

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 MICHAEL D. MIDGETT) Account Number: SR KH 53-001846
) Case ID 314399
 6 Petitioner) Turlock, San Joaquin County

7 Type of Liability: Responsible person liability

8 Liability Period: 4/1/02 – 3/31/03

9 <u>Disputed Items</u>	<u>Amounts</u>	
10 Tax and penalties assessed for 1Q03	\$40,175 ¹	
	<u>Tax</u>	<u>Penalties</u>
12 As determined:	\$51,314.00	\$13,222.31
13 Concurred in amount	<u>-17,835.00</u>	<u>- 6,526.51</u>
14 Protested	<u>\$33,479.00</u>	<u>\$ 6,695.80</u>
15 Proposed redetermination	\$51,314.00	
16 Interest to 2/28/09	28,945.61	
17 Penalties for late payment of returns	3,783.50	
18 Penalty for late filing of return	805.00	
19 Penalties for late prepayments	133.26	
20 Penalty for failing to file return	3,347.90	
21 Penalty for failing to timely pay determination	3,347.90	
22 Amnesty interest penalties	<u>1,804.75</u>	
23 Total tax, interest, and penalties	<u>\$93,481.92</u>	
24 Monthly interest beginning 3/1/09	<u>\$342.09</u>	

21 UNRESOLVED ISSUE

22 **Issue:** Whether petitioner has established that the assessment against The Sofa Factory, Inc.
 23 (The Sofa Factory) for the first quarter of 2003 (1Q03) (and therefore derivatively against petitioner) is
 24 overstated. We find that petitioner has not.

25 _____
 26
 27 ¹ Comprised of \$33,479.00 tax, a penalty of \$3,347.90 for failing to file a return, and a penalty of \$3,347.90 for failing to
 28 pay a determination timely. Petitioner has not specified how much of this tax (and associated penalties) he disputes, only
 that he believes the liability assessed against the corporation for the period January 1, 2003, through March 31, 2003,
 should be reduced.

1 Petitioner agrees that he is personally liable as a responsible person for the unpaid liabilities of
2 The Sofa Factory (SR KH 97-221773) for the liability period. The Sofa Factory ceased business in
3 April 2003 and its seller's permit was closed out effective June 30, 2003. At the time, The Sofa
4 Factory had unpaid liabilities resulting from returns filed with partial or no remittance for 2Q02 and
5 4Q02 and a failure to file a return for 1Q03, as well as associated penalties and other penalties incurred
6 during the liability period. The Sales and Use Tax Department (Department) concluded that petitioner
7 was responsible for The Sofa Factory's compliance with the Sales and Use Tax Law and is personally
8 liable for its unpaid liabilities for the liability period pursuant to Revenue and Taxation Code section
9 6829. At the conference, petitioner clarified that he disputes the Department's assessment against The
10 Sofa Factory for 1Q03, but does not otherwise dispute his personal liability for The Sofa Factory's
11 unpaid liabilities or the amount of that liability, or any of the penalties.

12 Since The Sofa Factory failed to file a return for 1Q03 and the Department had no corporate
13 records in its possession, the Department used The Sofa Factory's average daily sales as reported on its
14 sales and use tax returns for 2Q02 through 4Q02 to establish a tax liability of \$33,479 for 1Q03.

15 Petitioner contends that the Department's assessment for 1Q03 was made without any inquiry
16 into The Sofa Factory's records and, without a review of such records, the Department could not have
17 accurately calculated sales or the amount of sales tax reimbursement collected during 1Q03. Also,
18 petitioner contends the Department's use of average daily sales based on 2Q02 through 4Q02 returns
19 resulted in an overstated taxable measure for 1Q03, because The Sofa Factory was going out of
20 business during this quarter and made either minimal or no sales during this time. Following the
21 conference, petitioner submitted various documents but did not provide actual sales figures for 1Q03
22 or the amounts of sales tax reimbursement and use tax collected by The Sofa Factory during this time.

23 The Department responded that, although these various documents are relevant to 1Q03, they
24 are not sufficient to accurately determine if the assessment is overstated because it cannot determine if
25 the bank closing statements reflect all monies collected and disbursed during 1Q03, and which bank
26 deposits are attributable to sales and use tax. The Department also contends that it cannot determine
27 whether all of the records that list or reflect all 1Q03 taxable events have been submitted. The
28 Department states that, in order to determine if any adjustments are warranted, petitioner should file

1 returns for the Sofa Factory for 1Q03 and 2Q03, along with the proper documentation. On July 25,
2 2006, we informed petitioner that he could file these returns, but petitioner has failed to do so.

3 We find that the Department employed an appropriate methodology under the circumstances to
4 determine The Sofa Factory's tax liability following its failure to file a return for 1Q03. Following the
5 appeals conference, petitioner failed to provide evidence sufficient to enable the Department to make a
6 more accurate determination and, without such records, we have no basis on which to verify
7 petitioner's allegation that The Sofa Factory's sales were declining or nonexistent during 1Q03.
8 Accordingly, there is no basis on which to recommend any reduction to the measure of tax.

9 AMNESTY

10 The Sofa Factory incurred 50-percent amnesty interest penalties totaling \$1,804.75 when it
11 failed to apply for amnesty or pay the amnesty-eligible tax and interest due for 2Q02 and 4Q02 by
12 March 31, 2005, as required by the amnesty program. These penalties were included in the
13 determination issued to petitioner.² There is no statutory or regulatory authority for relieving amnesty
14 interest penalties in section 6829 determinations, but section 6592 provides that amnesty interest
15 penalties may be relieved if a person's failure to comply with amnesty was due to reasonable cause and
16 circumstances beyond the person's control and occurred notwithstanding the exercise of ordinary care
17 and in the absence of willful neglect. Thus, if petitioner can establish that The Sofa Factory should be
18 relieved of these penalties, then that would also inure to petitioner's benefit. Although not stated in the
19 D&R, we note that at the appeals conference we explained that relief is available for amnesty interest
20 penalties (as well as the other penalties passed through to petitioner) and that a statement under penalty
21 of perjury is required for us to consider such relief, but petitioner indicated that he does not dispute any
22 of the penalties assessed against The Sofa Factory, including the amnesty interest penalties.

23 OTHER DEVELOPMENTS

24 None.

25 Summary prepared by Rey Obligacion, Business Taxes Specialist III

26 _____
27 ² In accordance with Board policy, since the amnesty-interest penalties incurred by The Sofa Factory have been included in
28 the liabilities asserted against petitioner under section 6829, an additional penalty for petitioner's personal failure to
participate in the amnesty program will not be added to his liability.