

## 1 CALIFORNIA STATE BOARD OF EQUALIZATION

## 2 APPEALS DIVISION BOARD HEARING SUMMARY

3 In the Matters of the Petition for Redetermination )  
 4 and Claim for Refund Under the Sales and Use )  
 Tax Law of: )

5 **H&O, INC,** )  
 6 dba Kassa's Gas & Mart )

Account Number SR GH 100-683147  
 Case ID 547859, 709260

7 Petitioner )

San Jose, Santa Clara County

8 Type of Business: Two gas stations with mini-marts

9 Audit period: 01/01/06 – 12/31/08

10 Item Disputed Amount

11 Unreported taxable sales \$337,724

12 Tax as determined \$46,376.24<sup>1</sup>

Less concurred -18,514.00

13 Protested tax \$27,862.24

14 Proposed tax redetermination 46,376.24

Interest through 07/31/14 22,616.65

15 Penalty credit - 1,109.12<sup>2</sup>

16 Total tax, interest, and penalty credit \$67,883.77

17 Monthly interest beginning 08/01/14 \$ 231.88

18 This matter was scheduled for Board hearing in September 2013, but petitioner did not respond  
 19 to the Notice of Hearing and it was scheduled for decision on the nonappearance calendar. Pursuant to  
 20 a request by petitioner's new representative, the matter was rescheduled for Board hearing in  
 21 November 2013, but the matter was postponed at petitioner's representative's request for additional  
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24 <sup>1</sup> In addition to tax of \$27,862.24 computed on unreported taxable sales of \$337,724, the determined tax includes \$20,170  
 25 for disallowed claimed sales tax prepaid to a motor vehicle fuel distributor, \$45,179 for a disallowed claimed credit for tax  
 paid to another jurisdiction, less a tax credit of \$46,835 computed on unclaimed costs of tax-paid purchases resold of  
 \$567,697.

26 <sup>2</sup> In 2007, petitioner filed sales and use tax returns on a monthly basis. Petitioner was assessed and paid a penalty of  
 27 \$1,034.23 for a late payment towards its September 2007 return. Petitioner also was assessed and paid a finality penalty of  
 \$74.89 for paying a determination issued for the August 2007 return after the determination became final. However, the  
 28 Sales and Use Tax Department found in the audit that petitioner had failed to claim costs of tax-paid purchases resold of  
 \$567,697 in the third quarter of 2007, and therefore had reported more tax than it owed for that quarter. Accordingly, credit  
 was provided in the determination for the penalties of \$1,109.12 that had been computed on tax that actually was not due.

1 time to prepare. It was rescheduled for Board hearing in April 2014, but was postponed at petitioner's  
2 request for additional time to prepare.

### 3 UNRESOLVED ISSUES

4 **Issue 1:** Whether adjustments are warranted to the amount of unreported taxable sales. We  
5 find that no adjustments are warranted.

6 Petitioner operated two gas stations with mini marts from January 2006 through February 2008,  
7 when it closed one of its locations. For audit, petitioner provided monthly sales summaries, fuel  
8 purchase invoices, some market purchase invoices, and copies of its sales and use tax returns. To  
9 verify the accuracy of petitioner's recorded fuel sales, the Sales and Use Tax Department (Department)  
10 computed expected fuel sales by multiplying the recorded gallons of fuel purchased by the average  
11 retail gasoline selling prices published by the California Department of Energy. Since the expected  
12 fuel sales for the audit period were only \$26,673 more than petitioner's recorded fuel sales, the  
13 Department considered petitioner's recorded fuel sales to be substantially accurate. The Department  
14 concluded that the difference between petitioner's reported taxable sales and its recorded fuel sales  
15 represented reported taxable mini-mart sales. When the Department subtracted petitioner's recorded  
16 fuel sales (excluding sales tax reimbursement) from reported taxable sales for each quarterly period in  
17 the audit period, it found that the amounts of reported taxable mini-mart sales were reasonable for all  
18 periods in the audit except for the third quarter and fourth quarters of 2007, for which the Department  
19 computed reported taxable mini-mart sales of \$11,015 and -64,716, respectively. The Department  
20 concluded that taxable mini-mart sales for the third and fourth quarters of 2007 should be similar to the  
21 amounts computed for 2006, which averaged \$142,012 per quarter. Accordingly, the Department  
22 added audited taxable mini-mart sales of \$142,012 per quarter to petitioner's recorded fuel sales for the  
23 third and fourth quarters of 2007 to establish audited taxable sales for those two quarters. A  
24 comparison of audited taxable sales for the third and fourth quarters of 2007 with reported taxable  
25 sales for those two quarters showed unreported taxable sales of \$337,724.

26 Petitioner contends that audited taxable mini-mart sales of \$568,048 for the year 2007 are  
27 overstated, and that its reported taxable sales for the third and fourth quarters of 2007 were correct. To  
28 support this contention, petitioner provided its monthly recorded mini-mart sales for 2007, showing

1 recorded taxable mini-mart sales of \$418,398 for both locations. Petitioner also provided its Point-of-  
2 Sale (POS) monthly sales summary for both locations for July 2007 to show that its recorded sales  
3 matched its reported sales for that month.

4 Since the difference of \$11,015 between petitioner's reported taxable sales and its recorded fuel  
5 sales for the third quarter of 2007 was substantially smaller than the difference in the other quarters,  
6 and since the amount of petitioner's reported taxable sales for the fourth quarter of 2007 was \$64,716  
7 less than its recorded fuel sales for that quarter, we find there is strong evidence that petitioner's  
8 reported taxable sales were understated for those two quarters. While petitioner provided its POS sales  
9 summary for July 2007 to support its contention that its reported taxable sales were accurate, a  
10 comparison of total recorded taxable sales of \$692,258 from the sales summary with recorded fuel  
11 sales of \$689,189 for that month shows recorded taxable mini-mart sales of only \$3,060 for both  
12 locations for July 2007, which seems unreasonable. When we compare recorded exempt food sales of  
13 \$12,503 from the POS sales summary for July 2007 with recorded exempt food sales of \$9,725 from  
14 the mini-mart sales summary for July 2007 that petitioner also provided, we compute a difference of  
15 \$2,778. Our comparison of recorded lottery sales of \$8,989 and \$7,816 from the POS sales summary  
16 and the mini-mart sales summary, respectively, for July 2007 also shows a difference. Given these  
17 discrepancies, we find that petitioner's recorded mini-mart sales are unreliable. We find that it was  
18 reasonable to establish audited taxable mini-mart sales for the third and fourth quarters of 2007 based  
19 on average reported taxable mini-mart sales in 2006, and that no adjustments are warranted.

#### 20 **RESOLVED ISSUE**

21 Petitioner has filed a claim for refund of overpayments related to tax paid on purchases that  
22 were later resold. Since the Department has verified the overpayments and allowed them as offsets  
23 against deficiency items in the audit, petitioner's claim for refund has effectively been granted.  
24 However, a refund will not be forthcoming since there is a remaining understatement.

#### 25 **OTHER MATTERS**

26 The Department determined that, in April 2007, petitioner should have claimed a deduction for  
27 costs of tax-paid purchases resold, but instead, petitioner erroneously claimed a section 6406 tax credit  
28 of \$45,179.00. The Department disallowed the claimed \$45,179.00 section 6406 tax credit, and then

1 reduced audited taxable fuel sales for April 2007 by \$547,624 ( $\$45,179.00 \div 8.25$  percent) to account  
2 for the corresponding tax-paid purchases resold. In the D&R, we recommended another adjustment for  
3 this same issue, but the Department correctly pointed out that it already had reduced audited taxable  
4 fuel sales for April 2007 to allow the credit for costs of tax-paid purchases resold, and no additional  
5 adjustment was warranted. We also recommended another adjustment in the audit at issue here related  
6 to a separate appeal regarding petitioner's June 2007 sales and use tax return (Case ID 559975), but  
7 this adjustment also already had been made. We have examined the audit schedules in depth and now  
8 agree that no adjustments are warranted.

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Summary prepared by Lisa Burke, Business Taxes Specialist III