

## 1 CALIFORNIA STATE BOARD OF EQUALIZATION

## 2 APPEALS DIVISION BOARD HEARING SUMMARY

3 In the Matter of the Claims for Refund )  
4 Under the Sales and Use Tax Law of: )5 JASINDER PAL SINGH and CHARANJEEV )  
6 SINGH, dba Sierra Foods & Gas )

7 Claimant )

Account Number SR KH 97-830773

Case ID 621322

Roseville, Placer County

8 Type of Business: Gas station and mini-mart

9 Audit period: 01/01/07 – 12/31/09

10 ItemClaimed Refund

11 Claimed overpayment of payments

made against the Notice of Determination

\$11,825.76

12 Claimed overpayments made with returns

Unstated

13 Claimant filed two claims for refund for unstated amounts, which were timely filed for the  
14 payment of \$26,503.61 made June 21, 2012 against the Notice of Determination (NOD) issued for the  
15 period January 1, 2007, through December 31, 2009. After adjustments recommended in the D&R,  
16 there was an overpayment of \$14,677.85, and that amount has been refunded.<sup>1</sup> Thus, the amount  
17 remaining in dispute with respect to the payments made against the NOD is \$11,825.76.

18 Claimant also filed a protective claim for refund on January 19, 2011, which was timely for all  
19 overpayments made with returns during the audit period because petitioner had consented to an  
20 extension of the statute of limitations for issuing the NOD, which also extended the period during  
21 which a claim for refund could be filed. Thus, if claimant prevails in this matter, and the  
22 understatements established by audit are reduced to an amount less than the overstatement established  
23 by audit (for reported taxable sales in excess of recorded amounts), the resulting overpayment will be  
24 subject to refund. However, as explained below, our preliminary calculations indicate that there would  
25 be a remaining determined understatement if petitioner prevailed on all remaining issues.

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27 <sup>1</sup> The overpayment of \$14,677.85 was included in a refund of \$14,911.15 that was issued by the State Controller's Office  
28 on September 30, 2014.

**BACKGROUND**

The Sales and Use Tax Department (Department) issued an NOD on January 24, 2012, which established a deficiency measure of \$21,276, comprised of \$18,409 of unreported taxable cigarette rebates, \$359,429 of unreported taxable fuel sales, and a credit measure of \$356,562 which represented reported taxable sales in excess of recorded amounts. The Department also disallowed claimed credits for sales tax prepaid to fuel vendors of \$12,848.00, with a total tax liability in the NOD of \$13,428.58.<sup>2</sup> The NOD included a negligence penalty of 1,342.87, and a finality penalty of \$1,270.66 was added when the liability became final.

After the appeals conference, the Department recommended: 1) an increase of \$45,903 in the credit measure for reported tax in excess of recorded amounts, from \$356,562 to \$402,465, 2) an increase in the amount of unreported taxable fuel sales of \$11,181, from \$359,429 to \$370,610, and 3) a decrease in the amount of unreported taxable cigarette rebates of \$3,056, from \$18,409 to \$15,353. As a result of those adjustments, the difference in the reported measure of tax was reduced from a deficiency of \$21,276 to a credit measure of \$16,502.

In the D&R, we recommended those adjustments and recommended that the negligence penalty be deleted. After the Department made all the adjustments recommended in the D&R, and made corresponding adjustments to the interest, it computed an overpayment of \$14,677.85, which has been refunded, as mentioned previously. Thus, the amount of overpayment remaining in dispute with respect to payments made against the NOD is \$11,825.76 (\$26,503.61 - \$14,677.85).<sup>3</sup>

In total, after the adjustments in the D&R and SD&R, the amounts we understood to be remaining in dispute were: 1) unreported taxable fuel sales of \$370,610, 2) unreported cigarette rebates of \$15,353, 3) disallowed claimed prepayments of sales tax to fuel vendors of \$12,848, and 4) a finality penalty of \$983.51. However, in recent discussions with several Members' offices, petitioner's representative, Melissa Coates, stated that petitioner now contends only that the amount of

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<sup>2</sup> The total tax liability is comprised of \$580.58 tax related to the understatement of reported taxable measure and disallowed claimed prepayments of \$12,848.00. The \$580.58 represents tax of \$1,542.51 (7.25% x \$21,276) less \$961.94 (1 percent of the overstatement of reported measure of \$96,194 that was subject to the 1 percent state tax increase).

<sup>3</sup> In addition to the payment of \$26,503.61, the Department applied an overpayment on a return of \$722.00 to the NOD, effective June 30, 2009. Claimant did not file a timely claim for refund of that payment, and the time during which a claim could have been filed has expired.

unreported taxable sales of fuel should be reduced by \$52,021, from \$370,610 to \$318,589, which has been computed by reducing the audited understatement by the credit amounts reflected in periods for which petitioner's recorded sales of fuel exceeded the amounts established based on statewide average fuel selling prices. In a telephone discussion with us on May 14, 2015, Ms. Coates confirmed that petitioner no longer disputes the amount of unreported taxable cigarette rebates or the disallowed claimed prepayments of sales tax to fuel vendors, and that the only items remaining in dispute are the \$52,021 and the finality penalty. Thus, based on our preliminary calculations, it appears that, if claimant prevails in this matter, the amount determined on the NOD would not be reduced to less than zero. In that regard, we estimate that, if the overstatement of reported taxable measure recommended in the SD&R of \$16,502 is increased by \$52,021, as claimant requests, the overpayment of tax of \$4,967.92  $((\$16,502 + \$52,021) \times 7.25 \text{ percent})$  would be more than offset by the disallowed claimed credits for sales tax prepaid to fuel vendors of \$12,848.00 (which claimant no longer protests).

#### UNRESOLVED ISSUES

**Issue 1:** Whether an adjustment is warranted to the unreported taxable sales of fuel. We find no further adjustment is warranted.

Claimant has operated a gasoline station and mini-mart since March 2001, selling both gasoline and diesel fuel. The Department computed a book markup of 25.7 percent for taxable mini-mart sales, which it found reasonable. Accordingly, it concluded that recorded taxable mini-mart sales were substantially accurate. However, it computed book markups for fuel of -12.3 percent (costs in excess of sales) for 2007, 2.1 percent for 2008, and 6.5 percent for 2009. Since the markups for 2007 and 2008 were lower than the 4 to 10 percent markup the Department expected for this business, the Department decided further investigation was warranted. Using the amounts of prepaid sales tax reported by claimant's fuel suppliers and the applicable rate of pre-paid sales tax, the Department computed that claimant had purchased 1,756,333 gallons<sup>4</sup> of gasoline and 273,164 gallons of diesel fuel. The Department then obtained the average statewide selling prices for all grades of gasoline for

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<sup>4</sup> Originally, the Department had computed 1,711,383 gallons, but, after the appeals conference, it corrected a computation error related to the use of an incorrect prepayment rate for the first quarter 2009.

1 each week of the audit period from the U. S. Energy Information Administration (EIA) website. To  
2 establish the audited selling prices, the Department reduced the prices posted by EIA by 18.8 cents per  
3 gallon, based on its comparison of claimant's known selling prices and the prices posted by EIA on  
4 five days in March 2010. The Department multiplied the number of gallons by the audited selling  
5 prices to compute audited gasoline sales. The Department used a similar process to establish audited  
6 sales of diesel fuel, except that, for diesel, the Department found that claimant's selling prices were  
7 5.7 cents greater than the average selling prices posted by EIA.

8 The Department added audited gasoline sales to audited diesel fuel sales to establish audited  
9 taxable fuel sales for each quarter of the audit period. For the majority of the quarters, the Department  
10 found that recorded fuel sales either exceeded or were only slightly less than audited fuel sales. For  
11 those quarters, the Department concluded that recorded fuel sales were substantially accurate.  
12 However, the Department found material understatements of recorded taxable fuel sales (after the  
13 adjustments recommended in the D&R) of \$69,413 for the first quarter 2007 (1Q07), \$188,883 for  
14 2Q07, and \$112,314 for 1Q08, which total \$370,610.

15 Claimant contends that, if recorded sales from its point-of-sale (POS) system are deemed  
16 unreliable for the three quarters in which the Department established unreported taxable fuel sales,  
17 then its recorded fuel sales should also be deemed unreliable for the quarterly periods in which its  
18 recorded fuel sales exceed audited fuel sales. Claimant asserts that allowing credits in those periods in  
19 which recorded taxable fuel sales exceed audited fuel sales would reduce unreported taxable fuel sales  
20 by \$52,021, from \$370,610 to \$318,589.

21 The amounts of fuel sales shown in claimant's records were based on amounts recorded in its  
22 POS system. We find that the negative book markup for fuel of -12.3 percent for 2007, and low book  
23 markup of 2.1 percent for 2008, are strong evidence that claimant's records did not include all of its  
24 sales of fuel during those two years. Therefore, we find that it was reasonable to establish unreported  
25 taxable fuel sales for three quarters during those two years based on statewide average fuel selling  
26 prices. Claimant has not shown that its POS system recorded any fuel sales that it did not make, and  
27 we conclude that claimant's recorded sales were not overstated for any quarterly periods during the  
28 audit period. Moreover, we note that fuel sales recorded in a POS system always include sales tax

1 reimbursement, and even if recorded fuel sales were disregarded for certain quarters, as claimant  
2 requests, claimant would be required to demonstrate that it had not collected excess tax reimbursement.  
3 Accordingly, we reject claimant's argument that credits should be allowed in the periods for which its  
4 recorded fuel sales exceed the amounts established based on statewide average fuel selling prices.

5 **Issue 2:** Whether relief of the finality penalty is warranted. We find relief is not warranted.

6 Claimant filed a request for relief of penalty, on the basis that its failure to file a timely petition  
7 for redetermination was the result of a miscommunication with the Department and claimant's lack of  
8 awareness that the liability had been billed.

9 The NOD was mailed to claimant's address of record, with copies to each of the partners at  
10 their addresses of record. Another copy was mailed to claimant's representative. Board records do not  
11 show that any of the NOD's was returned by the Post Office as undeliverable. Also, the Board's  
12 computerized records show that staff spoke to claimant's representative on February 16, 2012,  
13 regarding the outstanding liability. Since the period for filing a timely petition for redetermination  
14 ended February 23, 2012, we find that claimant's representative was aware that the NOD had been  
15 issued before that deadline. Accordingly, we find that claimant was aware the NOD had been billed,  
16 that its failure to timely pay the determination or file a petition for redetermination was not due to  
17 reasonable cause, and that relief of the finality penalty is not warranted.

## 18 **RESOLVED ISSUES**

19 As explained in the Background section above, claimant no longer protests the amount of  
20 unreported taxable cigarette rebates or the disallowed claimed credits for sales tax prepaid to fuel  
21 vendors. Accordingly, those issues have been resolved.

22 Also, the Department imposed a negligence penalty because it found claimant had not  
23 exercised due care in reporting. We find, however, that claimant's reported sales were substantially  
24 correct, with the exception of fuel sales reported for three quarterly periods. Further, the majority of  
25 the liability relates to disallowed claimed credits for sales taxes prepaid to claimant's fuel suppliers.  
26 Moreover, after the adjustments recommended in the D&R, the remaining tax liability is \$10,557,  
27 which represents only about 2-percent of the taxes paid with claimant's returns of \$477,877.  
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1 Accordingly, while we are concerned by the lack of due care in reporting, we find there is insufficient  
2 evidence of negligence, since this business had not been audited previously.

3 **OTHER MATTERS**

4 None.

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