

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18083577
PARTNERSHIP OF RONNIE LEE) CDTFA Account No. 101-596956
GASAWAY ET AL.,) CDTFA Case ID 902371
dba Native Made Tobacco)
) Date Issued: December 18, 2019
)

OPINION

Representing the Parties:

For Appellant:	Ronnie Gasaway
For Respondent:	Joshua Aldrich, Tax Counsel
For Office of Tax Appeals:	William J. Stafford, Tax Counsel III

D. CHO, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 6561, the partnership of Ronnie Lee Gasaway et al. (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)¹ denying appellant’s petition for redetermination of a Notice of Determination (NOD) and increasing the liability to an assessed tax amount of \$110,821.55 and applicable interest for the period April 1, 2012, through December 31, 2014 (audit period).

Appellant failed to respond to a Notice of Oral Hearing. Therefore, appellant waived its right to an oral hearing, and the matter is being decided based on the written record.

ISSUE

Whether an adjustment is warranted to the determined measure of tax as stated in a March 9, 2018 Billing and Refund Notice.

¹ Sales taxes were formerly administered by the State Board of Equalization (BOE). In 2017, functions of the BOE relevant to this case were transferred to CDTFA. (See Gov. Code, § 15570.22.) For ease of reference, when referring to acts or events that occurred before July 1, 2017, “CDTFA” shall refer to the BOE; and when referring to acts or events that occurred on or after July 1, 2017, “CDTFA” shall refer to CDTFA.

FACTUAL FINDINGS

1. Appellant operated a business as a husband and wife partnership that sold cigarettes and other tobacco products in Palm Springs, California. Appellant operated its business on an Indian reservation,² and appellant's general partners are of Native American descent.
2. For the audit period, appellant reported gross sales of \$2,723,786 and claimed total deductions of \$660,339, which resulted in reported taxable sales of \$2,063,447.
3. On audit, appellant did not provide any documentation for CDTFA to review to verify the reported amounts on the sales and use tax returns. Nonetheless, CDTFA noted that appellant claimed a deduction for nontaxable sales to Native Americans, and CDTFA obtained 2010 U.S. Census data that indicated that the population in the business area was 1 percent Native American. Based on this information, CDTFA estimated a 2 percent deduction for nontaxable sales to Native Americans, which was \$54,476, and disallowed the remaining \$605,862³ of appellant's claimed nontaxable sales (\$660,339 - \$54,476).
4. On June 26, 2015, CDTFA issued the NOD to appellant assessing tax of \$54,173.87 plus accrued interest.
5. Appellant filed a timely petition for redetermination disputing the NOD and attended an appeals conference with CDTFA's Appeals Bureau.
6. After the appeals conference, appellant provided the following documentation: (1) a profit and loss statement for 2012, (2) bank statements for the second quarter of 2012 through the third quarter of 2014, (3) payment summary reports for the period April 2012 through October 2012, and (4) federal income tax returns for 2013 and 2014.
7. Based on these records, CDTFA determined that appellant was entitled to additional claimed nontaxable sales; however, CDTFA also concluded that appellant failed to report all of its gross sales and taxable sales. CDTFA determined a new aggregate deficiency measure of \$1,239,792, which is comprised of the following: (1) disallowed claimed

² An Indian reservation includes reservations, rancherias, and any land held by the United States in trust for any Indian tribe or individual Indian. (Cal. Code Regs., tit. 18, § 1616, subd. (d)(2).) In this decision, we use the term "Indian" to be consistent with the language in California Code of Regulations, title 18, section 1616, subdivision (d), which defines "Indian" as "any person of Indian descent who is entitled to receive services as an Indian from the United States Department of the Interior." (*Ibid.*)

³ Although \$660,339 - \$54,476 equals \$605,863, the \$1 difference is most likely due to rounding.

- nontaxable sales in interstate and foreign commerce measuring \$205,136; (2) disallowed claimed “other” nontaxable sales measuring \$262,557; and (3) unreported taxable sales measuring \$772,099.
8. Appellant originally claimed a deduction of \$388,007 for nontaxable sales in interstate or foreign commerce and nontaxable sales to Native Americans. Based on the new documentation and updated gross receipts, CDTFA allowed \$182,871 of appellant’s claimed nontaxable sales in interstate or foreign commerce and nontaxable sales to Native Americans. In other words, CDTFA disallowed \$205,136 ($\$388,007 - \$182,871$) of appellant’s claimed nontaxable sales in interstate or foreign commerce and nontaxable sales to Native Americans.
 9. With respect to appellant’s claimed “other” nontaxable sales, CDTFA concluded that appellant was claiming a deduction for freight, shipping, and cigarette tax stamp expenses. Based on the new documentation, CDTFA was able to verify that appellant was entitled to a deduction of \$9,775 for shipping charges. However, CDTFA concluded that the remaining amounts claimed were subject to tax. Accordingly, CDTFA disallowed \$262,557 of appellant’s claimed “other” nontaxable sales.
 10. Lastly, based on appellant’s payment summary reports for April 2012 through October 2012, CDTFA concluded that appellant received total payments of \$806,686 but only reported total gross sales of \$635,770. This resulted in a difference of \$170,916 and an error rate of 26.88 percent ($\$170,916 \div \$635,770$). CDTFA applied this error rate to appellant’s total reported gross sales for the audit period, accounted for the disallowed audit items, and arrived at audited taxable sales of \$2,835,546. CDTFA compared the audited taxable sales of \$2,835,546 to reported taxable sales of \$2,063,447. This resulted in a difference of \$772,099 ($\$2,835,546 - \$2,063,447$), which CDTFA determined to be unreported taxable sales.
 11. On March 9, 2018, CDTFA issued a Billing and Refund Notice informing appellant of the increase in tax liability. The March 9, 2018, Billing and Refund Notice was a timely notice of increase pursuant to R&TC section 6563.
 12. 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. (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.) "Gross receipts" is defined as the total amount of the sale without any deduction for the cost of the materials used, labor or service cost, interest paid, losses, or any other expense. (Rev. & Tax. Code, § 6012, subd. (a)(2).) However, gross receipts do not include separately stated charges for transportation from the retailer's place of business or other point from which shipment is made to the purchaser. (Rev. & Tax. Code, § 6012, subd. (c)(7); see also Cal. Code Regs., tit. 18, § 1628, subd. (a).) In addition, there is an exemption from the sales tax for a sale of tangible personal property that is required to be shipped and is shipped to a point outside of this state by the retailer. (Rev. & Tax. Code, § 6396; see also Cal. Code Regs., tit. 18, § 1620, subd. (a)(3)(B).)

In general, tax applies to the sale or use of tangible personal property upon Indian reservations to the same extent that it applies with the respect to sale or use elsewhere within this state. (Cal. Code Regs., tit. 18, § 1616, subd. (d)(1).) However, sales tax does not apply to sales of tangible personal property made to Indians by Indian retailers negotiated at places of business located on Indian reservations if the purchaser resides on a reservation and if the property is delivered to the purchaser on a reservation. (Cal. Code Regs., tit. 18, § 1616, subd. (d)(3)(A)(1).) Furthermore, sales tax does not apply to sales of tangible personal property by Indian retailers made to non-Indians and Indians who do not reside on a reservation when the sales are negotiated at places of business located on Indian reservations if the property is delivered to the purchaser on the reservation. (Cal. Code Regs., tit. 18, § 1616, subd. (d)(3)(A)(2).) However, Indian retailers are required to collect use tax from such purchases and must register with CDTFA for that purpose. (*Ibid.*)

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. (Rev. & Tax. Code, §§ 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) 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 Magidow (82-SBE-274) 1982 WL 11930.*)

Here, CDTFA used appellant's payment summary reports to calculate an error rate and determine unreported taxable sales. With respect to appellant's claimed nontaxable sales, CDTFA provided appellant with an opportunity to demonstrate that it was entitled to the deductions that appellant claimed on its sales and use tax returns. Although appellant was able to provide some substantiation for a small amount of the claimed deductions, appellant was unable to demonstrate that it was entitled to a majority of the claimed deductions. Nonetheless, CDTFA allowed the amounts that appellant provided documentation for and also allowed a 2 percent deduction for nontaxable sales to Native Americans based on 2010 U.S. Census data for the geographical area that appellant's business was located in. Based on the foregoing, we find that CDTFA's determination was both reasonable and rational because CDTFA used appellant's records to calculate a deficiency measure and CDTFA disallowed the claimed deductions that appellant was unable to establish as nontaxable sales. Accordingly, the burden of proof shifts to appellant to demonstrate that a different result is warranted in this appeal.

In its appeal letter, appellant argues that the audit figures are incorrect because the audit figures do not match the figures from appellant's bank statements, point of sale system, and tax returns. Appellant states that it submitted four boxes of "sales receipts, out of state sales, tribal sales, bank statements, point of sale monthly reports, IRS tax returns, vendor receipts and many other forms" to CDTFA. However, appellant only provided a 2013 federal income tax return, summaries of taxes, alleged interstate sales, alleged sales to Native Americans residing on an Indian reservation, and sales and use tax returns to the Office of Tax Appeals. Lastly, appellant argues that they are Native Americans operating a business on an Indian reservation and that they should not be required to collect tax.

Although appellant stated that it provided significant documentation to CDTFA, the Office of Tax Appeals is an independent agency from CDTFA, and those documents are not part of the record on appeal. Nonetheless, with respect to the documents in the record, we note that

we are unable to verify the accuracy of the summary documents. There is no original source documentation for us to conclude that the information contained in the summaries is both accurate and complete. Furthermore, it is unclear on what basis appellant is providing these summary documents. For example, we are unable to link the summary documents to an argument disputing the unreported taxable sales or disallowed claimed nontaxable sales. Therefore, we find that these documents do not warrant any adjustment to the increased determined measure of tax.

With respect to appellant's arguments that audit results do not match its records, these documents are not a part of the evidentiary record because appellant failed to provide them to the Office of Tax Appeals. Nonetheless, even if we had the records, appellant has not established why those records should be given more weight than CDTFA's audit determination. In addition, appellant has not explained why there was a 26.88 percent error rate between its payment summary records and its reported gross sales for the April 2012 through October 2012 period. As a result, we find this argument to be unpersuasive.

Lastly, we address appellant's argument that it did not have an obligation to collect any tax. California Code of Regulations, title 18, section 1616, subdivision (d)(3)(A)(2) provides that an Indian retailer is required to collect use tax from purchasers who are not Indian or an Indian who does not reside on an Indian reservation. Appellant had the burden to show that its transactions were exempt from use tax. Nevertheless, CDTFA allowed a 2 percent deduction in the absence of supporting documentation, and appellant has not established that it is entitled to a greater deduction.

Based on the foregoing, we find that appellant has not met its burden of proof that any further adjustments are warranted.

HOLDING

No additional adjustments are warranted to the increased determined measure of tax.

DISPOSITION

CDTFA’s decision to deny appellant’s petition for redetermination and increase the determined measure of tax to \$110,821.55, plus applicable interest, for the audit period is sustained.

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Daniel Cho
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Daniel K. Cho
Administrative Law Judge

We concur:

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Andrew J. Kwee
Administrative Law Judge

DocuSigned by:
Kenneth Gast
FD75A3136CB34C2...
Kenneth Gast
Administrative Law Judge