

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
GUISTOMANGIA, INC.

) OTA Case No. 18093823
) CDTFA Case ID: 835479
) CDTFA Account No. 97-959020
) Date Issued: June 7, 2019
)
)

OPINION

Representing the Parties:

For Appellant:

Sepideh Ghiasvand, Esq.
Gary Wong, Corporate President

For Respondent:

Scott A. Lambert, Hearing Representative

For Office of Tax Appeals:

Deborah Cumins,
Business Tax Specialist III

J. ANGEJA, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 6561, Guistomangia, Inc. (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA) denying appellant’s timely petition for redetermination of a Notice of Determination (NOD) which assessed a liability of \$258,745.09 of additional tax and applicable interest,¹ for the period April 1, 2010, through January 31, 2013.

Appellant waived its right to an oral hearing, and therefore, the matter is being decided based on the written record.

ISSUE

Whether appellant has established that adjustments are warranted to the audited understatement of reported taxable sales.

¹ The NOD included a negligence penalty, but that penalty has been deleted by CDTFA in its Decision dated August 21, 2018.

FACTUAL FINDINGS

1. Appellant operated a restaurant in Pinole, California, from December 2001 through January 2013.
2. During the audit period, appellant filed sales and use tax returns reporting total sales and taxable sales of \$462,350, claiming no deductions.
3. Appellant's corporate president, Gary Wong, informed CDTFA that reported sales were based on the restaurant's Point of Sale (POS) system records, but he stated that those records had been destroyed in a flood before the audit commenced.
4. Appellant provided the following books and records for audit: federal income tax returns for 2009, 2010, and 2011; 1099-K² merchant statements for 2011 and 2012; and bank statements for the entire audit period.
5. Appellant did not provide daily cash register Z-tapes or guest checks, sales journals, merchandise purchase invoices or journals, financial statements, or general ledgers. CDTFA concluded that the records appellant provided were incomplete for sales and use tax purposes.
6. The amounts reported on federal income tax returns for 2009, 2010, and 2011 reconciled with amounts reported on the sale and use tax returns (SUTR's). The available bank statements included credit card sales for the period April through September 2010, and show no credit card deposits for the remainder of the audit period, October 1, 2010, through January 31, 2013. In addition, the amounts of taxable sales reported on SUTR's were all rounded amounts.³ For the foregoing reasons, CDTFA concluded that further investigation was warranted.
7. To establish audited total sales, CDTFA added the cash deposits recorded on the bank statements and credit card receipts scheduled from forms 1099K.⁴ It reduced audited

² Form 1099-K, also called Payment Card and Third Party Network Transactions, is used by credit card companies and third-party processors like PayPal and Amazon to report the payment transactions they process for retailers or other third parties.

³ The amount on one return was rounded to the 10's digit, the amounts for six quarters were rounded to the 100's digit, and for four quarters to the 1,000's digit.

⁴ 1099K forms were not available for the period October 1, 2010, through March 31, 2011, or for the month of January 2013. To establish credit card receipts for those periods, CDTFA used the available credit card receipts to compute quarterly and monthly averages.

total sales by the amount of sales tax included⁵ to establish audited taxable sales of \$3,285,557, which exceeded reported taxable sales of \$462,350 by \$2,823,207, which is the disputed amount of underreported taxable sales at issue here.

8. To validate its findings, CDTFA gathered appellant's purchase information from known vendors and added estimated markups (based on experience in auditing similar businesses) of 200 percent for food and 300 percent for beverages, thus computing taxable sales of \$4,630,680, which substantially exceeded audited taxable sales of \$3,285,557.
9. On June 16, 2014, CDTFA issued the NOD proposing additional tax of \$258,745.09, a negligence penalty of \$25,874.49, plus applicable interest.
10. Appellant filed a timely petition for redetermination on July 14, 2014.
11. On August 21, 2018, CDTFA issued a Decision deleting the negligence penalty and making no adjustments to the audited understatement of reported taxable sales. This timely appeal followed.

DISCUSSION

California imposes sales tax on a retailer's retail sales in this state of tangible personal property, measured by the retailer's gross receipts, unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, § 6051.) All of a retailer's gross receipts are presumed subject to tax, unless the retailer can prove otherwise. (R&TC, § 6091.) Although gross receipts derived from the sale of "food products" are generally exempt from the sales tax, sales of hot foods and sales of food served at a restaurant, for consumption at the retailer's facilities, are subject to tax. (R&TC, § 6359, subs. (a), (d)(2), (d)(7).)

When CDTFA is not satisfied with the amount of tax reported by the taxpayer, or in the case of a failure to file a return, CDTFA may determine the amount required to be paid on the basis of any information which is in its possession or may come into its possession. (R&TC, § 6481, 6511.) In the case of an appeal, CDTFA has a minimal, initial burden of showing that its determination was reasonable and rational. (See *Schuman Aviation Co. Ltd. v. U.S.* (2011) 816 F.Supp.2d 941, 950; *Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514; *Appeal of Michael E.*

⁵ Appellant stated that tips were paid from cash daily. Therefore, CDTFA concluded that the amount of cash deposited in the bank represented cash sales, net of cash tips and tips paid by credit card. As a result, CDTFA did not make a separate adjustment for tips included in credit card receipts.

Myers (2001-SBE-001) 2019 WL 1187160.) Once CDTFA has met its initial burden, the burden of proof shifts to the taxpayer to establish that a result differing from CDTFA's determination is warranted. (*Riley B's, Inc. v. State Bd. of Equalization* (1976) 61 Cal.App.3d 610, 616.)

Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (See *Ibid*; see also, *Appeal of Aaron and Eloise Magidow* (82-SBE-274) 1982 WL 11930.)

As explained above, appellant provided no sales records, and the bank statements it provided did not include the credit card receipts for 28 of the 34 months of the audit period. In the absence of reliable records, we find that it was appropriate for CDTFA to use an indirect audit method to establish audited taxable sales.

CDTFA used the amounts of cash deposited, as reflected in the bank statements provided by appellant, to establish audited cash sales. It used credit card receipts, reported by third parties on Forms 1099K, to establish audited credit card sales. Further, CDTFA's mark-up test provides strong secondary support for the audited understatement. Accordingly, we find that CDTFA has carried its burden of establishing a reasonable and rational basis for its determination, and the burden then shifts to appellant to establish that a result differing from CDTFA's determination is warranted.

On appeal, appellant has not raised any specific contentions regarding the accuracy of the audit findings. Instead, in its opening brief, appellant requests a reduction of the liability on the basis that it does not have the ability to pay the entire amount.⁶ Appellant also requests that all fees and penalties be waived.

We first note that the negligence penalty has already been deleted, and there are no fees included in the liability. The remaining amount due represents tax and interest only.

Second, as noted above, CDTFA has used the best available information to establish the audited amount of taxable sales, and appellant has provided no evidence from which a more accurate determination may be made. Accordingly, we find that appellant has failed to establish that any adjustments are warranted to the audited understatement of reported taxable sales.

Finally, although the foregoing is dispositive, we note that appellant asserts that after the audit period it sold its business to a successor, and appellant asserts that CDTFA assessed a tax

⁶ With regard to appellant's assertions that the determined liability is unfair and that appellant does not have the funds to pay the liability, while we empathize with appellant's situation, inability to pay does not provide a basis for reducing or deleting the liability. Following this appeal, appellant may wish to contact CDTFA to discuss payment plan or settlement options.


liability of approximately \$133,000 against the successor. We are aware of nothing in the Sales and Use Tax Law that would allow CDTFA to collect twice on a liability; however, collection and payment issues are not before us. Appellant may wish to contact CDTFA to confirm the status of the account.

HOLDING


Appellant has failed to establish that adjustments are warranted to the audited understatement of reported taxable sales.

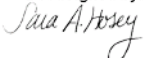
DISPOSITION

CDTFA's action in deleting the negligence penalty, but otherwise denying the petition for redetermination, is sustained.

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Jeffrey G. Angeja
Administrative Law Judge

We concur:

DocuSigned by:

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Michael F. Geary
Administrative Law Judge

DocuSigned by:

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Sara A. Hosey
Administrative Law Judge