

## CALIFORNIA STATE BOARD OF EQUALIZATION

## APPEALS DIVISION PETITION FOR REHEARING SUMMARY

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3 In the Matter of the Petition for Redetermination )  
4 Under the Sales and Use Tax Law of: )  
5 JUAN MANUEL GALLARDO, dba ) Account Number: SR BH 99-786856  
6 Gallardo's Mexican Restaurant ) Case ID 466120  
7 Petitioner ) City and County of San Francisco

8 Type of Business: Restaurant

9 Audit period: 07/01/04 – 06/30/07

10 Item Disputed Amount

11 Unreported sales \$504,028  
12 Negligence penalty \$ 5,913

	<u>Tax</u>	<u>Penalty</u>
13 As determined:	\$66,084.11	\$6,608.42
14 Adjustment - Appeals Division	- 6,958.62	- 695.83
15 Proposed redetermination	\$59,125.49	\$5,912.59
16 Less concurred	- 16,283.05	00.00
17 Balance, protested	<u>\$42,842.44</u>	<u>\$5,912.59</u>
18 Proposed tax redetermination	\$59,125.49	
19 Interest through 11/30/11	28,019.47	
20 Negligence penalty	<u>5,912.59</u>	
21 Total tax, interest, and penalty	\$93,057.55	
22 Payments	- 0.38	
23 Balance Due	<u>\$93,057.17</u>	
24 Monthly interest beginning 12/1/11	<u>\$ 295.63</u>	

21 The Board heard this matter on April 26, 2011, and concluded that no further adjustments were  
22 warranted and that the understatement was the result of negligence. Petitioner filed a timely petition  
23 for rehearing which was scheduled for decision in September 2011, but was removed from that  
24 calendar by Ms. Marcy Jo Mandel.

25 **Issue:** Whether the petition for rehearing should be granted. We recommend that it be denied.

26 The Sales and Use Tax Department (Department) used the credit card sales ratio method to  
27 establish audited taxable sales based on observation tests for several partial days (limited to  
28 establishing this ratio). After adjustments recommended in the D&R, the audited amount represents

1 average daily sales of about \$781 per day. After hearing arguments from the parties, the Board found  
2 that no further adjustments were warranted. In the petition for rehearing, petitioner contends that the  
3 findings of the audit of a subsequent period support a reduction for the period at issue in the present  
4 appeal. As support, petitioner has attached copies of the schedules from the subsequent audit, in which  
5 the Department recorded sales of \$604 for a full-day observation test.

6 We note that the subsequent audit is not complete, and thus the results are not yet final. We  
7 note also that the observation test on which petitioner now seeks to rely was conducted June 3, 2011,  
8 almost four years after the end of the audit period at issue here. We generally find that observation  
9 tests performed soon after the end of the audit period offer a better representation of a taxpayer's sales  
10 during that particular audit period than an observation test conducted several years later. In any event,  
11 we believe that the deficiency upheld by the Board represents the correct measure of tax due based on  
12 the available information. Petitioner has not presented evidence to show that the later observation test  
13 will produce a more accurate result, and we thus conclude that petitioner has not established that a new  
14 hearing is warranted. We therefore recommend that the petition for rehearing be denied.

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