

1 **CALIFORNIA STATE BOARD OF EQUALIZATION**

2 **APPEALS DIVISION FINAL ACTION SUMMARY**

3 In the Matter of the Administrative Protest)
 4 Under the Sales and Use Tax Law of:)
 5 DANSIG, INC.) Account Number: SR EA 13-859320
 6 Taxpayer) Case ID 493691
 7) Tustin, Orange County

8 Type of Business: Seller of frozen lemonade and related ingredients

9 Determination period: 1/1/06 – 12/31/08

<u>Item</u>	<u>Disputed Amount</u>		
Taxable sales at the Rose Bowl	\$998,560		
Negligence penalty	\$12,132		
		<u>Tax</u>	<u>Penalty</u>
As determined:		\$121,316.01	\$12,131.64
Finality penalty			\$12,131.60
Pre-hearing adjustment (finality penalty)			- 12,131.60
Less concurred		- 38,930.31	<u>0.00</u>
Balance, protested		<u>\$ 82,385.70</u>	<u>\$12,131.64</u>
Tax determined, unadjusted		\$121,316.01	
Interest through 03/31/12		30,043.42	
Negligence penalty		<u>12,131.64</u>	
Total tax, interest, and penalties		\$163,491.07	
Payments received		- 97,596.48	
Balance Due		<u>\$ 65,894.59¹</u>	
Monthly interest beginning 04/01/12		<u>\$ 138.36</u>	

22 The Board held a hearing regarding this matter on July 27, 2011, granting Appeals 30 days to
 23 write petitioner, asking specific questions, taxpayer 30 days to provide additional records and to
 24 provide the answers to Appeals' questions, and the Sales and Use Tax Department (Department)
 25 30 days to respond. In light of a document submitted by the Department with its response that had not

26 _____
 27 ¹ If the Board were to accept our recommended post hearing adjustment, the tax and penalty would be reduced to
 28 \$82,839.88 and \$8,283.99, respectively, and there would be no further monthly interest because payments would exceed the tax due.

1 previously been part of the record, taxpayer was given the opportunity to make an additional
2 submission.

3 UNRESOLVED ISSUES

4 **Issue 1:** Whether taxpayer was the retailer of the subject lemonade and other products sold at
5 the Rose Bowl. We conclude that taxpayer was the retailer of lemonade but not of the other products.

6 Sales of lemonade and other products were made at the Rose Bowl under an agreement signed
7 with Service America Corporation, dba Centerplate, Inc. (Centerplate) by Mr. Lane Vallier on
8 taxpayer's behalf. Taxpayer contends that it sells only lemonade and that Mr. Vallier did not have the
9 authority to sign the contract on its behalf, and further contends that it was not aware of the contract
10 until after the period at issue here. Taxpayer argues that it sells lemonade for resale, and that is what it
11 did here. It has stated that it received only a straight price per cup of its lemonade sold at retail, but has
12 also stated that its agreement with Mr. Vallier provided for sharing of the proceeds from sales of
13 lemonade at the Rose Bowl, after payment of Centerplate's commission and deduction of expenses.
14 Taxpayer has also conceded that it owes tax on *its share* of the proceeds from sales of lemonade,² but
15 contends it does not owe sales tax on Mr. Vallier's share of proceeds from the sales of lemonade, and
16 contends that it does not owe any sales tax with respect to the other products sold at the Rose Bowl
17 under the agreement that Mr. Vallier signed in taxpayer's name.

18 We conclude that the evidence shows that taxpayer and Mr. Vallier entered into a joint venture
19 under which taxpayer must have known that an agreement was required with the Rose Bowl to make
20 sales of taxpayer's lemonade at that facility (whether the agreement was oral or written). Some of the
21 evidence in support includes: that taxpayer issued a billing to "Dansig Special Events" rather than to
22 Mr. Vallier (or his company) as taxpayer apparently did when actually selling lemonade for resale for
23 other special events; that during the Department's investigation, Centerplate indicated that Mr. Sigaty
24 was the contact person; and that a Certificate of Insurance was issued by taxpayer's insurance
25 company to Centerplate on taxpayer's behalf. We do not believe that the insurance certificate would
26

27 ² It appears that this may be a "reluctant" concession in the nature of a concession that, *if* taxpayer owes anything, this is the
28 maximum amount, but when we offered taxpayer the opportunity to clarify its concession, taxpayer did not do so.

1 have been issued if taxpayer had not understood that the sales made at the Rose Bowl were being made
2 under its seller's permit. We note further that taxpayer's lawsuit against Mr. Vallier in state court
3 explicitly characterizes the agreement as a joint venture, and strongly implies that the alleged breach of
4 contract and fraud was not because of sales of lemonade at the Rose Bowl under taxpayer's seller's
5 permit, but for selling products *other* than lemonade under its permit, and not remitting Mr. Vallier's
6 share of the sales tax to the Board.

7 In sum, we find that taxpayer authorized retail sales of lemonade at the Rose Bowl under its
8 seller's permit, and therefore owes sales tax on the \$1,004,119 gross receipts from those sales (and not
9 just on the \$471,936, which represents taxpayer's allocated share of the gross receipts based on its
10 percentage share of the agreement with Mr. Vallier). However, while the evidence amply supports
11 taxpayer's liability for sales tax on the total gross receipts from sales of lemonade at the Rose Bowl,
12 there is not sufficient evidence for us to find that taxpayer authorized or knew about the sales of other
13 products by Mr. Vallier. We find, based on the record before us, that in making those sales of other
14 products, Mr. Vallier acted on his own behalf, without the authority or knowledge of taxpayer. We
15 therefore conclude that taxpayer should not be held liable for sales tax on the sales of products other
16 than lemonade, measured by \$466,377.

17 **Issue 2:** Whether taxpayer was negligent. We conclude that it was.

18 While we accept that, in hindsight, taxpayer probably realizes it made some very bad business
19 decisions regarding its agreement with Mr. Vallier, the circumstances are such that we are unable to
20 reach a conclusion other than that it was negligent in failing to report and pay *any* sales tax on its retail
21 sales of lemonade at the Rose Bowl.

22 **RESOLVED ISSUE**

23 Taxpayer incurred a finality penalty of \$12,131.60 when it failed to pay the tax assessed in the
24 April 24, 2009 Notice of Determination (NOD) within 30 days of its issuance. Taxpayer contends that
25 it did not receive that NOD but learned of the tax assessment in an April 29, 2009 letter from the Board
26 which included a copy of the April 21, 2009 Field Billing Order (FBO). Taxpayer filed its appeal on
27 May 27, 2009, within 30 days of the April 29, 2009 letter, but more than 30 days after the NOD.

28 The D&R recommends that relief of the finality penalty be denied. However, upon further

1 review, we reverse that recommendation. The 30th day after issuance of the NOD was on a weekend,
2 and the following Monday was Memorial Day, so the last date on which a timely petition could have
3 been filed was May 26, 2009. Taxpayer filed its appeal one day late. Furthermore, the April 29, 2009
4 letter transmitted the FBO on which the NOD was based to taxpayer, indicating that if taxpayer did not
5 respond within ten days, the FBO would be forwarded to headquarters for processing. This seems to
6 imply that the NOD had not yet been issued.

7 We find that under the circumstances of this case, relief is warranted. We therefore reverse our
8 prior recommendation on this issue, and instead recommend that the finality penalty be relieved
9 provided that taxpayer pays all remaining tax due within 30 days after the mailing to taxpayer of notice
10 of the Board's final decision in this appeal.

11 **OTHER MATTERS**

12 As of the writing of this summary, the Department has advised us that it will soon also issue a
13 Notice of Determination to Mr. Lane Vallier for the liability at issue here.

14
15 Summary prepared by David H. Levine, Tax Counsel IV
16
17
18
19
20
21
22
23
24
25
26
27
28