STATE BOARD OF EQUALIZATION
SALES AND USE TAX APPEAL

CALIFORNIA STATE BOARD OF EQUALIZATION

APPEALS DIVISION

PETITION FOR REHEARING

In the Matter of the Petition for Redetermination Under the Sales and Use Tax Law of:	)	
MAIN STREET CALIFORINIA, INC.	)	Account Number: SR Y OH 99-412704 Case ID 224746
Petitioner	)	Phoenix, Arizona

Type of Business: Chain of T.G.I. Friday's restaurants

Audit period: 4/1/98 – 6/30/01

Item	Measure
Unreported mandatory gratuities	$4,084,487
Amnesty interest penalty	$ 79,993

Tax, as determined	$726,112.52
Adjustment: Appeals Division	-391,986.68
Proposed redetermination	$334,125.84
Amount concurred in	- 13,325.96
Protested	$320,799.88
Proposed tax redetermination	$334,125.84
Interest through 12/31/09	301,436.69
Amnesty interest penalty	79,993.42
Total tax and interest	$715,555.95
Payments	- 23,299.34
Balance due	$692,256.61
Monthly interest beginning 1/1/10	$ 1,813.15

The Board heard this matter on June 9, 2009. The issue is whether gratuities petitioner charged and collected for parties of eight of more were taxable mandatory gratuities. The Board upheld petitioner's liability, and petitioner filed a timely petition for rehearing. The petition for rehearing was scheduled for the Board's November 17, 2009, consent calendar but was removed by Honorable Michelle Steel.

UNRESOLVED ISSUE

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

The Board concluded that the subject gratuities were mandatory and therefore taxable. Petitioner contends that: 1) there was no evidence supporting the Board's conclusion that the subject gratuities were mandatory, and petitioner has additional evidence showing that the gratuities were negotiated in advance of the meal service and that a number of petitioner's customers left gratuities less than the suggested 15 percent; 2) even if the gratuities were mandatory, they would still not be subject to sales tax because the tips were retained by petitioner's employees, were never in possession of petitioner, and were not considered part of the employees' wages; 3) the Board's decision is contrary to law because it requires taxpayers like petitioner to comply retroactively with a document retention policy established six to nine years after the period at issue.

All of these contentions were discussed at the Board hearing and were fully considered by the Board in rendering its decision. Regarding the alleged new evidence, petitioner stated in a recent telephone conversation that the evidence is in the form of witness testimony. We note that petitioner's opening brief included declarations from employees, and one of those employees testified at the Board hearing. The Board did not find this evidence sufficient to overcome the presumption that the charges were mandatory, and we have no reason to believe that petitioner's additional witnesses would be any more persuasive.

A rehearing may be appropriate when the Board made an error of law in reaching its decision or when there is newly discovered evidence that was unavailable prior to the Board's decision. (Cal. Code Regs., tit. 18, § 5082, subd. (b).) Here, petitioner has not shown that the Board's decision is wrong, has not provided any new evidence or indicated that it has additional persuasive evidence to support its position, and has not provided any other basis for granting a new hearing. We find the Board's decision in this matter was correct, and petitioner has not provided a sufficient basis to grant the petition. Accordingly, we recommend that the petition for rehearing be denied.

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

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