

## 1 CALIFORNIA STATE BOARD OF EQUALIZATION

## 2 APPEALS DIVISION BOARD HEARING SUMMARY

3 In the Matter of the Administrative Protest )  
 4 and Claim for Refund Under the )  
 Sales and Use Tax Law of: )  
 5 ) Account Number SR EA 97-882721  
 JOSE E. SANCHEZ, dba ) Case ID's 489568, 505671  
 6 El Rincon Chilango Restaurant )  
 7 Taxpayer/Claimant ) Santa Ana, Orange County

8 Type of Business: Restaurant  
 9 Audit period: 10/01/05 – 09/30/08

<u>Item</u>	<u>Disputed Amount</u>		
11 Disallowed claimed exempt food sales	\$658,700		
12 Disallowed claimed sales tax included	\$110,548		
12 Refund claimed	\$ 24,000 <sup>1</sup>		
		<u>Tax</u>	<u>Penalty</u>
14 As determined	\$63,677.69		
15 Finality penalty			\$5,704.38
15 Pre-D&R adjustment	- 4,060.92		- 406.09
16 Post D&R adjustment			- 5,298.29
16 Proposed liability, protested	<u>\$59,616.77</u>		<u>\$ 00.00</u>
17 Tax, as adjusted	\$59,616.77		
18 Interest through 10/31/12	<u>18,951.04</u>		
18 Total tax and interest	\$78,567.81		
19 Payments	- 55,349.94		
20 Balance Due	<u>\$23,217.87</u>		
21 Monthly interest beginning 11/01/12	<u>\$ 21.33</u>		

## 22 UNRESOLVED ISSUES

23 **Issue 1:** Whether adjustments are warranted to the disallowed claimed exempt sales of food.

24 We find no further adjustment is warranted.

25 \_\_\_\_\_  
 26 <sup>1</sup> Taxpayer has filed timely claims for refund of several payments, totaling \$18,500, and has filed claims that were not  
 27 timely as to payments totaling \$5,500. Taxpayer has paid \$55,349.94. Since the amount due for the period October 1,  
 28 2005 through June 30, 2008, is \$54,459.53, the claims are ripe for consideration for the period October 1, 2005, through  
 June 30, 2008. We recommend denial of the claims for \$5,500.00 because they were not filed timely, and we recommend  
 denial of the remainder of the claims because the amounts paid do not exceed the amount due.

1 Taxpayer has operated a restaurant since June 2001, at which time he sold mostly cold food  
2 items. In 2004, taxpayer added a dining room with tables and changed the menu to mostly hot foods.  
3 Despite the change of his business operation, taxpayer continued to claim approximately 70 percent of  
4 reported total sales as exempt sales of food.

5 In October 2008, a Statewide Compliance and Outreach Program specialist visited the business,  
6 and estimated that approximately 95 percent of taxpayer's sales were taxable sales of hot food. He  
7 advised taxpayer to file amended sales and use tax returns, and taxpayer did so, claiming deductions  
8 for sales tax included and exempt sales of food that totaled about 35 percent of reported total sales.  
9 The matter was thereafter referred for audit.

10 Taxpayer provided federal income tax returns, bank statements, a menu, and other  
11 miscellaneous documents for audit, but no records showing the types of products sold each day. The  
12 Sales and Use Tax Department (Department) instructed taxpayer regarding the application of tax to  
13 sales of the various menu items, and taxpayer began to collect sales tax reimbursement accordingly.  
14 The Department asked taxpayer to keep a record of daily total sales and the amount of sales tax  
15 reimbursement collected for a consecutive 13-day period during December 2008. Using that data, the  
16 Department computed that 99.76 percent of taxpayer's sales were taxable. However, it subsequently  
17 deleted three days from the test because taxpayer had recorded all of his sales as taxable for those three  
18 days. Using the data for the remaining 10 days, the Department computed a taxable to total sales ratio  
19 of 98.97 percent. The Department concluded that all of taxpayer's sales were subject to tax based on  
20 the 80-80 rule. (Rev. & Tax. Code, § 6359, subd. (d)(6); Cal. Code Regs., tit. 18, § 1603, subd.  
21 (c)(3).) Thus, the Department disallowed all of taxpayer's claimed exempt food sales for the audit  
22 period. Taxpayer contends the amount of disallowed claimed exempt food sales is overstated, and  
23 proposes that the Department perform another 10-day observation test. Taxpayer also indicates that he  
24 believed all food was ordered to go because he had no waitresses and he packaged the food in to-go  
25 containers.

26 Regarding taxpayer's stated belief that all food was ordered to go, we conclude his belief is  
27 irrelevant. The issue here is whether taxpayer's sales were taxable or not, which is not dependent on  
28 whether he thought they were taxable or not. Nor does the stated belief withstand scrutiny considering

1 that taxpayer's restaurant had a dining room with 12 tables, as well as six tables outside, which were  
2 provided for customers to consume food on the premises. We note also that the majority of menu  
3 items were sold hot, and sales of hot food are subject to tax regardless of whether they are consumed  
4 on the premises. We conclude that all sales for consumption on the premises were taxable (Rev. &  
5 Tax. Code, § 6359, subd. (d)(2)) and that all sales of hot food were taxable (Rev. & Tax. Code, § 6359,  
6 subd. (d)(7)). Thus, the remaining issue is whether any adjustment is warranted for sales of cold food  
7 to go.

8 Sales of cold food sold in a form suitable for consumption on the seller's premises are exempt  
9 from tax when sold to go, except when the 80-80 rule applies. Under that rule, where more than 80  
10 percent of a seller's receipts are from sales of food products and more than 80 percent of the seller's  
11 retail sales of food products are taxable under paragraph (1), (2), (3), or (7) of Revenue and Taxation  
12 Code section 6359, subdivision (d), sales to go of cold food suitable for consumption on the seller's  
13 premises are subject to tax unless the seller keeps a separate accounting of these transactions in his or  
14 her records. (Cal. Code Regs., tit. 18, § 1603, subd. (d).) Here, there is no dispute that all of  
15 taxpayer's gross receipts were from the sale of food products and that taxpayer did not maintain a  
16 separate accounting of sales of cold food to go. Therefore, *all* of taxpayer's retail sales of food were  
17 taxable unless taxpayer can show that 80 percent or less of its retail sales of food products were subject  
18 to tax under paragraph (1), (2), (3), or (7) of section 6359, subdivision (d).

19 The result of the observation test for a net period of 10 days reflects a taxable ratio of almost  
20 99 percent. There is no indication of any errors in the test, or any basis to think another test would  
21 reduce the taxable ratio the almost 20 percent required to change the result in this case, and we thus  
22 find that conducting another test is not worthwhile. We conclude that the taxable percentage of  
23 taxpayer's retail sales of food products was well over the 80 percent threshold of the 80-80 rule, and  
24 that, as such, all of taxpayer's retail sales of food products were taxable.

25 **Issue 2:** Whether adjustments are warranted to the disallowed claimed tax-included deductions.  
26 We find no adjustment is warranted.

27 The Department found that taxpayer did not have any signs in his restaurant informing  
28 purchasers that his selling prices include sales tax reimbursement, that his menu did not contain a

1 statement that the selling prices included sales tax reimbursement, and that taxpayer's receipts did not  
2 reflect tax reimbursement. Thus, the Department concluded that taxpayer did not make his sales on a  
3 tax-included basis, and disallowed the tax-included deductions taxpayer claimed on his returns.

4 Taxpayer contends that he sold food for a tax-included price, but he has not refuted the Department's  
5 findings of fact. Since there is no evidence that taxpayer conveyed to his purchasers that the sales  
6 price he charged them included sales tax reimbursement (see Cal. Code Regs., tit. 18, § 1700, subd.  
7 (a)(2)), we conclude that the Department properly disallowed the claimed tax-included deductions.

8 **Issue 3:** Whether taxpayer is entitled to relief because he received erroneous oral advice from  
9 the Board. We find he is not entitled to relief.

10 Taxpayer asserts he is entitled to relief from tax because the specialist who visited the business  
11 in October 2008 orally advised him to report 70 percent of his sales as taxable. Relief may be granted,  
12 under specified conditions, if a taxpayer has reasonably relied on erroneous written advice from the  
13 Board in failing to charge or collect tax or tax reimbursement from its purchasers. (Rev. & Tax. Code,  
14 § 6596, subd. (b).) Here, taxpayer did not receive erroneous written advice. Furthermore, the subject  
15 oral advice is alleged to have been given to taxpayer after the end of the audit period. Thus, taxpayer  
16 could not have relied on that alleged advice in failing to collect sales tax reimbursement from his  
17 purchasers on sales that occurred during the three-year period *prior* to the alleged advice. We  
18 conclude that there is no basis for relief pursuant to section 6596.

### 19 **RESOLVED ISSUE**

20 Since taxpayer did not timely pay the determination or file a petition for redetermination, a  
21 finality penalty was added. Taxpayer has requested relief of the penalty, stating that his failure to file a  
22 timely appeal was due to a misunderstanding. Taxpayer's appeal was filed only two days late, and,  
23 based on the day the determination was mailed to taxpayer, the appeal probably was filed within 30  
24 days of taxpayer's receipt of the determination (although not within 30 days from the date it was  
25 issued). We find that taxpayer's failure to file a timely petition was due to his misreading or failure to  
26 understand the requirements for filing a timely petition, particularly since English is his second  
27 language. Accordingly, we recommend relief of the finality penalty, on the condition that taxpayer  
28 pays the tax in full within 30 days of the notice of the Board's final decision.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**OTHER MATTERS**

None.

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