

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:)
PHUONG THANH KIM & VAN THANH NGUYEN,) Account Number: SR CH 97-666295
dba Kim’s Catering) Case ID 505991
Petitioner) Hayward, Alameda County

Type of Business: Catering truck
Liability period: 01/01/06 – 03/31/09

<u>Item</u>	<u>Disputed Amount</u>
Unreported sales	\$188,023
Negligence penalty	\$ 1,645
Tax as determined and protested	\$16,452.07
Interest through 12/31/11	5,241.06
Negligence penalty	<u>1,645.21</u>
Total tax, interest, and penalty	<u>\$23,338.34</u>
Monthly interest beginning 01/01/12	<u>\$ 95.97</u>

UNRESOLVED ISSUES

Issue 1: Whether adjustments are warranted to the amount of unreported sales. We find no adjustment is warranted.

Petitioner has operated a catering truck since March 2000, selling hot food, such as burritos and tacos, and cold food, such as sandwiches, chips, and juice. According to the Sales and Use Tax Department (Department), during a visit by a member of the Statewide Compliance and Outreach Program, petitioner stated that its sales were in the range of \$300 to \$350 per day, but petitioner provided no books or records for examination. The Department established total sales at \$350 per day and taxable sales per day of \$298 (85 percent of \$350), based on its experience investigating other catering trucks and its observation of petitioner’s inventory. The Department used \$298 and the number of days petitioner operated to establish taxable sales of \$248,830, which exceeded reported taxable sales of \$60,509 by \$188,321.

1 Petitioner contends that the amount of taxable sales established by the Department is excessive,
2 asserting it did not state that average daily sales were in the range of \$300 to \$350. On that issue,
3 Ms. Phoung Thanh Kim (one of the co-owners) alleged at the appeals conference that she had
4 difficulty communicating with the Department at the time of the investigation because English is her
5 second language. Ms. Kim explained that she determines the amount of sales each day based on a
6 count of cash, and she records the sales in a sales journal. At and after the conference, petitioner
7 provided sales journals, monthly sales reports, bank statements, and federal income tax returns.

8 The records provided during the appeals process do not appear reliable, for several reasons.
9 Although we do not share the Department's concern that the sales journals may have been prepared
10 solely for the purpose of the appeal, we nevertheless do not accept that the figures recorded therein are
11 accurate. The total sales amounts each day are not supported by any source documents, such as cash
12 register tapes, guest checks, or even tally sheets identifying the number of each item sold each day.
13 Further, petitioner acknowledges that the amount recorded in the sales journal is based on a cash count
14 at the end of the day and that it paid vendors with cash. Under those circumstances, it is highly
15 possible that the cash available at the end of the day is net of amounts paid to vendors and thus does
16 not represent all of the sales. Moreover, petitioner must have estimated its exempt sales because none
17 of the records it maintained indicated what items were sold. Under these circumstances, we find that
18 the Department used a reasonable method to establish petitioner's taxable sales. We have not
19 attempted to determine whether petitioner did, in fact, estimate its daily sales at \$300 to \$350 per day.
20 Regardless of the amount stated by petitioner, we find that the Department's estimate of \$350, based
21 on its experience investigating similar businesses, is reasonable, and petitioner has not provided
22 sufficient evidence to show that the estimate is excessive.

23 Notwithstanding our conclusion that the Department's method of establishing petitioner's
24 taxable sales was reasonable, in the D&R we also considered it appropriate to attempt to establish a
25 more precise figure based on an observation test. Accordingly, the D&R recommended that the
26 Department conduct an observation of petitioner's business and make adjustments, if appropriate,
27 based on that test. After the D&R was issued, the Department contacted petitioner at least four times,
28 three times by telephone (two times by a representative who is fluent in Vietnamese) and once by

1 letter. However, by letter dated March 25, 2011, petitioner complained that it had not been contacted
2 by the Department, and specified that the best means of communication was by email to Ms. Kim. We
3 therefore contacted petitioner by email to Ms. Kim, as she had requested, requesting that petitioner
4 contact the Department within 10 days. Petitioner neither contacted the Department nor responded to
5 our email. Thus, in the absence of evidence, we recommend no adjustment.

6 **Issue 2:** Whether petitioner was negligent. We conclude that it was.

7 The Department imposed the negligence penalty because petitioner's records were inadequate
8 and the understatement was large in relation to reported amounts. This was petitioner's first audit.

9 Although petitioner provided sales journals during the appeals process, it did not provide any
10 source documents to support the amounts of recorded sales, nor did petitioner provide a purchase
11 journal or purchase invoices. Further, petitioner maintained no records from which it could determine
12 its exempt sales, but rather estimated those amounts. We find that any business person, even one with
13 limited experience, should recognize that it is necessary to maintain records of its purchases and sales
14 and to report accurate amounts on returns. In addition, the understatement of \$188,023 represents an
15 error ratio of 311 percent when compared to reported taxable sales of \$60,349. We find that the
16 inadequate records, the estimated amounts of exempt sales, and the substantial understatement are
17 evidence of negligence, even though petitioner has not been audited previously.

18 **OTHER DEVELOPMENTS**

19 None.

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