

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:

**KHOREN YANIKYAN dba NEW
DOWNTOWN CAFÉ & MINI MARKET**

)
) OTA Case No. 19034466
) CDTFA Case ID: 994737
) CDTFA Acct. No. 100-893692
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OPINION

Representing the Parties:

For Appellant: Khoren Yanikyan, Owner

For Respondent: Kevin C. Hanks, Chief
Headquarters Operations Bureau

A. KWEE, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, appellant Khoren Yanikyan, dba New Downtown Café & Mini Market (appellant) timely appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA), on a petition for redetermination of a January 13, 2017, Notice of Determination (NOD). The NOD is for \$69,330.25 in tax, plus applicable interest, and a negligence penalty of \$6,933.08 for the period April 1, 2013, through March 31, 2016 (audit period). This matter is being decided based on the written record because appellant waived the right to an oral hearing.

ISSUE

Whether appellant established a basis to reduce his sales tax liability.

FACTUAL FINDINGS

1. Appellant operates a mini-market in downtown Los Angeles selling food, drink, tobacco products, and lottery tickets.

2. On November 5, 2015, CDTFA notified appellant that his account was selected for an audit.¹ Appellant failed to maintain or provide any source documents to CDTFA to support his reported taxable sales during the audit period. Appellant did provide a general ledger, which included his recorded cost of goods sold. Due to a lack of source documentation, CDTFA contacted appellant's vendors to verify recorded cost of goods sold, and thereafter accepted appellant's recorded cost of goods sold.
3. During 2013, appellant's cost of taxable goods sold was \$408,707. For that same period, appellant reported \$219,178 in taxable sales.
4. During 2014, appellant's cost of taxable goods sold was \$307,630. For that same period, appellant reported \$217,569 in taxable sales.
5. For 2013 and 2014, appellant's reported taxable sales were only 61 percent of his recorded cost of taxable goods sold. CDTFA rejected appellant's reported taxable sales as unreasonably low, because they would have resulted in appellant operating at a loss.
6. CDTFA calculated audited taxable sales by applying a weighted markup of 38.63 percent to appellant's taxable cost of goods sold. Audited taxable sales substantially exceeded reported taxable sales. CDTFA determined that the difference represents under-reported taxable sales.
7. On January 13, 2017, CDTFA issued the NOD for the under-reported taxable sales, which appellant timely petitioned. CDTFA issued a decision denying appellant's petition on March 6, 2019. This timely appeal followed.
8. On March 13, 2019, appellant timely appealed CDTFA's decision solely on the basis that "the tax liability should take into account greater amounts for theft given the fact that the business is located in an area where lots of theft takes place." Appellant provided no further explanation, or any documentation to support his contention. Appellant does not dispute the negligence penalty.
9. By letter dated March 14, 2019, we notified appellant that our decision will be based solely on the information provided to the Office of Tax Appeals (OTA), that OTA does not have access to any information maintained by CDTFA. In that letter, we requested appellant to provide supporting documentation and information to OTA within 30 days.

¹ Sales taxes were formerly administered by the Board of Equalization (board). Effective July 1, 2017, functions of the board relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) When referring to acts or events that occurred before July 1, 2017, CDTFA shall refer to its predecessor, the board.

10. Appellant failed to respond to our request for additional briefing.
11. By letter dated October 1, 2019, appellant was given an additional opportunity to submit briefing to OTA. Appellant also failed to respond to our second letter.

DISCUSSION

California imposes sales tax on a retailer's gross receipts from the retail sale of tangible personal property in this state unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, §§ 6012, 6051.) For the purpose of the proper administration of the Sales and Use Tax Law and to prevent the evasion of the sales tax, the law presumes that all gross receipts are subject to tax until the contrary is established. (R&TC, § 6091.) It is the retailer's responsibility to maintain complete and accurate records to support reported amounts and to make them available for examination. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).)

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) 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 met its initial burden by establishing, via audit, a discrepancy between appellant's records and appellant's reported taxable sales. Aside from alleged thefts, appellant failed to offer any other explanation for why his reported taxable sales amount was only 61 percent of his recorded cost of taxable goods sold for 2013 and 2014. We find such a large discrepancy to be unreasonable. Furthermore, appellant failed to provide any evidence or documentation to support that a larger allowance for alleged thefts is warranted.² The burden is

² CDTFA included a 2-percent allowance for spillage, breakage, and pilferage during the audit.

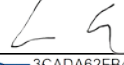
on appellant. (R&TC, § 6091.) Therefore, in absence of any supporting documentation or evidence, we have no legal basis to conclude that any adjustments are warranted.

HOLDING


Appellant failed to establish that any additional adjustments are allowable.


DISPOSITION

CDTFA’s action in denying the petition for redetermination is sustained, and the NOD shall be redetermined as provided in CDTFA’s decision.

DocuSigned by:

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Andrew J. Kwee
Administrative Law Judge

We concur:

DocuSigned by:

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Teresa A. Stanley
Administrative Law Judge

DocuSigned by:

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Keith Long
Administrative Law Judge

Date Issued: 1/17/2020