CALIFORNIA STATE BOARD OF EQUALIZATION

APPEALS DIVISION BOARD HEARING SUMMARY

In the Matter of the Petition for Redetermination, Administrative Protest, and Claim for Refund Under the Sales and Use Tax Law of:	
NAIM JAMALI, dba Z & T Auto Sales	Account Number SR BH 97-084067 Case ID's 448789, 450475, 595326
Petitioner/Taxpayer/Claimant	South San Francisco, San Mateo County

Type of Business: Used car dealer

Liability periods:[1] 01/01/04 – 03/31/05 (Case ID 450475)
04/01/05 – 12/31/06 (Case ID 448789)

Claim period: 01/01/03 – 03/31/05 (Case ID 595326)

Item	Disputed Amount
Understatement of reported taxable sales	$333,546
Unrecorded taxable sales	$ 22,092
Negligence penalty	$ 408 (Case ID 450475)
	$ 2,502 (Case ID 448789)
Finality penalty	$ 408 (Case ID 450475)

	450475		448789	
	Tax	Penalty	Tax	Penalty
As determined	$7,202.67	$720.26	$25,716.65	$2,571.65
Finality penalty		720.27		
Pre-D&R adjustment	- 3,107.37	- 621.47		
Post-D&R adjustment	- 13.81	- 2.76	- 691.77	- 69.17
Proposed redetermination, protested			$25,024.88	$2,502.48
Adjusted understatement, protested	$4,081.49	$816.30		

Adjusted tax/Proposed tax redetermination	$4,081.49	$25,024.88
Interest through 09/30/12	2,356.16	13,578.50
Negligence penalty	408.15	2,502.48
Finality penalty	408.15	
Total tax, interest, and penalty	$7,253.95	$41,105.86
Payments	- 7,253.95	- 57.66
Balance Due	$ 00.00	$41,048.20

Monthly interest beginning 10/01/12 $ 124.84

[1] The audit was conducted for the period January 1, 2004, through December 31, 2006, but a Notice of Determination was issued for a portion of the audit period before the audit was completed to avoid the bar of the statute of limitations as to that portion of the audit period.

This matter was scheduled for Board hearing in May 2012, but was deferred at the request of the Sales and Use Tax Department (Department) to allow time for additional investigation. As explained under "Other Matters," the Department concluded that no further adjustments were warranted. The matter was rescheduled for Board hearing in August 2012, but was postponed at petitioner's request because of scheduling conflicts.

UNRESOLVED ISSUES

Issue 1: Whether the Notice of Determination for the period January 1, 2004, through March 31, 2005, was timely for the first three quarters. We find that the determination was timely for the entire period.

Petitioner operates a used car dealership. Petitioner filed an annual sales and use tax return for the year 2004 and a quarterly return for the first quarter 2005. The Department issued a Notice of Determination to petitioner on January 24, 2008, for the period January 1, 2004, through March 31, 2005. Petitioner asserts that he has always filed his sales and use tax returns on a quarterly basis and thus must have filed returns for the first, second, and third quarters of 2004. On that basis, he asserts that the statute of limitations had passed for the first three quarters of 2004 before the determination was issued. Petitioner is correct that, *if* he had filed timely quarterly returns, the determination would not have been timely for the first three quarters of 2004.[2] However, the Board's records show that petitioner filed one sales and use tax return for the year 2004, on February 10, 2005 (after its January 31, 2005 due date), and petitioner has produced no evidence to the contrary. Thus, the statute of limitations for issuing a Notice of Determination for the entire year of 2004 expired on February 10, 2008 (Rev. & Tax. Code, § 6487, subd. (b)), and the determination was timely for all of 2004, as well as for the first quarter 2005.

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[2] Petitioner signed a waiver of limitations on January 8, 2008, which allowed the Department until July 31, 2008, to issue the determination for the liability period of January 1, 2004, through March 31, 2005, and the determination was issued before that waiver expired. However, *if* petitioner had actually filed returns on a quarterly basis for the first three quarters of 2004, issuance of a notice of determination for those three quarters would have already been barred when the waiver was signed. If, as we find, petitioner instead filed an annual return for 2004, a determination covering 2004 would have been timely if served by January 31, 2008, which it was. In other words, the waiver of limitations is irrelevant: if petitioner filed quarterly returns, the waiver was signed too late to cover those three quarters; if petitioner filed an annual return for 2004, the determination was timely for 2004 without regard to the waiver.

STATE BOARD OF EQUALIZATION
SALES AND USE TAX APPEAL

Issue 2: Whether adjustments are warranted to the audited understatements of reported taxable sales. We find no further adjustment is warranted.

The Department used sales jackets to compile recorded taxable sales for the audit period, not all of which had been recorded in petitioner's sales summaries. The Department found that the recorded amount substantially exceeded reported taxable sales and, after the most recent reaudit, the amount of that difference is $333,546. The Department also found five sales jackets, each of which contained information about a vehicle purchase and sale but without a sale price. The Department used the average sale price of $5,523, computed using recorded sale prices, to establish the audited amount of those five sales. After the appeals conference, the Department found that one of those five sales was listed on a separate audit schedule. Accordingly, that duplicate sale has been deleted and, in the most recent reaudit, the amount of the four unrecorded sales is $22,092.

Petitioner asserts that tax was paid to the Department of Motor Vehicles (DMV) by one of the purchasers of the four vehicles for which no sale price was available, and that the estimated sale price of $5,523 for each of those four sales is excessive. Petitioner generally asserts that there were no actual sales represented by sales jackets that were not recorded in his sales summaries. He states that he cannot find some of the sales jackets in his records that the Department picked up as representing sales, and he questions whether they ever existed, particularly since the Department did not make copies of the sales jackets. Petitioner also argues that some of the sale jackets that the Department regarded as representing completed sale transactions may not have been finalized, and that some sales were duplicated in the audit.

The vast majority of the audited understatement represents sales, compiled from sales jackets by the Department on an actual basis, that were not reported on returns. Only four transactions in the audit were established using an estimated sale price, and that estimate was based on the 177 sales for which a sale price was documented. The Department has made an adjustment for one duplicate entry documented by petitioner. Petitioner has not provided evidence of other errors in the Department's compilation of sales from petitioner's source documents or evidence that any of the sales were not consummated. Petitioner has not provided adequate evidence to show that one of the purchasers paid tax to DMV. Nor are we persuaded by petitioner's allegation that the sales jackets may not have

existed when the audit was completed, since he cannot find them now, because there is no basis for us to conclude that the Department fabricated the information included in the audit. Accordingly, we recommend no further adjustment to the audited understatements of reported taxable sales. Since we find no further adjustments are warranted, and the amount paid does not exceed the amount due, we also recommend that the claim for refund be denied.

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

The Department imposed the negligence penalty because of the discrepancies in the records and the substantial amount of understatement. Petitioner disputes the penalty on the basis that he was not negligent.

The understatement of reported taxable sales of $355,638 is substantial, and it represents an error rate of about 57 percent in comparison to reported taxable sales of $627,849. Of the total audited understatement, $328,151 represents transactions for which petitioner provided source documents (sales jackets) that had not been recorded in the sales summaries. We find that the significant understatement, in conjunction with the incomplete recording of sales into the sales summaries, is clear evidence of negligence. Further, since petitioner had been audited previously, for the period January 1, 2000, through September 30, 2002, he should have been aware of the necessity to maintain complete records and report accurately. Therefore, we find that the penalty was properly applied.

Issue 4: Whether relief of the finality penalty is warranted. We find that relief is not warranted.

Since petitioner did not timely pay the determination for the period January 1, 2004, through March 31, 2005, or file a petition for redetermination, a finality penalty was applied. Petitioner has requested relief of the penalty on the basis that he has paid the disputed tax for that period. Although the disputed tax liability was paid as of September 3, 2011, the determination was not paid when it became due on February 23, 2008. We find that petitioner has not shown reasonable cause for his failure to timely pay the determination or file a timely petition for redetermination. Therefore, we find that relief of the penalty is not warranted.

STATE BOARD OF EQUALIZATION
SALES AND USE TAX APPEAL

OTHER MATTERS

Before the scheduled May 2012 hearing, petitioner asserted that the Department should have verified with DMV whether the sales not on his sale summaries in fact took place. The Department requested that the hearing be deferred to allow it time to address this argument by gathering more information from DMV.

The Department checked DMV records for all of the transactions it had regarded as sales based on petitioner's sale jackets where the transaction was not listed on petitioner's summaries as sales. For most of these, the Department found that DMV records showed petitioner's sale had been consummated. There were a few transactions which the Department could not verify in the DMV database. However, for those, the Department was also unable to identify the vehicle as having been sold by any other dealer besides petitioner, which the Department concludes would have been the case if petitioner had not sold the vehicles (unless petitioner still had the vehicle in inventory, which he has not shown). Accordingly, the Department concludes no adjustment is warranted. Based on the available information, we do not recommend any further adjustment for this argument.

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