

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 19044600
C. FERRIE)	CDTFA Account No. 97-297759
dba Vinny & Carol’s The Original Cottage)	CDTFA Case ID 998517
)	
)	

OPINION

Representing the Parties:

For Appellant: Joyce E. Cheng, E.A./C.P.

For Respondent: Jason Parker, Chief
Headquarters Operations Bureau

For Office of Tax Appeals: Richard A. Zellmer,
Business Taxes Specialist III

J. LAMBERT, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 6561, C. Ferrie (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) issued on January 27, 2017. The NOD assessed a tax liability of \$99,339.09, plus accrued interest, and a failure to file penalty of \$1,549.61 for the period October 1, 2013, through September 30, 2016 (audit period). CDTFA subsequently deleted the failure to file penalty.

Appellant waived the right to an oral hearing; therefore, the matter is being decided based on the written record.

ISSUES

1. Whether a reduction is warranted to the measure of underreported taxable sales.
2. Whether relief of interest is warranted.

¹ Sales taxes were formerly administered by the State 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.

FACTUAL FINDINGS

1. Appellant operated a restaurant known as The Original Cottage, which closed on October 14, 2016.
2. CDTFA audited appellant for the period October 1, 2013, through September 30, 2016.
3. Upon audit, appellant did not provide any books and records, such as sales journals, cash register tapes, purchase journals, purchase invoices, or guest checks.
4. CDTFA obtained copies of appellant's federal income tax returns (FITRs) for 2013 and 2015 from the Franchise Tax Board (FTB).² For 2015, reported gross receipts on the FITR exceeded total sales reported on the sales and use tax returns (SUTRs) by a material difference of \$144,909. Due to this material difference and the lack of books and records, CDTFA conducted additional testing to verify appellant's reported taxable sales.
5. Appellant's business was closed at the time of the audit fieldwork and, therefore, CDTFA could not perform an observation test to determine the credit-card-sales ratio (the ratio of sales paid with credit cards to total sales). As a result, CDTFA estimated the credit-card-sales ratio, including sales tax reimbursement and tips, at 70 percent, which CDTFA based on its experience from audits of similar restaurants in appellant's area.
6. CDTFA obtained Forms 1099-K for the period October 1, 2013, through December 31, 2015.³ CDTFA used the Forms 1099-K to compile appellant's credit card sales of \$1,283,367 for the period October 1, 2013, through December 31, 2015. CDTFA divided \$1,283,367 by the 70 percent credit-card-sales ratio to compute audited taxable sales of \$1,833,381 for that period. CDTFA compared audited taxable sales of \$1,833,381 to reported taxable sales and computed an understatement of \$939,399 for the period October 1, 2013, through December 31, 2015.
7. CDTFA did not have Forms 1099-K for the period January 1, 2016, through September 30, 2016. Using Forms 1099-K, CDTFA compiled credit card sales of \$542,359 for 2015, and divided that amount by the 70 percent credit-card-sales ratio to compute audited taxable sales of \$774,779 for 2015. CDTFA multiplied \$774,779 by

²The 2014 FITR was not available.

³Federal 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.

75 percent to compute audited taxable sales of \$581,099 for the period January 1, 2016, through September 30, 2016. Upon comparison to reported taxable sales, CDTFA computed an understatement of \$302,339 for that period. In total, CDTFA computed unreported taxable sales of \$1,241,738 for the audit period (\$939,399 + \$302,339).

8. CDTFA issued an NOD to appellant on January 27, 2017. Appellant filed a timely petition for redetermination. CDTFA deleted the failure to file penalty, but otherwise denied the petition. This appeal followed.

DISCUSSION

Issue 1: Whether a reduction is warranted to the measure of unreported taxable sales.

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.) Although gross receipts from the sale of "food products" are generally exempt from the sales tax, sales of hot food and sales of food served in a restaurant are subject to tax. (R&TC, § 6359(a), (d)(1), (d)(2), and (d)(7).)

When CDTFA is not satisfied with the amount of tax reported by the taxpayer, 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.)

Appellant did not provide any books or records for examination, such as sales journals, cash register tapes, purchase journals, purchase invoices, or guest checks. The only records available were FITRs for 2013 and 2015, which were obtained from FTB. For 2015, reported

gross receipts on the FITR exceeded total sales reported on the SUTR by a material difference of \$144,909. For these reasons, CDTFA calculated appellant's sales from Forms 1099-K using the credit-card-sales-ratio method. As noted by CDTFA in citing to section 0810.12 of its Audit Manual, the credit-card-sales-ratio method has proven to be an effective audit procedure in establishing taxable sales because sales paid for by credit card are required to be deposited directly into the taxpayer's bank account, and therefore, credit card deposits are a verifiable source of information. Based on the lack of records, CDTFA's use of the credit-card-sales-ratio method to estimate appellant's taxable sales was reasonable and rational, and the burden of proof shifts to appellant to show errors in CDTFA's audit.

Appellant contends that CDTFA's audit is not reflective of the actual business, but provides no documentation in support. Appellant asserts that her severe health issues prevented her from providing books and records and otherwise participating in the audit process. While we are sympathetic to appellant's alleged health issues, such issues are not a basis to delete the liability. Moreover, appellant could have provided books and records at any time during the appeal process but has failed to do so. Based on a lack of documentation or other evidence to show error in CDTFA's determination, we conclude that no adjustments to the audited taxable measure are warranted.

Issue 2: Whether relief of interest is warranted.

The addition of interest to a determination issued by CDTFA is mandatory. (R&TC, § 6482.) The law provides for relief of interest only under very narrow circumstances, such as the occurrence of a disaster or unreasonable error or delay by an employee of CDTFA in his or her official capacity. (R&TC, §§ 6593, 6593.5.)


Appellant contends that interest should be relieved due to her health issues and financial hardship. However, appellant's circumstances do not qualify as one of the narrow circumstances that would allow for the relief of interest, and there is no provision in the Sales and Use Tax Law that allows for the such relief based on health issues or financial hardship. Therefore, we find that no relief of interest is warranted.

HOLDINGS

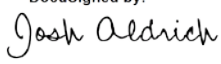
1. No reduction to the measure of unreported taxable sales is warranted.
2. Relief of interest is not warranted.

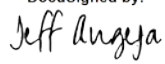
DISPOSITION

CDTFA’s action in deleting the failure to file penalty but otherwise denying the petition, is sustained.

DocuSigned by:

 B90E40A72DE3440...
 Josh Lambert
 Administrative Law Judge

We concur:

DocuSigned by:

 48745BB806914B4
 Joshua Aldrich
 Administrative Law Judge

DocuSigned by:

 0D390BC3CCB14A9...
 Jeffrey G. Angeja
 Administrative Law Judge

Date Issued: 3/2/2020