

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION BOARD HEARING SUMMARY

3 In the Matter of the Petition for Redetermination)
4 Under the Sales and Use Tax Law of:)5 HUNG VAN PHAM, dba)
6 Lee's Auto Repair & Gas)Account Number: SR BH 100-017565
Case ID 486918

7 Petitioner)

Redwood City, San Mateo County

8 Type of Business: Gasoline station

9 Audit period: 01/01/05 – 09/14/06

10 Item Disputed Amount11 Unreported sales of gasoline \$458,957
12 Negligence penalty \$ 4,773

	<u>Tax</u>	<u>Penalty</u>
13 As determined:	\$50,661.33	\$5,066.16
14 Post-D&R adjustment	- 2,935.02	- 293.51
15 Proposed redetermination	\$47,726.31	\$4,772.65
16 Less concurred	- 9,862.31	0.00
17 Balance, protested	<u>\$37,864.00</u>	<u>\$4,772.65</u>
18 Proposed tax redetermination	\$47,726.31	
19 Interest through 06/30/12	26,202.06	
20 Negligence penalty	<u>4,772.65</u>	
21 Total tax, interest, and penalty	<u>\$78,701.02</u>	
22 Monthly interest beginning 07/01/12	<u>\$ 238.63</u>	

23 This matter was scheduled for Board hearing in July 2011, but was postponed at petitioner's
24 request to allow additional time to prepare for the hearing. It was rescheduled for Board hearing in
25 November 2011, but petitioner waived his right to appear. At that meeting, the Board concluded that
26 no further adjustments were warranted and that the understatement was the result of negligence.
27 Petitioner filed a timely petition for rehearing, which the Board granted on March 20, 2012.

28 **UNRESOLVED ISSUES**

29 **Issue 1:** Whether adjustments are warranted to the audited understatement of reported sales.
30 We find no further adjustments are warranted.

1 Petitioner operated a gas station with a mini-mart and auto repair shop from April 10, 2002,
2 through September 14, 2006. The Sales and Use Tax Department (Department) found that petitioner
3 claimed all sales through the repair shop as nontaxable labor and all mini-mart sales other than
4 cigarettes as exempt sales of food products. The Department computed understatements of reported
5 taxable sales of gasoline, mini-mart merchandise, and repair parts. Petitioner agrees with the audited
6 understatements of taxable mini-mart merchandise and repair parts of \$119,543, but contends the
7 audited amount of understated fuel sales of \$458,957 is excessive because: 1) he made no purchases of
8 fuel from December 24, 2005, through January 31, 2006, while his business was closed for repairs; 2)
9 the audited ratios of each grade of gasoline sold are incorrect; 3) gasoline selling prices for the San
10 Mateo, rather than the San Francisco area, should be used to compute audited sales; and 4) the
11 differences in selling prices computed in each of the four months tested should not be equally
12 weighted. Petitioner has provided no documentation to support these arguments.

13 The audited number of gallons sold was based entirely on petitioner's own records of the sales
14 tax prepayments he had made to fuel vendors. Petitioner has provided no evidence that he did not
15 purchase the fuel for which Shell Oil charged him for the period December 24, 2005, through
16 January 31, 2006, or that the percentages of each grade of fuel purchased during the four months tested
17 were not representative of his operations for the audit period. Also, we find that use of the San Mateo
18 selling prices would not warrant a reduction in the audited selling prices because the 19-cent selling
19 price differential is based on a comparison of *petitioner's* recorded selling prices with the published
20 prices. For example, if the San Mateo selling prices were lower, the differential between those prices
21 and petitioner's would simply be higher, and the audited selling prices would remain constant. In
22 addition, petitioner has not provided a computation of the average selling price using unequal
23 weighting of the four months, or an explanation of why he believes it is incorrect to compute the
24 average selling price by equally weighting the prices for each month. Accordingly, we recommend no
25 adjustment to the audited sales of gasoline.

26 **Issue 2:** Whether petitioner was negligent. We conclude that he was.
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28

1 The Department imposed the negligence penalty because petitioner's records were incomplete
2 and the understatement was significant. Petitioner disputes the penalty on the basis that he provided
3 most of the books and records necessary for audit.¹

4 Petitioner's records were incomplete, and the \$578,500 audited understatement of reported
5 taxable sales (28 percent) is significant. Also, petitioner collected sales tax reimbursement on taxable
6 mini-mart sales and on sales of repair parts, which is evidence that he understood the application of
7 tax. Petitioner has provided no non-negligent explanation for his failure to report the tax on these sales
8 for which he collected tax reimbursement from his customers. We find that the incomplete records, the
9 substantial understatement, and the failure to report tax for which petitioner collected reimbursement
10 from his customers are strong evidence of negligence, and thus find that the penalty was properly
11 applied even though petitioner had not been audited previously.

12 **RESOLVED ISSUE**

13 At the appeals conference, petitioner argued that the audited gallons of fuel purchased should
14 be reduced by 11,664 gallons of fuel he sold to his successor, and he provided supporting
15 documentation after the conference. We thus recommend that adjustment.

16 **OTHER MATTERS**

17 None.

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19 Summary prepared by Deborah A. Cumins, Business Taxes Specialist III
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27 ¹ Petitioner also claims that the auditor lost some of the books and records petitioner provided, which the Department
28 denies. Other than petitioner's assertion, we have no evidence that this occurred, and we do not believe it did.