OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No.: 18093760
	CDTFA Case ID: 915701
UBOLSIRI KOIKE &	CDTFA Acct. No.: 102-024806
FUENG ADISORNKUL	
	Date Issued: October 14, 2019

OPINION

Representing the Parties:

For Appellants:	Ubolsiri Koike Watthawoot Koike, Representative
For Respondent:	Scott A. Lambert, Hearing Representative Pamela Bergin, Acting Assistant Chief Counsel Lisa Renati, Supervising Tax Auditor III
For Office of Tax Appeals:	Deborah Cumins, Business Taxes Specialist III

D. CHO, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Ubolsiri Koike & Fueng Adisornkul (appellants) appeal an action by respondent California Department of Tax and Fee Administration (CDTFA)[1] denying appellants' timely petition for redetermination of a Notice of Determination, assessing additional tax of $92,707.54, plus applicable interest, for the period April 1, 2012, through March 31, 2015.[2]

Office of Tax Appeals Administrative Law Judges Daniel K. Cho, Jeffrey G. Angeja, and Nguyen Dang held an oral hearing for this matter in Los Angeles, California, on July 24, 2019. At the conclusion of the hearing, the record was closed, and this matter was submitted for decision.

[1] Prior to July 1, 2017, CDTFA's sales and use tax functions were administered by the State Board of Equalization (BOE). (See Gov. Code, § 15570.22.) Therefore, for ease of reference, when referring to acts or events that occurred prior to July 1, 2017, CDTFA shall refer to BOE.

[2] The Notice of Determination included a negligence penalty of $9,270.82, but that penalty has been deleted by CDTFA. Therefore, it is not at issue in this appeal.

ISSUE

Whether adjustments are warranted to the determined measure of tax.

FACTUAL FINDINGS

1. Appellants have operated a restaurant specializing in Thai-style cuisine since April 2011.
2. For the audit period, appellants reported total sales of $2,033,608, claimed deductions for sales tax included of $137,721, and reported taxable sales of $1,895,887.
3. In its preliminary review, CDTFA found that gross receipts reported on federal income tax returns (FITR) reconciled with total sales reported on sales and use tax returns; the gross receipts reported on the FITR's achieved markups on cost of 210.74 percent for 2012 and 156.78 percent for 2013; and the amounts deposited in the bank for the last three quarters of 2014 (the only periods for which bank statements were provided) exceeded reported total sales by $142,341.[3]
4. Since the achieved markups were lower than expected and there were discrepancies between bank deposits and reported total sales, CDTFA decided additional investigation was warranted.
5. CDTFA conducted an audit of the business using a credit card to total sales ratio method. It used the Point of Sale system (POS) records provided by appellants for the period November 6, 2014, through March 31, 2015, and determined that credit card sales represented 65.30 percent of total sales. CDTFA also conducted a one-day observation test on April 16, 2015, and it computed a credit card to total sales ratio for that day of 72.43 percent. Because the percentage for the one-day observation test was close enough to the overall 65.30 percent, computed using the POS records, CDTFA concluded that it did not need to conduct any additional observation tests. Instead, CDTFA believed that the overall credit card to total sales ratio of 65.30 percent was an accurate representation of the entire audit period because it encompassed a much more expansive time period (November 6, 2014, through March 31, 2015).

[3] As the audit progressed, CDTFA also found that the taxable sales recorded in appellants' Point of Sale system (POS) for the first quarter of 2015 exceeded reported taxable sales by $57,076 ($280,777 - $223,701), which represented an understatement of 25.51 percent.

6. CDTFA totaled appellants' credit card receipts for the period April 1, 2012, through November 30, 2014, and reduced that amount by tips[4] and the amount of sales tax included. CDTFA then divided the credit card receipts, net of tax and tips, by 0.6530 to compute audited total taxable sales of $2,563,594 for the period April 1, 2012, through November 30, 2014. It added the sales recorded on the POS of $89,325 for December 2014, and $280,777 for the first quarter 2015 to compute total taxable sales of $2,933,696 for the audit period, which exceeded reported taxable sales of $1,895,887 by $1,037,809.
7. CDTFA issued a Notice of Determination on July 27, 2015, showing tax and penalty of $92,707.54 and $9,270.82, respectively.
8. On August 26, 2015, appellants filed a petition for redetermination, protesting the entire liability.
9. On July 18, 2018, CDTFA issued a Decision in which it deleted the negligence penalty but made no adjustment to the determined measure of tax.
10. Appellants filed this timely appeal.

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 sold in a heated condition and food sold for consumption on or off the premises of the retailer are subject to tax. (R&TC, § 6359, subds. (a), (d)(1), & (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 Myers* (2001-SBE-001) 2019 WL 1187160.) Once CDTFA has met its initial burden,

[4] CDTFA calculated the tips percentage to be 10.44 percent based on the POS records.

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 Magidow* (82-SBE-274) 1982 WL 11930.)

Here, CDTFA calculated a credit card sales ratio using data from approximately five months of POS records that were provided by appellants during the audit of the business. CDTFA then divided the amounts on appellants' 1099-K[5] statements for the entire audit period by the credit card sales ratio to establish total audited taxable sales. CDTFA determined the tax liability at issue by reducing the audited taxable sales by the reported taxable sales. This method is both reasonable and rationale because CDTFA used appellants' records to calculate the determined measure of tax. Accordingly, the burden of proof shits to appellants to establish error in CDTFA's determined measure of tax.

On appeal, appellants' primary contention is that CDTFA's use of the POS records data is not accurate. Instead, appellants argue that their tax liability should be based on the one-day observation test's calculation of the business's credit card to total sales ratio, which was 72.43 percent. Appellants state that throughout the audit of the business there were multiple audit reports that each contained different figures. As a result, appellants were confused as to how CDTFA obtained different figures, and appellants believe that the POS records data is unreliable as it caused different results on three separate occasions.

While CDTFA conceded that the audit of the business went through changes and revisions on more than one instance, CDTFA pointed out that the initial audit schedules indicated that these findings were subject to review. It was during the review process that CDTFA determined that the initial schedules contained errors, and that subsequent adjustments were necessary to correct those errors. Furthermore, there is no statute or regulation in the Sales and Use Tax Law that prevents CDTFA from reviewing its initial findings to ensure that the correct tax liability is determined.

In addition, CDTFA provided the POS records as part of its exhibit A, and appellants have not pointed to any errors or inconsistencies within that data. Instead, appellants' concern is with the interpretation of the POS records, and appellants are unwilling to accept CDTFA's

[5] Federal Form 1099-K, "Payment Card and Third Party Network Transactions," is a form used by credit card companies and third-party processors (payment settlement agencies) to report the gross amount of reportable payments made to the taxpayer by the payment settlement agency.

subsequent interpretation of those records even though CDTFA provided an explanation as to the reason for the changes to the audit. Specifically, CDTFA explained that during a review of the initial findings, CDTFA discovered that appellants had collected excess tax reimbursement by collecting sales tax reimbursement on transactions that were not subject to sales tax or collecting too much sales tax reimbursement on certain transactions. It was this issue that led CDTFA to recalculate appellants' liability and properly account for the excess tax reimbursement. Appellants have not disputed this explanation, and our review of the audit working papers confirms that CDTFA's audit of the business was performed correctly. Therefore, we find that the POS records are reliable and accurately represented appellants' business transactions for the approximate five-month period during the audit liability.

Lastly, with respect to appellants' argument that CDTFA's audit should be based on the credit card sales ratio calculated from the one-day observation test, the percentage of credit card sales to total sales, like any other benchmark for establishing audited sales, fluctuates from day to day. As a result, the reliability of the audited percentage increases as the period of review increases. Since we previously found that the POS records are reliable, we conclude that a percentage computed from almost five months of appellants' records is more representative of appellants' business than a percentage computed from sales for only one day.

In the alternative, appellants argue that if we accept that the credit card sales ratio should be computed from the POS records, then the credit card sales ratio should still be adjusted to 75.66 percent. Appellants explain that their calculation of this ratio includes all of their credit card sales and "other 1099K category payments (Groupon, Living Social, etc.)." However, CDTFA's percentage of *credit card sales* to total sales was calculated by using only all known *credit card deposits*. Thus, the base of the computation (credit card deposits from sales) does not include other types of "1099K category payments," and to include a calculation of credit card sales with other deposits would not produce an accurate estimate of taxable sales.

Based on the foregoing, we find that appellants have not met their burden of establishing an error with CDTFA's determined measure of tax.

HOLDING

No adjustment is warranted to the determined measure of tax.

DISPOSITION

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

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Daniel Cho
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Daniel K. Cho
Administrative Law Judge

We concur:

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

DocuSigned by:
Nguyen Dang
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Nguyen Dang
Administrative Law Judge