

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

In the Matter of the Administrative Protest )  
Under the Sales and Use Tax Law of: )  
DANSIG, INC. ) Account Number: SR EA 13-859320  
Taxpayer ) Case ID 493691  
Tustin, Orange County

Type of Business: Seller of frozen lemonade and related ingredients

Determination period: 1/1/06 – 12/31/08

<u>Item</u>	<u>Disputed Amount</u>		
Disallowed claimed sales for resale	\$998,560		
Negligence penalty	\$12,132		
		<u>Tax</u>	<u>Penalty</u>
As determined:		\$121,316.01	\$12,131.64
Less concurred		- 38,930.31	<u>0.00</u>
Balance, protested		<u>\$ 82,385.70</u>	<u>\$12,131.64</u>
Tax determined, unadjusted		\$121,316.01	
Interest through 7/31/11		28,833.67	
Negligence penalty		<u>12,131.64</u>	
Total tax, interest, and penalties		\$162,281.32	
Payments received		- 81,596.48	
Balance Due		<u>\$ 80,684.84</u>	
Monthly interest beginning 8/1/11		<u>\$198.60</u>	

**UNRESOLVED ISSUES**

**Issue 1:** Whether adjustments are warranted to disallowed claimed sales for resale. We find no adjustment is warranted.

Taxpayer has operated under this seller's permit since 1990. During the determination period, taxpayer reported total sales of \$2,599,830 on its sales and use tax returns, and claimed the entire amount as nontaxable sales for resale. This determination resulted from the Sales and Use Tax Department's (Department) investigation of selling activities at the Rose Bowl under the Statewide

1 Compliance Outreach Program. The Rose Bowl charged its patrons an admission fee for events held at  
2 its location, and the sales at issue were made at the Rose Bowl during these events.

3 Taxpayer entered into subcontract agreements with Service America Corporation, dba  
4 Centerplate, Inc. (Centerplate), an authorized Rose Bowl concessionaire, whereby taxpayer was  
5 authorized to sell frozen lemonade, hot chocolate, ice cream, cookies, and candy at Rose Bowl events.  
6 The agreement, signed by Mr. Lane Vallier on taxpayer's behalf, provides that Centerplate receives as  
7 a commission either 45- or 50-percent of taxpayer's gross receipts. According to taxpayer, it never  
8 sold any merchandise to patrons at the Rose Bowl but rather entered into an oral agreement with  
9 Mr. Vallier whereby it delivered frozen lemonade to him at the Rose Bowl and he managed and  
10 organized the sale of the lemonade to the Rose Bowl's patrons. Mr. Vallier would turn over all of the  
11 sales proceeds to Centerplate, who would then prepare an accounting of the sales proceeds as provided  
12 for in the agreement, retain its commission, and pay the remaining balance including the sales tax  
13 reimbursement collected to Mr. Vallier. Taxpayer states that its oral agreement with Mr. Vallier  
14 included a split of gross receipts (after deduction of Centerplate's commission, 47-percent to taxpayer  
15 and 53-percent to Mr. Vallier). Spreadsheets provided by Centerplate show total sales of \$1,470,496  
16 were made under the agreement during the determination period. Based on the agreement and the  
17 spreadsheets, the Department determined that taxpayer was the retailer of the sales at issue.

18 Taxpayer contends that Mr. Vallier was the retailer. While taxpayer does not dispute that it  
19 owes sales tax on its 47 percent share of the gross receipts from the \$1,004,119 in lemonade sales,  
20 taxpayer argues that Mr. Vallier is responsible for sales tax on his 53 percent share of the lemonade  
21 sales as well as 100 percent of the sales tax due on the \$466,377 gross receipts from sales of hot  
22 chocolate, ice cream, cookies, and candy, which items taxpayer contends it did not sell. Taxpayer  
23 states that Mr. Vallier had his own business known as Cartworks, Inc. (SR AS 100-228638).  
24 Taxpayer's president, Mr. Don Sigaty, submitted a declaration that of the \$1,470,497 gross receipts,  
25 Centerplate retained \$607,131 for commissions, Mr. Vallier received \$586,952, and taxpayer received  
26 \$276,414.

27 Taxpayer notes that although the agreement indicates that taxpayer is the person with whom  
28 Centerplate contracted to allow sales of the products at the Rose Bowl, the agreement was signed by

1 Mr. Vallier. Taxpayer contends that Mr. Vallier is not an officer of taxpayer, and has no ownership  
2 interest in taxpayer's business. Taxpayer alleges that Mr. Vallier was not authorized to sign the  
3 agreement for taxpayer, but rather signed the agreement on his own behalf. Thus, the agreement  
4 should be considered a contract between Centerplate and Mr. Vallier.

5 Section 14.1 of the agreement provides that taxpayer shall not transfer, convey, assign, or  
6 permit the use of any of its rights or privileges under the agreement, or delegate or subcontract its  
7 duties to any other person or entity without Centerplate's prior written consent. Mr. Vallier signed the  
8 agreement on taxpayer's behalf, and held himself out as taxpayer's representative. Taxpayer was  
9 aware of the agreement's existence. That Mr. Vallier collected \$1.47 million in gross receipts from the  
10 sales at issue with taxpayer's knowledge and without objection indicates that Mr. Vallier acted as  
11 petitioner's authorized representative. Taxpayer has not provided any evidence, such as a  
12 corroborating statement from Mr. Vallier or written consent from Centerplate authorizing taxpayer to  
13 subcontract its duties to Mr. Vallier, in support of its allegation that Mr. Vallier was the actual retailer  
14 for these transactions. Taxpayer has not provided the details of the alleged oral contract it had with  
15 Mr. Vallier which might establish a vendor-vendee relationship between the two. We conclude that  
16 Mr. Vallier made these sales on taxpayer's behalf, and therefore taxpayer owes the sales taxes at issue.

17 **Issue 2:** Whether taxpayer was negligent. We conclude that it was.

18 The Department imposed the 10-percent penalty for negligence because (1) taxpayer failed to  
19 report any tax to the Board despite its knowledge that tax reimbursement was being collected on its  
20 behalf, and (2) taxpayer was unable to support over half of its claimed deductions for nontaxable sales  
21 for resale. Taxpayer protests the penalty on the basis that (1) its business mainly consists of selling  
22 lemonade in bulk to vendors for resale and not to the general public, (2) its failure to pay the tax was  
23 due to inadvertence or otherwise excusable neglect, (3) Mr. Vallier retained the sales tax  
24 reimbursement collected and should be the one held responsible to report and pay those amounts, and  
25 (4) this was taxpayer's first audit.

26 We find that the penalty for negligence was properly applied because we believe that taxpayer,  
27 as the party to the agreement with and identified in accounting documents prepared by Centerplate,  
28 was aware or should have been aware that tax reimbursement was being collected on the sales at issue

1 but did not ensure its payment to the Board. Neither Mr. Vallier's retention of the tax reimbursement  
2 collected from Rose Bowl patrons nor taxpayer's other bulk sales of lemonade for resale relieve  
3 taxpayer of its responsibility to ensure that the tax reimbursement collected on its behalf was being  
4 reported to the Board. Taxpayer has provided no non-negligent explanation for retaining or allowing  
5 Mr. Vallier to retain the tax reimbursement. That taxpayer claimed all of its gross receipts as  
6 nontaxable sales for resale despite its knowledge that tax reimbursement was being collected on the  
7 sales at the Rose Bowl, demonstrate negligence in reporting.

### 8 **RESOLVED ISSUE**

9 Taxpayer incurred a finality penalty of \$12,131.60 when it failed to pay the tax assessed in the  
10 April 24, 2009 Notice of Determination (NOD) within 30 days of its issuance. Taxpayer contends that  
11 it did not receive that NOD but learned of the tax assessment in an April 29, 2009 letter from the Board  
12 which included a copy of the April 21, 2009 Field Billing Order (FBO). Taxpayer filed its appeal on  
13 May 27, 2009, within 30 days of the April 29, 2009 letter, but more than 30 days after the NOD.

14 The D&R recommends that relief of the finality penalty be denied. However, upon further  
15 review, we reverse that recommendation. The 30<sup>th</sup> day after issuance of the NOD was on a weekend,  
16 and the following Monday was Memorial Day, so the last date on which a timely petition could have  
17 been filed was May 26, 2009. Taxpayer filed its appeal one day late. Furthermore, the April 29, 2009  
18 letter transmitted the FBO on which the NOD was based to taxpayer, indicating that if taxpayer did not  
19 respond within ten days, the FBO would be forwarded to headquarters for processing. This seems to  
20 imply that the NOD had not yet been issued.

21 We find that under the circumstances of this case, relief is warranted. We therefore reverse our  
22 prior recommendation on this issue, and instead recommend that the finality penalty be relieved  
23 provided that taxpayer pays all remaining tax due within 30 days after the mailing to taxpayer of notice  
24 of the Board's final decision in this appeal.

### 25 **OTHER DEVELOPMENTS**

26 None.

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28 Summary prepared by David H. Levine, Tax Counsel IV