

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION SUMMARY FOR BOARD HEARING

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

8 Type of Business: Commissary and catering truck

9 Audit Period: 07/01/03 – 06/30/06

10 <u>Item</u>	<u>Amount in Dispute</u>
11 Unreported taxable sales	\$507,007
12 Tax as determined:	\$89,442.91
12 Adjustment – Appeals Division	<u>-660.28</u>
13 Proposed redetermination	\$88,782.63
13 Amount concurred in	<u>-50,214.89</u>
14 Protested	<u>\$38,567.74</u>
15 Proposed tax redetermination	\$88,782.63
15 Estimated interest through 12/31/10	<u>45,245.17</u>
16 Total tax and interest due	\$134,027.80
16 Payment	<u>-1,478.83</u>
17 Balance due	<u>\$132,548.97</u>
18 Monthly interest beginning 1/1/11	<u>\$509.27</u>

19 This matter was previously scheduled for Board hearing on July 13, 2010, but was postponed
 20 for settlement consideration. It was rescheduled for Board hearing on September 14, 2010, but was
 21 postponed due to petitioner's major personal issues.

22 **UNRESOLVED ISSUE**

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

25 Petitioner, a husband and wife co-ownership, operates a commissary and a catering truck.
 26 During the audit period, petitioner reported taxable sales of \$260,200 and stated that it reported
 27 30 percent of its recorded catering truck sales as taxable sales. The Sales and Use Tax Department
 28 (Department) concluded that a taxable percentage of 30 percent was much lower than expected for a

1 catering truck that sold primarily hot foods and soda. The Department also found that petitioner did
2 not consistently report 30 percent of its sales as taxable. Instead, the actual percentage of reported
3 taxable sales to total recorded catering truck sales, by month, varied from 3 percent to 70 percent
4 during the audit period. The Department also noted large variances in book markups, and significant
5 discrepancies between gross receipts reported on sales and use tax returns and the amounts reported on
6 federal income tax returns and recorded on Profit and Loss Statements.

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

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

22 At the appeals conference, petitioner stated that the variances in book markups were a factor in
23 the Department's conclusion that recorded total sales were understated. Petitioner contended that those
24 variances were not evidence of understatements in recorded total sales but were attributable to
25 petitioner's recording of cost of goods sold as consumable supplies. Petitioner asserted that, without
26 these errors, the achieved markups would be more consistent and therefore contended there is no
27 reason to reject recorded total sales for the audit period. If recorded total sales are not regarded as
28

1 accurate, petitioner alternatively contends that audited total sales should be computed using average
2 daily sales of \$1,385, based on its recorded total sales for the entire year 2007.

3 The Department used sales data provided by petitioner for August, September, and October
4 2007 to compute petitioner's daily sales at \$1,591 and a taxable percentage of 88.51 percent. We have
5 reviewed the Department's calculations, and have found no inherent errors or inaccuracies. With
6 respect to its primary argument that recorded total sales, with an average of \$1,022 per day, should be
7 regarded as accurate, we note that sales observed by the Department on the two test days were \$1,418
8 and \$2,362. We find it implausible that the average daily sales throughout the audit period were 28
9 percent less than the lower of the total sales observed by the Department on two different days, and we
10 find that daily sales based on sales data petitioner provided for August, September, and October 2007
11 is more accurate. Accordingly, we reject petitioner's contention that recorded total sales for the audit
12 period should be accepted as substantially accurate.

13 Petitioner's alternate contention is that audited total sales should be computed using average
14 daily sales of \$1,385 derived from records for 2007. Petitioner believes that this would eliminate the
15 distortion created by using sales only from August, September, and October 2007 as a result of
16 variations in "event day" sales. Petitioner has counted 42 event days in all of 2008, and for
17 comparison purposes, counts 14 event days in August, September, and October 2008. Petitioner
18 apparently believes that a three-month period that is representative of the entire year would have 10 or
19 11 event days, that is, 25 percent of the 42 event days it counted for 2008. We find that the alleged
20 variation of three or four extra event days within the tested three-month period is a minimal variation
21 that does not render the Department's method invalid. This is particularly true considering that our
22 analysis of the sales made during event days compared to sales made on other days, as set forth in the
23 D&R, indicates that the variation between event days and non-event days was not as significant as
24 petitioner implies. Furthermore, we note that the revised audit used sales figures from days during
25 which petitioner made its sales for three fewer hours than during the audit period.¹ The Department

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27 ¹ After the audit period, an ordinance enacted by the City of Santa Rosa (where petitioner operated) prevented catering
28 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.

1 did not make any adjustment to take into account for the fewer hours of operation. We believe this
2 was a considerable benefit to petitioner, which more than compensates for any perceived distortion
3 because of a couple additional event days during the tested period.

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

6 **OTHER DEVELOPMENTS**

7 None.

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9 Summary prepared by Rey Obligacion, Retired Annuitant

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