

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION SUMMARY FOR BOARD HEARING

In the Matter of the Petition for Redetermination)
Under the Sales and Use Tax Law of:)
GILBERTO GONZALEZ PEREZ,)
dba Latino's Night Club)
Petitioner)

Account Number: SR ARH 97-176033
Case ID 396030

Bakersfield, Kern County

Type of Business: Beer bar
Audit period: 01/01/03 – 06/30/06

<u>Item</u>	<u>Disputed Amount</u>
Unreported sales	\$46,828
Negligence penalty	\$ 343

	<u>Tax</u>	<u>Penalty</u>
As determined:	\$3,431.71	\$343.18
Less concurred	<u>36.68</u>	<u>00.00</u>
Balance, protested	<u>\$3,395.03</u>	<u>\$343.18</u>
Proposed tax redetermination	\$3,431.71	
Interest through 2/28/09	1,443.39	
10% penalty for negligence	<u>343.18</u>	
Total tax, interest, and penalty	<u>\$5,218.28</u>	
Monthly interest beginning 3/2/09	<u>\$ 22.88</u>	

A Notice of Appeals Conference was mailed to petitioner's address of record, and the notice was not returned by the Post Office. Petitioner did not respond to the notice or appear at the appeals conference, which was held as scheduled, nor did petitioner respond to our post-conference letter offering him an opportunity to provide arguments and evidence in writing. This matter was scheduled for Board hearing on August 19, 2008, but petitioner did not respond to the Notice of Hearing. Accordingly, the Board Proceedings Division informed petitioner that the matter would be presented to the Board for decision without oral hearing. Subsequently, petitioner contacted Board Proceedings to request that the case be scheduled for hearing at a Board meeting in the future, stating that he needed

1 additional time to prepare because he has been caring for his ill mother. The matter was then
2 scheduled for Board hearing on October 1, 2008, but was postponed because petitioner's representative
3 was ill.

4 UNRESOLVED ISSUES

5 **Issue 1:** Whether the audited amount of sales established on a markup basis is excessive. We
6 conclude no adjustments are warranted.

7 Petitioner operated a bar, selling bottled beer only, as an absentee owner. The Sales and Use
8 Tax Department (Department) established audited taxable sales on a markup basis, using costs of
9 goods sold from federal income tax returns for 2003, 2004, and 2005, and, since no federal return was
10 provided for 2006, using information from vendors to establish costs of goods sold during the first six
11 months of 2006. The Department then adjusted the audited cost of goods sold for self-consumption of
12 2 percent, bottle breakage of 1 percent, pilferage of 1 percent, and thefts of \$596 in 2004 that were
13 documented by police reports. The Department then added a markup of 349.71 percent, established by
14 shelf test, and compared audited and reported taxable sales to calculate an understatement of \$46,828.

15 Petitioner contends that the cost of goods sold as recorded on his federal returns was too high,
16 but he has not amended those returns or provided any other documentation to show that they were
17 incorrect. Petitioner contends that an adjustment should be made to account for the fact that the
18 business was closed for two months in 2005. However, this was already accounted for in the markup
19 audit method because there should have been no purchases during a period of non-operation. That fact
20 is demonstrated here since the cost of goods sold of \$4,010 reflected on petitioner's 2005 federal return
21 is significantly less than the \$8,580 reported on his 2004 federal return. Petitioner also contends that
22 the audit does not adequately account for burglaries. However, the audit does account for all
23 documented burglaries. Accordingly, we recommend no adjustments.

24 **Issue 2:** Whether petitioner was negligent. We conclude that he was.

25 Petitioner provided no summary records for audit other than the available federal returns, a few
26 purchase invoices, and sales tax worksheets for the first six months of 2006. Petitioner did not provide
27 a sales journal, purchase journal, or cash register tapes for audit. This lack of records is evidence of
28 negligence. In addition, the audited understatement of taxable sales of \$46,828 represents an error rate

1 of approximately 76 percent when compared to reported taxable sales of \$61,924. That large error rate
2 is additional evidence of negligence. We find that petitioner was negligent, and the negligence penalty
3 has been properly applied.

4 **OTHER DEVELOPMENTS**

5 At the October 1, 2008, meeting, petitioner did not present his case to the Board Members, but
6 he provided a list of merchandise purchases for the audit period to staff. Petitioner asserts that the total
7 of those purchases should be substituted for the audited amount of purchases. We conclude that the list
8 of purchases petitioner recently provided is incomplete because it does not reconcile with the amounts
9 petitioner reported on his federal returns. Further, there are several months for which petitioner has
10 listed no purchases. Petitioner claims that he was closed during various time periods, but he has
11 provided no documentation of those business closures. In addition, for the first six months of 2006,
12 petitioner has listed purchases of \$1,475. For that period, the Department contacted petitioner's known
13 vendors, and the total amount of purchases identified by those vendors was \$1,636. For all these
14 reasons, we find that the list of purchases petitioner provided October 1, 2008, is not sufficient to
15 warrant any adjustments.

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19 Summary prepared by Deborah A. Cumins, Business Taxes Specialist III
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MARKUP TABLE

Percentage of taxable vs. nontaxable purchases	100%
Mark-up percentages developed	349.71%
Self-consumption allowed in dollars	\$144 per year
Self-consumption allowed as a percent of total purchases	2%
Breakage allowed in dollars	\$74 per year
Breakage allowed as a percent of total purchases	1%
Pilferage allowed in dollars	\$74 per year
Pilferage allowed as a percent of total purchases	1%
Beer stolen, documented in police report for 2004	\$596