

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION SUMMARY FOR BOARD HEARING

In the Matter of the Administrative Protest and)
Claim for Refund Under the Sales and Use Tax)
Law of:)

ENYINNAYA CHRISTIAN OJOGHO, dba)
Nineties Sporting Goods)

Account Number: SR X AS 100-201658
Case ID's 396268, 414889

Taxpayer/Claimant)

Los Angeles, Los Angeles County

Type of Business: Retailer of sporting goods

Audit period: 01/01/97 – 03/31/05¹

<u>Item</u>	<u>Disputed Amount</u>	
Unreported sales	\$1,140,978	
Penalties	\$ 42,013	
Claimed refund	\$ 42,512	
	<u>Tax</u>	<u>Penalty</u>
As determined:	\$95,616.84	\$15,703.72
Adjustment - Sales and Use Tax Department	<u>-1,804.89</u>	-3,385.86
Additional penalties added when liability became final		<u>29,695.53</u>
Balance, protested	<u>\$93,811.95</u>	<u>\$42,013.39</u>
Adjusted tax	\$93,811.95	
Interest through 6/30/11	91,533.43	
Negligence penalty	3,010.07	
Failure-to-file penalty	6,371.24	
Finality penalty	9,267.24	
Amnesty double failure-to-file penalty	2,936.55	
Amnesty double-finality penalty	5,759.31	
Amnesty interest penalty	<u>14,668.98</u>	
Total tax, interest, and penalty	\$227,358.77	
Payments	<u>-16,996.06</u>	
Balance Due	<u>\$210,362.71</u>	
Monthly interest beginning 7/1/11	<u>\$384.08</u>	

¹ The determination did not include an assessment for the period April 1, 2003, through September 30, 2003, due to the expiration of the statute of limitations.

UNRESOLVED ISSUES

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2 **Issue 1:** Whether adjustments to unreported sales are warranted. We find that adjustments are
3 not warranted.

4 Taxpayer operated sporting goods stores and started accepting orders placed through the
5 Internet beginning on or about November 23, 1998. The Sales and Use Tax Department (Department)
6 found that taxpayer was operating without a permit and issued a seller's permit to him on April 13,
7 2003, with an effective start date of January 1, 1997. The permit was closed out effective June 30,
8 2005, when the business incorporated.

9 Taxpayer provided limited summary records. The Department decided to use a bank deposit
10 analysis to establish audited taxable sales, considering cash deposits to represent sales at the store
11 locations and credit card deposits to represent Internet sales, but bank statements for all periods were
12 not available. For the periods for which the statements were available, April 1, 2002, through March
13 31, 2005, the Department deducted from total cash deposits those deposits from sources other than
14 sales (such as loan proceeds and overdraft protection) and deducted sales tax included to compute
15 taxable store sales of \$609,637 for the three years, which is a quarterly average of \$16,935 for each of
16 the three locations. For periods for which taxpayer did not provide bank statements, the Department
17 used the per-store quarterly average multiplied by the number of retail locations in operation each
18 quarter to compute additional taxable sales from the retail locations of \$745,140. Thus, the
19 Department computed total audited taxable sales from the retail locations during the audit period of
20 \$1,354,777.

21 The Department then examined Internet sales summaries for the period 2000 through March
22 31, 2005, and computed that 11.97 percent of Internet sales represented sales subject to California sales
23 tax, net of tax reimbursement. The Department included in taxable sales any sales for which the
24 property had been shipped to a location in California and any sales for which the property was shipped
25 outside California, but taxpayer had collected sales tax reimbursement. The Department applied the
26 taxable ratio to credit card deposits for the period April 1, 2002, through March 31, 2005 (2Q02
27 through 1Q05), to compute taxable Internet sales of \$134,378 for the three years, or an average of
28 \$11,199 per quarter. The Department used this average to calculate taxable Internet sales of \$149,320

1 for the remaining portion of the audit period, for taxable Internet sales during the audit period of
2 \$283,698, and combined audited taxable sales during the audit period of \$1,638,475 (sales at stores of
3 \$1,354,777 + sales via the Internet of \$283,698). The Department then deducted audited taxable sales
4 for the second and third quarters of 2003 of \$114,342, which were barred by the statute of limitations,
5 to establish adjusted taxable sales of \$1,524,133. Upon comparison to reported taxable sales of
6 \$383,155 for the audit period except for the barred quarters (\$26,208 regular returns + \$356,947 for
7 amnesty returns), the Department computed unreported taxable sales of \$1,140,978 for which the
8 Notice of Determination was issued.

9 Taxpayer contends that the audited amount of unreported taxable sales is overstated. In
10 support, taxpayer has provided a CD, which allegedly contained a complete summary of all Internet
11 sales. However, upon examination of the CD, the Department found it only contained a mailing list of
12 Internet customers, not actual sales information.

13 We find that the Department's audit method was reasonable and based on the best-available
14 evidence, and taxpayer has failed to present any convincing evidence to support any further
15 adjustments. Further, we note that the Department accepted taxpayer's unsupported statement that all
16 credit card sales represented Internet sales, and it considered only 11.97 percent of Internet sales to be
17 taxable. Since 100 percent of in-store sales were considered taxable and it seems highly unlikely that
18 the stores made no credit card sales, it appears that this audit procedure was very favorable to taxpayer.
19 We recommend no further adjustments. Since the claim for refund is based on the same grounds as the
20 petition and since the amount paid does not exceed the amount due, we also recommend that the claim
21 be denied.

22 **Issue 2:** Whether taxpayer was negligent. We find that it was.

23 The Department applied the negligence penalty for the period 4Q03 through 1Q05 because
24 taxpayer failed to maintain and provide adequate records, and grossly underreported taxable sales.
25 Taxpayer has presented no specific arguments regarding the application of the negligence penalty other
26 than his assertion that the audit liability was too high.

27 Taxpayer had previously held a sellers permit for the same business which he closed out in
28 April 1996, effective June 30, 1995. Taxpayer thereafter operated without a permit from July 1996 to

1 April 2003, at which time he obtained a seller's permit in response to the Department's investigation of
2 his business. At a minimum, these facts are clear evidence of negligence. For the periods for which
3 the negligence penalty was imposed, taxpayer reported only seven percent of his taxable sales,
4 reporting \$26,208 as compared to audited taxable sales of \$391,063. Taxpayer was clearly at least
5 negligent, and we thus conclude the negligence penalty was properly imposed.

6 **Issue 3:** Whether taxpayer has established reasonable cause for relief of the failure-to-file
7 penalty. We find that he has not.

8 A failure-to-file penalty was imposed for the period 1Q97 through 1Q03 because taxpayer
9 failed to file returns during that period. Taxpayer filed a request for relief of this penalty, claiming that
10 his bookkeeper was responsible for filing the returns and that taxpayer was not aware the bookkeeper
11 had failed to do so. Taxpayer also states he was unaware that the Board had closed his previous
12 permit.

13 We do not accept that taxpayer could have believed a bookkeeper was filing returns and paying
14 taxes on his behalf when he never signed any returns or checks payable to the Board. Regarding the
15 closing of the prior permit, Board records indicate that taxpayer personally came into the Culver City
16 district office on April 9, 1996, to close his prior seller's permit (SR AS 99-474507). We find that
17 taxpayer knew the prior sole proprietorship permit had been closed prior to the audit period. We
18 conclude relief from the failure-to-file penalty is not warranted.

19 **Issue 4:** Whether taxpayer has established reasonable cause to be relieved of the finality
20 penalty. We find that he has not.

21 Since taxpayer did not file a timely petition for redetermination or pay the determination when
22 it became due and payable upon finality, a 10-percent finality penalty was added. Taxpayer filed a
23 request for relief of this penalty, claiming that he sent in an appeal after he received the audit, but he
24 must have sent it prior to the issuance of the Notice of Determination. The Department has no record
25 of having received any letter from taxpayer sent between the time the audit was completed and the
26 Notice of Determination was issued, nor does the administrative protest mention a prior appeal. We
27 thus find no support for taxpayer's assertion, nor any basis for relief of the finality penalty, which we
28 recommend be denied.

1 **Issue 5:** Whether taxpayer has established reasonable cause to be relieved of the amnesty
2 penalties. We find that he has not.

3 Although taxpayer timely applied for amnesty, filed amnesty returns for the period, July 1,
4 2001, through December 31, 2002, and entered into a qualifying installment payment agreement, the
5 reaudit established additional tax of \$58,732.68 due for the amnesty-eligible period of January 1, 1997,
6 through December 31, 2002. As a result, the determination included an amnesty double failure-to-file
7 penalty. Also added when the liability became final were an amnesty double finality penalty and an
8 amnesty interest penalty. After the adjustments in the pre-conference reaudit, these penalties are
9 \$2,936.55, \$5,759.31, and \$14,668.98, respectively.

10 Taxpayer filed a request for relief of the amnesty penalties based on his stated belief that the
11 audit would cover only the period for which he filed amnesty returns, July 1, 2001, through December
12 31, 2002. Taxpayer also stated that he did not pay the audit liability for the amnesty-eligible periods
13 because he did not have the funds, and because he did not believe he owed the tax.

14 The Department sent taxpayer correspondence at the beginning of the audit process that
15 indicated the periods eligible for amnesty were generally July 1, 2001, through December 31, 2002.
16 We can understand if that statement was misleading to taxpayer, but by the time amnesty returns were
17 due, taxpayer was aware just what periods were covered by amnesty as well as the Department's
18 estimate of unreported sales for the amnesty-eligible period. In fact, taxpayer himself listed periods as
19 far back as January 1999 on his application for amnesty, and before the amnesty application deadline,
20 the Department sent taxpayer an amnesty reminder letter with the estimated audit liability for all the
21 amnesty-eligible periods. Accordingly, we find taxpayer knew of the dates covered by the amnesty
22 program as well as the estimated amount due for the amnesty-eligible period.

23 We reject taxpayer's contention that he did not believe he owed the tax considering that he had
24 been making sales of tangible personal property and collecting sales tax reimbursement during the
25 amnesty-eligible periods, without a seller's permit and without filing any returns. With respect to
26 taxpayer's assertion that he did not have funds to pay the liability for the amnesty-eligible period,
27 taxpayer had the option of entering into a qualified installment payment agreement.

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For these reasons, we find that taxpayer has not established reasonable cause for his failure to comply with the requirements of the amnesty program, and conclude relief of the amnesty penalties should be denied.

OTHER DEVELOPMENTS

None.

Summary prepared by Thea Etheridge, Business Taxes Specialist II