

## 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 AMAR ABDO ALAMARY, ) Account Number: SR KHO 100-213632  
 6 dba Cargo Mart ) Case ID 513144  
 7 Petitioner ) Laton, Fresno County

8 Type of Business: Gas station and mini-mart

9 Audit period: 7/1/05 – 6/30/08

10 Item Disputed Amount

11 Unreported taxable sales \$509,019  
 12 Negligence penalty \$3,704

	<u>Tax</u>	<u>Penalty</u>
13 As determined <sup>1</sup>	\$38,797.22	\$3,879.74
14 Pre D&R adjustment	- 5,978.60	- 597.86
15 Post D&R adjustment	<u>+ 4,223.61</u>	<u>+ 422.37</u>
16 Proposed redetermination	\$37,042.23	\$3,704.25
17 Less concurred	- 2,106.92	0.00
18 Balance, protested	<u>\$34,935.31</u>	<u>\$3,704.25</u>
19 Proposed tax redetermination	\$37,042.23	
20 Interest through 11/30/12	17,102.30	
21 Negligence penalty	<u>3,704.25</u>	
22 Total tax, interest, and penalty	<u>\$57,848.78</u>	
23 Monthly interest beginning 12/1/12	<u>\$185.21</u>	

24 **UNRESOLVED ISSUES**

25 **Issue 1:** Whether petitioner has established that additional adjustments to reduce the measure  
 26 of understated taxable sales are warranted. We conclude that he has not.

27 Petitioner operated a service station with a mini-mart in a rural area from April 2003 through  
 28 June 2008, when the business was incorporated (Alamary Enterprise, Inc., SR KHO 101-063331).  
 29 Petitioner sold three grades of gasoline and diesel fuel, and sold the usual taxable merchandise in the

<sup>1</sup> The determined tax and applicable negligence penalty is net of credits for underclaimed prepaid sales tax of \$5,659.00.

1 mini-mart, including beer. Additionally, after petitioner completed his remodel to add kitchen  
2 facilities and a steam table for serving hot prepared food, petitioner began making taxable sales of hot  
3 prepared food products during the last quarter of the audit period. For audit, petitioner provided  
4 federal income tax returns, monthly summaries, profit and loss statements, purchase invoices, sales and  
5 use tax returns, and fuel price reports.

6 The Sales and Use Tax Department (Department) compared petitioner's recorded sales with the  
7 recorded cost of sales and computed book markups of 3.00 percent for gasoline and diesel (MVF)  
8 sales, 24.01 percent for taxable mini-mart sales, 33.00 percent for exempt sales of food products, and  
9 11.76 percent overall. The Department considered the MVF book markup low, noted that cigarette  
10 purchases appeared low for this type of business, and decided to establish petitioner's taxable sales by  
11 alternative methods. The Department computed MVF sales by multiplying the number of gallons of  
12 MVF that petitioner purchased during the audit period by adjusted statewide average retail MVF  
13 prices, computing taxable MVF sales of \$1,869,122.<sup>2</sup> The Department computed taxable mini-mart  
14 sales using normal markup procedures, and also added an amount for additional cigarette purchases  
15 after noticing that recorded cigarette purchases appeared low for this type of business, computing  
16 taxable mini-mart sales of \$1,005,847.<sup>3</sup> The Department observed that petitioner sold about 75 gallons  
17 of propane per week based on a two-day observation test, and calculated that at a stated selling price of  
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19 <sup>2</sup> The Department compiled the number of MVF gallons petitioner purchased by comparing the quarterly gallons of MVF  
20 sold to petitioner as reported to the Board by petitioner and by the MVF vendors, and using the higher of the two. It  
21 computed quarterly statewide weighted average selling prices of gasoline using estimated ratios of 70 percent for regular,  
22 15 percent for mid-grade, and 15 percent for premium, which were further adjusted by a price variance of +22.3 cents per  
23 gallon. It adjusted the quarterly statewide average selling prices of diesel by a price variance of +32.3 cents per gallon and  
24 the state excise tax of 18 cents per gallon. It applied these adjusted selling prices to the audited number of MVF gallons  
25 purchased to calculate audited MVF sales, which were reduced by sales tax reimbursement included and by \$13,364 for  
26 self-consumption of gasoline.

27 <sup>3</sup> The Department compiled total mini-mart merchandise purchases of \$912,353 from monthly summary reports, including  
28 \$641,584 in taxable purchases. After noting relatively few cigarette purchases in a two-month purchase segregation test, it  
assumed that petitioner's cigarette inventory equaled one month of purchases. It combined petitioner's observed cigarette  
inventory on-hand for August 9, 2008, and January 8, 2010, which totaled \$9,681, subtracted the \$2,863 recorded cigarette  
purchases in the two-month segregation test, computed unrecorded cigarette purchases of \$6,818, compared that amount  
with the \$31,901 *taxable* mini-mart merchandise purchases from the test, and computed a 21.3724 percent error ratio for  
unrecorded cigarette purchases. It applied the 21.3724 percent error ratio to the \$641,584 recorded taxable mini-mart  
merchandise purchases to compute unrecorded cigarette purchases of \$137,121. It added the unrecorded cigarette  
purchases to the recorded taxable mini-mart merchandise purchases, reduced that amount by \$23,712 for self-consumption  
and \$15,892 for pilferage, and computed \$778,700 as taxable mini-mart cost of goods sold. It conducted a shelf test and  
established a weighted average taxable markup of 29.17 percent, added that markup to the taxable mini-mart cost of goods  
sold.

1 \$2.50 per gallon propane sales were \$2,438 per quarter, or \$29,250 for the audit period. Petitioner's  
2 audited taxable sales of \$2,904,219 (\$1,869,122 + \$1,005,847 + \$29,250) were compared with reported  
3 taxable sales of \$2,395,201 and an understatement of \$509,018 (rounded) was established.

4 We conclude that petitioner has not provided any documentation to support his contentions that  
5 the MVF selling prices used by the Department to establish MVF sales are higher than his actual  
6 selling prices, the cigarette inventories observed in the two-day test are higher than his average daily  
7 cigarette inventory, and the allowance for pilferage of taxable mini-mart merchandise should be  
8 increased from two percent to three percent. We find there is no basis for further adjustment.

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

10 The Department imposed the penalty because petitioner's records were incomplete and the  
11 book markup percentages appeared low. Petitioner declined to comment on the negligence penalty.

12 The Department found that petitioner did not record all of his gasoline and cigarette purchases.  
13 We find this to be evidence of negligence in recordkeeping since even a taxpayer such as petitioner  
14 who had not been audited previously should understand that all purchases must be recorded. Further,  
15 the \$509,019 unreported taxable sales represents a 21.25 percent error ratio when compared with  
16 reported taxable sales of \$2,395,201. We find this error ratio to be evidence of negligence in reporting.  
17 Accordingly, we find that the audited understatement was due to petitioner's negligence.

18 **OTHER MATTERS**

19 None.

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21 Summary prepared by Pete Lee, Business Taxes Specialist II  
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**MARKUP TABLE****Mini-mart**

Percentage of taxable vs. nontaxable purchases	74.66% taxable
Mark-up percentages developed	29.17%
Self-consumption allowed in dollars	\$7,904 per year
Self-consumption allowed as a percent of taxable purchases	2.9%
Pilferage allowed in dollars	\$15,892
Pilferage allowed as a percent of taxable purchases	2%