

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION BOARD HEARING SUMMARY

3 In the Matter of the Petitions for Redetermination)
 4 Under the Sales and Use Tax Law of:)
 5 FRANCIS STEPHAN GHOSAL,) Account Number: SR FH 100-055649
 6 dba Fletcher Hills Union 76) Case IDs 445460, 464724, and 468127
 7 Petitioner) El Cajon, San Diego County

8 Type of Business: Gas station

9 Audit period: 1/1/05 – 12/31/07

10 Item Disputed Amount

11 Understated taxable sales \$ 136,335 (445460)
 12 \$ 99,918 (464724)
 13 \$1,256,956 (468127)
 14 Negligence penalty \$ 1,057 (445460)
 \$ 824 (464724)
 \$ 10,370 (468127)

	<u>445460</u>		<u>464724</u>		<u>468127</u>	
	<u>1/1/05 – 3/31/05</u>		<u>4/1/05 – 6/30/05</u>		<u>7/1/05 – 12/31/07</u>	
	<u>Tax</u>	<u>Penalty</u>	<u>Tax</u>	<u>Penalty</u>	<u>Tax</u>	<u>Penalty</u>
17 As determined	\$ 5,559.00	\$ 555.91	\$ 3,929.97	\$393.00	\$143,111.34	\$14,311.16
Pre-D&R adjustments	+ 7,923.99	+ 792.40	+ 7,350.68	+735.07	0.00	0.00
18 Post-D&R adjustments	- 2,917.02	- 291.71	- 3,037.41	-303.74	- 39,412.39	- 3,941.27
Proposed redetermination, protested	<u>\$10,565.97</u>	<u>\$1,056.60</u>	<u>\$ 8,243.24</u>	<u>\$824.33</u>	<u>\$103,698.95</u>	<u>\$10,369.89</u>
19 Proposed tax redetermination	\$10,565.97		\$ 8,243.24		\$103,698.95	
20 Interest through 02/28/13	6,567.35		5,220.73		53,584.14	
Negligence penalty	<u>1,056.60</u>		<u>824.33</u>		<u>10,369.89</u>	
21 Total tax, interest, and penalty	\$18,189.92		\$14,288.30		\$167,652.98	
Payments	- 1,920.14		0.00		- 627.85	
22 Balance Due	<u>\$16,269.78</u>		<u>\$14,288.30</u>		<u>\$167,025.13</u>	
23 Monthly interest beginning 03/01/13	<u>\$43.23</u>		<u>\$41.22</u>		<u>\$515.36</u>	

24 These matters were previously scheduled for Board hearing in October 2011, but were
 25 postponed at petitioner's request to allow additional time to prepare for the hearing. They were
 26 rescheduled for Board hearing in February 2012, July 2012, and October 2012, but were postponed
 27 each time at petitioner's request, first for settlement consideration, then to allow additional time to
 28 prepare for the hearing, and then again for settlement consideration.

UNRESOLVED ISSUES

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2 **Issue 1:** Whether further adjustments to the audited understatement of taxable sales are
3 warranted. We conclude that no further adjustments are warranted.

4 Petitioner operated a gas station with a mini-mart and auto repair facility from July 2002
5 through May 2010. The Sales and Use Tax Department (Department) deemed the books and records
6 that petitioner provided for examination to be inadequate and decided to use alternative methods to
7 establish audited taxable sales. The Department applied average gasoline selling prices for the Los
8 Angeles area from the U.S. Department of Energy website to the number of gallons of gasoline
9 petitioner purchased during the audit period to establish taxable gasoline sales of \$3,012,553. Based
10 on its estimate that petitioner's taxable mini-mart sales were equal to twice petitioner's claimed
11 deductions of \$226,224 for exempt sales of food, the Department established taxable mini-mart sales
12 of \$452,448. Based on its estimate that taxable sales of auto repair parts were twice petitioner's
13 claimed deductions of \$552,182 for nontaxable repair labor, the Department established taxable sales
14 of auto repair parts of \$1,104,364. In sum, the Department established taxable sales of \$4,569,365,
15 which exceeded petitioner's reported taxable sales of \$2,523,974 by \$2,045,391.

16 In the D&R, we found that, generally, sales of auto repair parts are either equal to or 1.5 times
17 an auto repair shop's nontaxable charges for repair labor. Since petitioner performed smog
18 certification services, which do not involve taxable sales of parts, in addition to auto repairs, we
19 concluded that it would be reasonable to estimate taxable sales of auto repair parts as equal to
20 petitioner's claimed deductions for nontaxable repair labor. Therefore, we recommended that taxable
21 sales of auto repair parts be reduced from \$1,104,364 to an amount equal to petitioner's claimed
22 deductions for nontaxable repair labor, \$552,182. Overall, the measure of unreported taxable sales was
23 reduced from \$2,045,391 to \$1,493,209 based on our recommendation.

24 Petitioner contends that, since he prepaid taxes to his gasoline suppliers, he has no further tax
25 liability for his gasoline sales. We recognize that petitioner did make sales tax prepayments to his
26 supplier, and the Department has credited those prepayments against petitioner's sales tax liability.
27 However, the prepayments represent only a portion of the amount due, and petitioner did not fully
28 extinguish his sales tax liability solely by making prepayments of sales tax to his vendors. Thus, we

1 find that no adjustment is warranted based on this contention. In addition to arguing that his sales tax
2 prepayments represent his entire sales tax liability related to gasoline sales, petitioner asserts that the
3 amounts of the other audit items are excessive. However, petitioner has not identified errors in the
4 Department's assumptions or computations, or in the computation of taxable sales of auto repair parts
5 recommended in the D&R, and we have found no errors. Petitioner also has not provided a more
6 accurate method to compute those sales. Thus, we find that there is no basis for further adjustment.

7 **Issue 2:** Whether the Department timely issued the notices of determination for the first quarter
8 2005 (1Q05) and 2Q05. We conclude that it did.

9 Petitioner declined to sign waivers of the statute of limitations. The Department issued
10 separate determinations for estimated audit deficiencies for the first two quarters of the audit period to
11 avoid the expiration of the statute of limitations. The determination for 1Q05 was issued on April 24,
12 2008, and the determination for 2Q05 was issued on July 21, 2008. Petitioner contends these
13 determinations were not timely. However, a determination is timely if issued within three years after
14 the last day of the calendar month following the quarterly period for which the amount is proposed to
15 be determined. Thus, in order to be timely for 1Q05, the determination had to be issued no later than
16 April 30, 2008, and for 2Q05, no later July 31, 2008. Since the determinations were issued prior to
17 these dates, respectively, we find that the determinations were timely. We note that, by letter dated
18 January 15, 2010, the Department asserted increases in each of these determinations. Since those
19 increases were asserted within three years after the determinations had been issued and the
20 determinations were not yet final, the assertion of the increases were timely as well. (Rev. & Tax.
21 Code, § 6563, subd. (a)(1).)

22 **Issue 3:** Whether petitioner was negligent. We conclude that he was.

23 The Department imposed the negligence penalty because of the large understatement of
24 reported taxable sales and because the records that petitioner provided for audit were incomplete.
25 Petitioner contends the penalty is not warranted because he provided all of the available records for
26 audit, and he entrusted his accounting and reporting responsibilities to his bookkeeper.

27 After our recommended adjustments, the percentage of error is 59.16 percent, which is
28 significant. Petitioner failed to segregate his sales of gasoline, mini-mart merchandise, and auto repair

1 parts in his records, and failed to provide records to support his claimed deductions for exempt food
2 sales and nontaxable repair or installation labor, or to otherwise support his reported taxable sales.
3 Petitioner is ultimately responsible for ensuring that his records are complete and accurate, even if he
4 retained a bookkeeper to assist him. Notwithstanding that this was petitioner's first audit, the errors
5 here are well beyond what we expect from the average prudent businessperson operating the same type
6 of business and we conclude that the negligence penalty was properly applied.

7 **OTHER MATTERS**

8 None.

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10 Summary prepared by Lisa Burke, Business Taxes Specialist III

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