

**CALIFORNIA STATE BOARD OF EQUALIZATION**  
**APPEALS DIVISION FINAL ACTION SUMMARY**

In the Matter of the Petition for Redetermination )  
Under the Sales and Use Tax Law of: )  
DAREN JAMES D’AMBROSIO & JUNE ELLA ) Account Number SR Y DF 101-002633  
D’AMBROSIO, dba DS Concessions ) Case ID 597646  
Petitioner ) Fresno, Fresno County

Type of Business: Food concessions  
Audit period: 04/01/08 – 12/31/10

<u>Item</u>	<u>Disputed Amount</u>	<u>Tax</u>	<u>Penalty</u>
Unreported taxable sales	\$236,558		
As determined		\$37,700.35	\$3,770.04
Post-D&R adjustment		- 15,142.93	- 2,651.71
Proposed redetermination, protested		<u>\$22,557.42</u>	<u>\$1,118.33<sup>1</sup></u>
Proposed tax redetermination		\$22,557.42	
Interest through 09/30/15		7,672.38	
Failure-to-file penalty		<u>1,118.33</u>	
Total tax, interest, and penalty		<u>\$31,348.13</u>	
Monthly interest beginning 10/01/15		<u>\$ 112.79</u>	

A Notice of Appeals Conference was mailed to petitioner’s address of record, and the notice was not returned by the Post Office. Petitioner did not respond to the notice or appear at the appeals conference, which was held as scheduled. We thereafter sent petitioner a letter offering it the opportunity to provide any additional arguments and evidence in writing it wished us to consider, but it did not respond.

This matter was scheduled for Board hearing in May 2015, but petitioner did not respond to the Notice of Hearing. Thus, the matter was scheduled for decision on the Consent calendar. It was removed from the Consent calendar at Member Harkey’s request.

<sup>1</sup> The negligence penalty has been deleted, as explained under “Resolved Issues;” the penalty of \$1,118.33 is a failure-to-file penalty. Petitioner has neither conceded the failure-to-file penalty nor filed a request for relief, signed under penalty of perjury. Thus, we include the failure-to-file penalty here but do not include it as a disputed item in the list above.

**UNRESOLVED ISSUE**

**Issue:** Whether additional adjustments are warranted to the amount of unreported taxable sales.

We find no further adjustment is warranted.

Petitioner operated concession trucks selling food at fairs, beginning in 2008. In February 2011, petitioner informed the Sales and Use Tax Department (Department) that it had discontinued the business “almost a year ago,” and the Department closed petitioner’s seller’s permit effective March 31, 2010. However, the Department obtained sales information from the Los Angeles County Fair documenting that petitioner made sales at that fair from September 4, 2010, through October 4, 2010. Consequently, the Department changed the effective close-out date of petitioner’s seller’s permit to December 31, 2010. For audit, petitioner provided bank statements for 14 months, sales reports for the period April 1, 2008, through December 31, 2009, and sales and use tax returns with worksheets.

The Department compared sales recorded on sales reports to amounts shown on sales and use tax worksheets for the period April 1, 2008, through December 31, 2009, and found that petitioner had failed to include on its sales and use tax worksheets the taxable sales made at the Los Angeles County Fair for the period September 23, 2009, through October 4, 2009, which totaled sales of \$20,275 for the third quarter 2009 (3Q09) and \$26,266 for 4Q09. Also, the Department examined petitioner’s check register and found that petitioner had paid a rental fee of \$1,857 to the Merced County Fair in 3Q09, but there were no sales from that fair listed on the sales reports or the sales and use tax worksheets. Since the fee at the Merced County Fair was 22.5 percent of petitioner’s receipts, the Department computed that petitioner had made taxable sales of \$8,253 ( $\$1,857 \div 0.225$ ) at that fair in 3Q09. Thus, the Department established an understatement of \$54,794 ( $\$20,275 + \$8,253 + 26,266$ ) for 3Q09 and 4Q09, which represented an error ratio of 75.01 percent in comparison to reported amounts for those quarters, which totaled \$73,048. The Department applied that percentage to reported taxable sales for the period April 1, 2008, through June 30, 2009, and then computed average quarterly sales for each quarter of 2010, for which petitioner did not file returns.

At the appeals conference, the Department recommended a reduction of the measure of tax. Specifically, the Department decided to establish the sales at the Los Angeles County Fair on an actual



1 explain its failure to report its own recorded taxable sales, on which it collected sales tax  
2 reimbursement. Moreover, petitioner failed to report *any* sales from the Merced County Fair, even  
3 though petitioner must have known that at least some of those sales were taxable. Nevertheless,  
4 despite the unwarranted benefit, we will not disturb the Department's recommendation.

5 In addition, the partnership, as shown on the application for a seller's permit, included a third  
6 partner, Scott Anthony Lawson. Petitioner contended that Mr. Lawson was not involved in the  
7 business and was not a partner. The Department recommended that Mr. Lawson be deleted from the  
8 partnership, since he had notified the Department that he was not involved in the business. We concur,  
9 and petitioner partnership now excludes Mr. Lawson.

10 **OTHER MATTERS**

11 Since petitioner did not file returns for the period April 1, 2010, through December 31, 2010, a  
12 penalty was applied for failure to file returns. Petitioner has not specifically protested the failure-to-  
13 file penalty. Further, although we explained to petitioner that it could file a request for relief of the  
14 penalty, and provided a form it could use, it has not done so. Accordingly, we have no basis to  
15 consider relief of the failure-to-file penalty.

16  
17 Summary prepared by Jeffrey G. Angeja, Tax Counsel IV  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28