

## 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 RIGOBERTO LOPEZ NUNEZ, ) Account Number SR DF 100-715826  
 6 dba Katy's Market ) Case ID 559883  
 7 Petitioner ) Madera, Madera County

8 Type of Business: Mini-mart with restaurant

9 Liability period: 07/01/06 - 01/31/10

10 Item Disputed Amount

11 Unreported taxable sales \$1,489,490

12 Negligence penalty \$ 11,738

13 Interest \$ 12,325

	<u>Tax</u>	<u>Penalty</u>
14 As determined	\$118,727.46	\$11,872.76
15 Post-D&R adjustment	- 1,349.29	- 134.91
16 Proposed redetermination	<u>\$117,378.17</u>	<u>\$11,737.85</u>
17 Proposed tax redetermination	\$117,378.17	
18 Interest through 07/31/14	50,021.93	
19 Negligence penalty	<u>11,737.85</u>	
20 Total tax, interest, and penalty	<u>\$179,137.95</u>	
21 Monthly interest beginning 08/01/14	<u>\$ 586.89</u>	

22 This matter was scheduled for Board hearing in January 2014, but was postponed at petitioner's  
 23 request due to a scheduling conflict. It was rescheduled for Board hearing in April 2014, but was  
 24 postponed at petitioner's request for additional time to prepare.

## 21 UNRESOLVED ISSUES

22 **Issue 1:** Whether additional adjustments to the amount of unreported taxable sales are  
 23 warranted. We find that no further adjustments are warranted.

24 Petitioner operated a mini-mart with a restaurant serving Mexican-style food from April 2006  
 25 through January 2010. Initially, for audit, petitioner provided copies of his federal income tax returns,  
 26 a sales journal for 2009, sales and use tax returns and worksheets, and a few purchase invoices. The  
 27 Sales and Use Tax Department (Department) obtained the amounts of petitioner's beer purchases from  
 28 two of his beer vendors for 2007, 2008, and 2009. The Department compared the costs shown in

1 purchase invoices from these two vendors with petitioner's corresponding selling prices, and computed  
2 markups of 32.45 percent for beer purchased from one of the vendors and 29.94 percent for beer  
3 purchased from the other vendor. Adding the computed markups to the purchase totals provided by  
4 the two vendors resulted in audited beer sales of \$562,969. Since audited beer sales alone exceeded  
5 petitioner's reported taxable sales of \$419,156 for the same three-year period by \$143,813, the  
6 Department concluded that petitioner's reported taxable sales were grossly understated.

7 In the absence of sufficient documentation to establish audited taxable sales on a markup basis,  
8 the Department asked petitioner to maintain his cash register Z-tapes for the period September 25,  
9 2009, through October 23, 2009. Petitioner provided 16 Z-tapes for that period, and also provided two  
10 other Z-tapes dated September 16, 2009, and December 20, 2009. The Department subtracted the  
11 cumulative sales total shown in the earliest Z-tape (dated September 16, 2009), from the cumulative  
12 sales total shown in the latest Z-tape (dated December 20, 2009), to compute recorded total sales of  
13 \$175,762, including sales tax reimbursement, for the test period. The Department then compared  
14 petitioner's reported taxable sales with his reported total sales for the quarterly periods through  
15 December 31, 2009, to compute a taxable sales ratio of about 88 percent, and applied that ratio to  
16 audited total sales of \$174,549, net of sales tax reimbursement, to establish audited taxable sales of  
17 \$153,533 for the test period September 17, 2009, through December 20, 2009.<sup>1</sup> Based on average  
18 daily taxable sales of \$1,633 ( $\$153,533 \div 94 \text{ days}^2$ ), the Department computed audited taxable sales of  
19 \$148,225 for the fourth quarter of 2009 (4Q09),<sup>3</sup> which exceeded petitioner's reported taxable sales for  
20 that quarter by \$111,424. The Department computed a reporting error rate of 302.77 percent  
21 [ $(\$111,424 \div (148,225 - 111,424))$ ] and applied the error rate to petitioner's reported taxable sales to  
22 establish unreported taxable sales of \$1,506,595 for the audit period. However, in preparing for the  
23 Board hearing, we noted that multiplying daily taxable sales of \$1,633 by the 90 business days in 4Q09  
24 shows taxable sales of \$146,970, which is less than taxable sales of \$148,225 computed in the audit.

25 \_\_\_\_\_  
26 <sup>1</sup> Although the earliest Z-tape was dated September 16, 2009, it was printed at the end of the day. Therefore, petitioner's  
sales on September 16, 2009, are not included in the test period.

27 <sup>2</sup> The period September 17, 2009, through December 20, 2009, includes 95 days. However, there were only 94 business  
days because petitioner's business was closed on Thanksgiving Day.

28 <sup>3</sup> To compute audited taxable sales for 4Q09, the Department multiplied average daily taxable sales of \$1,633 by 363  
business days in a year (excluding Thanksgiving Day and Christmas), and then divided by four quarters.

1 Pursuant to our recommendation, the Department reduced audited taxable sales for 4Q09, which  
2 resulted in a reduction to the reporting error rate from 302.77 percent to 299.36 percent, and a  
3 reduction to unreported taxable sales from \$1,506,595 to \$1,489,490 for the audit period.

4 Petitioner states that he did not know how to operate the cash register during the test period,  
5 and he made errors in ringing up sales. Therefore, petitioner contends that the accuracy of his  
6 handwritten daily sales records should be accepted, even in the absence of supporting documentation.  
7 As evidence that his daily taxable sales averaged \$600, not \$1,633 established in the audit, petitioner  
8 totaled bank deposits of \$54,035 for the fourth quarter of 2009, which shows average daily sales of  
9 \$600.39 ( $\$54,035 \div 90$  days).

10 According to the Department, the bank statements that petitioner used to total his bank deposits  
11 were not for the business under audit, but instead were statements for a personal bank account and a  
12 bank account for a separate business. While petitioner contends that he did not understand how to  
13 operate the cash register, we find that, since petitioner rang up sales in both taxable and nontaxable  
14 categories, used the void, no-sale, and cancel buttons, and was able to print out Z-tapes, it appears that  
15 petitioner did understand how the cash register works. Further, petitioner has provided no evidence  
16 showing that his actual sales for the test period were less than the total sales he rang up on the cash  
17 register. Therefore, we find that the cash register Z-tapes that petitioner provided represent the best  
18 evidence available of his sales, and conclude that no further adjustments are warranted.

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

20 The Department imposed the negligence penalty because petitioner estimated his taxable sales  
21 for reporting purposes, and he did not provide complete sales records. Additionally, the magnitude of  
22 the reporting error rate indicated to the Department that petitioner was negligent in reporting.  
23 Petitioner contends that his sales journals were sufficient for compiling his sales and he used the  
24 journals to accurately report his sales. Petitioner points out that this was his first audit, and states that  
25 he only has the equivalent of a middle school education, he does not speak English fluently, and he had  
26 no experience operating a cash register prior to operating this business. Therefore, petitioner contends  
27 that any errors in recordkeeping or reporting were due to inexperience rather than negligence.  
28

1 The only records that petitioner provided to support his reported sales were a sales journal for  
2 2009 and sales tax worksheets. Also, in the sales journal, petitioner only recorded daily total sales,  
3 without segregating his taxable sales and his exempt sales of food products. We find that petitioner's  
4 failure to maintain and provide source documents to support his recorded sales is evidence of  
5 negligence in recordkeeping. We note that petitioner's recorded total sales of \$215,896 exceeded his  
6 reported total sales for 2009 by \$76,798, and find that petitioner's failure to report all of his recorded  
7 sales is evidence of negligence in reporting. Further, a comparison of unreported taxable sales of  
8 \$1,489,490 with reported taxable sales of \$516,139 shows an error rate of 288.58 percent,<sup>4</sup> which is  
9 very strong evidence of negligence. Accordingly, even though petitioner had not been audited  
10 previously, we conclude that petitioner was negligent and the penalty was properly imposed.

11 **Issue 3:** Whether relief of interest is warranted. We conclude that relief is not warranted.

12 Petitioner contends that three-fourths of the interest charges between January 4, 2011, and  
13 February 27, 2013, should be relieved.<sup>5</sup> Petitioner contends that the period of more than two years  
14 between the date his petition was filed (January 4, 2011) and the date of the appeals conference  
15 (February 27, 2013), represents an unreasonable delay or error by Board employees, and he should not  
16 be responsible for three-fourths of the interest that accrued during that time.

17 Petitioner filed a settlement offer three days after filing his petition on January 4, 2011. The  
18 Sacramento District Office investigated the contentions stated in the petition, found that petitioner  
19 provided no additional documentation or other evidence to support any adjustments, and returned the  
20 case to the Petitions Section on March 10, 2011. We find that two months is not an unusually long  
21 period of time for a district office to investigate an appeal. The file was in the Petitions Section's  
22 inventory of cases waiting for a Summary Analysis to be prepared for six months, and then, on  
23 September 21, 2011, it was transferred to the Settlement Section for review of petitioner's settlement  
24

---

25 <sup>4</sup> The Department applied a reporting error rate of 299.36 percent to reported taxable sales to establish unreported taxable  
26 sales for periods through December 31, 2009. However, for January 2010, the Department divided audited taxable sales for  
27 4Q09 by three and compared the result, \$48,990, with petitioner's reported taxable sales of \$26,200 for that month to  
28 establish unreported taxable sales of \$22,790. Since the reporting error rate for January 2010 is lower than the reporting  
error rate used to establish unreported taxable sales for the rest of the audit period, the overall error rate is lower than  
299.36 percent.

<sup>5</sup> Interest of \$16,432.98 accrued during this period.  $\$16,432.98 \times .75 = \$12,324.74$ .

1 offer. On January 31, 2012, the Settlement Section wrote to petitioner notifying him that they were  
2 unable to come to a mutually agreeable settlement. We find that six months in the Petitions Section's  
3 inventory and four months under review by the Settlement Section do not represent unreasonable  
4 delays. After the Petitions Section prepared the Summary Analysis, the case was transferred to the  
5 Case Management Section on February 29, 2012, where it remained in inventory until December 21,  
6 2012, when it was assigned for conference. Petitioner had declined the opportunity for an expedited  
7 conference by telephone or in Sacramento, and instead had requested a conference in the Fresno  
8 District Office. Since the Case Management Section must hold cases in its inventory until there are a  
9 sufficient number of cases ready for conferences at any given location, we find that there was no  
10 unreasonable delay in scheduling the conference. Thus, we conclude that there was no unreasonable  
11 delay by a Board employee and recommend no relief of interest.

12 **OTHER MATTERS**

13 None.

14  
15 Summary prepared by Lisa Burke, Business Taxes Specialist III  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28