

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:)
JALIDAT, INCORPORATED, dba)
Texaco) Account Number SR Y AC 17-803647
Petitioner) Case ID 476422
Tarzana, Los Angeles County

Type of Business: Gasoline stations with mini-marts

Audit period: 04/01/04 – 03/31/07

<u>Item</u>	<u>Disputed Amount</u>	
Unreported fuel sales	\$15,466,597	
Understated taxable mini-mart sales	\$ 377,926	
Disallowed claimed nontaxable propane sales	\$ 1,216,883	
	<u>Tax</u>	<u>Penalty</u>
As determined	\$1,340,402.63	\$134,040.27
Post-D&R adjustment	- 1,790.64	- 179.04
Proposed redetermination, protested	<u>\$1,338,611.99¹</u>	<u>\$133,861.23</u>
Proposed tax redetermination	\$1,338,611.99	
Interest through 02/28/15	960,004.31	
Negligence penalty	<u>133,861.23</u>	
Total tax, interest, and penalty	<u>\$2,432,477.53</u>	
Monthly interest beginning 03/01/15	<u>\$ 6,693.06</u>	

This matter was scheduled for Board hearing in February 2012, but petitioner did not respond to the Notice of Hearing. Accordingly, the matter was scheduled for decision on the nonappearance calendar. Petitioner subsequently requested that the matter be rescheduled, and it was rescheduled for hearing in April 2012, but was postponed for settlement consideration.

This appeal involves an amount in controversy that is \$500,000 or more and thus is covered by Revenue and Taxation Code section 40, as explained below.

¹ Petitioner does not dispute the taxable cigarette rebates of \$40,367 or the credit of \$233,961 for improperly reporting sales tax on the 18 cent per gallon state diesel fuel tax (a net credit of \$193,594 in measure). Petitioner protests the entire amount of tax determined, and, since a claim for refund was secured from petitioner during the audit, a refund will be made if petitioner prevails in this matter.

UNRESOLVED ISSUES

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2 **Issue 1:** Whether adjustments are warranted to the amount of unreported fuel sales. We find no
3 adjustment is warranted.

4 Petitioner operates four gasoline stations with mini-markets. The Sales and Use Tax
5 Department (Department) found that petitioner had recorded fuel sales of \$52,172,018, but had
6 reported only \$36,705,418 of those sales. It concluded that the difference of \$15,466,600² represented
7 unreported taxable fuel sales. Petitioner contends that the amount of sales tax should be based on the
8 number of gallons of gasoline sold, adjusted for the expansion that occurs as the fuel warms.
9 Petitioner also contends that the difference between recorded and reported fuel sales represents sales
10 for resale to other vendors of fuel. In addition, petitioner contends that an adjustment is warranted for
11 the amounts of fees charged by credit card companies.

12 The amount of sales tax is computed on the amount of petitioner's sales, with no adjustments
13 for changes in the volume of gas. There is neither an exclusion nor an exemption related to fuel
14 expansion. Moreover, in this case, the deficiency is based on petitioner's *own recorded sales*, and
15 therefore any assertion regarding the alleged expansion of gasoline lacks merit.³ Petitioner has
16 provided no evidence in support of its contention that the sales at issue were for resale. Further,
17 petitioner did not register as a wholesaler of fuel until September 1, 2008, and there is no evidence that
18 petitioner accounted for or reported any fuel sales for resale prior to that date. Nor is an adjustment
19 warranted for bank-imposed credit card charges since the taxable gross receipts include the total
20 amount of the retail sale, with no deduction for costs of doing business. (Rev. & Tax. Code, § 6012,
21 subd (a)(2).)

22 **Issue 2:** Whether adjustments are warranted to the understated taxable mini-mart sales. We
23 find no further adjustment is warranted.

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26 ² The slight difference in the audited understatement of \$15,466,597, is due to rounding.

27 ³ We also note that even if some reduction in measure were warranted for the alleged expansion (which it is not),
28 petitioner's own records show that it collected sales tax reimbursement on the full measure of the "expanded volume"
which would constitute excess tax reimbursement owed to the state (Cal. Code Regs., tit. 18, § 1700, subd. (b)(1)), and thus
no reduction of tax liability would be warranted on this basis.

1 Using the first quarter 2007 (1Q07) as a test period, the Department compiled recorded costs of
2 purchases of taxable merchandise, by category, for each store. It then made an adjustment for pilferage
3 of 1 percent of cigarette purchases, at only one of the stores, the Roscoe and Haskell location. The
4 Department then computed audited taxable sales by adding the audited markups (computed in shelf
5 tests) to the purchases in each category and computed an overall percentage of error in recorded
6 taxable mini-mart sales of 19.73 percent. The Department used that percentage of error to compute the
7 understatement of reported taxable mini-mart sales.

8 The D&R does not recommend any revisions to the pilferage allowance. However, upon
9 reconsideration of that issue when we were preparing this matter for Board hearing, we recommended
10 an adjustment for a pilferage allowance of 1 percent with respect to all purchases of taxable
11 merchandise in all the stores. Accordingly, the Department has reduced all purchases of taxable
12 merchandise for 1Q07 by 1 percent. That adjustment is in addition to the 1 percent allowance the
13 Department had already made with respect to the purchases of cigarettes at the Roscoe and Haskell
14 location. After that adjustment, the percentage of error was reduced to 18.58 percent.

15 Petitioner contends that the pilferage allowance should be increased, stating that it fired the
16 store manager of the Roscoe and Haskell location after discovering that the manager had stolen in
17 excess of \$60,000 over the prior year. Petitioner claims that the manager's theft primarily represented
18 theft of cigarettes. Petitioner has provided no documentation of the \$60,000 loss due to theft, and we
19 recommend no further adjustment.

20 **Issue 3:** Whether adjustments are warranted to the disallowed claimed nontaxable sales of
21 propane. We find no adjustment is warranted.

22 Petitioner claimed sales of propane of \$1,216,882 as nontaxable sales. Petitioner originally
23 stated that the sales were exempt sales of propane to catering truck vendors. At the conference,
24 however, petitioner conceded that the tax was owed, but contended that it is unfair to charge petitioner
25 for a tax that was not collected. Petitioner's failure to collect sales tax reimbursement does not alter
26 petitioner's liability for the tax, and we recommend no adjustment.

27 **Issue 4:** Whether petitioner was negligent. We find that it was.
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1 The Department imposed the negligence penalty because the understatement was significant,
2 and because petitioner did not exercise due care in reporting. Petitioner disputes the penalty on the
3 basis that the understatement was the result of misunderstanding rather than negligence.

4 Petitioner had recorded sales of over \$15.4 million of gasoline and diesel that it did not report,
5 and it claimed \$1.2 million of propane sales as nontaxable without retaining any documentation to
6 support the claimed amounts. The difference between recorded and reported fuel sales alone
7 represented an error rate of 42 percent ($\$15,466,600 \div \$36,705,481$). We are not persuaded that this
8 discrepancy is the result of petitioner's misunderstanding of the application of tax to its actual,
9 recorded, sales of fuel. Thus, we find that the substantial amount of recorded, but not reported taxable
10 sales of fuel is strong evidence of negligence. We find petitioner's failure to provide documentation to
11 support any nontaxable sales is additional evidence of negligence. Petitioner's failure to report
12 correctly and to provide complete documentation is particularly significant since petitioner had been
13 audited previously, through June 30, 1996. For all these reasons, we find that the penalty was properly
14 applied.

15 **OTHER MATTERS**

16 None.

17 **Section 40 Matter**

18 As noted above, this matter is subject to Revenue and Taxation Code section 40. Therefore,
19 within 120 days from the date the Board's vote to decide the appeal becomes final, a written opinion
20 (i.e., Summary Decision or Memorandum Opinion) must be published on the Board's website. (Cal.
21 Code Regs., tit. 18, § 5552, subs. (b), (f).) The Board's vote to decide the appeal will become final 30
22 days following the date on which notice of the Board's decision is mailed to the parties, except when a
23 petition for rehearing is filed within that period.⁴ (Cal. Code Regs., tit. 18, § 5561, subd. (a).)

24 Following the conclusion of this hearing, if the Board votes to decide the appeal, but does not
25 specify whether a Summary Decision or a Memorandum Opinion should be prepared, staff will
26 _____

27 ⁴ If a petition for rehearing is filed, the Board's decision will not become final, and no written opinion under Section 40 will
28 be considered until after the petition for rehearing is resolved.

1 expeditiously prepare a nonprecedential Summary Decision and submit it to the Board for
2 consideration at a subsequent meeting. (Cal. Code Regs., tit. 18, § 5551, subd. (b)(2).) Unless the
3 Board directs otherwise, the proposed Summary Decision would not be confidential pending its
4 consideration by the Board (Cal. Code Regs., tit. 18 § 5551, subd. (b)(5)); accordingly, it would be
5 posted on the Public Agenda Notice for the meeting at which the Board will consider and vote on the
6 Summary Decision.

7 A taxpayer may request that the Board hold in abeyance its vote to decide the appeal so the
8 taxpayer may review the Board’s written opinion prior to the expiration of the 30-day period for the
9 filing of a petition for rehearing. If the vote is held in abeyance, the proposed Summary Decision will
10 be confidential until it is adopted by the Board. (Cal. Code Regs., tit. 18, § 5551, subd. (b)(5).) Any
11 request that the Board’s vote be held in abeyance should be made in writing to the Board Proceedings
12 Division prior to the hearing or as part of oral argument at the hearing. Any such request would then
13 be considered by the Board during its deliberations on the appeal.

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15 Summary prepared by Deborah A. Cumins, Business Taxes Specialist III
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MARKUP TABLE

Percentage of taxable vs. nontaxable purchases	Not applicable*
Mark-up percentages developed	29.60% - Cigarettes 44.69% - Beer 55.42% - Soda 72.00% - Carbonated energy drinks 66.67% - Ice 25.00% - Newspapers 62.35% - Oil products
Self-consumption allowed in dollars	None
Pilferage allowed in dollars	\$1,862 for 1Q07
Pilferage allowed as a percent of taxable purchases	1% of recorded cost of taxable goods sold for all stores plus an additional 1% of recorded cost of cigarettes sold at the Roscoe & Haskell location

* The Department used the recorded cost of goods sold in each merchandise category for the test period, applying the audited markup for each category to recorded costs, and it did not compute the percentage of taxable to total purchases.