

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION BOARD HEARING SUMMARY

In the Matter of the Petition for Redetermination)
Under the Sales and Use Tax Law of:)
FLORINDA GARCIA-SAN ANTONIO, dba) Account Number SR BH 100-613978
Kusina Ni Tess) Case ID 573678
Petitioner) City and County of San Francisco

Type of Business: Restaurant
Audit period: 10/01/07 – 12/31/10

<u>Item</u>	<u>Disputed Amount</u>
Unreported taxable sales	\$526,866
Negligence penalty	\$ 6,771
Tax as determined	\$67,706.64
Less concurred	<u>-20,117.84</u>
Balance, protested	<u>\$47,588.80</u>
Tax as determined	\$67,706.64
Interest through 12/31/13	19,816.31
Negligence penalty	<u>6,770.68</u>
Total tax, interest, and penalty	\$94,293.63
Less payments	- 4,907.00
Balance due	<u>\$89,386.63</u>
Monthly interest beginning 01/01/14	<u>\$ 314.00</u>

This matter was scheduled for Board hearing in May 2013, but was postponed for settlement consideration.

UNRESOLVED ISSUES

Issue 1: Whether a reduction to the amount of audited taxable sales is warranted. We conclude that no reduction is warranted.

Petitioner has operated a restaurant serving Filipino-style food since August 2005. The records petitioner provided for examination consisted of federal income tax returns, sales and use tax returns, and cash register Z-tapes for 45 days from October 28, 2010, through December 31, 2010; and for four days in January 2011. The Sales and Use Tax Department (Department) computed book markups of 35 percent and 40 percent for 2008 and 2009, respectively, which were much lower than expected.

1 To establish audited taxable sales for the fourth quarter of 2010, the Department multiplied
2 average daily taxable sales of \$901 shown in the 45 Z-tapes for the period October 28, 2010, through
3 December 31, 2010, by 75 days of operation in the quarter, which resulted in audited taxable sales of
4 \$67,557 for that quarter. The Department then conducted a site observation test on Tuesday,
5 January 25, 2011. During this test, the Department observed 118 sales, comprised entirely of taxable
6 sales totaling \$882.41, excluding tips and sales tax reimbursement, with no sales of cold food to go.
7 Using the cash register Z-tapes that petitioner provided for January 6, 7, and 8, 2011, combined with
8 the results of the site observation test, the Department computed average daily taxable sales of
9 \$882.92. The Department multiplied \$882.92 by 74 days of operation per quarter to establish audited
10 taxable sales of \$65,336 for each of the 12 quarters through September 30, 2010, and combined those
11 results with \$67,557 for the fourth quarter of 2010 to establish audited taxable sales of \$851,585 for
12 the audit period, which exceeded reported taxable sales of \$101,990 by \$749,595.

13 Petitioner contends that the results of the one-day site observation test are not representative of
14 her sales throughout the audit period, especially due to the economic conditions at the time of the site
15 observation. However, since petitioner's sales on the day of the site observation test were nearly the
16 same as the sales shown in the Z-tapes that petitioner provided for three other days in January 2011,
17 we conclude that the results of the site observation test were representative of petitioner's sales that
18 month. Petitioner has not provided any evidence showing that her sales during the audit period were
19 lower than her sales in January 2011 because of economic conditions or for any other reason. In fact,
20 petitioner's assertion is contradicted by the fact that her reported sales decreased during the audit
21 period. Therefore, lacking more definitive evidence, we conclude that petitioner's average sales in
22 January 2011 are representative of her sales throughout the audit period, except for the fourth quarter
23 of 2010, when 45 daily cash register Z-tapes show that her sales were somewhat higher.

24 Petitioner provided a summary of bank deposits showing total deposits of \$324,719 for the
25 audit period, and claims that her total deposits represent her actual total sales amounts. However, the
26 Department's examination of the summary showed unexplained transfers into petitioner's bank
27 account, which raised the possibility that petitioner might have held additional undisclosed bank
28 accounts into which she could have deposited some of her proceeds. More importantly, since there

1 was no way to verify that petitioner deposited all of her cash sales into any bank account or otherwise
2 accounted for cash sales in her summary, we conclude that the summary of bank deposits is not a
3 reliable indicator of petitioner's total sales. Therefore, we recommend no adjustments.

4 **Issue 2:** Whether petitioner was negligent. We conclude that she was.

5 The Department imposed the negligence penalty because petitioner's books and records were
6 incomplete and the understatement was large when compared to reported taxable sales. Petitioner
7 claims that her records were lost or inadvertently discarded when her residence was fumigated.
8 Regarding her reporting errors, petitioner argues that she has no background in recordkeeping or
9 reporting procedures, and it was her brother who provided her accountant with the taxable sales
10 amounts for preparing her returns. Finally, petitioner asserts that, since the beginning of the audit
11 work, she has maintained a complete set of records and is now reporting her taxable sales correctly.

12 Regarding the records provided for examination, we find that petitioner's failure to safeguard
13 her records when her residence was fumigated shows a lack of due care in maintaining records.
14 Regarding the reporting errors, we would expect petitioner to be able to compile the sales recorded on
15 her Z-tapes for reporting purposes even if she has no background in accounting. However, we note
16 that the Department compiled taxable sales of \$40,534 from Z-tapes for 45 days in the fourth quarter of
17 2010, but petitioner reported taxable sales of only \$24,210 on her return for that entire quarter. Even if
18 petitioner's brother provided sales amounts to the accountant for reporting purposes, we find that
19 petitioner ultimately was responsible for verifying the accuracy of reported amounts. A comparison of
20 unreported taxable sales of \$749,595 with reported taxable sales of \$101,990 for the audit period
21 shows a reporting error rate of 734.97 percent, which is strong evidence of negligence in preparing
22 returns. Finally, even if petitioner has maintained a complete set of records since the start of the audit
23 and has reported her sales accurately since then, we find that petitioner was negligent during the audit
24 period at issue. Accordingly, although this was petitioner's first audit, we conclude that petitioner was
25 negligent and the penalty was properly imposed.

26 **OTHER MATTERS**

27 None.

28 Summary prepared by Lisa Burke, Business Taxes Specialist III