



**UNRESOLVED ISSUE**

**Issue:** Whether adjustments are warranted to the audited amounts of unreported taxable sales.

We find no adjustments are warranted.

This business, a restaurant and catering truck, was operated by the partnership of Amador Patino and Gerardo Javier Guzman from September 2006 through June 2008, when the business was incorporated as La Primavera Products SVCS, Inc. Mr. Patino and Mr. Guzman are the president and vice-president, respectively, of the corporation. The Sales and Use Tax Department (Department) found that the business operations remained the same when the business organization changed from a partnership to a corporation. In order to ensure that the statute of limitations did not expire, the Department issued two determinations to the partnership. The partnership filed a timely petition for redetermination for one of those determinations. For the other determination issued to the partnership and the determination issued to the corporation, administrative protests have been filed.<sup>2</sup>

To establish audited taxable sales, the Department conducted observation tests of the business during the period that it was operated by the corporation. On the days of the tests, the Department observed that the restaurant made taxable sales of \$1,109.50 and the catering truck made sales of \$1,250.75. The Department multiplied each of those figures by 90 days to compute average quarterly sales of \$99,855 and \$112,568 for the restaurant and catering truck, respectively. The Department used those amounts to establish audited taxable sales for both the partnership and the corporation, which it compared to reported amounts to establish understatements of \$797,647 for the partnership (both determinations combined) and \$1,072,017 for the corporation. Taxpayers contend that the audited daily sales of \$1,019.50 for the restaurant and \$1,250.75 for the catering truck are too high.

---

<sup>2</sup> The partnership made payments on June 8, 2011, and April 6, 2012, against the liability for which no petition was filed. The corporation has been making regular payments of \$500 per month since March 2012. The period for filing a timely claim for refund of the payments is three years from the due date of the return for the relevant quarter or six months from the date of payment, whichever period expires later. (Rev. & Tax. Code, § 6902, subd. (a).) Thus, the time during which the partnership could file a claim ended October 6, 2012. However, for the corporation, a claim for refund will be timely if it is filed within six months of the payments made on the 20<sup>th</sup> of each month beginning June 20, 2012. The three-year period with respect to the fourth quarter 2009 and first quarter 2010 expires January 31, 2013, and April 30, 2013, respectively. However, that period is not relevant here because the payments have been applied to the liabilities in earlier quarters. In our post-conference letter to the corporation, we explained the requirement to file timely claims for refund.

1 The only records taxpayers provided were the federal income tax return for 2008 and bank  
2 statements for the corporation. In the virtual absence of records, we find it was appropriate for the  
3 Department to establish audited sales using an alternate audit method. Taxpayers have not provided  
4 any documentation to show that the sales observed by the Department on the days of the tests were not  
5 representative of their operations. Thus, we find no adjustments are warranted.

6 **OTHER MATTERS**

7 The Department imposed negligence penalties on all three determinations, and taxpayers have  
8 not protested those penalties. As more fully addressed in the D&R's, we find that the grossly  
9 incomplete records and the substantial amounts of understatement, (\$797,647 for the two  
10 determinations issued to the partnership, combined, and \$1,072,017 for the corporation, which  
11 represent understatements of 167 and 258 percent, respectively) are clear evidence of negligence, and  
12 that the penalties were properly applied, even though the business had not been audited previously.

13 Since taxpayers did not timely pay the determinations represented by case ID's 549106 and  
14 550549, finality penalties were added. Although we explained to taxpayers in post-conference letters  
15 that each could file a request for relief of the finality penalty and provided each a form it could use,  
16 they have not done so. Accordingly, we have no basis to consider recommending relief of the finality  
17 penalties.

18  
19 Summary prepared by Deborah A. Cumins, Business Taxes Specialist III  
20  
21  
22  
23  
24  
25  
26  
27  
28