

## 1 CALIFORNIA STATE BOARD OF EQUALIZATION

## 2 APPEALS DIVISION BOARD HEARING SUMMARY

3 In the Matter of the Claims for Refund )  
 4 Under the Sales and Use Tax Law of: )  
 5 VARUJ LLC, dba Bayside Restaurant ) Account Number SR EA 97-595334  
 Case ID 538547  
 6 KASSIAN, INC., dba Kimera ) Account Number SR EA 100-696050  
 Case ID 538549  
 7 BISTANGO-IRVINE, dba Bistango Restaurant ) Account Number SR EA 13-824654  
 Case ID 538551  
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 9 Claimants ) Newport Beach (538547) and Irvine,  
 Orange County

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 11 Type of Business: Restaurants  
 12 Claim periods: 04/01/09 – 12/31/09 (Case ID's 538547 and 538551)  
 01/01/07 – 12/31/08 (Case ID 538549)

14 <u>Item</u>	<u>Claimed Refund</u>
15 Late payment penalties	\$13,193.40 (Case ID 538547) \$15,100.70 (Case ID 538549)
16 Finality penalty	\$12,849.90 (Case ID 538551) \$ 7,459.90 (Case ID 538549)

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 18 Claimants each filed a claim for refund, for an unstated monetary amount, described as the total  
 19 amount of penalties paid for each respective claim period. The amounts scheduled above are the total  
 20 amounts of penalties paid for each claim period.

21 **UNRESOLVED ISSUE**

22 **Issue:** Whether claimants are entitled to refunds of the late payment penalties or the finality  
 23 penalty. We find they are not.

24 Claimants are related restaurants. Varuj LLC has operated since October 1999, Kassian, Inc.  
 25 has operated since February 2006, and Bistango-Irvine has operated since November 1987. Each  
 26 claimant incurred and paid penalties during the claim periods noted above, and each filed a request for  
 27 relief of the penalties, which was denied by the Sales and Use Tax Department. Each claimant then  
 28 filed a claim for refund for unstated amounts of overpayment described as all penalties paid during the

1 claim periods. For Varuj and Bistango-Irvine, the claims for refund were timely filed with respect to  
2 penalties paid for the second quarter 2009 (2Q09) and 3Q09, but were not timely filed for the penalties  
3 paid for 4Q09 because the claims were filed before those penalties were paid (a claim for such  
4 amounts would be timely if filed by January 31, 2013). For Kassian, the claim for refund was timely  
5 filed with respect to all penalties paid. Although the claims filed by Varuj and Bistango-Irvine are not  
6 timely for the penalties paid for 4Q09, the issues related to those penalties are identical to the issues  
7 related to the penalties for which timely claims were filed.

8 Penalties were assessed against all three claimants for failure to timely pay either a portion of  
9 or all of the amounts reported on sales and use tax returns (late payment penalties). Also, Kassian, Inc.  
10 incurred a finality penalty when a Notice of Determination issued to it for the year 2007 went final  
11 without payment. Claimants filed requests for relief of the penalties, asserting that their failure to  
12 timely pay the returns and the Notice of Determination was due to reasonable cause and circumstances  
13 beyond their control. In that regard, claimants state that the severe downturn in the economy caused  
14 them to have insufficient cash to make timely payments. Claimants stated, however, that they did pay  
15 wages and pay vendors, in order to stay in business. In the claims for refund, claimants expand on  
16 those arguments, stating that each family-run business is an upscale restaurant with overhead costs  
17 higher than other restaurants. They assert that, because of the nature of their businesses, they were  
18 unable to cut back costs and still maintain their reputations as fine dining establishments. Claimants  
19 also state that they always timely paid their tax liabilities in the past, but the downturn in the economy  
20 was so sudden and severe that there was not enough cash to pay the Board.

21 We find that, since claimants collected sales tax reimbursement with respect to their taxable  
22 sales, funds were available to pay their sales tax liabilities. However, claimant elected to pay other  
23 bills during the period. Further, claimant's overhead costs were entirely within their control. Thus, we  
24 find that claimants have not established reasonable cause for relief of the penalties, and we find that  
25 refunds are not warranted.

#### 26 **OTHER MATTERS**

27 None.

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