STATE BOARD OF EQUALIZATION
SALES AND USE TAX APPEAL

CALIFORNIA STATE BOARD OF EQUALIZATION

APPEALS DIVISION FINAL ACTION SUMMARY

In the Matter of the Petition for Redetermination Under the Sales and Use Tax Law of: HUNG VAN PHAM, dba Lee's Auto Repair & Gas Petitioner	Account Number: SR BH 100-017565 Case ID 486918 Redwood City, San Mateo County

Type of Business: Gasoline station

Audit period: 01/01/05 – 09/14/06

Item	Disputed Amount
Unreported sales of gasoline	$458,957
Negligence penalty	$ 4,773

	Tax	Penalty
As determined:	$50,661.33	$5,066.16
Post-D&R adjustment	- 2,935.02	- 293.51
Proposed redetermination	$47,726.31	$4,772.65
Less concurred	- 9,862.31	0.00
Balance, protested	$37,864.00	$4,772.65
Proposed tax redetermination	$47,726.31	
Interest through 12/31/12	27,623.84	
Negligence penalty	4,772.65	
Total tax, interest, and penalty	$80,122.80	
Monthly interest beginning 01/01/13	$ 236.13	

The Board held a hearing regarding this matter on June 27, 2012, and it directed the Sales and Use Tax Department (Department) to conduct an investigation to determine if the business had been closed for repairs during the audit period. Based on petitioner's submissions and the Department's response, we do not recommend adjustments, as discussed below under Post Hearing Developments.

UNRESOLVED ISSUES

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

Petitioner operated a gas station with a mini-mart and auto repair shop from April 10, 2002, through September 14, 2006. The Department found that petitioner claimed all sales through the repair shop as nontaxable labor and all mini-mart sales other than cigarettes as exempt sales of food products.

The Department computed understatements of reported taxable sales of gasoline, mini-mart merchandise, and repair parts. Petitioner agrees with the audited understatements of taxable mini-mart merchandise and repair parts of $119,543, but contends the audited amount of understated fuel sales of $458,957 is excessive because: 1) he made no purchases of fuel from December 24, 2005, through January 31, 2006, while his business was closed for repairs; 2) the audited ratios of each grade of gasoline sold are incorrect; 3) gasoline selling prices for the San Mateo, rather than the San Francisco area, should be used to compute audited sales; and 4) the differences in selling prices computed in each of the four months tested should not be equally weighted. Petitioner has provided no documentation to support these arguments.

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

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

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

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[1] Petitioner also claims that the auditor lost some of the books and records petitioner provided, which the Department denies. Other than petitioner's assertion, we have no evidence that this occurred, and we do not believe it did.

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

RESOLVED ISSUE

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

POST HEARING DEVELOPMENTS

At the June 27, 2012 Board hearing, the Members directed the Department to further investigate petitioner's assertion that the business was closed for repairs from December 24, 2005, through January 31, 2006. The Department first contacted petitioner's fuel supplier, Equilon Enterprises, LLC, dba Shell Oil Products US (Shell) to request sales reports for fuel sold to petitioner. Shell was unable to access that information without petitioner's customer number. The Department attempted to obtain the customer number from petitioner, explaining to him that it needed the number to get information from Shell. Petitioner stated he no longer had any records with his customer number. The Department also attempted to obtain the customer number from Shell's accounting staff, but was unsuccessful. Accordingly, the Department was unable to acquire the actual sales reports for the period in question. However, on its fuel wholesale account, Shell reported sales to petitioner of 44,066 gallons of fuel during December 2005 and 44,095 gallons during January 2006, indicating that the business was open and making sales of fuel. The Department also contacted the City of San Mateo Building Department and found that, from 2004 through 2006, only one permit was obtained for the business address, on October 30, 2006. Since that date was after petitioner's close-out date of September 14, 2006, that permit is not relevant to the issue at hand. When the Department explained

to petitioner's wife it had found no evidence that the business had been closed for repairs, she disagreed with those findings and stated that the dates of closure were incorrect. Petitioner's wife stated that the business was actually closed for repairs in December 2004 and January 2005. However, the Department confirmed that Shell had reported sales of 31,563 gallons of gasoline to petitioner during January 2005, and it did not gather information for December 2004, which was not part of the audit period.

We find there is no evidence that the station was closed for repairs during any portion of the audit period. Further, as noted under Issue 1 above, the audited fuel sales are based on an audited number of gallons sold, computed using petitioner's own records of the sales tax prepayments he had made to fuel vendors. Thus, any decreased purchases that resulted from a short-term closure of the station have already been incorporated into the computations of audited fuel sales. Accordingly, our conclusion remains that no further adjustments are warranted.

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

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