

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

S. AND B. ANDREWS
dba CALEYE COMPANY) OTA Case No. 18011834
) CDTFA Case ID: 862033
) CDTFA Account No. 102-160225
)
)
)
)**OPINION**

Representing the Parties:

For Appellant:

B. Andrews¹

For Respondent:

Kevin Smith, Tax Counsel III
Randy Suazo, Hearing Representative
Monica Silva, Tax Counsel IV

For Office of Tax Appeals:

Andrea Long, Tax Counsel

A. KWEE, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, S. and B. Andrews, a husband and wife partnership doing business as Caley Company (Caley Company) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)² denying Caley Company's petition of a Notice of Determination (NOD) dated February 23, 2015.³ The NOD is for \$24,369.37 in tax, \$2,436.95 in penalties, plus applicable interest, for the period June 2, 2011, through June 30, 2012.

The Office of Tax Appeals (OTA) consolidated this appeal matter and a separate appeal involving Caley Corporation (OTA Case number 18011955), with the written consent of all parties. On the day of the oral hearing, appellant-husband appeared, and stated that he did not

¹ Appearing solely on behalf of B. Andrews.

² 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 this opinion refers to acts or events that occurred before July 1, 2017, "CDTFA" shall refer to its predecessor, the board.

³ For ease of analysis, we refer to B. Andrews in his individual capacity as appellant-husband, and to S. Andrews individually as appellant-wife. As discussed below, appellant-husband disputes that he was engaged in business as Caley Company.

represent the corporation and had never been involved in the corporation, and that he was only representing himself. As a result of Caley Corporation's failure to appear at the oral hearing, these appeals were deconsolidated. Thereafter, Administrative Law Judges Andrew J. Kwee, Sara A. Hosey, and Michael F. Geary held an oral hearing for this matter in Sacramento, California, on February 26, 2020, for the instant appeal. At the conclusion of the hearing, OTA closed the record and this matter was submitted for decision.⁴

ISSUES

1. Whether any adjustments are warranted to the liability as determined by CDTFA.
2. Whether Caley Company made taxable sales of tangible personal property in this state.

FACTUAL FINDINGS

1. On October 21, 2010, appellant-wife appeared in person at one of CDTFA's offices. CDTFA verified appellant-wife's identity with the following forms of identification: (1) a government-issued passport card with her photo; and (2) a government-issued temporary driver's license without her photo. CDTFA recorded appellant-wife's passport number, driver's license number, and the expiration date for both forms of identification.
2. On December 8, 2011, appellant-husband and appellant-wife jointly applied for a seller's permit with CDTFA.⁵ CDTFA verified and recorded the following information for appellant-husband and appellant-wife at this time: (1) social security numbers; (2) driver's licenses and numbers; and (3) the home address that they shared in San Jose, California. In addition, and as required by the application process, CDTFA indicated that it obtained copies of both appellants' driver's licenses.
3. Appellant-husband and appellant-wife both signed the application for seller's permit, and reported that Caley Company purchased "porcelain, furniture, [and] arts," which were "import[ed] from China," and that Caley Company was engaged in the business of

⁴ OTA will issue a separate opinion based on the written record in the appeal of Caley Corporation.

⁵ S. and B. Andrews reported the business as a husband and wife co-ownership to CDTFA. Under certain circumstances, a partnership for income tax purposes does not include a qualified joint venture conducted by a husband and wife who file a joint income tax return (more commonly referred to as a husband and wife co-ownership). (See Int.Rev. Code, § 761(f).) For sales and use tax purposes, irrespective of income tax treatment, both a "partnership" and a "joint venture" are considered a separate person. (R&TC, §§ 6005, 6015.)

- selling “china porcelain and furniture.” Caleye Company also reported projected monthly taxable sales of \$4,500.
4. Caleye Company reported to CDTFA that the type of business it was engaged in was making retail sales, and it had one selling location. The reported mailing address for the business was on Saratoga Avenue, in San Jose, California (business mailing address).
 5. Caleye Company filed a sales and use tax return for fourth quarter of 2011 (4Q11), and 1Q12, reporting no taxable sales. Caleye Company reported \$1,061 in taxable sales for 2Q12. Caleye Company has not filed any other sales and use tax returns.
 6. On April 23, 2013, the United States Customs and Border Protection (CBP) provided a report to CDTFA which detailed property that appellant-husband imported into the United States from China. According to the report, appellant-husband imported ceramics, furniture, and bedding with a declared value of \$217,977 into the United States. The export dates from China began on May 14, 2011, and ended on March 17, 2012, and the corresponding import dates for the property to arrive in the United States started on June 2, 2011, and ended on April 4, 2012. The import address on file with CBP for this property is the same as the business mailing address for Caleye Company.
 7. According to CDTFA’s records, Importer Security Filing Request Forms provided by CBP also identify appellant-husband and/or appellant-wife as the purchaser.
 8. CDTFA informed Caleye Company it was selected for an audit. Caleye Company did not provide any documentation to CDTFA to support reported taxable sales. Caleye Company did not even provide copies of federal income tax returns. In absence of any documentation from the taxpayer, CDTFA applied a markup of 30 percent to the declared value of imported goods to California (\$217,977), to calculate audited taxable sales of \$283,371.
 9. On September 18, 2014, appellant-husband and appellant-wife met with CDTFA’s auditor at CDTFA’s Oakland office to discuss the audit of their account. During the discussion, Caleye Company contended that a corporation based in China, Jing De Zhen Ceramic Capital Foreign Trade Co., Ltd. (JDZC) was the retailer, and Caleye Company was only acting as an agent.
 10. Caleye Company provided a translated copy of an “Export Agreement” between JDZC and *Caleye Corporation*, which provides that “[JDZC] shall export Jingdezhen porcelain

- on behalf of [Caley Corporation].” There is no evidence in the record before OTA of an export agreement between *Caley Company* and JDZC.⁶
11. According to CDTFA’s records, appellant-wife is a corporate officer of JDZC.
 12. On February 23, 2015, CDTFA issued an NOD to Caley Company for the underreported liability. This appeal followed.
 13. On July 25, 2017, Caley Company, by and through its attorney, filed an opening brief contending that appellant-wife was involved in this business as a service provider, on behalf of JDZC, and merely assisted with export customs clearance and preparing documents for import and export and, as such, Caley Company was not a retailer. Further, Caley Company contends that it only took possession of goods for purposes of delivering the goods to other retailers. Separately, Caley Company contends that appellant-husband was only involved in the business “as a corporate officer after the formation of the corporation,” which is after the period at issue in this appeal.⁷
 14. At the oral hearing, appellant-husband testified that he was never involved in either Caley Corporation or Caley Company, that his signature was forged on the application for Caley Company’s seller’s permit, and that he and his wife were victims of a criminal conspiracy.⁸
 15. Appellant-husband further testified that he and appellant-wife filed separately for income tax purposes, and that he did not know how or even whether his wife reported any income from this business on her returns. Appellant-husband further testified that he did not report income from this business on his income tax returns. Federal income tax returns are not a part of the evidentiary record and were not examined by CDTFA in connection with this appeal.

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

⁶ As indicated previously, the appeal of Caley Corporation has been deconsolidated from this appeal. As such, we do not further discuss Caley Corporation’s Export Agreement with JDZC in this appeal.

⁷ On October 15, 2018, Caley Company’s attorney withdrew from his representation of Caley Company.

⁸ Appellant-husband indicated that the persons responsible were criminals and involved in bringing pregnant women from China to America, and that he and his wife were victims.

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).)

Issue 1: Whether Caleye Company made taxable sales of tangible personal property in this state.

As a preliminary matter, Caleye Company contends that it was not the retailer of the property. For purposes of the sales and use tax law, the terms “sale” and “purchase” mean and include any transfer of title or possession, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. (R&TC, §§ 6006(a), 6010(a).) In simplest terms, if there is a transfer of title, there is a sale and purchase. (R&TC, §§ 6006(a), 6010(a).) Here, the CBP reports identify appellant-husband as both the importer and the consignee, and the address for the imported goods is the same as Caleye Company's business mailing address. CDTFA's audit working papers, which describes this source documentation, including purchase invoices, further indicate that Caleye Company was “the buyer” of the imported goods.⁹ CDTFA's audit working papers also state that the CBP Security Filing Request Forms report appellant-husband or appellant-wife under the section titled: “Buyer Name & Address.” Based on this evidence, we conclude that Caleye Company had both possession and title to the property.

Furthermore, having found sufficient evidence that Caleye Company held title and possession to the property, we must reject the contention that Caleye Company was only a service provider. We similarly reject the alternative contention that Caleye Corporation (as opposed to Caleye Company) made the sales because the documentation identifies appellant-husband as the purchaser and importer. Caleye Corporation was separately billed to the extent it

⁹ As relevant, we note that in the appeal of Caleye Corporation, CDTFA provided copies of purchase invoices attached to the CBP import reports. The purchase documents identify Caleye Corporation as the purchaser of the goods, and the terms of sale of Caleye Corporation. For the instant appeal, CDTFA only included a copy of the CBP report, but did not submit any of the source documentation. As indicated above, CDTFA's audit working papers nevertheless describe the source documentation for Caleye Company and indicate the nature of the source documentation is the same for both appeals.

was identified as the purchaser and importer of the property; however, that matter is not at issue before OTA in this appeal.

Caley Company refused to cooperate in the audit and, as such, CDTFA admittedly does not have evidence that Caley Company actually sold the property at retail in this state. Nevertheless, Caley Company does not contend that it purchased any of the property for personal use (in such a case, Caley Company would still be liable for use tax; however, a markup over cost would not be appropriate). To the contrary, Caley Company contends that all the property was transferred to other retailers. It is true that California sales tax does not apply to a sale for purposes of resale in the regular course of business. (R&TC, § 6051.) For these purposes, the law sets forth a statutory presumption that all sales are presumed to be at retail, until the contrary is established. (R&TC, § 6091; Cal. Code Regs., tit. 18, § 1668.) Here, Caley Company applied for and held a seller's permit to engage in the retail sale of "China porcelain and furniture," and projected monthly taxable sales of this type of property. Furthermore, all of the goods Caley Company purchased involved this type of property. Based on this information, we find that Caley Company purchased the property for purposes of selling it at retail, and that it was the retailer of the property.

Appellant-husband contends that his signature was forged on the application for seller's permit, and that he was never involved in this business. Nevertheless, we find persuasive the evidence that CDTFA verified appellant-husband's identity in person when he applied for the permit, and that CDTFA confirmed his identity at this time by examining and verifying his driver's license information and his social security number. Furthermore, CDTFA's records indicate that CDTFA met with appellant-husband and discussed the results of the audit with him and his wife. As such, we reject the contention that appellant-husband's signature was forged and that he was not involved in the business.

Issue 2: Whether any adjustments are warranted to the liability as determined by CDTFA.

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 the available records and Caleye Company's reported taxable sales. First, although Caleye Company reported taxable sales of only \$1,061 during the audit period, CBP documents established that Caleye Company's cost of goods purchased from China during this same period was \$217,977. Second, all of the goods purchased involved furniture, bedding, and ceramics. Third, Caleye Company applied for and held a seller's permit to engage in the retail sale of "China porcelain and furniture" in this state. Fourth, Caleye Company reported on its seller's permit that it would make approximately \$4,500 in monthly taxable sales of this type of property. Fifth, there is no documentary evidence that any of the property at issue was otherwise purchased, sold or used for exempt or nontaxable purposes. Based on these facts, we find that CDTFA established evidence of a substantial underreporting. As such, we find it was reasonable and rational for CDTFA to reject the reported amounts and to instead estimate the tax liability on the basis of the only other information in its possession: the CBP import documents.


Caleye Company has the burden of establishing error in CDTFA's determination. The record contains no documentation which could be used to establish Caleye Company's actual markup. Nevertheless, we believe it is reasonable and rational to assume that Caleye Company was not engaged in the business of selling property at a loss, and as such, there must be a positive markup. In absence of any evidence or argument to the contrary, we conclude that the estimated 30-percent markup is both reasonable and rational. In summary, we conclude that the CBP import documents are the best available evidence in the record, and that it was reasonable and rational for CDTFA to establish audited taxable sales based on a flat 30-percent markup. Caleye Company failed to present evidence or argument for any nontaxable or exempt sales and, as such, we have no basis to recommend an adjustment to the liability as determined by CDTFA.

HOLDINGS

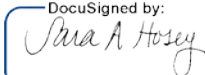
1. Caleye Company made retail sales of tangible personal property in this state.
2. Caleye Company failed to establish a basis for adjustment to the liability as determined by CDTFA.


DISPOSITION

CDTFA’s action as set forth in CDTFA’s decision is sustained.

DocuSigned by:

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 Andrew J. Kwee
 Administrative Law Judge

We concur:

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 Sara A. Hosey
 Administrative Law Judge

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 Michael F. Geary
 Administrative Law Judge

Date Issued: 4/15/2020