

**CALIFORNIA STATE BOARD OF EQUALIZATION**  
**APPEALS DIVISION BOARD HEARING SUMMARY**

In the Matter of the Petition for )  
 Reconsideration of Successor's Liability )  
 Under the Sales and Use Tax Law of: )  
 CHOMSIK PAK, dba ) Account Number SR AS 101-193345  
 Whale Land Korean Restaurant ) Case ID 516137  
 Petitioner )  
 \_\_\_\_\_ ) Gardena, Los Angeles County

Type of Business: Restaurant  
 Liability period: 06/27/07 – 12/22/08

<u>Item</u>	<u>Disputed Amount</u>	<u>Tax</u>	<u>Penalty</u>
Successor liability	\$28,887		
As determined		\$36,694.53	\$3,869.45
Post-D&R adjustment		<u>00.00</u>	<u>- 3,869.45</u>
Proposed redetermination		\$36,694.53	<u>\$ 00.00</u>
Less concurred		<u>- 7,807.39</u>	
Balance, protested		<u>\$28,887.14</u>	
Proposed tax redetermination		\$36,694.53	
Interest through 04/30/12		<u>10,368.55</u>	
Total tax and interest		<u>\$47,063.08</u>	
Monthly interest beginning 05/01/12		<u>\$ 214.05</u>	

This matter was scheduled for Board hearing on February 1, 2012, but was postponed at petitioner's request because of his representative's schedule during the tax season.

**UNRESOLVED ISSUE**

**Issue:** Whether adjustments are warranted to the understatement established by audit of the predecessor, La EMS, Inc. We find no adjustment is warranted.

Petitioner operates a restaurant that he purchased from La EMS, Inc. (SR AS 100-928699), which had operated the restaurant from June 27, 2007, through December 22, 2008. In an audit of La EMS, the Sales and Use Tax Department (Department) established an understatement of reported taxable sales of \$469,024, resulting in a tax deficiency of \$38,694.53. The Department applied a \$2,000.00 payment from escrow to that liability, and it issued a Notice of Successor Liability to

1 petitioner for \$36,694.53 tax, plus penalty and interest. Petitioner does not dispute his liability as a  
2 successor for amounts due from La EMS because he failed to withhold such amounts from the  
3 \$110,000 purchase price, but he contends that the understatement established by audit of La EMS is  
4 excessive.

5 La EMS did not provide books and records for audit. Based on the Department's experience  
6 auditing restaurants of similar size and type, it concluded that the taxable sales reported by La EMS  
7 were substantially correct for the period June 27, 2007, through September 30, 2007. However, the  
8 Department noted that the average daily sales of \$457 for the remainder of the audit period were  
9 significantly less than the average daily sales of \$2,224 for the last few days of June 2007 and \$1,646  
10 for the third quarter 2007 (3Q07). The Department used average daily sales of \$1,646 to establish  
11 audited taxable sales for 4Q07 of \$148,097. Since it recognized that the economy was slow in 2008,  
12 the Department estimated average daily sales of \$1,500 for the period January 1, 2008, through  
13 December 22, 2008, computing taxable sales of \$526,500. The Department compared audited and  
14 reported taxable sales and established an understatement of \$469,024.

15 Petitioner contends that the audited understatement of reported taxable sales should be reduced  
16 from \$469,024 to \$94,635, which corresponds to an understatement of tax of \$7,807.39. Taxpayer  
17 asserts that the sales for the entire period June 27, 2007, through December 31, 2007, should be  
18 accepted as substantially accurate. For the period January 1, 2008, through December 22, 2008,  
19 petitioner has computed a percentage of error of 77.6 percent, using the amount of credit card deposits  
20 recorded in the bank and a ratio of 50 percent credit card sales to total sales, which petitioner has  
21 estimated. Petitioner has provided no evidence to support that estimated percentage, such as an  
22 observation test.

23 In the absence of documentation of the percentage of credit card sales to total sales, we find  
24 that petitioner's method of computing a percentage of error is not reliable. Further, petitioner has  
25 provided no basis for his assertion that the reported sales were substantially accurate for 4Q07. Thus,  
26 we find no adjustment is warranted.

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**RESOLVED ISSUE**

A negligence penalty of \$3,869.45 was applied in the audit of the predecessor. We find that there was no business relationship between the predecessor and petitioner. Accordingly, we recommend that the penalty be deleted from the liability assessed against petitioner as a successor.

**OTHER MATTERS**

Petitioner asserted that he is financially unable to pay this liability, which is not relevant to the disputed issue. We note we informed petitioner of the settlement and offer in compromise programs.

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