

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION BOARD HEARING SUMMARY

In the Matters of the Petition for)
 Redetermination and Claim for Refund)
 Under the Sales and Use Tax Law of:)
) Account Number SR Z OHA 97-183225
) Case ID's 556419, 557544
 SMF ENERGY CORPORATION)
)
 Petitioner/Claimant) Fort Lauderdale, Florida

Type of Business: Mobile fueling service

Audit period: 04/01/05 – 03/31/08

Claim period: 12/15/06 – 10/31/10

<u>Item</u>	<u>Disputed Amount</u>
Unreported taxable gross receipts	\$4,739,265
Claim for refund	\$ 618,483
Tax as determined	\$656,364.39
Pre-D&R adjustment	- 280,554.92
Proposed redetermination, protested	\$375,809.47
Interest through 11/30/13	<u>232,143.60</u>
Total tax and interest	\$607,953.07
Payments	- 62.06
Balance Due	<u>\$607,891.01</u>
Monthly interest beginning 12/01/13	<u>\$ 1,878.74</u>

A Notice of Appeals Conference was mailed to petitioner's address of record, and the notice was not returned by the Post Office. Petitioner did not respond to the notice or appear at the appeals conference, which was held as scheduled. We thereafter sent petitioner a letter offering it the opportunity to provide any additional arguments and evidence in writing it wished us to consider. We received a telephone call from petitioner's bankruptcy counsel who informed us that petitioner did not appear at the scheduled conference because it had filed for bankruptcy protection. We informed petitioner's counsel that the appeals process at the Board of Equalization would continue regardless of the bankruptcy proceedings. We also provided additional time for petitioner to provide any additional arguments or evidence in writing, but it has not done so.

1 This matter was scheduled for Board hearing in May 2013 and again in August 2013, but was
2 postponed each time at petitioner's request to allow additional time to prepare.

3 This is an appeal that is covered by Revenue and Taxation Code section (Section) 40.
4 Therefore, after the Board has made a determination in this matter, a written opinion that, among other
5 things, sets forth the relevant factual findings and the legal analysis on which that determination is
6 based must be published on the Board's website within 120 days from the date the Board renders a
7 final decision in this matter. Accordingly, the Board may wish to consider the following two options:
8

9 (1) The Board could follow its usual practice in business tax appeals, in which it typically votes
10 to resolve the appeal on the day of the hearing. Under the usual practice, a notice of the
11 Board's determination will be mailed within 45 days of the date of the Board's vote, and the
12 30-day period for the filing of a Petition for Rehearing (PFR) would begin on the date the
13 notice is mailed. If a PFR is not filed, the Board's determination will become final and its
14 decision will be rendered at the expiration of the 30-day PFR period. Unless the Board
15 specifically directs that it desires to issue a precedential (Memorandum Opinion) decision in
16 this matter, staff would then expeditiously bring back a proposed (nonprecedential) Summary
17 Decision that complies with Section 40 for the Board's approval on a later calendar. The
18 adopted decision will be published timely on the Board's website. If a PFR is filed, no decision
19 will be rendered until the conclusion of the petition for rehearing process.

20 (2) The Board could inform staff of its tentative determination and direct staff to prepare a
21 proposed Summary Decision (or Memorandum Opinion) that reflects the tentative
22 determination for Board approval as soon as practicable. Under this option, the Board would
23 hold any determination of the appeal in abeyance until it has the opportunity to consider the
24 proposed decision. The Board's later vote to adopt the decision would also constitute its vote
25 to resolve the appeal, and within 45 days a notice of decision would be mailed. The 30-day
26 PFR period would begin running when the notice of the Board's determination was mailed. If
27 no PFR is filed, the Summary Decision (or Memorandum Opinion) would then be timely
28 posted on the Board's website pursuant to Section 40.

29 We also note that petitioner could request during the oral hearing that the Board take Option 2
30 above and defer its vote to determine the appeal until it adopts a Summary Decision (or Memorandum
31 Opinion). Such a request would, of course, defer resolution of the appeal and interest would continue
32 to accrue. On the other hand, petitioner may prefer that the Board follow its usual practice in business
33 tax appeals, which typically would result in a vote to resolve the appeal on the day of the hearing, thus
34 accelerating the resolution process, but potentially requiring petitioner to file a PFR before it sees the
35 content of the Summary Decision (or Memorandum Opinion) adopted by the Board.

UNRESOLVED ISSUE

1
2 **Issue:** Whether a portion of the selling price charged for fuel represents a fee charged by
3 petitioner for nontaxable services. We find that it does not and that no further adjustment is warranted.
4 We further find that there is no overpayment for periods after petitioner began reporting the entire
5 selling price as taxable, and thus recommend that the claim for refund be denied.

6 Petitioner operated a mobile and bulk fueling service throughout the United States. It did not
7 maintain any underground storage tanks; instead it purchased fuel on a daily basis and delivered the
8 fuel to its customers. During its audit of the period April 1, 2005, through March 31, 2008, the Sales
9 and Use Tax Department (Department) found that petitioner's reported gross receipts were less than
10 the amount shown for sales of fuel in its records. Upon further review, the Department found
11 petitioner regarded a portion of the amount shown on the invoice as the sale price of fuel as a
12 nontaxable service charge.¹ The Department concluded that the difference between the selling price
13 shown on the invoice and the amount reported to the Board represented transportation charges, which
14 were subject to tax because they were not separately stated on the sales invoice. Petitioner disputes
15 that conclusion, arguing that the difference represents a fee for outsourced logistical services, such as
16 data collection, reporting, and truck-to-truck redistribution of fuel, which petitioner regards as
17 nontaxable services. In the audit, the Department conducted a test, using records for July 2006, from
18 which it established that reported taxable sales were understated by 7.9452 percent, and it used that
19 percentage to compute the understatement for the entire audit period. After the determination was
20 issued, petitioner provided evidence that it began to include the purported fee in its reported taxable
21 sales as of December 15, 2006. As a result, the Department reduced the liability for the period
22 January 1, 2007, through March 31, 2008, to zero, and it made some adjustments to the amounts
23 established for the earlier portion of the period, based on its review of additional records provided by
24 petitioner.

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26 _____
27 ¹ For example, with respect to the only invoice copied in the audit workpapers, which is representative of the transactions at
28 issue, the amount charged for a sale of diesel was \$1,696.04. However, for that sale, the amount reported as taxable on the
sales and use tax return was \$1,595. Thus, for this transaction, the 101 difference is the amount in dispute.

