

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
JOO EUN, INC.

) OTA Case No. 18022357
) CDTFA Case No. 931051
) CDTFA Account No. SR EH 100-785934
)
) Date Issued: October 29, 2019
)

OPINION

Representing the Parties:

For Appellant: Shin Kang, President

For Respondent: Scott A. Lambert, Hearing Representative
Lisa Renati, Hearing Representative
Dana Flanagan-McBeth, Tax Counsel IV

For Office of Tax Appeals: Deborah Cumins,
Business Tax Specialist III

N. DANG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Joo Eun, Inc. (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA) partially denying appellant’s timely petition for redetermination (Petition) of a Notice of Determination (NOD) for the period April 1, 2012, through December 16, 2014.¹ The NOD is based on an audit report dated August 20, 2015, in which CDTFA found an aggregate deficiency measure of \$361,290. Thereafter, on January 8, 2018, CDTFA issued a reaudit report reducing this measure to \$78,559.

Office of Tax Appeals Administrative Law Judges Nguyen Dang, Daniel K. Cho, and Richard I. Tay, 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.

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.

ISSUE

Whether further adjustments are warranted to unreported taxable sales.

FACTUAL FINDINGS

1. Appellant operated a restaurant in Moreno Valley, California from September 1, 2006, through December 16, 2014.
2. Appellant did not separately account for any takeout sales of cold food, and therefore all of appellant's food sales were deemed to be taxable under the 80-80 rule.²
3. Upon audit, appellant provided federal income tax returns for 2013 and 2014, limited bank records, and a sales contract for the sale of the business. However, appellant failed to provide CDTFA with any sales records for examination such as sales journals, purchase journals, and supporting source documentation.
4. CDTFA determined that appellant had understated its reported taxable sales based on the following: (1) appellant's federal income tax returns indicate that appellant's markups were inconsistent and that appellant had underreported its gross receipts to CDTFA; (2) 1099-K forms issued to appellant indicate that appellant's credit card receipts exceeded reported taxable sales for the audit period; and (3) appellant's credit card sales to total sales ratio (Ratio) of 68 to 75 percent (as determined from a review of appellant's bank deposits for the periods July through November 2012, April through May 2013, third quarter 2013 (3Q13), and 1Q14), was substantially higher than the 44.2 percent Ratio of similar businesses in the area, indicating that appellant may not have deposited all of its cash sales.
5. In the absence of any sales records, CDTFA was forced to rely on an indirect audit method to estimate appellant's taxable sales. Applying an arbitrarily determined 80 percent Ratio to appellant's credit card receipts of \$288,461, CDTFA computed audited

² Under the 80-80 rule, sales of cold food to-go in a form suitable for consumption on a seller's premise, which ordinarily is not subject to tax, would be subject to tax. This rule applies when more than 80 percent of the seller's gross receipts are from sales of food products and over 80 percent of the seller's retail sales of food are subject to tax. (R&TC, § 6359(d)(6); Cal. Code Regs., tit. 18, § 1603(c)(3).)

taxable sales to be \$360,577 ($\$288,461 \div .8$).³ Comparing this amount to reported taxable sales of \$282,018, CDTFA determined that appellant underreported its taxable sales by \$78,559.

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. (Rev. & Tax. Code, § 6051.) All of a retailer's gross receipts are presumed subject to tax, unless the retailer can prove otherwise. (Rev. & Tax. Code, § 6091.) When CDTFA is not satisfied with the accuracy of the sales and use tax returns filed, it may base its determination of the tax due upon the facts contained in the returns or upon any information that comes within its possession. (Rev. & Tax. Code, § 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 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.) 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.) The justification for placing the burden of proof upon the taxpayer is the "strong need of the government to accomplish swift collection of revenues and in order to encourage recordkeeping by taxpayers." (*Carson v. U.S.* (5th Cir. 1977) 560 F.2d 693, 696.)

In computing the measure of tax, CDTFA relied upon undisputed third-party information returns and an 80 percent Ratio, which is higher than the Ratio computed from appellant's own bank records and is clearly to appellant's benefit. In addition, the credit card projection of sales

³ According to CDTFA's decision, the 80 percent Ratio accounted for sales tax reimbursement and tips included in appellant's credit card receipts, such that CDTFA did not need to reduce total credit card receipts by these amounts prior to dividing it by 80 percent. While it is unclear how the Ratio could account for these amounts, appellant has not disputed this calculation or alleged that its credit card receipts should have been reduced by sales tax reimbursement or tips. Therefore, we do not address this issue any further.

method utilized by CDTFA is a recognized and standard audit procedure. (See CDTFA Audit Manual § 0180.12.) Therefore, we find CDTFA has met its initial burden of production, and the burden now shifts to appellant to demonstrate that further adjustments are warranted.

Appellant argues that its reported taxable sales are accurate, and that regardless, it is unable to pay the liability due to financial difficulties. It is the taxpayer’s responsibility to maintain and make available for examination on request all records necessary to determine the correct tax liability, including bills, receipts, invoices, or other original source documents supporting the entries in the books of account. (Rev. & Tax. Code, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).) Appellant has produced no evidence to support its reported taxable sales, and the failure of appellant to produce evidence that is within its control gives rise to a presumption that such evidence would be unfavorable to appellant’s case. (See *Appeal of Cookston* (83-SBE-048) 1983 WL 15434.) We also lack the authority to reduce appellant’s liability based on either appellant’s or Mr. Kang’s alleged financial difficulties or inability to pay.

HOLDING

No further adjustments are warranted to unreported taxable sales.

DISPOSITION

CDTFA’s decision is sustained.

DocuSigned by:
Nguyen Dang
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Nguyen Dang
Administrative Law Judge

We concur:

DocuSigned by:
Daniel Cho
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Daniel K. Cho
Administrative Law Judge

DocuSigned by:
Richard I. Tay
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Richard I. Tay
Administrative Law Judge