

**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: )  
CLASSIQUE RAPHY'S, A CALIFORNIA CORP. ) Account Number: SR AC 100-530768  
Petitioner ) Case ID 468141  
Valley Village, Los Angeles County

Type of Business: Restaurant and caterer

Audit period: 01/01/05 – 12/31/07

<u>Item</u>	<u>Disputed Amount</u>	<u>Tax</u>	<u>Penalty</u>
Disallowed claimed exempt sales of food	\$ 92,184		
Unreported sales	\$179,614 <sup>1</sup>		
As determined:	\$36,872.44	\$3,509.35	
Adjustment - Appeals Division	-14,449.06	-3,805.82	
Proposed redetermination	\$22,423.38	\$ - 296.47 <sup>2</sup>	
Less concurred	00.00	- 296.47	
Balance, protested	<u>\$22,423.38</u>	<u>\$ 00.00</u>	
Proposed tax redetermination	\$22,423.38		
Interest through 2/28/11	8,531.94		
Late return penalty	- 296.47		
Total tax, interest, and penalty	<u>\$30,658.85</u>		
Monthly interest beginning 3/1/11	<u>\$ 130.80</u>		

**UNRESOLVED ISSUES**

**Issue 1:** Whether adjustments are warranted to the disallowed claimed exempt sales of food.

We recommend no further adjustment.

Petitioner is a caterer which also operates a restaurant, with three types of food sales: 1) food sold and served at the customers' facilities (catering); 2) food sold for consumption at the restaurant;

<sup>1</sup> Taxpayer protests an unspecified portion of this audit item.

<sup>2</sup> The D&R recommends that the negligence penalty be deleted. The overstatement of penalty of \$296.47 represents overpayments of late payment penalties for the returns for the fourth quarter 2005 and the first quarter 2006, for which the audit established overpayments of tax.

1 and 3) food sold and delivered to customers' locations, with no serving (sales of food to go). Petitioner  
2 regarded all sales of food to go as exempt.

3 The Department found that, for large to-go orders, petitioner charged each customer a lump  
4 sum based on the number of people to be served and the combination of food selected. Since  
5 petitioner reported sales tax with respect to 89 percent of its reported total sales, the Department  
6 concluded that all of petitioner's sales, including its sales of cold food to go, were subject to tax based  
7 on the "80/80 rule." (Rev. & Tax. Code, § 6359, subd. (d)(6); Cal. Code Regs., tit. 18, § 1603, subd.  
8 (c)(3).) It therefore disallowed all of petitioner's claimed exempt sales of food.

9 Petitioner contends that all of its claimed exempt sales are valid exempt sales of cold food to  
10 go. Petitioner stated that, although some of the foods were prepared in a heated condition, they were  
11 cooled and refrigerated prior to delivery. It also asserted that the food was delivered to customers in  
12 bulk containers and not pre-packaged into individual servings or meals. According to petitioner, it  
13 merely dropped off the food, and the customers were responsible for the final preparation, reheating,  
14 and serving of the food to their guests. On that basis, petitioner argues that the 80/80 rule is not  
15 applicable here because that rule applies only to sales of food products sold in a form suitable for  
16 consumption on the seller's premises.

17 During the reaudit we recommended in the D&R, the Department verified that the food was  
18 sold in bulk containers. As such the food was not served by petitioner as meals nor was it served in a  
19 form suitable for immediate consumption. Thus, we agree that the 80/80 rule is inapplicable, and  
20 conclude that the only basis for imposing tax would be if the food was sold in a heated condition since  
21 the sale of hot prepared food products does not qualify for the food exemption. (Rev. & Tax. Code, §  
22 6359, subd. (d)(7).) During the reaudit, the Department found that the subject sales included both hot  
23 food and cold food. The Department reviewed the contracts at issue here (large to-go sales) on an  
24 actual basis, and determined that petitioner made exempt sales of cold food to go of \$158,355. The  
25 reaudit thus allows a deduction of these sales but denies the remaining \$92,184 of the claimed  
26 deductions. In the absence of additional evidence, we recommend no further adjustment.

27 **Issue 2:** Whether adjustments are warranted to the unreported sales determined by an analysis  
28 of bank deposits. We recommend no further adjustment.

1 The Department reconciled petitioner's total bank deposits with reported total sales. After  
2 adjusting for non-sale deposits, hotel charges (separately stated nontaxable charges for hotel facilities),  
3 and sales tax included, the Department computed an understatement of \$196,399. Petitioner contends  
4 that a pro-rated amount of the difference should be regarded as exempt, based on the findings in the  
5 reaudit regarding the disallowed claimed exempt sales of food.<sup>3</sup>

6 In the post-conference reaudit, after adjusting the amount of disallowed claimed exempt sales  
7 of food, as described under Issue 1, the Department computed that petitioner's taxable sales  
8 represented 92.31 percent of its total sales. The Department applied that percentage to the difference  
9 between bank deposits and reported total sales to compute an understatement of taxable sales of  
10 \$179,614,<sup>4</sup> a reduction of \$16,785 from the amount of \$196,399 established in the audit. Petitioner has  
11 not provided evidence to support a greater adjustment.

#### 12 **RESOLVED ISSUE**

13 We have recommended that the negligence penalty be deleted. We note that the Department  
14 considered petitioner's books and records adequate for sales and use tax purposes. Further, we  
15 conclude that petitioner's overstatement of claimed exempt sales of food was the result of a  
16 misunderstanding of the law rather than negligence. With respect to the remainder of the  
17 understatement, which was established using a bank deposit analysis, we note that the understatement  
18 in the reaudit of \$179,614 represents less than 10 percent of reported taxable sales of \$1,808,515. We  
19 find that an understatement of that magnitude is not, by itself, evidence of negligence.

#### 20 **OTHER DEVELOPMENTS**

21 None.

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23 Summary prepared by Deborah A. Cumins, Business Taxes Specialist III  
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27 <sup>3</sup> Petitioner had argued that some of the difference represented funds from non-sales sources and nontaxable deposits for  
future jobs, but it clarified at the appeals conference that it did not wish to pursue those grounds.

28 <sup>4</sup> Adjusted excess bank deposits (net of hotel charges) of \$210,630 times 92.31 percent taxable ratio results in tax-included  
taxable sales of \$194,433, divided by 1.0825 to remove tax included equals \$179,614.