

**CALIFORNIA STATE BOARD OF EQUALIZATION**  
**APPEALS DIVISION BOARD HEARING SUMMARY**

In the Matter of the Petition for Redetermination )  
Under the Sales and Use Tax Law of: )  
ELTON JUSTIN HOILES, dba Mick's Cafe ) Account Number SR AS 101-102941  
Petitioner ) Case ID 794727  
Pacific Palisades, Los Angeles County

Type of Business: Restaurant  
Audit period: 07/01/09 – 06/13/12

<u>Item</u>	<u>Disputed Amount</u>	<u>Tax</u>	<u>Penalty</u>
Disallowed claimed exempt food sales	\$294,821		
As determined		\$27,958.09	\$2,795.82
Post-D&R adjustment		<u>00.00</u>	<u>-2,795.82</u>
Proposed redetermination		<u>\$27,958.09</u>	<u>\$ 00.00</u>
Proposed tax redetermination		\$27,958.09	
Interest through 02/29/16		<u>8,905.57</u>	
Total tax and interest		<u>\$36,863.66</u>	
Monthly interest beginning 03/01/16		<u>\$ 139.79</u>	

**UNRESOLVED ISSUE**

**Issue:** Whether adjustments are warranted to the disallowed claimed exempt sales. We find no adjustment is warranted.

Petitioner applied for a seller's permit on June 20, 2008.<sup>1</sup> The business was to start operations June 25, 2008, and it was closed June 12, 2012. On his returns, petitioner reported total sales and claimed deductions for exempt sales of food products (approximately 71 percent of reported total sales) and sales tax included. For audit, petitioner provided a 2011 profit and loss statement and bank

<sup>1</sup> Although petitioner, Elton Justin Hoiles, applied for the seller's permit, his father, Michael Hoiles attended the appeals conference and identified himself as the owner of the business. The Board's electronic notes indicate that this information was provided to the Sales and Use Tax Department as early as April 7, 2009, and the staff advised Elton Hoiles and Michael Hoiles to close the permit and apply for a new permit showing Michael Hoiles as the owner. They did not do so.

1 statements. In addition, the Sales and Use Tax Department (Department) had a menu, photographs of  
2 portions of the business premises (apparently obtained on the Internet), and reviews of the restaurant  
3 recorded on the website Yelp.

4 Based on various audit tests, the Department concluded that reported total sales were  
5 substantially correct. However, the Department questioned the claimed exempt sales of food products.  
6 Since petitioner had no records to support the claimed amount of sales of cold food to-go, the  
7 Department originally disallowed the entire amount of claimed exempt sales of food of \$454,129.  
8 Petitioner then provided cash register Z-tapes for three days in March 2012.

9 The Department examined those Z-tapes and found them to be incomplete, inaccurate, and not  
10 clearly representative of petitioner's business. Petitioner also provided two fliers advertising food to  
11 go, one offering a sandwich or salad with drink combination for \$9.95 and another offering various  
12 snack items for \$5 each. The Department noted that there did not appear to be any sales of these items  
13 on the provided Z-tapes, and it therefore found that the advertisements were of minimal evidentiary  
14 value. Thus, the Department found that the documentation provided by petitioner did not support his  
15 claim that he made substantial amounts of nontaxable sales. Nevertheless, the Department considered  
16 25 percent of petitioner's sales to be exempt sales of food (sales of cold food to go). That allowance  
17 reduced the disallowed claimed exempt sales of food to \$294,821.

18 Petitioner contends that his taxable and total sales were reported accurately. He asserts that he  
19 worked hard to create a welcoming and comfortable space for dine-in customers, but that business  
20 never materialized. Further, petitioner states that, out of economic necessity, he actively solicited take-  
21 out orders from local business and that most of his sales were take-out orders of cold food.

22 We have examined the menu included in the audit workpapers, and we note that petitioner  
23 served an assortment of items, including soups, salads, entrées, pastas, sandwiches, specialty breads,  
24 pastries, and desserts. Photographs of the restaurant show an attractive patio dining space. There are  
25 54 reviews of the restaurant shown in the material printed from the Yelp website and most, if not all,  
26 appear to describe dine-in experiences. Thus, all evidence found by the Department indicates that  
27 petitioner's restaurant was like most restaurants (other than fast-food operations). In other words, there  
28 is nothing in the available evidence to indicate that petitioner's restaurant would do more take-out

1 business than comparable establishments. Also, we note that petitioner's menu included soup, entrées,  
2 and pastas, which are served hot, and take-out sales of those items would be taxable. So, if petitioner's  
3 sales of cold food to go represented 25 percent of total sales, as the Department has concluded, then his  
4 sales of all food to go (including hot food) was some percentage greater than 25 percent. The fact that  
5 petitioner printed fliers to promote the availability of take-out or delivered food does not establish that  
6 an unusually high percentage of his sales were sales of cold food to go. In the absence of evidence, we  
7 find that the Department's estimate that sales of cold food to go represented 25 percent of total sales  
8 was reasonable, and most likely generous. Consequently, we find no adjustment is warranted.

9 **RESOLVED ISSUE**

10 The Department imposed a negligence penalty because it found that petitioner had not provided  
11 adequate business records. Petitioner disputed the penalty, arguing that the reported amount was  
12 correct and stating that the records had been lost in a fire or stolen. The Department does not dispute  
13 petitioner's assertion that some or all of his records were accidentally destroyed. Based on the  
14 available evidence, we find that the lack of records may be due to circumstances beyond his control.  
15 Since this was petitioner's first audit, we find that the understatement, while large in comparison to  
16 reported taxable sales, may be the result of a lack of experience. Accordingly, we have recommended  
17 that the negligence penalty be deleted.

18 **OTHER MATTERS**

19 None.

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