

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION SUMMARY FOR BOARD HEARING

In the Matter of the Administrative Protest filed)
Under the Sales and Use Tax Law of:)
PARMINDER K. WALIA and)
SURENDERPAL S. WALIA,) Account Number: SR CH 97-478097
dba P.K. Market) Case ID 489616
Taxpayer) Fremont, Alameda County

Type of Business: Convenience store

Audit period: 1/1/05 – 7/31/07

<u>Item</u>	<u>Disputed Amount</u>
Disallowed claimed exempt food products ¹	\$278,995
Relief of interest	\$11,570
Tax as determined	\$27,039.77
Adjustment - Sales and Use Tax Department	- 1,296.76
- Appeals Division	- 481.03
Proposed adjusted tax determination	\$25,261.98
Less concurred	- 849.80
Balance, protested	<u>\$24,412.18</u>
Proposed adjusted tax determination	\$25,261.98
Interest through 5/31/11	<u>11,569.97</u>
Total tax and interest	\$36,831.95
Payments	- 4,000.00
Balance Due	<u>\$32,831.95</u>
Monthly interest beginning 6/1/11	<u>\$124.03</u>

UNRESOLVED ISSUES

Issue 1: Whether further adjustments to disallowed claimed exempt sales of food products are warranted. We conclude no further adjustments are warranted.

The Sales and Use Tax Department (Department) compared taxpayer's gross receipts with the costs of goods sold reported on taxpayer's federal income tax returns (FITR's) for 2005 and 2006 to compute book markups of 21.52 percent for 2005 and 36.14 percent for 2006, which the Department

¹ The Decision and Recommendation describes this audit item as "Additional (taxable) sales based on markup of cost."

1 considered inconsistent. Based on taxpayer's sales and use tax returns, the Department calculated
2 ratios of taxable sales to total sales, excluding sales of telephone cards and lottery tickets, of 55.26
3 percent for 2005, 60.83 percent for 2006, and 84.31 percent for January 1 through July 31, 2007.
4 Taxpayer explained that it started using a scanner point of sale system which it used to report sales
5 beginning in 2007, and the Department suspected that this was the reason for the considerable increase
6 in the ratio of taxable to total sales for the last seven months of the audit period. The Department
7 decided to compute taxpayer's taxable sales using the markup method.

8 The Department computed audited merchandise purchases based on the cost of goods sold from
9 the FITR's for 2005 and 2006, and based on a test of second quarter 2007 (2Q07) purchase invoices
10 for the period January 1 through July 31, 2007. The Department also used the 2Q07 purchase invoices
11 to establish an 84.01 percent ratio of taxable to total purchases. The Department applied the 84.01
12 percent taxable purchases ratio to the audited merchandise purchases to compute the audited taxable
13 merchandise purchases, which it then reduced by 2 percent for pilferage, an additional \$4,000 for a
14 burglary in 2006 that was supported by a police report, and self-consumption of \$1,487 for 2006 and
15 \$780 for the period January 1 through July 31, 2007. The Department performed a shelf test using
16 costs from purchase invoices from February 2008 and selling prices posted on the shelf and provided
17 orally by taxpayer (selling prices for sales of cigarettes and soda were based on sales of single units
18 because taxpayer did not provide selling prices of cigarettes by the carton or of soda by the six- or 12-
19 pack). The Department computed a weighted average taxable markup of 24.85 percent, which was
20 added to the audited cost of taxable merchandise to compute audited taxable sales. Since the
21 Department regarded the computed understatement for the period January 1 through July 31, 2007, of
22 2.8 percent as minimal, it did not establish an audited understatement for that period. The Department
23 established a total audited understatement of taxable sales of \$285,980, comprised of audited
24 understatements of taxable sales of 64.22 percent for 2005 and 26.59 percent for 2006.

25 At the appeals conference, all parties agreed that audited taxable merchandise purchases should
26 be reduced for self consumption of \$1,487 for 2005. In the D&R, we also made an adjustment to the
27 weighted average taxable markup to account for some sales of soda by the pack. The current audit
28 computed a markup of 42.44 percent for soda while the prior audit computed a markup of 33.19 based

1 on sales of soda by the pack and as singles. Using the 33.19 percent markup for soda from the prior
2 audit, we recommended the weighted average taxable markup be reduced from 24.85 percent to 24.16
3 percent. However, we concluded no adjustment was warranted for sales of cigarettes by the carton
4 because the 16.74 percent markup for cigarettes established by the Department in this audit was lower
5 than the 17.95 percent markup it had established in the prior audit for cigarettes, 30 percent of which
6 were considered sold in cartons. With all adjustments, the amount of understated taxable sales was
7 reduced to \$278,995, and we recommend no further adjustments.

8 **Issue 2:** Whether any portion of the accrued interest should be relieved due to unreasonable
9 delay by the Department. We conclude that relief is not warranted.

10 Taxpayer filed a request for relief of interest, signed under penalty of perjury, asserting that the
11 audit took too long to complete, alleging that on several occasions the auditor indicated he was too
12 busy to work on taxpayer's audit. The Department denied the request because: (1) taxpayer cancelled
13 appointments delaying the start of the audit; (2) taxpayer failed to maintain books and records for
14 audit, which caused a delay in the audit so that information from taxpayer's vendors could be obtained;
15 and (3) no significant delays were attributable to the audit staff. Taxpayer continues to request relief of
16 the interest.

17 The Board may, in its discretion, relieve interest where interest has accrued because of the
18 taxpayer's failure to pay the tax due resulting from an unreasonable delay by a Board employee acting
19 in his or her official capacity, where no significant aspect of the delay is attributable to the taxpayer.
20 (Rev. & Tax. Code, § 6593.5.) The Assignment Contact History Report reflects numerous significant
21 delays attributable to taxpayer. While there are some gaps of almost three months between entries in
22 the report, no evidence has been provided to show that any delays were caused by the auditor. Based
23 on the record, we conclude that the delay was, in large part, attributable to acts of, or failures to act by,
24 taxpayer, including the failure to maintain a complete set of merchandise purchase records and the
25 failure to timely provide other documentation, and that there is no evidence of unreasonable delay by
26 the Department. Therefore, we recommend no relief of interest.

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OTHER DEVELOPMENTS

We issued a Supplemental Decision and Recommendation to recommend relief of the finality penalty of \$2,526.20, conditioned on taxpayer’s payment of all remaining tax due within 30 days after the mailing to taxpayer of notice of the Board’s final decision in this appeal

Summary prepared by Pete Lee, Business Taxes Specialist II

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MARKUP TABLE

Percentage of taxable vs. nontaxable purchases	84%
Mark-up percentages developed	24.16%
Self-consumption allowed in dollars	\$1,487 per year
Self-consumption allowed as a percent of total purchases	0.39%
Pilferage allowed in dollars	\$15,348 (2005-06)
Pilferage allowed as a percent of total purchases	2%