

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION BOARD HEARING SUMMARY

3 In the Matter of the Petition for)
 4 Redetermination and Administrative Protests)
 Under the Sales and Use Tax Law of:)

5 AMADOR PATINO & GERARDO J. GUZMAN,)
 6 dba La Primavera Food Services)

Account Number SR X CH 100-802783
 Case ID's 532069, 549106

7 LA PRIMAVERA PRODUCTS SVCS, INC.)

Account Number SR X CH 101-158342
 Case ID 550549

8 Petitioner/Taxpayer)

Martinez, Contra Costa County

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 10 Type of Business: Restaurant and catering truck

11 Liability period: 01/01/07 – 06/30/07 (Case ID 532069)

07/01/07 – 06/30/08 (Case ID 549106)

12 07/01/08 – 03/31/10 (Case ID 550549)

<u>Item</u>	<u>Disputed Amount</u>		
	<u>532069</u>	<u>549106</u>	<u>550549</u>
13 Unreported taxable sales	\$253,923	\$543,724	\$1,072,017
14 Tax as determined and protested	\$20,948.66	\$44,857.26	\$ 90,745.40
15 Interest through 07/31/14	11,299.28	20,189.94	28,806.75
16 Negligence penalty	<u>2,094.86</u>	4,485.74	9,074.56
17 Finality penalty		<u>4,485.73</u>	<u>9,074.54</u>
Total tax, interest, and penalty	<u>\$34,342.80</u>	\$74,018.67	\$137,701.25
18 Payments		- 3,976.00	- 13,500.00
19 Balance Due		<u>\$70,042.67</u>	<u>\$124,201.25</u>
20 Monthly interest beginning 08/01/14	<u>\$ 104.74</u>	<u>\$ 204.41</u>	<u>\$ 386.23</u>

21 Notices of Appeals Conference were mailed to taxpayers'¹ addresses of record, and the notices
 22 were not returned by the Post Office. Taxpayers did not respond to the notices or appear at the appeals
 23 conference, which was held as scheduled. We thereafter sent letters to taxpayers offering them the
 24 opportunity to provide any additional arguments and evidence in writing they wished us to consider,
 25 but they did not respond. These matters were scheduled for Board hearing in December 2012, but

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 28 ¹ Since only one of these cases is based on a timely petition for redetermination (Case ID 532069), we generally use the term "taxpayers" rather than "petitioner" to refer to both the partnership and the corporation. Where a distinction is necessary, we refer to the partnership or the corporation.

1 were postponed at taxpayers' request due to medical issues. They were rescheduled for Board hearing
2 in March 2013, but were deferred at the Sales and Use Tax Department's (Department's) request for
3 time to review additional records provided by taxpayers. They were then rescheduled for Board
4 hearing in June 2013, but were postponed at taxpayers' request due to medical issues and needing
5 additional time to prepare. They were rescheduled for Board hearing in May 2014, but were postponed
6 at taxpayers' request due to a scheduling conflict.

7 UNRESOLVED ISSUE

8 **Issue:** Whether adjustments to the audited amounts of unreported taxable sales are warranted.

9 We find no adjustments are warranted.

10 This business, a restaurant and catering truck, was operated by the partnership of Amador
11 Patino and Gerardo Javier Guzman from September 2006 through June 2008, when the business was
12 incorporated as La Primavera Products SVCS, Inc. Mr. Patino and Mr. Guzman are the president and
13 vice-president, respectively, of the corporation. The Department found that the business operations
14 remained the same when the business organization changed from a partnership to a corporation. In
15 order to ensure that the statute of limitations did not expire, the Department issued two determinations
16 to the partnership. The partnership filed a timely petition for redetermination for one of those
17 determinations. For the other determination issued to the partnership and the determination issued to
18 the corporation, administrative protests have been filed.²

19 To establish audited taxable sales, the Department conducted observation tests of the business
20 during the period that it was operated by the corporation. On the days of the tests, the Department
21 observed that the restaurant made taxable sales of \$1,109.50 and the catering truck made sales of
22 \$1,250.75. The Department multiplied each of those figures by 90 days to compute average quarterly
23 _____

24 ² The partnership made payments on June 8, 2011, April 6, 2012, and March 12, 2013, and on February 7, 2014, began
25 making regular payments of \$500 per month against the liability. The corporation has been making regular payments of
26 \$500 per month since March 2012. The period for filing a timely claim for refund of the payments is three years from the
27 due date of the return for the relevant quarter or six months from the date of payment, whichever period expires later. (Rev.
28 & Tax. Code, § 6902, subd. (a).) Thus, the time during which the partnership could file a claim for its first three payments
has expired. However, the time during which the partnership may file a claim for its payment of February 7, 2014, will not
expire until August 7, 2014, and claims for the remaining monthly payments will be timely if they are filed within six
months from the dates of payment. For the corporation, a claim for refund will be timely if it is filed within six months of
the payments made on the 20th of each month. In our post-conference letter to the corporation, we explained the
requirements for filing timely claims for refund.

1 sales of \$99,855 and \$112,568 for the restaurant and catering truck, respectively. The Department
2 used those amounts to establish audited taxable sales for both the partnership and the corporation,
3 which it compared to reported amounts to establish understatements of \$797,647 for the partnership
4 (both determinations combined) and \$1,072,017 for the corporation. Taxpayers contend that the
5 audited daily sales of \$1,109.50 for the restaurant and \$1,250.75 for the catering truck are too high.

6 The only records taxpayers provided prior to the issuance of the Notices of Determination were
7 the federal income tax return for 2008 and bank statements for the corporation. In the virtual absence
8 of records, we found it was appropriate for the Department to establish audited sales using an alternate
9 audit method. Since taxpayers had not provided any documentation to show that the sales observed by
10 the Department on the days of the tests were not representative of their operations, we found that no
11 adjustments were warranted.

12 In December 2012, taxpayers indicated that they had additional books and records to provide.
13 After taxpayers failed to provide records and declined the Department's offer to conduct another
14 observation test for a day at each location, the Department decided to conduct remote observation tests
15 on Wednesday, February 20, 2013, during which it observed the number of customers at the catering
16 truck and the restaurant. The Department then used the observed numbers of customers and the
17 average sales per customer (established in the original observation tests) to estimate sales of \$2,958 on
18 that day, which were consistent with average daily sales of \$2,360 established in the audit.

19 Subsequently, on March 14, 2013, taxpayers provided additional records to the Department, including
20 bank statements showing credit card deposits of \$437,570 for the period 2007 through 2009 (except
21 four months from September through December 2008). With this additional documentation, the
22 Department was able to use the tip percentage of 13.65 percent and the credit card sales ratio of 29.59
23 percent computed in the original observation test for taxpayers' restaurant to calculate restaurant sales
24 of \$1,176,887 for a 32-month period, which exceeded audited restaurant sales of \$1,065,120 for the
25 same period. We find that the results of the remote observation tests and the credit card sales ratio
26 analysis offer strong secondary support for the audit findings, and conclude that no adjustments are
27 warranted.

OTHER MATTERS

The Department imposed negligence penalties on all three determinations, and taxpayers have not protested those penalties. As more fully addressed in the D&R's, we find that the grossly incomplete records and the substantial amounts of understatement, (\$797,647 for the two determinations issued to the partnership, combined, and \$1,072,017 for the corporation, which represent understatements of 167 and 258 percent, respectively) are clear evidence of negligence, and that the penalties were properly applied, even though the business had not been audited previously.

Since taxpayers did not timely pay the determinations represented by case ID's 549106 and 550549, finality penalties were added. Although we explained to taxpayers in post-conference letters that each could file a request for relief of the finality penalty and provided each a form it could use, they have not done so. Accordingly, we have no basis to consider recommending relief of the finality penalties.

Summary prepared by Lisa Burke, Business Taxes Specialist III