CALIFORNIA STATE BOARD OF EQUALIZATION

APPEALS DIVISION BOARD HEARING SUMMARY

In the Matter of the Petition for Redetermination Under the Sales and Use Tax Law of:	
LA TORTA GORDA, INC., dba La Torta Gorda	Account Number SR BH 100-890720 Case ID 572008
Petitioner	City and County of San Francisco

Type of Business: Restaurant

Audit period: 07/01/07 – 06/30/10

Item	Disputed Amount		
Unreported taxable sales	$229,720		
Tax as determined and protested		$20,741.42	
Interest through 03/31/13		5,511.18	
Total tax and interest		$26,252.60	
Monthly interest beginning 04/01/13			$ 311.13

UNRESOLVED ISSUE

Issue: Whether adjustments are warranted to the amount of unreported taxable sales. We find no adjustments are warranted.

Petitioner has operated a restaurant serving Mexican-style food since April 2007. While petitioner informed the Sales and Use Tax Department (Department) that its accountant prepares its sales and use tax returns based on cash register z-tapes, the cash register z-tapes were not available for examination. Petitioner provided daily sales journals for 24 various days in April and May 2010, but did not provide any other records, such as guest receipts, purchase invoices, or a purchase journal. Given the incomplete records, the Department observed petitioner's operations on September 2, 2010. Results of this one-day observation test showed total sales of $945.24, excluding sales tax reimbursement, which included taxable sales of food of $758.74, taxable sales of carbonated beverages of $125.00, and sales of cold food to-go of $61.50. The Department also noted that petitioner did not account for its sales of cold food to-go separately. Since more than 80 percent of petitioner's sales were sales of food, and more than 80 percent of the food sales were taxable, the Department concluded that petitioner met the criteria of the 80-80 rule,[1] and all of petitioner's sales were taxable.

From an examination of petitioner's daily sales journals for 24 days in April and May 2010, the Department compiled recorded total sales of $20,286.68, excluding sales tax reimbursement, a daily average of $845.28. The Department multiplied this amount by 90 days to compute audited total sales of $76,075 for the second quarter of 2010 (2Q10), which exceeded reported total sales of $64,875 for 2Q10 by $11,200, representing a reporting error rate of 17.26 percent. The Department applied this error rate to reported total sales of $404,144, excluding sales tax reimbursement, to compute audited total sales of $473,916 for the audit period. Since all of petitioner's sales were considered to be taxable sales based on the 80-80 rule, the Department compared audited total sales with reported taxable sales of $244,195 to compute unreported taxable sales of $229,720 for the audit period.

Petitioner contends that the ratio of 92.50 percent for taxable sales of food based on the observation test on September 2, 2010, is not representative of its taxable sales ratio for the audit period, and therefore, the 80-80 rule does not apply to its sales for earlier periods. Petitioner provided copies of magazine articles with favorable reviews of its restaurant and claims that, due to these favorable reviews, its taxable sales ratio increased in 2010. In addition, petitioner provided an old menu and a new menu (both without dates), and argues that the new menu, which purportedly was used in 2010, includes more taxable food items than the old menu. However, we find that petitioner has not provided sufficient documentation to support its assertion that fewer than 80 percent of its sales of food were taxable sales at some point before the observation test. Therefore, we find that no adjustments are warranted.

OTHER MATTERS

None.

Summary prepared by Lisa Burke, Business Taxes Specialist III

[1] Under, the 80-80 rule, when more than 80 percent of the seller's gross receipts are from the sale of food products and more than 80 percent of the seller's retail sales of food products are taxable, then sales of cold food products sold in a form suitable for consumption on the premises are subject to tax, unless the retailer maintains a separate accounting of sales of cold food to-go. (Cal. Code Regs., tit. 18, § 1603, subd. (c)(1).)