

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION PETITION FOR REHEARING SUMMARY

In the Matter of the Petition for Redetermination)
Under the Sales and Use Tax Law of:)
NIRVAIR CORPORATION, dba) Account Number SR EA 97-141696
College Park Mobil) Case ID 529714
Petitioner) Woodland Hills, Los Angeles County

Type of Business: Gas station with mini-mart

Audit period: 04/01/05 – 03/31/08

| <u>Item</u> | <u>Disputed Amount</u> |
|---------------------------------|------------------------|
| Unreported sales, 2005 | \$408,038 |
| Unreported gasoline sales, 2007 | \$227,993 |
| Negligence penalty | \$ 12,125 |

| | <u>Tax</u> | <u>Penalty</u> |
|---|--------------------------|--------------------|
| As determined | \$134,390.85 | \$13,439.10 |
| Post-D&R adjustment | - 579.70 | - 57.95 |
| Post-Board hearing adjustment | - 630.23 | - 63.05 |
| 2 nd Post-Board hearing adjustment | - 4,035.12 | - 403.50 |
| 3 rd Post-Board hearing adjustment | <u>- 7,894.37</u> | <u>- 789.44</u> |
| Proposed redetermination | \$121,251.43 | \$12,125.16 |
| Less concurred | - 71,959.02 ¹ | <u>00.00</u> |
| Balance, protested | <u>\$ 49,292.41</u> | <u>\$12,125.16</u> |
| Proposed tax redetermination | \$121,251.43 | |
| Interest | 69,907.07 | |
| Negligence penalty | <u>12,125.16</u> | |
| Total tax, interest, and penalty | \$203,283.66 | |
| Payments | <u>- 129,145.80</u> | |
| Balance Due | <u>\$ 74,137.86</u> | |

The Board held a hearing regarding this matter on July 18, 2013, granting petitioner 30 days to provide additional records and the Sales and Use Tax Department (Department) 30 days to respond.

Based on petitioner's submissions and the Department's response, we recommended a reduction of the determined tax of \$630.23, from \$133,811.15 to \$133,180.92, and an adjustment of the interest

¹ The concurred amount of \$71,959.02 represents a concurred amount of tax of \$221,154.02 related to unreported taxable measure of \$2,853,600 less a concurred amount of unclaimed prepaid sales tax of \$149,195.00.

1 through December 31, 2013 to \$73,978.89. The Board considered our recommendations on
2 December 17, 2013, and voted to defer the matter until the March 2014 Board meeting. During the
3 interim, the Department recommended a further reduction to the determined tax of \$4,035.12, with
4 which we concurred, and we recommended to the Board that the tax be reduced to \$129,145.80. On
5 March 25, 2014, the Board ordered a further reduction, such that audited taxable mini-mart sales for
6 the period April 1, 2005, through December 31, 2005, represent 50 percent of average audited taxable
7 mini-mart sales for 2006, and the audited markup for fuel for 2007 has been reduced to 1.77 percent.
8 Otherwise, the Board ordered the liability redetermined in accordance with the recommendation of the
9 Appeals Division. The effect of the Board's order was an additional reduction to the determined tax of
10 \$7,894.37, to \$121,251.43. Petitioner filed a timely petition for redetermination, which was scheduled
11 for consideration on the Consent calendar for August 2014. However, petitioner contacted Member
12 Runner's office, and the matter has been rescheduled for consideration on the Adjudicatory calendar.

13 UNRESOLVED ISSUE

14 **Issue 1:** Whether the petition for rehearing should be granted. We recommend that it be
15 denied.

16 Petitioner now disputes only the audited taxable sales in excess of recorded taxable sales for the
17 last three quarters of 2005 and the year 2007. In the petition for rehearing, petitioner argues that it did
18 not receive a full evidentiary hearing and states that the Board's decision is based on ex-parte
19 evidence, assumption and speculation. It also states that the auditor has not provided any evidence
20 related to negligence. In addition, petitioner has attached to the petition for rehearing various
21 documents that it characterizes as "new relevant evidence."

22 Petitioner's description of the documents sent with the petition for rehearing is virtually
23 entirely incorrect. With two exceptions, all of the material provided with the petition for rehearing was
24 provided to the Department and the Appeals Division for consideration in advance of the Board's
25 consideration of the matter on March 25, 2014. The only exceptions are an amended return for the
26 fourth quarter 2007 and two pages that are titled "Summary Report all registers Store Number 4000."
27 Petitioner has not explained what those two documents are intended to show, and the relevance of the
28 documents is not clear. Nevertheless, virtually all of the alleged "new evidence" was in the record and

1 was considered by the Department and Appeals during the review of evidence that resulted in the
2 recommended reduction of tax of \$4,035.12. Accordingly, the documents were incorporated in
3 material presented to the Board with the Final Action Summary and were thus considered by the Board
4 when it considered and decided this matter on March 25, 2014. Accordingly, we find that petitioner
5 has provided no pertinent new evidence, and it has provided no new arguments in the petition for
6 rehearing.

7 Petitioner's argument that it was not granted its constitutional right to a full evidentiary hearing
8 is patently untrue. At the hearing on July 18, 2013, petitioner was allowed time after the standard
9 allotment of time had expired to make his original presentation. Also, there was an extended period of
10 questions by the Members and discussion of petitioner's arguments. (The Board's video archives
11 show that the hearing lasted approximately 55 minutes.) After that detailed consideration of the
12 matter, the Board ordered that petitioner be granted additional time to provide evidence (i.e., a
13 30-30-30), and the Board again considered the matter on December 17, 2013. At that Board meeting,
14 the Board did not decide the appeal but instead put the matter over until the March 25, 2014 calendar,
15 and directed the Appeals Division to work closely with petitioner in an effort to obtain additional,
16 relevant evidence. Both Appeals staff and the Department communicated with petitioner on multiple
17 occasions and reviewed multiple submissions of additional evidence, and even met with petitioner in
18 early March 2014, and an adjustment was recommended. The Board Members subsequently ordered
19 additional adjustments at the March 25, 2014 meeting.

20 Regarding petitioner's assertion that the Department has provided no evidence regarding
21 negligence, we note that petitioner failed to report \$2,853,600 of taxable sales that were recorded in its
22 own records, and petitioner does not dispute that portion of the understatement. We find that the
23 failure to notice a discrepancy of almost \$3 million between recorded and reported sales is clear
24 evidence of negligence.

25 We conclude that the Board has correctly decided this matter, and petitioner has not presented a
26 basis for rehearing. We thus recommend that the petition for rehearing be denied.

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