

## 1 CALIFORNIA STATE BOARD OF EQUALIZATION

## 2 APPEALS DIVISION BOARD HEARING SUMMARY

3 In the Matter of the Petition for Redetermination )  
 4 Under the Sales and Use Tax Law of: )  
 5 HEARTBEAT, INC., dba Stargazer Restaurant ) Account Number: SR AC 100-043264  
 ) Case ID 417580  
 6 Petitioner ) West Hills, Los Angeles County

7 Type of Business: Restaurant  
 8 Audit period: 10/1/03 – 9/30/06

9 <u>Item</u>	<u>Disputed Amount</u>	
10 Understated taxable sales	\$581,765	
	<u>Tax</u>	<u>Penalty</u>
11 As determined	\$93,520.74	\$9,352.09
Pre-D&R adjustment	0.00	-9,352.09
12 Post-D&R adjustment	<u>-45,525.09</u>	<u>0.00</u>
Proposed redetermination, protested	<u>\$47,995.65</u>	<u>\$ 0.00</u>
13 Proposed tax redetermination	\$47,995.65	
14 Interest through 4/30/12	<u>26,085.87</u>	
Total tax and interest	\$74,081.52	
15 Payments	<u>- 3,858.98</u>	
16 Balance Due	<u>\$70,222.54</u>	
17 Monthly interest beginning 5/1/12	<u>\$257.46</u>	

18 This matter was scheduled for Board hearing on June 18, 2010, but was postponed at  
 19 petitioner's request. It was rescheduled for Board hearing on October 28, 2011, but petitioner did not  
 20 respond to the Notice of Hearing, and the Board Proceedings Division informed petitioner that the  
 21 matter would be presented to the Board for decision without oral hearing. Petitioner subsequently  
 22 requested that the matter be placed back on the oral hearing calendar. It was rescheduled for Board  
 23 hearing on January 31, 2012, but was again postponed at petitioner's request.

24 **UNRESOLVED ISSUE**

25 **Issue:** Whether further adjustments to the audited understatement of taxable sales are  
 26 warranted. We conclude that no further adjustments are warranted.

27 Petitioner operated a buffet-style restaurant with banquet facilities, a bar, and a dance floor. It  
 28 also offered entertainment and hosted catered events (banquet sales). Petitioner sold a lunch buffet on

1 weekends and a dinner buffet on a daily basis for a set price (buffet sales) which varied according to  
2 the activity at its facilities. Patrons paid an extra fee for the entertainment which began at 8:00 pm.  
3 Petitioner contends that it charged \$9.95 for the dinner buffet without entertainment, \$15 to \$40 for the  
4 dinner buffet with entertainment, and \$5 to \$20 for entertainment only without the dinner buffet.  
5 Petitioner asserts that patrons usually came for entertainment only and very few came for meals.

6 The Sales and Use Tax Department (Department) was unable to reconcile petitioner's recorded  
7 and reported taxable sales due to insufficient records. It accepted the 2003 and 2005 gross receipts  
8 reported on Federal income tax returns as substantially accurate but concluded the 2004 gross receipts  
9 were understated because the book markup was low in relation to 2003 and 2005. The Department  
10 determined petitioner's total sales by the markup method, and established \$1,136,662 as the  
11 understated taxable sales for the audit period and \$3,078 as the tax-paid purchases resold deduction not  
12 claimed for 2006. It subsequently removed the negligence penalty that it had asserted for inadequate  
13 records.

14 Petitioner contends that many of the line item charges on its banquet sales as well as charges  
15 for entertainment are not subject to tax because they do not relate to its sales of food and drink. It  
16 asserts that it had previously reported all of its receipts as taxable until the third quarter of 2002 when  
17 Mr. Mejia, a Business Taxes Representative (now retired), informed it that it was incorrectly reporting  
18 its sales. It contends that in reliance on Mr. Mejia's instructions, it has excluded about two-thirds of its  
19 banquet charges from its reported sales.

20 We recommended a reaudit to make adjustments for the amounts that patrons paid for  
21 entertainment and dance floor rental (whether only for entertainment or as part of the lump sum charge  
22 that patrons paid for dinner and entertainment), the amount of sales tax reimbursement included in the  
23 gross receipts petitioner reported on its federal income tax returns, and the amount of unclaimed tax-  
24 paid purchases resold for the entire audit period. In that reaudit, the Department changed the method  
25 of computing petitioner's taxable sales to a bank deposit analysis. The Department scheduled total  
26 bank deposits, removed non-sale deposits and recorded banquet sales to establish buffet sales, and  
27 removed sales tax reimbursement included to establish taxable buffet sales. It concluded that 64.37  
28 percent of the banquet sales represented the taxable portion. The Department combined audited

1 taxable banquet and buffet sales and compared that total with the reported taxable sales. In sum, the  
2 taxable sales understatement was reduced by \$263,830 to \$872,832, and the tax-paid purchases resold  
3 allowance was increased by \$9,234 to \$12,312, for a net measure of deficiency of \$860,520. This  
4 figure does not include an adjustment for entertainment charges because petitioner did not provide  
5 sufficient documentary evidence to establish that it is entitled to such an adjustment. Upon further  
6 consideration, the Department concluded that 20 percent of the gross receipts from buffet sales is a  
7 reasonable adjustment for the entertainment charges, and it prepared another reaudit to further reduce  
8 the measure of deficiency by \$278,755, to \$581,765. Petitioner has not provided a specific argument  
9 related to the amount of gross receipts established by the bank deposit analysis, or documentation that  
10 it is entitled to an adjustment for entertainment charges greater than 20 percent of audited buffet sales.

11 The D&R finds that the charges made in connection with the banquet sales that were  
12 nontaxable were charges related to entertainment or dance. In the post-D&R reaudit, the Department  
13 scheduled 22 banquet contracts, and determined that petitioner had collected tax reimbursement on an  
14 average of 64.37 percent of the total charges. Rather than determining the taxable portion of the  
15 banquet charges in accordance with our recommendation, the Department accepted that 64.37 percent  
16 of petitioner's banquet charges were taxable and 35.63 percent were not taxable, in accordance with  
17 the tax reimbursement petitioner had collected based on the Department's examination. We find that  
18 this portion of the reaudit is very favorable to petitioner. Furthermore, not only does the Department's  
19 examination refute petitioner's contention that it relied on advice that it should regard two-thirds of its  
20 banquet sales as nontaxable (having actually collected tax reimbursement on about two-thirds of its  
21 charges), but has rendered the reliance argument moot since the Department regarded petitioner's  
22 banquet charges as taxable only to the extent that petitioner had collected tax reimbursement on such  
23 charges. Petitioner has also failed to provide any evidence of a written request to the Board for advice,  
24 or its receipt of any erroneous written advice from the Board. We find that relief from the tax due, or  
25 any further adjustment, is not warranted.

#### 26 OTHER MATTERS

27 None.

28 Summary prepared by Pete Lee, Business Taxes Specialist II