STATE BOARD OF EQUALIZATION
SALES AND USE TAX APPEAL

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:	
J & E HOLDINGS, LLC, dba Birley Sandwiches	Account Number: SR X BH 100-188053 Case ID 430091
Petitioner	San Francisco, San Francisco County

Type of Business:	Sandwich shop
Audit Period:	01/01/04 – 12/31/06
Item	Amount in Dispute
Unreported taxable sales	$39,223[1]

	Tax	Penalty
As determined:	$42,614.82	$4,261.53
Adjustment - Appeals Division	-12,759.16	-4,261.53
Proposed redetermination	$29,855.66	$0.00
Concurred in	-26,540.65	
Balance, protested	$3,315.01	
Proposed tax redetermination	$29,855.66	
Interest through 7/31/10	11,139.86	
Total tax and interest	$40,995.52	
Payments	-10,532.35	
Balance Due	$30,463.17	
Monthly interest beginning 8/1/10	$112.72	

This matter was previously scheduled for Board hearing on January 27, 2010, but was postponed for settlement consideration.

UNRESOLVED ISSUE

Issue 1: Whether further adjustments are warranted to the understatement of reported taxable sales. We recommend no further adjustments.

[1] Based on the taxable percentages petitioner asserts, petitioner concedes an understatement in taxable sales of $312,019. After our recommended adjustments the understated taxable sales are $351,242. Thus, the protested measure is $39,223.

Petitioner operates a delicatessen and sandwich shop serving breakfast, hot and cold sandwiches, soups, and salads in San Francisco. During the audit, the Sales and Use Tax Department (Department) observed that seating was available inside the business and in a common area outside and that the majority of petitioner's taxable sales were sales of hot food and soda. The Department calculated that the percentage of reported taxable sales to reported total sales each quarter ranged from 19.26 percent to 32.18 percent. Based on petitioner's menu, the Department concluded that the percentages were lower than expected and decided further investigation was warranted. The Department concluded that the reported taxable percentage was low for this business and thus conducted observation tests on May 9, 10, and 17, 2007, during which it noted that the cashiers were making some errors ringing sales. The Department instructed the cashiers regarding the correct application of tax and asked petitioner to retain detailed cash register tapes for the period May 9, 2007, through May 23, 2007. Using cash register tapes for that two week period, the Department calculated a percentage of taxable to total sales of 37.42 percent. The Department established audited taxable sales by applying this percentage to recorded total sales, which resulted in understated taxable sales of $501,350.

Petitioner has conducted a six-month test, using cash register tapes for the period July through December 2007, and has computed taxable to total sales percentages of 33.6 percent for the five months July through November 2007 and 34.26 percent for the full six-month period. Petitioner argues that the taxable percentage of 33.6 percent should be used to calculate taxable sales for the years 2005 and 2006, and that a taxable percentage of 30.8 percent should be used for the year 2004 because taxable sales for that year were 10 percent lower than 2005 and 2006. These percentages would result in an understatement of taxable sales of $312,019.

At the appeals conference, the Department agreed that adjustments were warranted but not to the extent requested by petitioner. The Department argued that the percentages should be 34.26 percent for 2005 and 2006, and 32.18 percent for 2004, and we recommended the use of 34 percent for 2005 and 2006 and 32 percent for 2004 be used. We recommend no further adjustment.

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RESOLVED ISSUE

We recommend that the negligence penalty be deleted. Petitioner maintained and provided adequate records, the Department acknowledged in the appeals conference that tracking taxable and nontaxable sales in this type of business can be difficult, and this is petitioner's first audit. We find that petitioner did exercise due care, and the understatement was not the result of negligence.

OTHER DEVELOPMENTS

None.

Summary prepared by Rey Obligacion, Retired Annuitant