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:	
IRMA OSUNA, dba Del Rey Seafood	Account Number SR AA 100-209653 Case ID 847485
Petitioner	Downey, Los Angeles County

Type of Business: Restaurant

Audit period: 10/01/09 – 03/31/13

Item	Disputed Amount
Unreported taxable sales	$173,180

Tax as determined and protested	$16,057.68
Interest through 07/31/16	4,918.01
Total tax, interest, and penalty	$20,975.69
Monthly interest beginning 08/01/16	$ 289.13

UNRESOLVED ISSUE

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

Petitioner operated a restaurant from May 15, 2003, until March 31, 2013. For audit, petitioner provided federal income tax returns (FITR's) for 2010, 2011, and 2012, bank statements, monthly financial reports, and credit card merchant statements for the period October 1, 2009, through June 30, 2012. Petitioner also provided cash register tapes for the period November 18, 2012, through November 30, 2012.

The Business Tax and Fee Department (Department), formerly the Sales and Use Tax Department, found total sales reported on petitioner's sales and use tax returns were materially consistent with gross receipts reported on the FITR's. The Department computed book markups of 233.78 percent for 2010, 206.10 percent for 2011, and 204.03 percent for 2012, which were considered adequate for a restaurant. However, since petitioner failed to provide source documents such as cash register tapes or merchandise purchase invoices, the Department decided to verify reported sales using a credit card to total sales ratio.

Using the available cash register tapes for the 13-day period (November 18, 2012, through November 30, 2012), the Department computed that credit card sales represented 59.08 percent of total sales and 6.78 percent of the amount charged on credit cards represented optional tips.[1] The Department reduced credit card deposits for the period October 1, 2009, through June 30, 2012, by optional tips, computed at 6.78 percent, and divided the remainder by 59.08 percent to audited taxable sales of $637,440 for the period October 1, 2009, through June 30, 2012, which exceeded reported taxable sales of $477,905 for that same period by $159,535, which represents a 33.38 percent error rate.

Since credit card deposits were not available for the period July 1, 2012, through March 31, 2013, the Department could not use the ratio of credit card sales to compute audit taxable sales for that period. The Department accepted petitioner's reported taxable sales in the third quarter of 2012 (3Q12) and the 1Q13 because reported taxable sales in these quarters were consistent with audited quarterly taxable sales for the period October 1, 2009, through June 30, 2012. The Department applied the 33.38 percent error rate to reported taxable sales in the 4Q12 to compute unreported taxable sales of $13,645 for the 4Q12. In total, the Department computed unreported taxable sales of $173,180 ($159,535 + $13,645) for the audit period.

Petitioner contends that audited taxable sales are excessive, asserting that the 59.08 percent credit card to total sales ratio is not representative. Petitioner states that most of her customers use credit cards to pay for the meals purchased at the restaurant.

Initially, we note that petitioner's records were incomplete and inadequate. Petitioner did not provide POS sales reports, even though she claims that she used her computerized point of sales (POS) system to ring up all the sales during the audit period. In addition, petitioner did not provide cash register tapes or sales tax worksheets for the entire audit period. Thus, in light of the incomplete records, the Department determined that sales could not be verified by a direct audit approach and reliance could not be placed on the petitioner's records, and we concur with that conclusion. Under

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[1] The Department did not perform an observation test at the business because petitioner no longer operated the business at the time the audit was conducted.

those circumstances, the Department was required to calculate audited sales from whatever information was available using indirect audit methods to determine the correct tax liability. (Business Tax and Fee Department Audit Manual §§ 0404.05, 0407.05.) Consequently, we find that the Department was justified in establishing audited taxable sales using the ratio of credit card to total sales computed from available cash register tapes for a 13-day period.

As to our analysis of the audit findings, we note that, after the appeals conference, the Department (with petitioner's assistance) was able to obtain sales reports for the 1Q13 from the POS System at the business, which is currently operated by the new owner. The Department was also able to acquire credit card deposit information for the 1Q13 from forms 1099K. Using sales information from the POS system, the Department computed that credit card sales represented 52.01 percent of total sales. The Department also compared credit card deposits for the 1Q13 on the form 1099K (reduced by optional tips and sales tax included) with reported taxable sales in the 1Q13 (which the Department previously accepted as be accurate) and computed that credit card sales represented 52.01 percent of total sales. Both these ratios of credit card sales are lower than the 59.08 percent ratio of credit card sales computed in the audit, and if used would increase the measure of unreported taxable sales. Thus, we conclude that this information from 1Q13 is evidence that the results of the audit are reasonable, and petitioner has provided no evidence to support an adjustment. Accordingly, we find no adjustment is warranted.

OTHER MATTERS

None.

Summary prepared by Gary A. Lomazzi, Business Taxes Specialist II