

## 1 CALIFORNIA STATE BOARD OF EQUALIZATION

## 2 APPEALS DIVISION SUMMARY FOR BOARD HEARING

3 In the Matter of the Petition for Redetermination )  
 4 Under the Sales and Use Tax Law of: )  
 5 NIKYAR HOSSEIN, dba All American Gas ) Account Number: SR EHC 100-291687  
 6 ) Case ID 443193  
 7 Petitioner ) Ontario, San Bernardino County

8 Type of Business: Gasoline station

9 Audit period: 01/01/04 – 10/31/06

10 Item Disputed Amount

11 Unreported sales of gasoline \$229,724

12 Negligence penalty \$2,306

13 TaxPenalty

14 As determined and proposed to be redetermined: \$62,120.48 \$6,212.06

15 Less concurred -44,316.83

16 Adjustment for penalty on unclaimed sales tax  
17 prepayment to distributors-3,906.40<sup>1</sup>18 Balance, protested \$17,803.65\$2,305.66

19 Proposed tax redetermination \$62,120.48

20 Interest through 3/31/11 11,928.97

21 10% penalty for negligence 2,305.66

22 Total tax, interest, and penalty \$76,355.11

23 Payments -61.00

24 Credit for unclaimed sales tax prepayment to distributors -39,064.0025 Balance Due \$37,230.1126 Monthly interest beginning 4/1/11 \$134.14

27 This matter was scheduled for Board hearing on June 18, 2010, but petitioner did not respond  
 28 to the Notice of Hearing. Accordingly, the Board Proceedings Division informed petitioner that this  
 matter will be presented to the Board for decision without oral hearing. Subsequently, petitioner  
 contacted the Board Proceedings Division to request that it be given an oral hearing before the Board.

<sup>1</sup> The Sales and Use Tax Department found that petitioner failed to claim \$39,064 in sales tax prepayments made to its distributors. Since these unclaimed prepayments constitute prepayments against any liability established in the audit, the penalty associated with that prepaid audit liability is reduced accordingly.

1 This matter was then scheduled for Board hearing on November 20, 2010, but the hearing was  
2 postponed to allow petitioner's newly retained representative additional time to familiarize himself  
3 with the case.

#### 4 UNRESOLVED ISSUES

5 **Issue 1:** Whether adjustments are warranted to the unreported sales of gasoline. We  
6 recommend no adjustment.

7 Petitioner operated a gasoline station until October 31, 2006, when he sold the business.  
8 Petitioner reported all sales as taxable and claimed deductions for sales tax prepayments to vendors of  
9 fuel. For the audit, petitioner did not provide purchase journals, providing only limited purchase  
10 invoices, some copies of handwritten sales receipts, and his federal income tax returns *within* the  
11 Schedule C on which business income is reported. In the absence of complete purchase records, the  
12 Department contacted petitioner's vendors to establish audited purchases. One vendor, Southern  
13 Counties Oil (SC Oil) provided information about its sales to petitioner. For the other vendor, Lee  
14 Escher Oil Company, the Department estimated petitioner's purchases based on the tax prepayment  
15 claimed. The Department found purchases were three times higher than reported sales, and it decided  
16 to establish audited taxable sales on a markup basis. The Department used the transaction information  
17 provided by SC Oil and average selling prices published by the U.S. Department of Energy (reduced  
18 by 1.53 percent to account for the business location) to establish sales of fuel. It compared that figure  
19 to known purchases from SC Oil to compute a markup of 7.32 percent. The Department used that  
20 markup and audited purchases of gasoline from both vendors to establish audited taxable sales, which  
21 exceeded reported taxable sales by \$801,554. The understatements for each year represented error  
22 ratios of approximately 150 percent for 2004, 160 percent for 2005, and 487 percent for 2006. The  
23 Department also computed a credit of \$39,064 for unclaimed prepayments of sales tax to vendors of  
24 fuel.

25 Petitioner does not dispute the audited understatement for the period before March 2006, but  
26 disputes the audit liability for sales made from March 1, 2006, through October 31, 2006, because he  
27 leased the gasoline station to another person, and did not operate the station during that period.  
28 Petitioner states that he continued filing sales and use tax returns during that period and paying the

1 reported amount of sales tax due for the sole purpose of keeping his seller's permit active. As support  
2 that the station was leased, petitioner has provided a handwritten lease agreement signed by Lee Porter,  
3 lessee, dated March 23, 2006. The lease is for the station's bay and garage, with a monthly lease  
4 payment of \$2,000.00. At the appeals conference, petitioner stated he also would provide court  
5 documents showing that he was not liable for gasoline purchases from SC Oil. Subsequently,  
6 petitioner contacted us to state that the court matter was ongoing, and that there was no judicial finding  
7 to support his contentions. In addition, petitioner provided a purported copy of a check signed by the  
8 lessee, and a handwritten note, dated March 23, 2006, which is apparently signed by the lessee, to  
9 memorialize a debt to petitioner.

10       The purported lease does not support petitioner's contention that gasoline sales were made by  
11 another person because it covers only the garage and bay, and is silent about the gasoline pumps.  
12 Furthermore, not only does the agreement not specify any date when the lessee would take possession  
13 of the garage and bay, it also appears the lessee never did take possession of those repair facilities (the  
14 Department observed they had not been used during the audit period). In addition, the only evidence  
15 relevant to the question of whether the lessee took possession is a check for \$8,049, for gas and rent,  
16 dated March 23, 2006. We note that the check does not include a check number or account name, and,  
17 more importantly, petitioner has not provided evidence that the check was deposited into a bank  
18 account. Furthermore, petitioner signed and filed sales and use tax returns in his own name for the  
19 period of the purported lease, and the purchases of fuel for the station during that period continued to  
20 be made under petitioner's seller's permit. During the period of the purported lease, petitioner paid  
21 sales tax prepayments to vendors and sales tax on returns that totaled \$17,666. We do not believe that  
22 petitioner made those payments during the eight-month period of the purported lease on behalf of the  
23 purported lessee who allegedly paid \$2,000.00 a month in rent. We also reject petitioner's assertion  
24 that he paid the tax and filed sales and use tax returns to keep his seller's permit since that assertion  
25 does not make any business sense we can think of. We thus conclude that petitioner operated the  
26 station throughout the audit period and find no adjustment is warranted.

27       **Issue 2:** Whether petitioner was negligent. We conclude that he was.  
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**MARKUP TABLE**

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| Percentage of taxable vs. nontaxable purchases | 100%  |
| Mark-up percentages developed                  | 7.32% |
| Self-consumption allowed in dollars            | None  |
| Pilferage allowed in dollars                   | None  |