

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION BOARD HEARING SUMMARY

In the Matter of the Petition for Redetermination)
Under the Sales and Use Tax Law of:)
NABIL W. WANISS, dba Bob's Union) Account Number: SR Y EA 24-806669
Petitioner) Case ID 491575
Fullerton, Orange County

Type of Business: Gasoline stations
Audit period: 10/01/05 – 06/04/08

<u>Item</u>	<u>Disputed Amount</u>	<u>Tax</u>	<u>Penalty</u>
Unreported taxable sales of auto parts	\$222,267		
Unclaimed state diesel fuel tax deduction	\$320,372 ¹		
Negligence penalty	\$ 3,813		
As determined and proposed to be redetermined		\$38,133.81	\$3,813.39
Less concurred		<u>- 20,583.61</u>	<u>00.00</u>
Balance, protested		<u>\$17,550.20</u>	<u>\$3,813.39</u>
Proposed tax redetermination		\$38,133.81	
Interest through 10/31/12		17,386.76	
Negligence penalty		<u>3,813.39</u>	
Total tax, interest, and penalty		\$59,333.96	
Payments		<u>- 1.40</u>	
Balance Due		<u>\$59,332.56</u>	
Monthly interest beginning 11/01/12		<u>\$ 190.66</u>	

This matter was scheduled for Board hearing on October 27, 2011, but was postponed because the afternoon session of that meeting day was cancelled. The matter was rescheduled for hearing on April 24, 2012, but was deferred at the request of the Appeals Division in order for the Sales and Use Tax Department (Department) to conduct further investigation. As discussed under Issue 1, the Department's investigation disclosed that the determined tax should be increased. However, since the period to assert an increase has passed, no adjustment has been made to the determination.

¹ Petitioner has not filed a claim for refund for unclaimed deductions, and the statute of limitations for doing so has passed. Thus, if petitioner were to prevail on this issue, resulting in a net overpayment, that overpayment could not be refunded.

UNRESOLVED ISSUES

1
2 **Issue 1:** Whether adjustments are warranted to the amount of unreported taxable sales of auto
3 parts. We find no reduction is warranted.

4 Petitioner operated two gasoline stations, selling fuel, cigarettes, and other taxable mini-mart
5 merchandise. At one of the stations, he also operated an auto repair shop. Petitioner's records were
6 significantly incomplete. He only provided federal income tax returns, incomplete daily sales
7 summaries for one location, and incomplete purchase invoices for fuel. Despite this, the Department
8 did attempt to reconcile recorded and reported taxable sales. In a memo schedule, which was not
9 incorporated into the audit workpapers, the Department scheduled recorded sales, which consisted of
10 fuel sales and mini-mart sales only, with no recorded sales of auto parts. The Department then used
11 reported total sales and the cost of goods sold which petitioner had reported on his federal returns to
12 compute book markups that ranged from 4.33 percent to 6.01 percent, with a markup for the three-year
13 period of 5.39 percent. The Department also used observed selling prices and costs from the vendor's
14 delivery sheets on October 8, 2008, to compute a weighted average markup for fuel of 5.12 percent.
15 The Department noted that the substantial majority of petitioner's sales were sales of fuel and that the
16 book markup for total sales (including fuel sales and mini-mart sales) was slightly higher than the
17 observed markup of 5.12 percent for fuel. As a result of that similarity, the Department concluded that
18 reported total sales consisted only of sales of fuel and mini-mart merchandise and were a substantially
19 accurate representation of petitioner's taxable sales in those categories.

20 In order to compute petitioner's sales of auto parts, since petitioner provided no sales and cost
21 information which could be used in a shelf test to compute an audited markup, the Department decided
22 to establish such sales by adding an estimated markup of 50 percent to petitioner's purchases.
23 However, petitioner also failed to provide any records of his purchases of auto parts. The Department
24 therefore contacted his four known vendors of auto parts to request information about their sales to
25 petitioner. Only one vendor replied. The Department added the estimated 50 percent markup to the
26 purchases from that one vendor to compute unreported auto parts sales of \$222,267. After this matter
27 was deferred from the April 2012 hearing, the Department sent vendor inquiry letters to additional
28 vendors, and the responses disclosed purchases that were not included in the cost of sales in the audit.

1 The Department computed that the unreported audit parts sales should be increased by \$17,456, from
2 \$222,267 to \$239,723. However, since the period to assert an increase had passed, the Department
3 made no adjustment to the determination.

4 Petitioner contends that the audited amount of sales of auto parts should be reduced, arguing
5 that the estimated markup of 50 percent is excessive. As support, petitioner has provided sample sales
6 invoices and purchase invoices from another auto repair shop in his neighborhood, which reflect
7 markups of 25 percent to 35 percent.

8 Although the estimated markup of 50 percent could be high, the Department applied that
9 markup only with respect to the purchases from one of petitioner's four known vendors of auto parts,
10 and the Department found evidence recently that shows additional purchases not included in the
11 Department's calculations. We conclude that any possible overstatement of the estimated markup is
12 more than offset by purchases not included in the audit computations. In the absence of complete
13 records of purchases and sales of auto parts, we find no *decrease* in audited taxable sales of auto parts
14 is warranted.

15 **Issue 2:** Whether an adjustment should be made for unclaimed state diesel fuel tax. We find no
16 adjustment is warranted.

17 Petitioner contends that reported total sales included the state diesel fuel excise tax and states
18 that he did not claim a deduction for that excise tax because he was unaware he could do so. In
19 support, petitioner provided a worksheet showing diesel fuel excise tax of \$320,372 paid with respect
20 to the number of gallons of diesel fuel purchased for the audit period.

21 The state diesel fuel excise tax is excludable from gross receipts subject to sales tax, and we do
22 not dispute petitioner's computation of the amount of diesel fuel excise tax paid for the audit period.
23 However, petitioner's records are not sufficiently complete to show whether the sales of diesel
24 included in reported total sales included the diesel fuel excise tax or were net of that tax. Since
25 petitioner has not established that his reported taxable sales of diesel included the state diesel fuel
26 excise tax, we conclude that he has not established that any adjustment is warranted for this contention.

27 **Issue 3:** Whether petitioner was negligent. We conclude that he was.
28

1 The Department imposed the negligence penalty because petitioner's records were not adequate
2 for sales and use tax purposes. Petitioner has not specifically protested the negligence penalty.

3 Petitioner's records were severely incomplete. For example, he provided no documentation to
4 support the \$100,982 in claimed exempt sales of food and \$62,093 in claimed nontaxable labor, all of
5 which the Department disallowed without dispute from petitioner. Petitioner provided documentation
6 to support only \$18,549 of the \$116,158 claimed exempt sales to the U. S. Government, so the
7 Department disallowed the remaining \$97,609, again without dispute. These conceded unsupported
8 deficiencies are alone sufficient to establish petitioner's negligence. Petitioner additionally reported no
9 sales of auto parts, even though he purchased auto parts from several different vendors. We find that
10 the petitioner was negligent and that the penalty was properly imposed.

11 **OTHER MATTERS**

12 None.

13
14 Summary prepared by Deborah A. Cumins, Business Taxes Specialist III
15
16
17
18
19
20
21
22
23
24
25
26
27
28