

## CALIFORNIA STATE BOARD OF EQUALIZATION

## APPEALS DIVISION BOARD HEARING SUMMARY

In the Matter of the Petition for )  
Redetermination and Claim for Refund )  
Under the Sales and Use Tax Law of: )  
PORT PETROLEUM, INC. ) Account Number SR EA 99-506588  
Case ID's 474336, 551074  
Petitioner )  
Torrance, Los Angeles County

Type of Business: Fuel cardlock station with mini-mart

Audit period: 01/01/06 – 12/31/08

<u>Item</u>	<u>Disputed Amount</u>
Disallowed claimed prepayments of tax on fuel sales	\$186,211
Relief of interest	Unstated <sup>1</sup>
Tax as determined and protested	\$151,193.53 <sup>2</sup>
Interest through 11/30/15	<u>44,874.39<sup>3</sup></u>
Total tax and interest	\$196,067.92
Payments	<u>- 86,668.86</u>
Balance Due	<u>\$109,399.06</u>
Monthly interest beginning 12/01/15	<u>\$ 322.62</u>

This matter was scheduled for Board hearing in October 2014, but was deferred at the request of the Appeals Division in order to issue an SD&R.

## UNRESOLVED ISSUES

**Issue 1:** Whether adjustments are warranted to the amount of disallowed claimed prepayments of tax on fuel sales. We find no adjustment is warranted.

Petitioner operated a fuel cardlock station with a mini-mart from June 15, 1994, through June 19, 2013. Accordingly, petitioner operated as both a retailer and a supplier of fuel because it sold

<sup>1</sup> Petitioner requests relief of interest that accrued from January 1, 2009, to the present, and we have not computed that total. However, it exceeds the amount of interest relief we have recommended.

<sup>2</sup> The amount of tax determined is net of an overpayment of tax established by audit of \$35,017.47, related to a difference between recorded and reported taxable sales.

<sup>3</sup> The interest of \$44,874.39 is net of \$11,100.71 (the amount of interest for the period January 18, 2008, through February 4, 2009), and \$4,394.59 (the amount of interest for the period March 13, 2013, through December 12, 2013), for which we recommend relief.

1 fuel at retail to its own members and to the general public, and it sold fuel at wholesale to other  
2 affiliates (when petitioner's members purchased fuel from another affiliate). In other words,  
3 petitioner's sales of fuel from its location included "domestic" sales (sales to petitioner's members at  
4 petitioner's location), sales to the general public, and "foreign" sales (sales of fuel to other affiliates'  
5 members). Petitioner also made sales of fuel to its members at other affiliates' locations, which were  
6 referred to as "remote" sales. Petitioner was required to report the following sales of fuel as taxable:  
7 1) domestic sales; 2) sales to the general public; 3) and remote sales (sales to its members at affiliates'  
8 stations) if the sales occurred in California. Petitioner's foreign sales of fuel were nontaxable sales for  
9 resale to the other affiliates, and its remote sales of fuel outside California were exempt sales in  
10 interstate commerce. The Sales and Use Tax Department (Department) found that petitioner's  
11 recorded taxable sales were substantially accurate, and it found that its reported taxable sales exceeded  
12 recorded amounts, which resulted in an overpayment of tax on sales. However, the Department also  
13 found that petitioner had claimed all of the sales tax prepayments it made to fuel vendors as credits on  
14 its sales and use tax returns. Since petitioner was entitled to claim the sales tax prepayments as credits  
15 only with respect to the fuel it sold at retail, the Department concluded that the claimed prepayments  
16 were overstated. The Department used petitioner's records and information from Commercial Fuel  
17 Network (CFN) reports to compute the amount of the overstatement at \$186,211.

18         Petitioner does not dispute the audit method or the amount of prepayments related to sales that  
19 were not at retail. Instead, petitioner contends that the reporting requirements are complicated and  
20 misleading, that the Department itself does not fully understand petitioner's industry, and that  
21 petitioner followed directions provided by the Board. Petitioner argues, based on those factors, that the  
22 audit should not disallow the claimed overstatement of claimed sales tax prepayments. Specifically,  
23 petitioner asserts that it followed the instructions provided on the face of the Schedule G's (*Sales Tax*  
24 *Prepaid to Fuel Suppliers*) provided by the Board, which directs taxpayers to enter the amount of sales  
25 tax prepaid to fuel suppliers on line 20 of its return, rather than the more detailed instructions on the  
26 back of the form.

27         In the D&R, we concluded that petitioner is responsible for correctly reporting the tax, and  
28 claiming the correct amount of sales tax prepayments, regardless of the accuracy or clarity of the

1 instructions on the return. Petitioner filed a request for reconsideration (RFR) arguing that a form  
2 adopted by an administrative agency is a standard of general application, which implements the law to  
3 be administered by the agency, and is therefore a regulation. Petitioner also asserted that the  
4 Department was required to write its forms in plain English. Petitioner cited various statutes and court  
5 decisions, which we find are not applicable in this case.

6 In the SD&R, we continue to find no adjustment is warranted on the basis that petitioner  
7 believed it was properly reporting its tax liabilities. We note that Government Code section 11340.9,  
8 subdivision (c) expressly omits from the statutes governing administrative regulations and rulemaking  
9 “[a] form prescribed by a state agency or any instructions relating to the use of the form,” thereby  
10 indicating that agency forms, and the instructions thereon, do not constitute regulations. Further,  
11 information found on preprinted forms, instructions, and publications, do not constitute written advice  
12 for purposes of relief under Revenue and Taxation Code section 6596. In any event, we note that  
13 instructions on the back of the Schedule G explain that the amount of prepayments claimed on a  
14 taxpayer’s sales and use tax return are limited to the amount of prepayments related to petitioner’s  
15 retail sales of fuel.<sup>4</sup>

16 **Issue 2:** Whether petitioner is entitled to relief from the tax because its procedure for claiming  
17 sales tax prepayments was the result of its reliance on incorrect advice from the Board in a prior audit.  
18 We find there is no basis for relief.

19 Petitioner argues that it is entitled to relief because its failure to properly claim the amount of  
20 sales tax prepaid to suppliers of fuel was the result of its reliance on incorrect advice it received from  
21 the Board in the findings of a prior audit. In that prior audit, the Department found that petitioner’s  
22 claimed prepayments to fuel suppliers were understated. Petitioner asserts that its method of claiming  
23 sales tax prepayments on fuel during the prior audit was the same as its method in the audit period at  
24 issue. On that basis, petitioner argues that it was misled by the Department’s conclusions in the prior  
25 audit and therefore believed it was properly claiming the sales tax prepayments.

26 \_\_\_\_\_  
27 <sup>4</sup> At the appeals conference, petitioner asserted that the instructions on the back of the Schedule G were not included on the  
28 form during the audit period. The Department has provided evidence that those instructions have been on the form at least  
since April 2003. Although we asked petitioner if that evidence altered its position, petitioner has not responded.

1 First, it is important to note that under the express terms of the statute, relief is inapplicable  
2 here because in relevant part, Revenue and Taxation Code section 6596 only provides relief from tax  
3 in situations where a taxpayer fails to charge or collect amounts from its customers designated as sales  
4 tax reimbursement or use tax. (Rev. & Tax. Code, § 6596, subd. (b)(3)(A).) (In other words, Section  
5 6596 does not allow a refund of properly collected and paid tax.) Here, petitioner properly collected  
6 tax reimbursement (and reported tax) in connection with its retail sales, and therefore Section 6596  
7 does not apply to the situation at hand.

8 Second, as explained in the Second SD&R, the prior audit advice was not erroneous but was in  
9 fact correct. In particular, we note that the prior auditor specifically excluded non-retail sales of fuel  
10 from the credit allowance for sales tax prepayments. No evidence indicates that the auditor advised  
11 petitioner that it had properly claimed sales tax prepayments collected for fuel not sold at retail. Thus,  
12 the prior audit advice was correct, and there is no erroneous written advice upon which petitioner could  
13 have relied for purposes of relief.

14 Third, as explained in the Department's February 5, 2015 memorandum (attached as exhibit 2  
15 to the Second SD&R), claimant properly claimed credit for prepaid sales tax *only* on its retail sales of  
16 fuel for the period April 1, 1997 through December 31, 1997, which was the subject of a Field Billing  
17 Order (essentially, in general terms, a following audit, although it would not have included a full  
18 review of all aspects of petitioner's sales and use tax compliance), in which the Department accepted  
19 claimant's amended sales tax returns. In other words, claimant knew how to properly claim the credits  
20 in the periods immediately following the prior audit, and therefore petitioner cannot now reasonably  
21 argue that its errors in claimed credits following 1997 were the result of reliance on any (alleged)  
22 erroneous advice from the preceding audit. (See Cal. Code Regs., tit. 18, § 1705, subd. (c).)

23 Fourth, we note that allowing relief on these facts would result in unjust enrichment to  
24 petitioner. Specifically, the transactions at issue are petitioner's sales for resale of fuel. Petitioner  
25 prepaid sales tax to its vendors when it purchased the fuel, *and collected the corresponding prepaid*  
26 *sales tax when it resold the fuel* to other suppliers. (See Rev. & Tax. Code, § 6480.1, subd. (a).) In  
27 other words, the prepaid sales tax that petitioner collected from its customers has already offset and  
28 reimbursed petitioner for the prepaid sales tax that it paid to its vendors. Consequently, allowing

1 petitioner to claim the disallowed credits on these sales essentially would pay petitioner twice for tax  
2 that it only paid once, which is unjust enrichment. (It is for this reason that only the retailer of the fuel  
3 (or the supplier who consumed the fuel) may claim a pre-paid sales tax credit against its tax liability.  
4 (See Rev. & Tax. Code, § 6480.1, subd. (d).)) Furthermore, the credit that claimant seeks has already  
5 been claimed by and allowed to the actual retailers who are entitled to such credit, so there has been no  
6 unjust enrichment to the state.

7       Next, although the foregoing is dispositive of this issue, we note that in its RFR, petitioner  
8 asserted that California Code of Regulations, title 18, section (Regulation) 1705 does not include the  
9 same requirement (that sales tax relief is only available with respect to amounts for which the taxpayer  
10 did not collect sales tax reimbursement). Accordingly, we addressed that assertion in the SD&R and  
11 second SD&R.

12       The Board adopted Regulation 1705 as a means of explaining when relief of taxes, interest, and  
13 penalties is available based on a taxpayer's reasonable reliance on prior written advice from the Board  
14 pursuant to section 6596. Regulation 1705 merely interprets and implements, but does not expand, the  
15 circumstances under which relief is available under section 6596. We recognize that one of the  
16 conditions set forth in section 6596 for relief of a sales tax liability (i.e., that the reasonable reliance  
17 must have resulted in the taxpayer's failure to charge or collect tax reimbursement), does not also  
18 appear in Regulation 1705. However, such absence from the regulation does not mean the regulation  
19 is in conflict with the statute or that the regulation provides for a different or more expansive basis for  
20 relief. It merely means the implementing regulation did not repeat that portion of the statute.  
21 Accordingly, petitioner's argument regarding Regulation 1705 does not alter our finding that no relief  
22 is warranted because the deficiency did not result from petitioner's failure to collect sales tax  
23 reimbursement or its failure to pay use tax on its storage, use, or other consumption of tangible  
24 personal property in California. (Rev. & Tax. Code, § 6596, subd. (b)(3).)

25       **Issue 3:** Whether further relief of interest is warranted. We find that relief is warranted for the  
26 periods January 18, 2008, through February 4, 2009, and March 13, 2013, through December 12, 2013.

27       Petitioner has filed a request for relief of interest that has accrued from January 1, 2009,  
28 through the present, on the basis that Department staff unreasonably delayed the commencement of the

1 audit and its completion. We reviewed the records regarding the processing of this case, and we found  
2 that the Department made initial contact with petitioner regarding the audit on January 17, 2008, but  
3 did not engage in any further audit activity until more than a year later, on February 5, 2009. We  
4 found that delay to have been unreasonable, and, in the D&R, we recommended relief of interest for  
5 the period January 18, 2008, through February 4, 2009. The Department has computed the amount of  
6 interest for that period at \$11,100.71. After February 5, 2009, until the Notice of Determination  
7 (NOD) was issued on September 17, 2010, we found in the D&R and in the first and second SD&R's  
8 that there were various delays, some of which were the result of the action or failure to act by the  
9 petitioner. However, we found no evidence of unreasonable delays by Board staff.

10 In preparing this matter for Board hearing, we have re-examined the period of time from the  
11 date of the appeals conference through the date of the issuance of the D&R in this matter (August 29,  
12 2012 through December 12, 2013). Our review reveals several instances during the post-conference  
13 briefing period in which there were short delays in transmitting a party's submissions to the other  
14 party. None of the delays by themselves were unreasonable, and each delay was based on unavoidable  
15 workload issues, but when viewed in the aggregate, we believe the resulting delay is unreasonable.  
16 Had the delays not occurred, this matter reasonably could have been considered ready to write as early  
17 as December 12, 2012, in which case the D&R would have been issued on or before March 12, 2013  
18 (see Cal. Code Regs., tit. 18, § 5265, subd. (a)). Accordingly, we recommend relief of interest for the  
19 period March 13, 2013, through December 12, 2013.

#### 20 **RESOLVED ISSUE**

21 In addition, we note that petitioner filed an amended return for the first quarter 2008 in which it  
22 reduced the amount of transactions and use tax reported from \$36,910 to \$34,951 (a difference of  
23 \$1,959). The Department verified the overpayment and included that overpayment in its audit  
24 computations. Thus, the claim for refund has been granted, but the overpayment has been offset  
25 against amounts due in the audit, and no further refund is due.

#### 26 **OTHER MATTERS**

27 None.

28 Summary prepared by Jeffrey G. Angeja, Tax Counsel IV