

## 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 MANH VAN LE, dba Charlier's Catering ) Account Number SR KH 97-584005  
 6 Petitioner ) Case ID 538190  
 7 ) Sacramento, Sacramento County

8 Type of Business: Catering truck

9 Liability period: 01/01/07 - 12/31/09

10 Item Disputed Amount

11 Unreported taxable sales \$129,949

12 Negligence penalty \$ 1,040

Tax

Penalty

13 As determined

\$14,599.25

\$1,459.92

14 Post-D&R adjustment

- 4,196.03

- 419.58

15 Proposed redetermination, protested

\$10,403.22

\$1,040.34

16 Proposed tax redetermination

\$10,403.22

17 Interest through 12/31/12

3,228.64

18 Negligence penalty

1,040.34

19 Total tax, interest, and penalty

\$14,672.20

20 Monthly interest beginning 01/01/13

\$ 52.02

### 21 UNRESOLVED ISSUES

22 **Issue 1:** Whether additional adjustments are warranted to the amount of unreported taxable  
 23 sales. We find no further adjustments are warranted.

24 Petitioner operated a catering truck selling hot and cold food from August 1999 through  
 25 September 2010. In February 2010, a Statewide Compliance and Outreach Program specialist  
 26 interviewed petitioner and examined his federal income tax returns for 2007 and 2008 and sales  
 27 summary for the liability period, which were the only records petitioner provided. The Sales and Use  
 28 Tax Department (Department) obtained a summary of petitioner's purchases from his known vendor, a  
 catering truck commissary, and found that his commissary purchases of \$69,386 for 2007 and 2008,  
 combined, were nearly as much as his reported total sales of \$75,515 for the same two-year period.  
 Based on that discrepancy, the Department concluded that petitioner likely underreported his sales.

1 The Department considered using the markup method to establish taxable sales, but it concluded that  
2 there was insufficient information to do so because petitioner provided no purchase invoices and did  
3 not provide information regarding his purchases from grocery stores. Therefore, the Department  
4 decided to compute petitioner's taxable sales using estimated average taxable sales of \$360 per day.  
5 Then, based on its examination of the daily sales summaries for nine months that had been provided by  
6 petitioner, the Department estimated that petitioner operated 233 days per year. The Department's  
7 computed taxable sales exceeded reported amounts by \$182,761.<sup>1</sup>

8 Based on petitioner's assertion at the appeals conference that his route was shorter than the  
9 Department had understood it to be, the Department recommended that the estimated taxable sales be  
10 reduced from \$360 per day to \$300 per day, resulting in a reduction of \$40,627 in the understatement  
11 of reported taxable measure, to \$142,134. The Department then allocated this deficiency between the  
12 audit items, \$99,255 to unreported taxable sales and \$42,879 to overstated claimed exempt food sales,  
13 based on an exempt sales ratio of 8.94 percent. Although this exempt ratio was relevant only to the  
14 allocation of the deficiency between two audit items (an allocation that was unnecessary), the D&R  
15 misconstrues the Department's audit procedure and assumes that the Department was recommending a  
16 reduction in *total* sales from \$360 to \$300 per day, and an additional allowance for 8.94 percent  
17 exempt sales of food. Based on this misconception, the D&R erroneously recommends an additional  
18 reduction measured by \$12,185. As a result, the understatement of reported taxable measure has been  
19 reduced to \$129,949.

20 Petitioner asserts that his total sales ranged from \$180 to \$320 per day for the liability period  
21 and that his exempt sales of food products represented approximately 44 percent of his total sales, as  
22 he reported. Petitioner claims that, during the liability period, his business was very slow due to the  
23 economic recession, and also claims that he did not have enough time to have made sales in the  
24 amounts estimated by the Department because he ran the business by himself and had to drive, cook,  
25 sell, and collect money. Moreover, petitioner states that he wanted to sell the business but could not  
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27 <sup>1</sup> As explained in the D&R, the Department segregated the understatement into an overstatement of claimed exempt food  
28 sales and an understatement of reported taxable sales, which the D&R separately addresses. For purposes of this summary,  
we have concluded that it is more clear to address the understatement as a whole.

1 find a buyer, which he claims is evidence that his business was very slow.

2         Petitioner has provided no evidence to support further reductions. Also, of necessity, all of the  
3 figures used to establish the liability are estimates, and the D&R has already used an estimate lower  
4 than that recommended by the Department. Moreover, when we were preparing this matter for Board  
5 hearing, we noted that there is some evidence that the estimated sales may be understated.

6 Specifically, we noted that the amount charged to petitioner by the commissary for parking and  
7 insurance fluctuated during the liability period from \$33 per day to \$83 per day (for April 4, 2007,  
8 through February 19, 2008), and \$68 per day (beginning September 25, 2008). These variances in the  
9 amount charged for parking and insurance indicate that, during some portions of the period, petitioner  
10 may have operated more than one catering truck, but the estimated amounts are based on his operation  
11 of a single truck. Thus, in the absence of clear, detailed evidence, we find there is no basis for further  
12 reduction of the unreported taxable sales.

13         **Issue 2:** Whether petitioner was negligent. We conclude that he was.

14         The Department imposed the penalty because petitioner failed to provide records, and the  
15 understatement was substantial. Petitioner disputes the penalty on the basis that he reported his sales  
16 accurately.

17         Although petitioner had operated this business since 1999, the only records he maintained were  
18 his federal income tax returns and a sales summary, with no source documents. Petitioner reported  
19 total sales averaging \$156 per day for the liability period, which are even less than the amount he  
20 estimated at the appeals conference (\$180 to \$320), and his documented purchases from the  
21 commissary alone are nearly as much as his reported total sales for the same period. We find that any  
22 businessperson, regardless of his level of experience, would recognize that his sales barely exceed his  
23 costs. Also, the understatement of \$129,949 represents an error ratio of 213 percent in comparison to  
24 reported taxable sales of \$61,004. We find that the lack of reliable records, reported sales that barely  
25 exceed documented purchases, and the magnitude of the reporting errors are strong evidence of  
26 negligence. Thus, we find that the penalty was properly imposed, even though petitioner had not been  
27 audited previously.

28 Summary prepared by Lisa Burke, Business Taxes Specialist III