

## 1 CALIFORNIA STATE BOARD OF EQUALIZATION

## 2 APPEALS DIVISION SUMMARY FOR BOARD HEARING

3 In the Matter of the Petitions for Redetermination )  
 4 Under the Sales and Use Tax Law of: )  
 5 ALI K. AMIDY, RITA M. BELUS, and ) Account Number: SR CH 97-477488  
 6 FRED JAMES BELUS, ) Case ID 309684  
 7 dba A&M Gas )  
 8 ALI K. AMIDY, ) Account Number: SR CH 100-402742  
 dba A&M Gas ) Case ID 309681  
 )  
 8 Petitioners ) Hayward, Alameda County

9 Type of Business: Gas station with mini-market

10 Audit Periods: 4/01/01 – 4/16/04 (Case ID 309684)

11 4/17/04 – 5/24/04 (Case ID 309681)

12 <u>Items</u>	13 <u>Disputed Amounts</u>			
	14 <u>309684</u>		15 <u>309681</u>	
	16 <u>Tax</u>	17 <u>Penalty</u>	18 <u>Tax</u>	19 <u>Penalty</u>
20 Understated sales	\$2,268,625		\$92,598	
21 Sale of fixtures, furniture, and equipment			\$75,000	
22 Negligence penalty	\$ 18,590		\$ 1,383	
23 Amnesty interest penalty	\$ 10,272			
			24 <u>309681</u>	
			25 <u>Tax</u>	26 <u>Penalty</u>
27 As determined	\$197,267.40	\$19,726.80	\$15,041.07	\$1,504.11
28 Adjustments: Appeals Division	<u>- 11,369.52</u>	<u>- 1,136.98</u>	<u>- 1,214.23</u>	<u>- 121.42</u>
Proposed redetermination and protested	<u>\$185,897.88</u>	<u>\$18,589.82</u>	<u>\$13,826.84</u>	<u>\$1,382.69</u>
Proposed tax redetermination	\$185,897.88		\$13,826.84	
Interest through 10/31/09	68,355.99		4,975.94	
Penalty	18,589.82		1,382.69	
Amnesty interest penalty	<u>10,272.40</u>		<u>0.00</u>	
Total tax, interest, and penalty	\$283,116.09		\$20,185.47	
Payments	<u>-122,093.69</u>		<u>- 4,950.00</u>	
Balance due	<u>\$161,022.40</u>		<u>\$15,235.47</u>	
Monthly interest beginning 11/1/09	<u>\$425.36</u>		<u>\$59.18</u>	

26 These matters were previously scheduled for Board hearing on July 21, 2009, but were  
 27 postponed by the Board Proceedings Division in order to properly notice all parties 75 days prior to  
 28 their hearing as required by California Code of Regulations, title 18, section 5522.6.

**UNRESOLVED ISSUES**

**Issue 1:** Whether additional adjustments are warranted. We conclude none are warranted.

Petitioners operated a gas station with a mini-market. The business began as a partnership in 1999. On April 16, 2004, Mr. Amidy purchased the balance of the partnership's interests and operated the business as a sole proprietorship until he sold the business on May 24, 2004.

For audit, petitioners provided federal income tax returns (FITR's) for 2001, 2002, and 2003, profit and loss statements for 2002 and 2003, purchase invoices, bank statements, and the purchase agreements related to Ali Amidy's purchase of the partnership. Petitioners did not provide cash register z-tapes, sales summaries, or sales journals. Mr. Amidy stated that these records had been thrown away. The Sales and Use Tax Department (Department) found that the gross receipts reported on the FITR's for the three year period exceeded the reported sales to the Board by over \$1.5 million. The Department also found that the bank deposits for 2002 and 2003 exceeded the reported sales to the Board by over \$1.2 million for that period. Therefore, the Department concluded that reported sales were understated.

In the initial audit, the Department compiled petitioners' fuel purchases for the audit period and projected petitioners' sales based upon statewide average selling prices. The Department found no significant differences between the estimated fuel sales for the years 2001 and 2002 and the reported fuel sales on the FITR's. For the year 2003, the Department noted that petitioners reported the fuel sales and mini-market sales as a single amount on the FITR; thus, the Department estimated the fuel sales for 2003 based on petitioners' fuel purchases, average selling prices, and October 2003 invoices. For the mini-market sales, the Department performed a purchase segregation test for the second quarter 2002 and the third quarter 2003, and found that 75.44 percent of the purchases were taxable merchandise. The Department applied this percentage to the reported mini-market sales on the 2001 and 2002 FITR's to establish audited taxable mini-market sales for the two years. For 2003, the Department applied the achieved markup of 32.66 percent to petitioners' mini-market purchases to establish total mini-market sales, and applied the taxable ratio to this amount to establish taxable mini-market sales for 2003. The Department then compared the audited fuel sales and taxable mini-market sales for 2001 through 2003 to reported taxable sales, and found that the partnership had underreported

1 its taxable sales by 34.33 percent for the three year period. The Department applied this error rate to  
2 the reported 2004 taxable sales to determine the understated taxable sales for the period January 1,  
3 2004, to April 16, 2004. In sum, the Department calculated that the partnership had underreported its  
4 taxable sales by \$2,408,980, and the sole proprietorship had underreported its taxable sales by  
5 \$107,316.

6 After the audit was completed, Mr. Amidy provided the Department with daily sales summaries  
7 for the months of June 2002, September 2003, and February 2004 and with a cash register z-tape for  
8 one month in the audit period. The Department extended the taxable sales for these periods into yearly  
9 sales and found that the projected amounts resulted in higher taxable sales than the audit results. Thus,  
10 the Department concluded that the documents provided by petitioners supported the Department's  
11 audit findings.

12 During the first appeals conference, petitioners submitted additional documentation. The  
13 Department stated that upon review of the additional documents, the projected understated taxable  
14 sales were higher than the amounts calculated in the original audit. Petitioners agreed with the  
15 Department's audit methodology, but disagreed with the audit results. A second appeals conference  
16 was held at which petitioners stated that they had provided the Department with actual sales  
17 documentation for the audit period, including z-tapes, and requested a reaudit based on petitioners'  
18 actual documentation. The Department responded that it found numerous errors in the sales  
19 summaries and petitioners did not explain the difference between their actual sales data and the  
20 amounts reported on the FITR's. Petitioners conceded that the sales data originally presented  
21 contained errors, but that the errors had been corrected. Petitioners contended that the 2001 and 2002  
22 FITR's were unreliable because the gross receipts on the FITR's included ATM deposits.

23 We recommended the Department to perform a reaudit to examine petitioners' additional  
24 documentation. During the reaudit, the Department reviewed petitioners' revised sales summaries and  
25 concluded that the gross receipts in the FITR's did not include ATM deposits, but did include some  
26 sales tax reimbursement for 2001 and 2002. Therefore, the Department used petitioners' revised  
27 monthly sales reports to establish audited taxable sales. The reaudit reduced the understated taxable  
28 sales for the partnership by \$140,355, from \$2,408,980 to \$2,268,625, and reduced the understated

1 taxable sales for the sole proprietorship by \$14,718, from \$182,316 (\$107,316 plus sale of assets in the  
2 amount of \$75,000) to \$167,598.

3         Petitioners now contend that the taxable purchase ratio of 75.44 percent is excessive.

4         Petitioners state that the audited taxable mini-market sales should not be based on the taxable purchase  
5 ratio; instead, it should be based on the actual amount of sales tax reimbursement collected by  
6 petitioners. Petitioners have not provided satisfactory evidence to show that the taxable purchase ratio  
7 is excessive. Accordingly, we conclude that no further adjustments are warranted.

8         **Issue 2:** Whether petitioner Amidy has established that the sale of fixtures, furniture, and  
9 equipment is not taxable. We conclude that he has not.

10         On May 24, 2004, Mr. Amidy sold the business to Maria Delgado for \$960,000, \$75,000 of  
11 which was allocated to fixtures, furniture, and equipment. Mr. Amidy contends that he is not liable  
12 for the sales tax on the sale of assets, but has not explained any basis for his position.

13         There is no dispute that Mr. Amidy was a retailer, he was required to hold a seller's permit, and  
14 the fixtures, furniture, and equipment were held or used by Mr. Amidy in the course of operating the  
15 gas station and mini-market. When a person sells a business that is required to hold a seller's permit,  
16 tax applies to the gross receipts from the retail sale of tangible personal property held or used by that  
17 business. (Cal. Code Regs., tit 18, § 1595, subd. (b)(1).) Mr. Amidy has not provided an explanation  
18 why the sale is not subject to sales tax nor is there any evidence to suggest a basis for exclusion or  
19 exemption. Thus, we find no adjustment is warranted.

20         **Issue 3:** Whether petitioners were negligent. We conclude that they were.

21         The Department imposed the negligence penalty because petitioners underreported a substantial  
22 amount of tax. In the reaudit, the Department found that the partnership underreported its taxable sales  
23 by \$2,268,625, or by 32.4 percent, and that the Mr. Amidy underreported his taxable sales by  
24 \$167,598, or by 53.6 percent. This understatement is significant and cannot be justified as merely  
25 compiling errors. Additionally, the Department noted that Mr. Amidy had more than ten businesses in  
26 a 15-year period, suggesting that he had extensive knowledge in the filing of sales and use tax returns.

27         Petitioners submitted a statement signed under penalty of perjury contending that the business  
28 manager provided Mr. Amidy with incorrect data for use in completing the returns. Petitioners

1 contend that they misunderstood the return instructions, which led to errors. Petitioners assert that  
2 these errors occurred despite the exercise of ordinary care and did not result from willful neglect. We  
3 find that petitioners were directly responsible for filing complete and accurate sales and use tax returns  
4 and were accountable for the actions of their employees. Thus, if the business was negligent, the  
5 penalties were properly imposed.

6 During the audit, petitioners failed to provide the Department with complete and accurate  
7 records (and even asserted they had been destroyed), which led to the completion of the audit on a  
8 projected basis. Such records only began to appear in January 2005 as the Department was concluding  
9 the audit. The substantial error ratios and the failure to provide records demonstrate a standard of care  
10 well below that of a reasonably prudent retailer, and thus we find that petitioners were negligent and  
11 the penalties properly imposed.

12 **Issue 4:** Whether petitioners are entitled to relief from interest due to unreasonable delay by  
13 Board staff. We conclude that there was no unreasonable delay by Board staff, and that relief is not  
14 warranted.

15 Revenue and Taxation Code section 6593.5 provides that interest may be relieved where the  
16 failure to pay tax is due in whole or in part to an unreasonable error or delay by an employee of the  
17 Board, but only if no significant aspect of the error or delay is attributable to an act of, or a failure to  
18 act by, the taxpayer. Petitioners submitted a statement signed under penalty of perjury contending that  
19 the Department initially requested only specific audit documents, and that petitioners made such  
20 documents available. Petitioners contend that they fully cooperated with the Department by providing  
21 all of the documents requested in May 2004. Petitioners state that the Department only reviewed their  
22 documents in a piecemeal fashion, not requesting z-tapes and handwritten spreadsheets until December  
23 2004, such that it was the Department which caused delays in the audit process. Petitioners also  
24 contend that the Department then utilized its own audit methodology, as opposed to petitioners' actual  
25 records, to compute a deficiency.

26 The Department contacted petitioners on May 20, 2004, regarding an audit and completed the  
27 audit reports for both petitioners on December 29, 2004. The Department issued a determination to  
28 both petitioners in May 2005. During the audit, petitioners asserted that they had destroyed various

1 records, thereby causing the Department to resort to alternative methods to conduct the audit. The  
2 Department states that on September 1, 2004, and again on October 4, 2004, Mr. Amidy directed the  
3 Department to complete the audit utilizing petitioners' bank statements. Additionally, petitioners have  
4 continued to submit documents in a piecemeal fashion. We find that this is not a case where there was  
5 an unreasonable delay on the part of Board staff where no significant aspect of that delay is attributable  
6 to an act of, or a failure to act by, petitioners. Thus, we find that there was no unreasonable delay for  
7 purposes of section 6593.5. (Rev. & Tax. Code, § 6593.5, subd. (b).) Thus, petitioners are not entitled  
8 to any relief of interest.

### 9 AMNESTY

10 The partnership did not apply for amnesty or pay off the tax and interest due by March 31,  
11 2005. (Rev. & Tax. Code, § 7073, subd. (a).) Therefore, an amnesty interest penalty of \$10,272.40  
12 will apply when the liability is final with respect to the amnesty-eligible portion of the partnership's  
13 liability. (Rev. & Tax. Code, § 7074, subd. (a) (there will be no amnesty interest penalty with respect  
14 to Mr. Amidy's liability because it was not incurred during the amnesty-eligible period).) The  
15 partnership filed a request for relief of the amnesty interest penalty contending that it paid the full  
16 amount of the tax in March 2006, and that the liability was the result of computational errors. The  
17 partnership asserts that these errors occurred despite the exercise of ordinary care and did not result  
18 from willful neglect.

19 On December 9, 2004, the Department discussed the amnesty program with Mr. Amidy and the  
20 partnership's accountant. On January 24, 2005, the Department discussed the audit findings with  
21 Mr. Amidy and, on March 24, 2005, the NOD was issued. Thus, the partnership had knowledge of the  
22 amnesty program and the pending liability. Nevertheless, despite this knowledge, it did not file an  
23 amnesty application and did not pay off the tax and interest due by March 31, 2005. The partnership  
24 attempts to explain the basis for the reporting errors, but it is the failure to timely participate in and  
25 complete the amnesty program that is the basis of the penalty, and it is those failures that require a  
26 reasonable-cause explanation. The partnership has not provided an explanation for its failure to  
27 participate in the amnesty program. Under these circumstances, any payment after the amnesty  
28 program is not a basis for relief of the penalties. Rather, we conclude that the failure to participate in

1 amnesty or to timely satisfy the amnesty-eligible liability was not due to reasonable cause. Therefore,  
2 we do not recommend relief from the amnesty interest penalty.

3 **OTHER DEVELOPMENTS**

4 None.

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6 Summary prepared by Rey Obligacion, Business Taxes Specialist III  
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