

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION SUMMARY FOR BOARD HEARING

3 In the Matter of the Petition for Redetermination)
 4 Under the Sales and Use Tax Law of:)
 5 JULIE LYNN COSSEY, dba) Account Number: SR KHO 100-634448
 6 Brew Ha Ha Pub N' Grub) Case ID 441252
 7 Petitioner) Prather, Fresno County

8 Type of Business: Restaurant with sales of beer and wine

9 Audit period: 08/01/05 – 03/31/07

10 Item Disputed Amount11 Unreported bar sale \$159,821
12 Interest \$ 1,396¹

	<u>Tax</u>	<u>Penalty</u>
13 As determined:	\$21,013.19	\$2,101.34
14 Adjustment - Sales and Use Tax Department	- 6,093.20	<u>-2,101.34</u>
15 - Appeals Division	<u>- 1,775.50</u>	
16 Proposed redetermination, protested	<u>\$13,144.49</u>	<u>00.00</u>
17 Proposed tax redetermination	\$13,144.49	
18 Interest through 8/31/07 (tax paid in full on 8/22/07)	<u>1,395.88</u>	
19 Total tax and interest	\$14,540.37	
20 Payments	<u>-14,540.37</u>	
21 Balance Due	<u>00.00</u>	

22 UNRESOLVED ISSUES

23 **Issue 1:** Whether further adjustments are warranted to the audited amount of taxable bar sales.

24 We recommend no further adjustment.

25 Petitioner operated a restaurant with bar, selling beer and wine, from August 1, 2005, through
 26 March 31, 2007. Petitioner's recorded sales were segregated into three categories: 1) bar sales, with

27 ¹ This amount of interest is less than the \$4,097.68 listed in the D&R. At the time the D&R was written, the payment from
 28 escrow at the time of the sale of the business had not been applied to the liability, and the interest was computed through
 April 30, 2009. The payment, which was effective August 22, 2007, has now been applied, and the interest has been
 calculated through August 31, 2007.

1 sales tax reimbursement included in the selling price; 2) restaurant sales, and 3) sales tax
2 reimbursement collected with respect to restaurant sales.

3 Petitioner stated that, from the time she started her business, she took her records to the District
4 Office each quarter and requested assistance from Sales and Use Tax Department (Department) staff
5 when she prepared the sales and use tax return. The Department does not dispute that statement.
6 Petitioner, following the instruction of the Department as she understood it, totaled the sales amounts
7 recorded in the three categories, bar sales, restaurant sales, and sales tax reimbursement included, and
8 reported that figure as total sales. She then deducted the recorded bar sales as exempt sales of food.
9 As a result, petitioner reported and paid tax on the recorded restaurant sales only.

10 Based on its review and preliminary testing, the Department concluded that petitioner's
11 recorded restaurant sales were substantially accurate. However, it appeared that the recorded bar sales
12 were not complete. Accordingly, the Department established the audited amount of bar sales by
13 determining the amounts of beer and wine purchased, determining the number of drinks those amounts
14 represented, and multiplying the number of drinks by the selling prices.² The Department computed
15 audited selling prices, using information provided on the Bar Fact Sheet and petitioner's menu.³ The
16 Department also made adjustments for Happy Hour selling prices, using petitioner's estimate that 25
17 percent of her sales were made during Happy Hour. The Department made the standard allowances for
18 breakage, over pour and spillage of 1 percent for bottled beer,⁴ 10 percent for draft beer, and 6 percent
19 for wine.

20 Petitioner contended that the allowance for sales at reduced Happy Hour selling prices should
21 be increased and that the pour size for draft beer should be increased from 10 ounces to 12 ounces.
22 The D&R recommends a reaudit to reduce the audited number of drinks sold by 2 percent, to allow for
23 pilferage and shrinkage, and to increase the audited pour size for draft beer from 10 ounces to 12

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25 ² This audit procedure is similar to a markup audit, since it uses known purchases and selling prices to establish audited
26 sales. The distinction between this audit and a standard markup audit is that the Department used the *number* of drinks sold
and the selling prices instead of computing a markup factor and applying that percentage to the *dollar amounts* of recorded
purchases.

27 ³ As noted in the D&R, the Department used a selling price for domestic beer that was \$0.50 less than stated on the Bar
28 Fact Sheet. The Department has not explained the reason for that discrepancy, but it did not revise the selling price in the
reaudit conducted pursuant to the D&R.

⁴ The Department actually applied the 1 percent allowance to purchases of both bottled and canned beer.

1 ounces. The Department has prepared a reaudit, dated June 3, 2009, to make those adjustments. With
2 respect to the contention regarding an increase in the allowance for sales at Happy Hour selling prices,
3 petitioner has provided no supporting documentation. The Department used the estimate provided by
4 petitioner during the audit, and there is no evidence that an increase is warranted. We find that there is
5 no basis for further adjustments to the audited amount of bar sales.

6 **Issue 2:** Whether relief from interest should be granted. We find no basis for relief.

7 Petitioner contends that relief from the interest should be granted because she requested
8 assistance from the Department when she prepared her sales and use tax returns. Petitioner states that
9 her failure to timely report the correct amount of tax was caused by the Department's incorrect
10 direction.

11 The imposition of interest is mandatory, and the law provides for relief from interest in only
12 three circumstances, when the failure to make a timely return or payment was due to a disaster,
13 unreasonable error or delay by a Board employee, or reasonable reliance on written advice from the
14 Board. (Rev. & Tax Code, §§ 6593, 6593.5, 6596.) Petitioner does not contend that her failure to
15 timely pay the tax on her bar sales was due to a disaster or an unreasonable delay or error by a Board
16 employee. Accordingly, we will address only the application of section 6596.⁵

17 Section 6596 provides that relief may be granted from tax, interest, and penalty if a taxpayer's
18 failure to timely report tax was due to his or her reasonable reliance on incorrect written advice from
19 the Board. In this case, petitioner never requested written advice from the Department. In the absence
20 of a written request from petitioner and a written response from the Board, there is no basis upon
21 which to consider relief pursuant to Revenue and Taxation Code section 6596. Further, section 6956,
22 subdivision (b)(3)(A), provides that, with respect to sales tax, relief may be granted only if a person, in
23 reasonable reliance on incorrect written advice from the Board, did not charge or collect sales tax
24 reimbursement from customers with respect to the transactions at issue. In this case, it is undisputed
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27 ⁵ Although petitioner contends that she received incorrect direction, which, if true, could be regarded as an error, it is not
28 the type of error covered by the relief provisions of section 6593.5. Rather, she is complaining about the nature of advice
she was given, and relief based on incorrect advice is covered by section 6596.

1 that petitioner included sales tax reimbursement in the selling prices charged in the bar. For these
2 reasons, we find there is no basis for granting relief of interest pursuant to section 6596.

3 **RESOLVED ISSUE**

4 In the pre-conference reaudit dated July 22, 2008, the Department deleted the negligence
5 penalty. The Department noted that petitioner did request help from the District Office staff when she
6 prepared returns. The Department concluded that the understatement was the result of
7 misunderstanding and not the result of negligence.

8 **OTHER DEVELOPMENTS**

9 None.

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