

## 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 NABIL W. WANISS, dba Bob's Union )

6 Petitioner )

Account Number: SR Y EA 24-806669

Case ID 491575

Fullerton, Orange County

8 Type of Business: Gasoline stations

9 Audit period: 10/01/05 – 06/04/08

10 Item Disputed Amount

11 Unreported taxable sales of auto parts \$222,267

12 Unclaimed state diesel fuel tax deduction \$320,372<sup>1</sup>

13 Negligence penalty \$ 3,813

TaxPenalty

14 As determined and proposed to be redetermined \$38,133.81

\$38,133.81

\$3,813.39

15 Less concurred - 20,583.61

- 20,583.61

00.00

16 Balance, protested \$17,550.20

\$17,550.20

\$3,813.39

17 Proposed tax redetermination \$38,133.81

\$38,133.81

18 Interest through 10/31/11 14,908.16

14,908.16

19 Negligence penalty 3,813.39

3,813.39

20 Total tax, interest, and penalty \$56,855.36

\$56,855.36

21 Payments - 1.40

- 1.40

22 Balance Due \$56,853.96

\$56,853.96

23 Monthly interest beginning 11/01/11

\$ 190.66

24 **UNRESOLVED ISSUES**25 **Issue 1:** Whether adjustments are warranted to the amount of unreported taxable sales of auto  
26 parts. We find no adjustment is warranted.27 Petitioner operated two gasoline stations, selling fuel, cigarettes, and other taxable mini-mart  
28 merchandise. At one of the stations, he also operated an auto repair shop. Petitioner's records were1 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.

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

15 In order to compute petitioner's sales of auto parts, since petitioner provided no sales and cost  
16 information which could be used in a shelf test to compute an audited markup, the Department decided  
17 to establish such sales by adding an estimated markup of 50 percent to petitioner's purchases.  
18 However, petitioner also failed to provide any records of his purchases of auto parts. The Department  
19 therefore contacted his four known vendors of auto parts to request information about their sales to  
20 petitioner. Only one vendor replied. The Department added the estimated 50 percent markup to the  
21 purchases from that one vendor to compute unreported auto parts sales of \$222,267.

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

26 Although the estimated markup of 50 percent could be high, the Department applied that  
27 markup only with respect to the purchases from one of petitioner's four known vendors of auto parts.  
28 We conclude that, rather than overstating taxable sales of auto parts, this approach is far more likely to

1 have understated such sales, perhaps significantly. In the absence of complete records of purchases  
2 and sales of auto parts, we find no *decrease* in audited taxable sales of auto parts is warranted.

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

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

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

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

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

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

## 26 OTHER DEVELOPMENTS

27 None.

28 Summary prepared by Deborah A. Cumins, Business Taxes Specialist III