

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION BOARD HEARING SUMMARY

3 In the Matter of the Petition for)
 4 Redetermination and Claim for Refund)
 4 Under the Sales and Use Tax Law of:)
 5) Account Number SR EA 100-602931
 5 FUN IS FIRST, INC.) Case ID's 334140, 559880
 6)
 6 Petitioner/Claimant)
 7) Laguna Beach, Orange County

8 Type of Business: Destination management company

9 Audit period: 01/01/06 – 12/31/09 (Case ID 559880)

10 Claim Period: 01/01/98 – 12/31/02 (Case ID 344140)

11 <u>Item</u>	<u>Disputed Amount</u>
12 Unreported taxable sales	\$1,239,993 (Case ID 559880) (01/01/06 – 12/31/09)
12 Claimed refund	\$ 53,635 ¹ (Case ID 334140) (01/01/98 – 12/31/02)
13 Tax as determined and protested (01/01/06 – 12/31/09)	\$32,254.72 ²
14 Interest through 10/31/13	<u>13,202.72</u>
15 Total tax and interest	\$45,457.44
15 Payments	- 1,500.00
16 Balance Due	<u>\$43,957.44</u>
17 Monthly interest beginning 11/01/13	<u>\$ 153.77</u>

18 UNRESOLVED ISSUE

19 **Issue:** Whether adjustments are warranted to the measure of unreported taxable sales. We find
 20 no adjustment is warranted.

21 _____
 22 ¹ The D&R shows the disputed amount for the claim period as unreported taxable sales of \$1,834,317. Although that is not
 23 incorrect, the appeal for the period January 1, 1998, through December 31, 2002 is a claim for refund of the payments made
 24 on amnesty returns of \$53,635 (which represents the tax on the disputed amount of unreported taxable sales net of a
 25 concurred credit for tax-paid purchases resold). Accordingly, for clarity, we show the disputed amount for this period as
 the actual amount of refund claimed. Further, we note that, after the payments were made and the claim for refund had
 been filed, the Department made adjustments to the amnesty returns, such that there was a payment of \$1,500.00 in excess
 of amounts due. Thus \$1,500.00 of the \$53,635 has been applied to the determination for the years 2006 through 2009.

26 ² The tax is measured by \$409,517, which represents the disputed amount of unreported taxable sales of \$1,239,993, net of
 27 a concurred credit for tax-paid purchases resold of \$830,476. Since petitioner's argument is that it was operating as an
 agent of the restaurants, it does not argue that there was an overpayment of tax on the \$830,476. Thus, if petitioner
 prevails, the overpayment subject to refund will be limited to the amounts of any payments made against the determination.
 28 In other words, no portion of the tax on the concurred credit will be subject to refund.

1 Petitioner/claimant (hereinafter petitioner) operates as a destination management company
2 (DMC), offering event planning and coordination of various types. As herein relevant, petitioner
3 offered its customers a “Dine Around” dining program, through which petitioner transported customers
4 to prearranged dinners and/or drinks at various local restaurants. The restaurants used in the dining
5 program billed petitioner for the food on an amount-per-person basis and billed for beverages on a per-
6 drink basis. The restaurants added a 21 percent mandatory gratuity, and they billed petitioner for sales
7 tax reimbursement with respect to the total charges for food, beverage, and gratuity. Petitioner billed
8 its customers the same amounts as part of the dining program. In addition to the charges for food,
9 beverages, gratuity, and tax reimbursement charged by the restaurants, petitioner also billed its
10 customers for transportation, an 18 percent service charge for each beverage purchased by customers,
11 coordination fees (sometimes identified as management fees in petitioner’s sales documents), and staff
12 advance fees. On its returns, petitioner did not report any sales of food or beverages, and it claimed the
13 exact amounts of its reported total sales as deductions for nontaxable labor.

14 The Sales and Use Tax Department (Department) concluded that petitioner was the retailer of
15 food and beverages billed to its customers as part of the dining program. Further, the Department
16 found that the amounts petitioner billed its customers for coordination fees, staff advance fees, and the
17 18 percent charge for each beverage purchased represented gross receipts from petitioner’s sales of
18 food and beverages. To establish the taxable measure for the audit period, January 1, 2006, through
19 December 31, 2009, the Department used 2008 as a test period and computed a taxable to total sales
20 ratio of 17.62 percent. It also computed a tax-paid purchases resold to total sales ratio of 11.8 percent.
21 The Department applied those percentages to reported total sales to compute taxable sales of
22 \$1,239,993 and tax-paid purchases resold of \$830,476, with unreported taxable measure of \$409,517.
23 The Department applied the same percentages to reported total sales for the period January 1, 1998,
24 through December 31, 2002, for which petitioner had filed amnesty returns, to compute unreported
25 taxable sales of \$1,834,317 and tax-paid purchases resold of \$1,228,948, for a net amount of
26 unreported taxable measure of \$605,369. For that period, petitioner has paid \$53,635, which paid the
27 tax in full, and it has claimed a refund of that entire amount.

1 Petitioner contends that it acted as an agent for the various restaurants it contracted with, and
2 was not acting as a retailer of tangible personal property. Thus, petitioner asserts that the restaurants,
3 rather than petitioner, were the retailers of the food and beverages sold as part of the dining program.
4 Therefore, petitioner claims that the amount of tax reimbursement it paid to the restaurants (the amount
5 the Department has identified as “tax-paid purchases resold”), and the related tax paid by those
6 restaurants to the Board, represents the entire amount of tax due on these transactions. On that basis,
7 petitioner protests the entire amount of unreported taxable measure for the audit period and claims a
8 refund of the entire amount paid on amnesty returns for the claim period.

9 Alternatively, in the event it is found to be a retailer, petitioner argues that the charges for staff-
10 advance and coordination fees for the dining program are not taxable because the fees were not part of
11 the sale of tangible personal property. Petitioner explained that staff-advance fees are charges to
12 customers for having a staff member arrive at the restaurant prior to the group to ensure everything is
13 in order, provide directions, and make sure customers are transported back safely after the meal.
14 Petitioner argues that these fees are part of the fees for transportation to the restaurant and that they are
15 not part of the sales of food and beverages. Petitioner states that the coordination fees represent
16 overhead for operating all facets of the business, and the fees are not solely related to the dining
17 program, and therefore argues that the fees are not part of the sales of tangible personal property.

18 There is no dispute that there was a transfer of tangible personal property (food and beverages)
19 and that the transfer of that property represents taxable sales. The issue to be determined is whether
20 petitioner made retail sales of the food and beverages or acted as an agent of the restaurants. As one
21 element of its argument that it was acting as an agent, petitioner relies on the Board’s Memorandum
22 Opinion in *Mark Pulvers* (adopted 12/31/1994). However, we find that reliance is misplaced because
23 the facts in the two cases are different. Specifically, in *Pulvers*, there were preexisting agreements
24 between the taxpayer and the restaurants that set out the duties and obligations of the parties, and the
25 taxpayer advertised himself as a provider of pick-up and delivery service on behalf of the restaurants.
26 In contrast, there is no indication that petitioner had the power to alter legal relations between the
27 alleged principal (the restaurants) and third parties (petitioner’s customers) or that the restaurants
28 granted petitioner such authority. Further, there is no evidence that the alleged principals had the

1 power to control the conduct of petitioner with respect to the dining program. Therefore, we find there
2 was no agency relationship. Accordingly, we find petitioner was the retailer of food and beverages.

3 With respect to petitioner's alternative argument, we find that the coordination and staff-
4 advance fees petitioner charged as part of the dining program were mandatory charges since its
5 customers could not get the food and beverages without paying those fees. Petitioner's assertion that
6 the coordination fees also relate to costs for the entire DMC experience does not alter the fact it
7 charged the mandatory fees as part of its sales of food and beverages in the dining program. Therefore,
8 we find that both the coordination fees and the staff-advance fees were mandatory as part of the sale of
9 food and beverages in the dining program, and thus are considered part of petitioner's gross receipts
10 and subject to tax. (Rev. & Tax. Code, § 6012, subds. (a)(2), (b)(1).) Accordingly, we find no
11 adjustments are warranted to the amount of unreported taxable measure for the audit period, and there
12 is no overpayment subject to refund with respect to the amnesty returns.

13 **OTHER MATTERS**

14 None.

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16 Summary prepared by Deborah A. Cumins, Business Taxes Specialist III
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