</u>	<u>- 199.92</u>
Proposed redetermination	<u>\$50,039.79</u>	<u>\$5,003.99</u>
Proposed tax redetermination	\$50,039.79	
Interest through 10/31/14	27,748.47 ¹	
Negligence penalty	<u>5,003.99</u>	
Total tax, interest, and penalty	<u>\$82,792.25</u>	
Monthly interest beginning 11/01/14	<u>\$ 250.20</u>	

This matter was scheduled for Board hearing in April 2013, but it was deferred so that the Appeals Division could issue an SD&R. It was rescheduled for Board hearing in February 2014, but was postponed at petitioner's request due to a family emergency. It was rescheduled for Board hearing in June 2014, but was postponed at petitioner's request for additional time to prepare.

¹ As discussed under "Other Matters," the Appeals Division recommends relief of interest for the period September 23, 2010, through August 9, 2011, due to an unreasonable delay. The interest shown here is net of interest of \$3,029.90, the amount that we recommend be relieved.

UNRESOLVED ISSUES

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2 **Issue 1:** Whether any adjustment to the amount of unreported taxable sales of sunglasses is
3 warranted. We conclude that no adjustments are warranted.

4 Petitioner operated as an optometrist selling both nonprescription sunglasses and prescription
5 glasses from January 15, 2002 through February 15, 2008, when petitioner incorporated the business.
6 For audit, petitioner provided his federal income tax returns for the years 2005, 2006 and 2007, sales
7 invoices for the fourth quarter of 2007 (4Q07) and 1Q08, and a few random purchase invoices. The
8 Sales and Use Tax Department (Department) noted that gross receipts reported on the income tax
9 returns agreed with total sales reported on the sales and use tax returns. However, the Department
10 found that petitioner's book markups were lower than expected. Consequently, the Department
11 concluded that petitioner's reported sales were understated, and the Department computed audited
12 taxable sales using an alternate method.

13 The Department contacted petitioner's known vendors to obtain petitioner's total purchases of
14 sunglasses. Because petitioner claimed his vendors required him to sell sunglasses at the
15 manufacturer's suggested retail prices, the Department used the available manufacturer's suggested
16 retail selling prices, where available, to establish an audited markup on sunglasses. The Department
17 added the markup to audited total purchases of sunglasses to establish audited taxable sales of
18 sunglasses, which exceeded petitioner's reported taxable sales for 2005, 2006, and 2007 by \$434,498.
19 A comparison of audited taxable sales with reported taxable sales for 2007 showed a reporting error
20 rate of 228.56 percent for 2007. The Department applied this reporting error rate to petitioner's
21 reported taxable sales for 1Q08 to establish unreported taxable sales of \$444,210 for the audit period.

22 Petitioner contends that the audited total purchases of sunglasses are overstated because the
23 Department did not account for returned merchandise. Petitioner also contends the Department used
24 the incorrect selling prices to establish the markup on sunglasses. The Department argues petitioner
25 has not provided any documentation to support a reduction to audited purchases of sunglasses.
26 Instead, the Department found that the documentation submitted showed purchases of sunglasses that
27 exceed the audited purchases of sunglasses, and the Department concluded audited purchases of
28 sunglasses were net of returned merchandise. We find the available evidence does not support

1 petitioner's contention that audited total purchases of sunglasses are overstated. Further, petitioner
2 has not provided any documentary evidence that the selling prices used by the Department are
3 incorrect. Thus, we reject petitioner's contentions, and we recommend no adjustments.

4 **Issue 2:** Whether any adjustments to the unreported purchases of ophthalmic materials subject
5 to use tax are warranted. We conclude that no adjustments are warranted.

6 The Department found petitioner to be the consumer of ophthalmic materials related to his sales
7 of prescription eyeglasses. Because petitioner provided no documentation to establish his costs of
8 ophthalmic materials, the Department calculated petitioner's costs of ophthalmic materials by dividing
9 audited sales of prescription glasses by the audited markup factor. Initially, the Department
10 established audited costs of ophthalmic materials using petitioner's markup on sunglasses. However,
11 in a post-D&R reaudit, a separate markup on eyeglasses was established which benefited petitioner by
12 reducing the audited costs of materials to \$166,806. After a reduction for the costs of materials
13 purchased tax-paid, an understatement of \$146,533 was established.

14 Petitioner did not provide any specific contentions for this issue. We find the available
15 evidence indicates that petitioner purchased all of his ophthalmic materials from out-of-state vendors,
16 which are generally subject to use tax, and petitioner has not provided any evidence to show his
17 remaining purchases of ophthalmic materials were tax-paid. Thus, we recommend no adjustments.

18 **Issue 3:** Whether any adjustments to the disallowed claimed tax-paid purchases resold
19 deduction are warranted. We conclude no adjustments are warranted.

20 Petitioner claimed a tax-paid purchase resold deduction of \$15,797 on his 4Q07 sales and use
21 tax return. Petitioner contends that he purchased a wrist watch tax-paid and then resold the watch.
22 The Department found that the purchase invoice petitioner provided did not include petitioner as the
23 purchaser, and the sales invoice provided failed to include a description of the item sold. We find that
24 even if petitioner were to establish that he was entitled to a tax-paid-purchases resold deduction, the
25 gross receipts from the alleged retail sale of the watch have not been included in the deficiency
26 measure. Consequently, we reject petitioner's contention and we recommend no adjustment.

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MARKUP TABLE

Optometrist & Retailer of Sunglasses

Percentage of taxable vs. nontaxable purchases (Sunglasses)	100%
Mark-up percentages developed	123.89%
Self-consumption allowed in dollars	None
Pilferage allowed in dollars	None ²

² No adjustment was made for pilferage of sunglasses because an optometrist's office is not a typical retail establishment where merchandise is out on display and is more susceptible to theft.