CALIFORNIA STATE BOARD OF EQUALIZATION

APPEALS DIVISION SUMMARY FOR BOARD HEARING

In the Matter of the Petition for Redetermination Under the Sales and Use Tax Law of:	
FERNANDO OLVERA BARRAGAN AND CLAUDIA OLVERA, dba La Texanita	Account Number: SR JH 100-021661 Case ID 436181
Petitioner	Santa Rosa, Sonoma County

Type of Business: Commissary and catering truck

Audit Period: 07/01/03 – 06/30/06

Item	Amount in Dispute
Unreported taxable sales	$507,007

Tax as determined:	$89,442.91
Adjustment – Appeals Division	-660.28
Proposed redetermination	$88,782.63
Amount concurred in	-50,214.89
Protested	$38,567.74
Proposed tax redetermination	$88,782.63
Estimated interest through 9/30/10	43,717.36
Total tax and interest due	$132,499.99
Payment	-1,478.83
Balance due	$131,021.16
Monthly interest beginning 10/1/10	$509.27

UNRESOLVED ISSUE

Issue: Whether further adjustments are warranted to the audited understatement of reported taxable sales. We recommend no further adjustments.

Petitioner, a husband and wife co-ownership, operates a commissary and a catering truck. During the audit period, petitioner reported taxable sales of $260,200 and stated that it reported 30 percent of its recorded catering truck sales as taxable sales. The Sales and Use Tax Department (Department) concluded that a taxable percentage of 30 percent would be much lower than expected for a catering truck that sold primarily hot foods and soda. The Department also found that petitioner did not consistently report 30 percent of its sales as taxable. Instead, the actual percentage of reported taxable sales when compared to total recorded catering truck sales, by month, varied from 3 percent to

70 percent during the audit period. The Department also noted large variances in book markups, and significant discrepancies between gross receipts reported on sales and use tax returns and the amounts reported on federal income tax returns and recorded on Profit and Loss Statements.

Originally, the Department conducted the audit on the basis of observation tests and established that petitioner understated its taxable sales by $1,512,429. After the audit, petitioner submitted recorded taxable and total sales for the months of August, September, and October 2007. The Department found that the accuracy of petitioner's recorded taxable and total sales had improved considerably after the audit and concluded that the recorded amounts for August, September, and October 2007 were substantially accurate. The Department used the recorded amounts for those three months to calculate average daily total sales of $1,591 and a percentage of taxable sales, tax included, to total sales of 89.05 percent, which it used to establish understated taxable sales of $1,175,810. At the appeals conference, the Department corrected the taxable percentage to 88.51 percent and revised the audited understatement to $1,167,126.

Petitioner concedes that it understated its reported taxable sales but contends that its calculations show the understated taxable sales should be only $660,119. Petitioner asserts that the recorded total sales of $1,118,807 for the audit period should be used in the calculations to establish understated taxable sales rather than the amount of $1,737,564 that was based on the average daily sales for the months of August, September, and October 2007.

At the appeals conference, petitioner stated that the variances in achieved markups were a factor in the Department's conclusion that recorded total sales were understated. Petitioner contended that those variances were not evidence of understatements in recorded total sales but were attributable to petitioner's recording of cost of goods sold as consumable supplies. Petitioner asserted that, without these errors, the achieved markups would be more consistent and therefore contended there is no reason to reject recorded total sales for the audit period. If recorded total sales are not regarded as accurate, petitioner alternatively contends that audited total sales should be computed using average daily sales of $1,385, based on its recorded total sales for the entire year 2007.

The Department used sales data for August, September, and October 2007 to compute petitioner's daily sales at $1,591 and a taxable percentage of 88.51 percent. We find that this information, provided by petitioner, is the best available evidence of petitioner's actual sales. Also, we have reviewed the Department's calculations, and have found no inherent errors or inaccuracies.

With respect to its primary argument that recorded total sales, with an average of $1,022 per day, should be regarded as accurate, we note that sales observed by the Department on the two test days were $1,418 and $2,362. We find it implausible that the average daily sales throughout the audit period were 28 percent less than the lower of the total sales observed by the Department on two different days. Accordingly, we reject petitioner's contention that recorded total sales for the audit period should be accepted as substantially accurate.

Petitioner's alternate contention is that audited total sales should be computed using average daily sales of $1,385 derived from records for 2007. Petitioner believes that this would eliminate the distortion created by using sales only from August, September, and October 2007 as a result of variations in "event day" sales. Petitioner has counted 42 event days in all of 2008, and for comparison purposes, counts 14 event days in August, September, and October 2008.[1] Since three months is 25 percent of the full year, petitioner apparently believes that a three-month period that is representative of the entire year would have 10 to 11 event days.[2] We find that the alleged variation of three or four extra event days within the tested three-month period is a minimal variation that does not render the Department's method invalid. This is particularly true considering that our analysis of the sales made during event days compared to sales made on other days, as set forth in the D&R, indicates that the variation between event days and non-event days was not as significant as petitioner implies. Furthermore, we note that the revised audit used sales figures from days during which petitioner made its sales for three fewer hours than during the audit period.[3] The Department did not make any

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[1] That is, petitioner apparently assumes that the number of event days in these three months of 2008 would be the same as the number of event days in the three months of 2007 for which petitioner submitted records used by the Department in its reaudit. It is not clear why petitioner has done this comparison using 2008 sales, by day, when its argument is that the Department should use recorded total sales for the 12 months of *2007* , from the Profit and Loss Statement, to compute average daily sales. If petitioner had complete records of sales, by day, for 2007, it would seem more logical to provide those records instead of providing records for 2008. In any event, this does not alter our analysis.

[2] Since 25 percent of 42 is 10.5 and a day either is an event day or not (i.e., we do not understand petitioner to claim that it had one-half event days), it appears that either 10 or 11 days is equally valid, under petitioner's theory, for any quarter that would be representative of the entire year.

[3] After the audit period, an ordinance enacted by the City of Santa Rosa (where petitioner operated) prevented catering trucks such as petitioner's from operating after 10:00 p.m. Thus, petitioner made sales until 1:00 a.m. during the audit period, but only made sales until 10:00 p.m. during the months of August, September, and October 2007.

adjustment to take into account the fewer hours of operation. We believe this was a considerable benefit to petitioner, which more than compensates for any perceived distortion because of a couple additional event days during the tested period.

We conclude that no further adjustments to the audited understatement of taxable sales are warranted.

OTHER DEVELOPMENTS

None.

Summary prepared by Rey Obligacion, Retired Annuitant