

1 determination for tax of \$537, \$454, and \$537, respectively. When petitioner failed to file a return for
2 FYE 2007, the Department estimated petitioner's taxable sales at \$4,000 per month, the monthly
3 projected total gross sales stated on petitioner's seller's permit application.¹

4 After the determination was issued, petitioner met with the Department and provided limited
5 records, including a few sales contracts and a purchase invoice that showed payment of sales tax
6 reimbursement to the vendor. The Department found that the records did not support a reduction in the
7 estimated taxable sales of \$48,000 for FYE 2007. In reaching that conclusion, the Department relied
8 on petitioner's estimates of total landscaping contract receipts of \$125,000 to \$140,000 for FYE 2007
9 and on one of petitioner's landscaping contracts which reflected material costs that were about
10 42 percent of the total contract price. Based on petitioner's unsupported estimates, the cost of tangible
11 personal property installed would have been between \$52,500 ($\$125,000 \times 42\%$) and \$58,800
12 ($\$140,000 \times 42\%$). Since the cost of tangible personal property would be the minimum amount subject
13 to tax in petitioner's lump sum contracts, the Department concluded that there was no basis to reduce
14 its estimate of unreported taxable measure. Although we recommended no adjustment in the D&R, we
15 subsequently re-examined the issue. In the SD&R, we concluded there was evidence petitioner paid
16 tax to his vendors with respect to some purchases of materials and fixtures. In the absence of
17 documentation of the amount, we recommended a minimal adjustment for tax-paid purchases of
18 1 percent of the asserted deficiency.

19 Petitioner contends that the estimated amount of unreported taxable measure is far in excess of
20 the actual amount, stating that the vast majority of his receipts relate to nontaxable labor. At the
21 appeals conference, petitioner stated that his taxable sales for FYE 2007 totaled \$6,305.90, which
22 consisted of \$2,024.80 related to landscaping contracts and \$4,281.10 of other plant sales. However,
23 the only documentation provided to support those amounts was a handwritten note, and petitioner
24 declined the opportunity to provide a more specific explanation or additional records after the
25 conference. In addition to providing those figures, petitioner asserted that he always paid sales tax
26 reimbursement to vendors on his purchases. However, after the meeting discussed above, the

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28 ¹ Petitioner indicated on the application his estimate that \$500 per month of these sales would be taxable.

1 Department telephoned some of petitioner’s vendors and was informed that petitioner paid sales tax
2 reimbursement on some purchases of tangible personal property and not on others.

3 As a construction contractor billing on a lump sum basis, petitioner is liable for tax on the cost
4 of materials consumed on construction contracts (e.g., gravel and sod) and on the selling price of
5 fixtures furnished and installed (e.g., trees and plants). (See Cal. Code Regs., tit. 18, § 1521.)

6 Although petitioner has provided various figures throughout the appeals process, he has provided no
7 reliable business records to support any of those figures, including no records to show that he routinely
8 paid sales tax reimbursement to his vendors. In the absence of records, we find that it was appropriate
9 for the Department to estimate petitioner’s taxable sales based on the available information, and we
10 find no basis for further adjustment.

11 **Issue 2:** Whether relief of the failure-to-file penalty is warranted. We find it is not.

12 Petitioner filed a request for relief of the penalty, on the grounds that he disputes the amount
13 the Department asserts is due. However, the Department did not issue the determination or otherwise
14 estimate the amount due until April 22, 2008, long after the due-date of the return, July 31, 2007.
15 Petitioner has offered no explanation for his failure to file a return. Thus, we find there is no basis for
16 relief of the failure-to-file penalty.

17 **OTHER DEVELOPMENTS**

18 None.

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