

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION BOARD HEARING SUMMARY

3 In the Matter of the Petition for Redetermination)
 4 Under the Sales and Use Tax Law of:)
 5 MARTEL TOLER AND NABIEL N. MUSLEH,) Account Number SR BH 100-900949
 dba Bacchus Wine Bar) Case ID 510343
 6 Petitioner) City and County of San Francisco

7 Type of Business: Wine bar

8 Liability period: 10/01/00 – 03/31/07

9 Item Disputed Amount

10 Unreported taxable sales \$764,481
 11 Failure-to-file penalty \$ 6,473
 12 Amnesty double failure-to-file penalty \$ 2,010
 Amnesty interest penalty \$ 2,696

	<u>Tax</u>	<u>Penalty</u>
13		
14 As determined	\$67,029.85	\$8,889.44
Adjustment - Appeals Division	- 2,305.04	- 406.54
15 Proposed redetermination, protested	<u>\$64,724.81</u>	<u>\$8,482.90</u>
16 Proposed tax redetermination	\$ 64,724.81	
Interest through 05/31/13	48,491.47	
17 Failure-to-file penalty	6,472.53	
Amnesty double failure-to-file penalty	2,010.37	
18 Amnesty interest penalty	<u>2,696.34</u>	
19 Total tax, interest, and penalty	\$124,395.52	
Payments	<u>0.02</u>	
20 Balance Due	<u>\$124,395.50</u>	
21 Monthly interest beginning 06/01/13	<u>\$ 323.62</u>	

22 This matter was scheduled for Board hearing in December 2011, and again in February 2012,
 23 but was postponed each time at petitioner's request to allow additional time to prepare for the hearing.
 24 It was rescheduled for Board hearing in May 2012, but was deferred at the request of the Appeals
 25 Division to allow for further review of the related case, Martel & Nabel, Inc. (SR BH 97-008976). In
 26 a supplemental D&R dated November 8, 2012, we recommended that the petition filed by Martel &
 27 Nabel, Inc. be granted based on additional information petitioner provided. This matter was
 28

1 rescheduled for Board hearing in March 2013, but was postponed again at petitioner's request to allow
2 additional time to prepare for the hearing.

3 UNRESOLVED ISSUES

4 **Issue 1:** Whether adjustments are warranted to the amount of unreported taxable sales. We
5 find no further adjustments are warranted.

6 Petitioner operated a wine bar without filing any sales and use tax returns during the liability
7 period. The Investigations and Special Operations Division (ISOD) discovered petitioner was
8 operating without a seller's permit during a routine inspection made by the Statewide Compliance
9 Outreach Program. Petitioner obtained a seller's permit in April 2007, with an effective start date of
10 October 1, 2000; it sold the business and closed the seller's permit in September 2007. For the liability
11 period, petitioner provided its bank statements and various records for the related account, Martel and
12 Nabel Inc (SR BH 97-008976). Petitioner stated that it recorded its daily sales activity on the
13 computer but that it could not produce its sales records because the computer file was corrupted.

14 ISOD used bank deposits to establish petitioner's taxable sales for the liability period.
15 Petitioner contends that some of the funds deposited in the bank were from sources other than taxable
16 sales, such as deposits from other accounts, capital contributions, and voluntary tips. Petitioner also
17 contends that it reported all its sales on the returns filed by the related account, Martel and Nabel, Inc.

18 We reject petitioner's assertion that its bank deposits included voluntary tips since it did not
19 have enough cash at the end of the day to pay the tips to its employees that had been charged on credit
20 cards. Restaurants generally pay the tips to their employees using cash from the register before
21 depositing receipts in the bank. Petitioner has not explained how tips allegedly deposited into the bank
22 account were thereafter paid to its employees. Further, we find it improbable that petitioner did not
23 have cash available to pay tips because it did make deposits of cash into the bank account.

24 Accordingly, we recommend no adjustment for tips included in bank deposits. After the appeals
25 conference, ISOD re-examined petitioner's bank statements and concluded that \$27,239 of the deposits
26 were from sources other than taxable sales. Accordingly, we recommend that the deficiency measure
27 be reduced by \$27,239, but recommend no other adjustments.

1 In an SD&R dated November 8, 2012, we concluded that reported taxable sales for the related
2 account were substantially accurate. We found no evidence that the amounts deposited in the bank for
3 the related account included any of petitioner's receipts, and we reject petitioner's assertion that the
4 amounts reported by the related account include petitioner's sales.

5 **Issue 2:** Whether relief of the failure-to-file penalty is warranted. We find relief is not
6 warranted.

7 Petitioner has requested relief of the failure-to-file penalty on the basis that it reported its
8 taxable sales on the sales and use tax returns filed by the related account. For the reasons explained
9 above, we reject that assertion. Further, petitioner's business location is not listed on the seller's
10 permit for the related account. Since petitioner has offered no other explanation, we find that its
11 failure to file returns was not due to reasonable cause, and we find no basis for relief of the penalty.

12 **Issue 3:** Whether relief of the amnesty penalties is warranted. We conclude relief is not
13 warranted.

14 Since petitioner did not participate in the amnesty program, an amnesty double failure-to-file
15 penalty was included in the determination, and an amnesty interest penalty will be added when the
16 liability becomes final. Petitioner has requested relief of the amnesty penalties on the grounds that it
17 reported its taxable sales on returns filed by the related business. As explained above, we reject this
18 assertion, and petitioner has offered no other explanation. Accordingly, we find petitioner's failure to
19 participate in the amnesty program was not due to reasonable cause and that relief of the amnesty
20 penalties is not warranted.

21 **OTHER MATTERS**

22 None.

23
24 Summary prepared by Lisa Burke, Business Taxes Specialist III
25
26
27
28