

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION SUMMARY FOR BOARD HEARING

3 In the Matter of the Petition for Redetermination)
 4 Under the Sales and Use Tax Law of:)
 5 SANTIAGO RODRIGUEZ,) Account Number: SR BH 97-610062
 6 dba Frjtz Gourmet Belgian Fries) Case ID 361129
 7 Petitioner) City and County of San Francisco

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9 Type of Business: Two restaurants

10 Audit Period: 7/01/01 – 9/30/05

<u>Items</u>	<u>Amount in Dispute</u>	
12 Unreported sales based on cash register tapes	\$1,521,472	
13 Negligence penalty	\$12,889	
	<u>Tax</u>	<u>Penalty</u>
14 As determined	\$127,321.51	\$17,474.12
15 Adjustments: Sales and Use Tax Department	+ 1,567.48	+ 192.67
16 Proposed redetermination, protested	<u>\$128,888.99</u>	<u>\$17,666.79</u>
17 Proposed tax redetermination	\$128,888.99	
Interest through 12/31/11	69,484.06	
18 Negligence penalty	12,888.98	
Amnesty double negligence penalty	4,777.81	
19 Amnesty interest penalty	<u>5,405.47</u>	
20 Total tax, interest, and penalties	\$221,445.31	
Payments received	<u>- 59,346.53</u>	
21 Balance due	<u>\$162,098.78</u>	
22 Monthly interest beginning 01/01/12	<u>\$405.66</u>	

23 This matter was previously scheduled for Board hearing on April 15, 2009, but was postponed
 24 at petitioner's request due to a scheduling conflict. It was rescheduled for Board hearing on May 27,
 25 2009, but was postponed for settlement consideration.

26 UNRESOLVED ISSUES

27 **Issue 1:** Whether adjustments are warranted to unreported taxable sales. We conclude that no
 28 adjustment is warranted.

1 Petitioner operates two restaurants. The Sales and Use Tax Department (Department) based the
2 amount of audited restaurant sales on a review of cash register tapes, and it established audited sales of
3 beer and wine on a markup basis. The Department concluded, based on observation of the business,
4 that 97 percent of the food sales were subject to tax.

5 The D&R notes two errors in the Department's calculations: the Department duplicated beer
6 and wine sales in audited taxable sales (since sales of beer and wine were recorded on the cash register
7 receipts and assessed on that basis, the separate markup calculation duplicated those sales), and the
8 Department should not have allowed an amount as exempt sales of food products since all of
9 petitioner's sales of food were taxable under the "80-80 rule" set forth in Revenue and Taxation Code
10 section 6359, subdivision (d)(6). Since offsetting the two errors resulted in an increase to the measure
11 of tax due, we recommended no reduction to the determined tax. The Department subsequently
12 asserted an increase pursuant to Revenue and Taxation Code section 6563 of unreported taxable sales
13 from \$1,502,993 to \$1,521,472, consistent with the analysis in the D&R.

14 Petitioner argues that, because he does not speak fluent English, the Board was obligated to
15 inform him how to accurately report his sales and use tax liability at the time he first started filing his
16 sales and use tax returns, and thus he should not be liable for the unreported sales. We find, however,
17 that, as a seller holding a seller's permit, petitioner was responsible for learning how the Sales and Use
18 Tax Law applies to his sales. The Board offers various sources, in Spanish, for a business owner to
19 become so informed, including Publication 22, "Tax Tips for the Dining and Beverage Industry,"
20 which describes how tax applies to restaurant sales. In any event, there is no statutory or regulatory
21 provision for relief from tax on the basis that a taxpayer does not understand the law, and we conclude
22 that no adjustment is warranted for this contention.

23 Petitioner also argues that, at the inception of the business, he believed only 50 percent of his
24 sales were taxable due to erroneous advice received from his tax preparer, and that he attempted to
25 increase his reported taxable sales ratio throughout the audit period as he became aware his prior
26 reporting ratio was incorrect. He asserts that his reliance on the erroneous advice from his tax preparer
27 and his later attempts to increase his taxable ratio warrant relief from the tax he owes. However, there
28 is no basis in the Revenue and Taxation Code for relief from taxes based upon reliance on erroneous

1 advice received from individuals other than Board staff, and we find no adjustment is warranted.

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

3 The Department assessed the negligence penalty because petitioner's records were inadequate,
4 and the amount of unreported sales was substantial. Petitioner disputes the penalty on the basis that he
5 was simply a non-English speaking person who really did not understand his responsibilities as a
6 business owner and who relied on other people to aid him in reporting the correct measure of the tax.

7 Petitioner provided extremely limited records, which we find is evidence of negligence.
8 Further, the asserted understatement of \$1,521,472 is significant and represents an error percentage of
9 about 54 percent ($\$1,521,472 \div \$2,833,563$). Even though this is petitioner's first audit, we find that a
10 reasonably prudent businessperson would have made the effort to determine what sales were taxable.
11 For example, petitioner did not report sales-to-go of beer, wine, and sodas as taxable during the early
12 periods of the audit. The application of tax to these sales by a restaurant is not complex, and
13 petitioner's error can be explained only by an absence of due care to report correctly. Thus, we find
14 that the understatement was the result of negligence, and the penalty was properly applied.

15 **OTHER DEVELOPMENTS**

16 Although petitioner applied for amnesty, he did not enter into a qualifying installment plan, or
17 pay off the tax and interest due, by May 31, 2005. Accordingly, the determination includes an amnesty
18 double negligence penalty and an amnesty interest penalty will be imposed when this liability is final.
19 Although we explained to petitioner that he could request relief of the amnesty penalties and provided
20 a form he could use to do so, petitioner has not returned the form or otherwise requested relief.
21 Accordingly, we have no basis to consider recommending relief of the penalties.

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23 Summary prepared by Thea C. Etheridge, Business Taxes Specialist II
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