

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18012082
THE ARMENIAN CAFÉ, INC.) CDTFA Case No. 943835
) CDTFA Account No. SR FH 97-846038
)
) Date Issued: October 29, 2019
)

OPINION

Representing the Parties:

For Appellant:	Jim Taleb, Representative Eddy Shakarjian, President
For Respondent:	Scott Lambert, Hearing Representative Lisa Renati, Hearing Representative Dana Flanagan-McBeth, Tax Counsel IV
For Office of Tax Appeals:	Lisa Burke, Business Taxes Specialist III

N. DANG, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 6561, The Armenian Café, Inc. (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA) denying appellant's petition for redetermination of a Notice of Determination (NOD) for the period January 1, 2012, through December 31, 2014.¹

Office of Tax Appeals (OTA) Administrative Law Judges, Nguyen Dang, Jeffrey G. Angeja, and Kenneth Gast, held an oral hearing for this matter in Los Angeles, California, on September 17, 2019. At the conclusion of the hearing, the record was closed and this matter was submitted for decision.

ISSUE

Whether any reduction to the measure of unreported taxable sales is warranted.

¹ Prior to July 1, 2017, CDTFA's sales and use tax functions were administered by the State Board of Equalization (SBE). (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 SBE.

FACTUAL FINDINGS

1. Appellant operated a restaurant in Carlsbad, California from April 1, 2001, through December 31, 2015.
2. Appellant initially provided CDTFA with its federal income tax returns, profit and loss statements, monthly sales journals and sales and use tax returns, but was unable to provide any detailed sales records (e.g., daily sales reports, cash register z-tapes, etc.) for examination.
3. In order to perform a credit-card-sales ratio analysis to establish audited taxable sales, CDTFA requested that appellant maintain detailed sales records for a 2-week period beginning June 1, 2015.
4. CDTFA used daily sales reports that appellant provided for the period June 1, 2015, through June 14, 2015 (test period), to compile credit card sales of \$34,598.21 and total sales of \$43,384.68, excluding sales tax reimbursement and tips. Based on those amounts, CDTFA determined that 79.75 percent ($\$34,598.21 \div \$43,384.68$) of appellant's sales were paid by credit card. CDTFA then divided appellant's credit card sales for the audit period (as determined from its monthly sales journals) by this percentage to establish audited taxable sales of \$3,189,422 ($\$2,543,480 \div .7975$).² This amounts to a quarterly average of \$265,785 ($\$3,189,422 \div 12$ quarters).
5. For 2015, appellant reported an average of \$273,500 in taxable sales per quarter, which CDTFA relied upon in confirming that audited taxable sales were reasonable.
6. Comparing audited taxable sales to reported taxable sales for the audit period, CDTFA determined that appellant had underreported its taxable sales by \$573,325.

DISCUSSION

California imposes a 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.) When CDTFA is not satisfied with the accuracy of the sales and use tax returns filed, it may base its

²The difference is due to rounding.

determination of the tax due upon the facts contained in the returns or upon any information that comes within its possession. (R&TC, § 6481.)

CDTFA has a minimal, initial burden of showing that its determination is 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 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.) The applicable burden of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c).) That is, the taxpayer must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

Here, the deficiency measure was computed from appellant's own sales records using a recognized and standard audit procedure. (See CDTFA Audit Manual § 0180.12.) Therefore, we find that CDTFA has provided the requisite evidentiary foundation for its assessment, and the burden now shifts to appellant to demonstrate error.

There is only one issue in dispute – whether the credit-card-sales ratio used by CDTFA to compute audited taxable sales should be determined from appellant's daily sales reports for 2012, or from the test period. Appellant has provided a list of what it alleges are 29 percent of its daily sales reports for 2012, which appellant asserts are more representative of the audit period than those used by CDTFA in computing audited taxable sales. Appellant explains that upon learning that its lease would not be renewed in April 2015, it posted a sign at its business location and placed notices in its check presenters requesting that customers pay via cash so that appellant could minimize its credit card fee expenses. Appellant contends that these actions resulted in its credit-card-sales ratio being significantly lower for the test period, and uncharacteristic of its sales during the audit period. Appellant further notes that a comparison of its credit card receipts (as shown on its 1099-K forms) to reported taxable sales for each quarter of 2015, supports appellant's contention that its credit-card-sales ratio began to decline during

the second quarter of 2015 (2Q15).³ Consequently, appellant concludes that audited taxable sales should be recomputed using the daily sales reports for 2012.

Appellant's daily sales reports from 2012, which are segregated by employee shifts, are unreliable at best. According to appellant, it employed two to three employees on weekdays and four employees on weekends. Accordingly, we would expect to see, on average, between two to four reports per day. However, for a substantial number of days in 2012, appellant provided only a single report, or no report at all. Absent a complete record of appellant's 2012 sales, we are unable to determine whether the credit-card-sales ratio, computed from these fragmentary reports, is accurate and representative of that period, or whether it is the result of selection bias.

Regarding appellant's analysis of its credit-card-sales ratio for each quarter of 2015, appellant has not provided any evidence to substantiate the accuracy of its reported taxable sales for 2015, and thus, the accuracy of any ratios computed from those sales is questionable. In addition, the lack of any evidence pertaining to *when* appellant began requesting its customers pay in cash, makes it difficult to determine whether that was indeed the cause of appellant's alleged declining credit-card-sales ratio, or whether it was due to appellant accurately reporting its cash sales following CDTFA's examination in June 2015.

In contrast, it is undisputed that the daily sales reports from the test period are complete and accurate. Moreover, audited taxable sales, which were computed based on these reports, are similar to appellant's reported taxable sales for 2015 when compared on an average quarterly basis. These facts, in comparison to the evidence provided by appellant, demonstrate that appellant's daily sales records from the test period remain the best available evidence of appellant's credit-card-sales ratio for the audit period.

³ Appellant computes its credit-card-sales ratio as 96.9 percent for 1Q15, 93.93 percent for 2Q15, 84.69 percent for 3Q15, and 79.03 percent for 4Q15.

HOLDING

No reduction to the measure of unreported taxable sales is warranted.

DISPOSITION

CDTFA’s decision denying appellant’s petition is sustained.

DocuSigned by:
Nguyen Dang
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Nguyen Dang
Administrative Law Judge

We concur:

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

DocuSigned by:
Kenneth Gast
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Kenneth Gast
Administrative Law Judge