OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18011962
	) CDTFA Case ID: 915461
MARC D. MEZZETTA	) CDTFA Account No. 101-538079
dba Marc Mezzetta's Deli & BBQ	)
	) Date Issued: July 15, 2019
	)

OPINION

Representing the Parties:

For Appellant: Marc D. Mezzetta

For Respondent: Scott Lambert, Business Tax Specialist III
Pamela Bergin, Tax Counsel III

J. ANGEJA, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Marc D. Mezzetta (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA),[1] on a timely petition for redetermination of a Notice of Determination assessing a tax deficiency of $7,469.06, plus applicable interest, and a $746.92 penalty for negligence, for the period October 1, 2011, through December 31, 2014.[2]

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

[1] Sales taxes were formerly administered by the State Board of Equalization (board). In 2017, functions of the board relevant to this case were transferred to the California Department of Tax and Fee Administration (CDTFA). (Gov. Code, § 15570.22; 2017 Stats. 2017, ch. 16, § 5.) When referring to acts or events that occurred before June 1, 2017, "CDTFA" shall refer to the board; and when referring to acts or events that occurred on or after June 1, 2017, "CDTFA" shall refer to CDTFA.

[2] The tax of $7,469.06 is based on an aggregate measure of $83,636, consisting of $53,636 in unreported taxable sales during the audit period and $30,000 in unreported sales of fixtures and equipment upon the sale of appellant's businesses. Appellant has conceded that tax applies to the $30,000 sale of fixtures and equipment, and CDTFA has deleted the negligence penalty because this was appellant's first audit. Accordingly, only the $53,636 measure of tax remains in dispute.

ISSUE

Whether appellant has established that reductions are warranted to the measure of unreported taxable sales established in the audit.

FACTUAL FINDINGS

1. During the audit period, appellant operated two delicatessens, located in Cotati and Sebastopol, California. At each location appellant had seating facilities and sold hot and cold food such as sandwiches, meats, cheeses, and other deli items, as well as beer, wine, and other beverages. Appellant sold the Cotati location on December 31, 2014, and he sold the Sebastopol location on September 30, 2016.
2. CDTFA audited appellant for the period October 1, 2011, through December 31, 2014. For the audit, appellant provided his sales logs, profit and loss statements, bank statements, cash register Z-tapes for the month of December 2014, and federal income tax returns. After examining appellant's records, CDTFA initially determined that appellant had underreported his taxable sales by a measure of $53,636 during the audit period.
3. CDTFA determined the $53,636 measure based upon its analyses of (1) the credit-card sales-ratio for the Cotati location, and (2) the taxable sales-ratio reflected in appellant's Z-tapes for the Sebastopol location.
4. After further review, CDTFA agreed to reduce the $53,636 measure of tax to a measure of $26,355, based on its analysis of appellant's sales tax accrual account and its reported sales tax. Specifically, appellant's sales tax accrual account shows that appellant collected sales tax reimbursement from its customers in the amount of $60,395; however, appellant only reported sales tax on its sales and use tax returns in the amount of $58,099, reflecting unreported tax of $2,296, which corresponds to a measure of tax of $26,355.
5. On June 26, 2017, CDTFA's Appeals Bureau issued a Decision and Recommendation recommending, as relevant here, that the measure of tax for unreported sales be reduced from $53,636 to $26,355. The remaining aggregate measure of tax is $56,355 ($26,355 for unreported taxable sales + $30,000 for the sale of fixtures and equipment, as noted in footnote 2). 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 food served at a restaurant and sales of hot food are subject to tax. (R&TC, § 6359, subds. (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.* (D. Hawaii 2011) 816 F.Supp.2d 941, 950; *Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514; *Appeal of Michael E. Myers* (2001-SBE-001) 2001 WL 37126924) 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.)

Here, CDTFA based its determination of the disputed measure of tax on appellant's own records, which show that appellant collected $2,296 in sales tax reimbursement that it failed to remit to the state. Accordingly, we find that CDTFA has established that its determination is reasonable and rational, and the burden shifts to appellant to establish that a result differing from CDTFA's determination is warranted.

On appeal, appellant asserts that he paid all the sales tax applicable to his taxable sales. In support of his position he has provided a computer printout that appellant obtained from CDTFA, which lists payments that appellant made to CDTFA from November 24, 2010, through January 12, 2015. The payments on the printout total $60,043.78. Appellant has hand-written onto the printout two additional payments totaling $3,861 and argues that he has paid $64,704.78 in taxes for the audit period. Based on the foregoing, appellant asserts that he has not underpaid his tax liability.

First, we note that appellant has offered neither argument nor evidence to show that the Department's determination is incorrect. Specifically, appellant has not addressed the difference between appellant's accrued sales tax liability *recorded in his own records* and his reported sales tax, which is the basis for the remaining liability at issue herein.

Instead, appellant argues that he has already paid tax of $64,704.78 in tax, which is more than the amount of tax that he reported during the audit period of $58,099. There is no evidence that appellant paid more tax than he reported on his tax returns, and indeed the evidence indicates that appellant's list of payments includes payments for penalties and interest, which are not tax. Furthermore, appellant has not substantiated the two hand-written, alleged tax payments.

Thus, we are not persuaded that appellant paid more tax than he reported during the audit period, and we conclude that appellant has failed to establish any error in CDTFA's determination.

HOLDING

Appellant failed to establish that reductions are warranted to the measure of unreported taxable sales established in the audit.

DISPOSITION

CDTFA's action in reducing the aggregate measure of tax from $83,636 to $56,355 and deleting the negligence penalty, but otherwise denying the petition, is sustained.

DocuSigned by:
Jeff Angeja
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Jeffrey G. Angeja
Administrative Law Judge

We concur:

DocuSigned by:
Michael F. Geary
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Michael F. Geary
Administrative Law Judge

DocuSigned by:
Tommy Leung
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Tommy Leung
Administrative Law Judge