

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION SUMMARY FOR BOARD HEARING

In the Matter of the Petition for Redetermination)
Under the Underground Storage Tank)
Maintenance Fee Law of:)
))
FASSEL M. & AMAL ELDER) Account Number: TK MT 44-024701
dba Rainwater Car Wash/Mini Mart) Case ID: 272656
))
Petitioner) Manteca, San Joaquin County

Type of Business: Retail Service Station

Audit Period: 10/1/00 – 03/05/02

<u>Items</u>	<u>Disputed Amounts</u>	
Underground Storage Tank Maintenance Fee	\$18,622	
Negligence Penalty	\$ 1,862	
	<u>Fee</u>	<u>Penalty</u>
As determined, protested	<u>\$18,621.87</u>	<u>\$1,862.19</u>
Proposed fee redetermination	\$18,621.87	
Interest through 1/26/09	12,888.15	
Penalty	<u>1,862.19</u>	
Total fee, interest, and penalty	<u>\$33,372.21</u>	
Additional monthly interest beginning 1/26/09	<u>\$155.18</u>	

This matter was scheduled for Board hearing on December 12, 2007, but was postponed so petitioner could attempt to negotiate a settlement, but its settlement proposal was rejected. The matter was rescheduled for Board hearing on September 16, 2008, but was again postponed because petitioner appealed the settlement decision and filed another settlement proposal, which was also rejected. The matter was then rescheduled for Board hearing on December 17, 2008, but, at the scheduled hearing, petitioner's representative requested a further postponement because petitioner was unavailable due to illness and because the representative did not have all relevant documentation. The Board granted the postponement. The Chairwoman directed that the matter be rescheduled for January 22, 2009, and indicated that petitioner should be prepared to go forward with the hearing on that date without further postponement.

UNRESOLVED ISSUES

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2 **Issue 1:** Whether an adjustment should be made to the assessed Underground Storage Tank
3 Maintenance (USTM) fees. We conclude that no adjustment is warranted.

4 Health and Safety Code section (section) 25299.41, as implemented by California Code of
5 Regulations, title 18, section (Regulation) 1212, subdivision (a), provides that every owner of a tank is
6 required to obtain a permit to own or operate underground storage tanks and must pay a storage fee to
7 the Board for each gallon of petroleum placed in the storage tank. Petitioner filed USTM Fee returns
8 for the quarterly reporting periods of October 1, 2000, through March 31, 2002, in which it reported
9 271,226 gallons of petroleum products placed into the underground storage tanks.

10 The Fuel Taxes Division of the Property and Special Taxes Department (Department) verified
11 petitioner's returns and found that reported gallons on petitioner's Schedule G as filed by petitioner
12 with its sales and use tax returns totaled 1,823,048 gallons of petroleum placed into its underground
13 storage tanks for the audit period. The Department compared this amount with the total amount
14 reported by petitioner's vendors on their Schedule A's, and found minimal differences. Since
15 petitioner only reported 271,226 gallons for purposes of the USTM for the same period, the
16 Department issued a Notice of Determination on July 14, 2004, assessing the USTM fees on the
17 1,551,822 gallon difference.

18 Petitioner does not dispute that it owned the property and the underground storage tanks located
19 on this property during the audit period. However, petitioner contends that the amount of gallons
20 reported on its Schedule G is not correct, and that the amount reported on Schedule G was based on
21 erroneous invoices issued to petitioner by its petroleum suppliers. Thus, petitioner asserts that the
22 basis of the Department's assessment is wrong and should be adjusted. Petitioner also contends that its
23 tanks were contaminated with water and, as a result, during the period at issue it had to remove the
24 gasoline placed into the tanks on two separate occasions. Thus, petitioner argues that the Department's
25 assessment should be adjusted for the contaminated gasoline removed from the tanks.

26 Finally, in its petition, petitioner argues that "the periods in question and the amount of fuel
27 purchases do not equal." At the appeals conference, petitioner was asked if this was still a contention,
28 to which petitioner responded that it would look into this further and would provide a basis or

1 statement whether this remains as a basis for its dispute. Petitioner has failed to do so. Accordingly,
2 we conclude that this contention is no longer at issue. With respect to its argument that amounts
3 reported on Schedule G were incorrect, petitioner has not provided any evidence to support such
4 assertion. We therefore find no basis to recommend any adjustment. Additionally, the accuracy of
5 amounts reported on Schedule G is confirmed by the amounts reported by its vendors on Schedule A
6 of their returns for the same periods, and there is no evidence of any erroneous invoices.

7 With respect to petitioner's argument that the assessed fee should be adjusted for contaminated
8 gasoline removed from its underground storage tanks, Regulation 1212, subdivisions (a) and (b), are
9 clear that the fee is imposed for petroleum placed into the tanks and cannot be adjusted based on its
10 subsequent re-use and /or removal.

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

12 The Department assessed the negligence penalty because petitioner only reported 15 percent of
13 USTM fees that it owed. Thus, petitioner failed to report 85 percent of the total fees that were due for
14 the period in issue. Petitioner argues that it was not negligent, and that it relied upon its bookkeeper to
15 correctly fill out the USTM fee returns. Petitioner states that the bookkeeper became gravely ill and
16 subsequently died during the period in issue, and asserts that because of this illness, the bookkeeper
17 made numerous errors on the USTM fee returns. Although, at petitioner's request, we allowed
18 additional time after the appeals conference for petitioner to produce a detailed explanation and
19 evidence to support this contention, petitioner did not do so.

20 We conclude that petitioner was negligent. Despite reporting 1,823,048 gallons of petroleum
21 as having been placed into its underground storage tanks during the period in issue with its sales and
22 use tax returns, petitioner only reported 271,226 gallons on its USTM fee returns. This substantial
23 underreporting of its fee liability, measured by 1,551,822 gallons, supports a finding of negligence.
24 Additionally, with respect to its claim that it relied upon its bookkeeper to accurately report the fee, we
25 conclude that petitioner cannot avoid responsibility for its substantial underreporting by blaming its
26 bookkeeper. Petitioner has a non-delegable duty to accurately report the amount of gallons it placed
27 into its underground storage tanks on its USTM returns. In instances in which the taxpayer's employee
28 or agent has concealed a failure to file tax returns or pay taxes on time, the courts have held that the

