

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION SUMMARY FOR BOARD HEARING

3 In the Matter of the Petition for Redetermination)
Under the Sales and Use Tax Law of:)4 SHIRLEY EVERETT-DICKO & DONALD RAY)
5 WHITE, dba Everett & Jones Barbeque Coliseum)Account Number: SR X CH 97-006769
Case ID 3425706 Petitioner)

Oakland, Alameda County

7 Type of Business: Barbeque restaurant

8 Audit Period: 10/01/02 – 9/30/05

9 Item Amount in Dispute10 Unreported sales \$25,326¹

11 Negligence penalty \$ 3,940

12 Interest \$ 4,680²

	<u>Tax</u>	<u>Penalty</u>
14 As determined	\$92,645.09	\$10,763.88
15 Adjustment: Sales and Use Tax Department	-53,240.98	- 6,680.40
Appeals Division		- 143.05
16 Proposed redetermination, protested	\$39,404.11	\$ 3,940.43
17 Amount concurred in	<u>-37,270.94</u>	
Protested	<u>\$ 2,133.17</u>	<u>\$ 3,940.43</u>
18 Proposed tax redetermination	\$39,404.11	
19 Interest to 3/31/09	17,053.82	
Negligence penalty	<u>3,940.43</u>	
20 Total tax, interest, and penalty	\$60,398.36	
21 Payments	- 414.94	
Balance Due	<u>\$59,983.42</u>	
22 Monthly interest beginning 4/1/09	<u>\$259.93</u>	

24 This matter was originally scheduled for Board hearing on December 17, 2008, but was
25 postponed because petitioner's representative had previous scheduled matters and out-of-state travel.

27 ¹ Petitioner has not specified what portion of the \$467,819 audited unreported sales it disputes, but based on petitioner's
28 contentions and the daily audited sales, we calculate that the disputed measure is \$25,326.

² Petitioner seeks relief of 18 months of interest, which we estimate based on the *current* monthly interest.

UNRESOLVED ISSUES

1
2 **Issue 1:** Whether an additional reduction to unreported taxable sales is warranted to account
3 for days that the business was allegedly closed. We conclude that no additional reduction is warranted.

4 Petitioner, a partnership, did not provide sales journals, purchase journals, general ledgers, cash
5 register tapes, federal income tax returns, or worksheets showing how the sales and use tax returns
6 were prepared, but did provide some guest checks from the second quarter 2004 which the Sales and
7 Use Tax Department (Department) used to estimate unreported taxable sales of \$1,117,895. The
8 Department issued a Notice of Determination based on this measure of deficiency.

9 Petitioner thereafter filed a petition for redetermination and provided additional guest checks so
10 that the Department was able to review guest checks for 20 days during the fourth quarter of 2002, for
11 216 days in 2004, and for 112 days during the first six months of 2005. Based on its calculations using
12 these guest checks, the Department established average daily sales of: \$450.65 for the period October
13 1, 2002, through June 30, 2003; \$2,101.71 for the period October 1, 2003, through December 31, 2004;
14 and \$2,840.87 for the period January 1, 2005, through September 30, 2005. For each quarterly period
15 in the audit, the average sales per day were multiplied by the number of days the business was opened
16 to compute audited taxable sales of \$1,856,519 for the audit period.³ Comparing this amount to
17 reported taxable sales of \$1,388,700, the Department calculated an understatement of \$467,819.

18 Petitioner asserts that an adjustment should be made for the five additional days each year on
19 which the business was closed: Thanksgiving, Easter, the day after Memorial Day, the day after
20 Independence Day, and the day after Labor Day.⁴ However, the Department states that the guest
21 checks provided by petitioner reflect that petitioner's business was open on Easter in 2004 and 2005
22 (April 11, 2004, and March 27, 2005), the day after Memorial Day in 2004 (June 1, 2004), and
23 Thanksgiving in 2002 (November 28, 2002). Petitioner did not provide evidence that the business was
24
25

26 ³ The Department did not include any sales for the third quarter of 2003 because it accepted that the business was closed
27 during a change of location (petitioner reported no sales on its return for that quarter). Except for this period of closure, the
Department concluded that the business was open every day except Christmas.

28 ⁴ Two of these days were during the third quarter 2003, during which the Department regarded the business as closed.
Thus, the total number of days petitioner claims the business was closed that the Department has not allowed is 13.

1 closed during the other days it claims the business was closed. Thus, the Department asserts that no
2 additional adjustment is warranted for days that the business was closed.

3 Petitioner has not provided any documentation to support this contention, such as a complete
4 sales journal listing daily sales totals for each day that the business was open. Furthermore, the guest
5 checks that it did provide show that, on at least four of the days it claims the business was closed, the
6 business was actually opened. We find that petitioner has not shown that its business was closed on
7 any additional days, and we recommend no adjustment for this contention.

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

9 The Department imposed the penalty for negligence primarily due to the lack of records
10 presented for audit. Petitioner argues that the negligence penalty should not be imposed because: this
11 is petitioner's first audit; petitioner's partners are not sophisticated in matters of accounting, and
12 therefore did not know what records to maintain; and one of the partners, Shirley Everett-Dicko,
13 suffers from chronic depression which was severe during the audit period because of the death of her
14 mother and a lawsuit between her and some family members.

15 California Code of Regulations, title 18, section 1698, requires taxpayers to maintain and
16 provide for examination all records necessary to determine the correct tax liability under the Sales and
17 Use Tax Law. Failure to maintain and keep complete and accurate records is evidence of negligence.
18 (Cal. Code Regs., tit. 18, § 1698, subd. (k).)

19 Here, petitioner did not provide for audit sales journals, purchase journals, general ledgers, cash
20 register tapes, federal income tax returns, or worksheets showing how the sales and use tax returns
21 were prepared. Even though it provided guest checks from which the determination was established,
22 these guest checks represented activities for only a portion of the audit period. Ms. Everett-Dicko's
23 medical condition is not a valid excuse. The condition did not prevent her from operating the business,
24 and if she found that depression prevented her from maintaining books and records, then it was her
25 duty to delegate the record keeping to her partner or one of her employees, or hire an outside
26 professional to maintain the books and records. We also note that the understatement of \$467,819
27 represents an error ratio of 33.7 percent when compared to reported taxable sales of \$1,388,700. We
28 conclude that petitioner was negligent and the negligence penalty properly imposed.

1 the final liability pursuant to Revenue and Taxation Code section 7074, subdivision (a). Petitioner
2 filed a request for relief of both penalties, signed under penalty of perjury. The Department
3 recommends that relief from the amnesty penalties be granted.

4 The audit began on August 9, 2005, which is long after the March 31, 2005 deadline for
5 applying for amnesty, and the Department accepts that petitioner did not know that an understatement
6 existed. As such, petitioner has reasonable cause for having failed to apply for amnesty, and we thus
7 recommend that the amnesty penalties be relieved provided that, within 60 days after the mailing of the
8 Notice of Redetermination, petitioner either pays the amnesty-eligible tax and interest, or enters into a
9 qualifying installment agreement and successfully completes that installment agreement.⁵

10 **OTHER DEVELOPMENTS**

11 None.

12
13 Summary prepared by David H. Levine, Tax Counsel IV
14
15
16
17
18
19
20
21
22
23
24
25
26

27 ⁵ The D&R should have conditioned its recommendation for relief of the amnesty penalties on payment or entry into a
28 qualifying installment agreement within 30 days after the Notice of Redetermination rather than 60. Since the Department
has not objected and we did not correct the error well before the hearing, and since we judge the discrepancy as
insignificant in this particular case, we do not alter our recommendation.