

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of:  
**CALEYE CORPORATION**

) OTA Case No. 18011955  
) CDTFA Case ID: 870030  
) CDTFA Account No. 102-294233  
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**OPINION**

Representing the Parties:

For Appellant: No appearance

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, Caleye Corporation (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)<sup>1</sup> denying appellant's untimely<sup>2</sup> protest of a Notice of Determination (NOD) dated February 25, 2015. The NOD is for \$21,677.87 in tax, \$2,167.79 in penalties,<sup>3</sup> plus applicable interest, for the period July 1, 2012, through December 31, 2012 (liability period).

The Office of Tax Appeals (OTA) consolidated this appeal matter and a separate appeal involving S. and B. Andrews, a husband and wife partnership doing business as Caleye

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<sup>1</sup> 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.

<sup>2</sup> Under regulations applicable at the time the petition was filed, if a taxpayer filed a petition for redetermination after the 30-day time period specified in R&TC section 6561, CDTFA could accept it as an administrative (late) protest. (Cal. Code Regs., tit. 18, § 5220 [superseded by Cal. Code Regs., tit. 18, § 35019].)

<sup>3</sup> CDTFA's decision recommends deleting the negligence penalty, and it is not at issue in this appeal. The finality penalty imposed pursuant to R&TC section 6561 for failure to timely pay the NOD is also not at issue in this appeal. As relevant, CDTFA's supplemental decision recommends conditional relief of the finality penalty, subject to appellant meeting certain payment conditions. We do not discuss these items further.

Company (Caley Company) (OTA Case No. 18011834), with the written consent of all parties.<sup>4</sup> On the day of the oral hearing, B. Andrews appeared at the oral hearing for the consolidated matter, and stated that he did not represent the corporation and had never been involved in the corporation, and that he was only representing himself. As a result of appellant's failure to appear at the oral hearing, these appeals were deconsolidated and this matter was submitted for a decision on the basis of the written record. Thereafter, Administrative Law Judges Andrew J. Kwee, Sara A. Hosey, and Michael F. Geary held an oral hearing in Sacramento, California, on February 26, 2020, for the appeal of Caley Company.<sup>5</sup>

### ISSUES

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

### FACTUAL FINDINGS

1. On September 26, 2012, appellant electronically applied for a seller's permit with CDTFA.
2. Appellant filed sales and use tax returns for the liability period reporting \$0 in gross sales and \$0 in taxable sales.
3. On April 23, 2013, the United States Customs and Border Protection (CBP) provided CDTFA with a United States customs report, and supporting documentation, detailing property that appellant imported into the United States from China. According to the report, appellant imported ceramics, furniture, and bedding with a declared value of \$199,108 into the United States. The export dates from China began on July 21, 2012, and ended on October 14, 2012, and the corresponding import dates for the property to arrive in the United States occurred from August 9, 2012, through October 31, 2012. The import address on file for this property was located in California.
4. The supporting documentation included with the United States customs report included Importer Security Filing Request Forms filed with CBP, which reported that the "Buyer" of the imported goods was appellant. CBP Entry Summaries identify appellant as both

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<sup>4</sup> After consolidation, B. Andrews subsequently disputed the classification of the entity as a partnership and his involvement with the entity.

<sup>5</sup> OTA will issue a separate opinion in the appeal of Caley Company.

the ultimate consignee and the importer of record, and they also contain invoice totals. Also attached are commercial invoices from the seller Jing De Zhen Ceramic Capital Foreign Trade Co., Ltd. (JDZE) and issued to appellant, and these invoices include sales confirmation numbers, description of the property purchased, payment terms, and invoice totals.

5. On or about September 10, 2013, appellant filed a federal income tax return for calendar year 2012. On the return, appellant reported \$243,636 in gross receipts, and \$81,086 for its cost of goods sold. Appellant also reported that it was incorporated on February 16, 2012.
6. CDTFA informed appellant that its account had been selected for an audit. Appellant did not maintain or provide any sales and use tax records to CDTFA to support reported taxable sales of \$0.00. In absence of any documentation from the taxpayer, CDTFA applied a markup of 30 percent to the declared value of imported goods to California (\$199,108), to calculate audited taxable sales of \$258,840.
7. On September 18, 2014, appellant met with CDTFA's auditor at CDTFA's Oakland office to discuss the audit. During the discussion, appellant contended that JDZC, a corporation based in China, was the retailer of this property, and appellant was only acting as an agent.
8. Appellant provided a translated copy of an "Export Agreement" between JDZC and appellant. The translated copy states: "[JDZC] shall export Jingdezhen porcelain on behalf of [appellant]. [JDZC] shall be in charge of purchasing products, shipping, export procedures and sales in American market; [appellant] shall be responsible for export customs clearance, preparing documents required for import and export for [JDZC] but shall not be involved in other affairs."
9. S. Andrews is a corporate officer of both JDZC and appellant.
10. On February 25, 2015, CDTFA issued the NOD to appellant for the underreported liability, which appellant protested.
11. On December 7, 2016, CDTFA denied, in substantial part, appellant's protest.
12. On August 9, 2017, CDTFA issued a supplemental decision which, as relevant to this appeal, sustained the December 7, 2016 decision. This timely appeal followed.

13. On July 25, 2017, appellant, by and through its attorney, filed an opening brief contending that it only took possession of goods for purposes of delivering the goods to other retailers. Separately, appellant contends that another corporate officer, B. Andrews, 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 and, as such, he should have no personal liability.<sup>6</sup>
14. On October 15, 2018, appellant’s attorney withdrew from his representation of appellant.

### DISCUSSION

#### Issue 1: Whether appellant made taxable sales of tangible personal property in this state.

As a preliminary matter, appellant contends that it was not the retailer of the property. California imposes sales tax measured by 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.) The term “retailer” includes every seller who makes any retail sale or sales of tangible personal property. (R&TC, § 6015.) 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 available documentation identifies appellant as the purchaser, importer, and the ultimate consignee. Purchase invoices were issued by the seller JDZC to appellant as the buyer pursuant to “Terms of Payment T/T.”<sup>7</sup> The purchase invoices also identify appellant as the purchaser of the imported goods. CBP Security Filing Request Forms report appellant under the section titled: “Buyer Name & Address.” Based on this evidence, we conclude that appellant had both possession and title to the property. Furthermore, having found sufficient evidence that appellant obtained title to the property from the seller, we must reject the contention that appellant was only a service provider. Although appellant provided a translated document between appellant and JDZC, stating that JDZC was responsible for sales in the American

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<sup>6</sup> As indicated previously, the appeal of Caleye Company has been deconsolidated from this appeal. Only the corporate liability is at issue in this appeal. As such, we do not further discuss this contention.

<sup>7</sup> T/T stands for Telex Transfer, which is an international bank transfer.

market, this cannot overcome the fact that the parties legally structured the transactions as sales from JDZC to appellant. As such, we find the sales invoices and CBP import documentation sufficient to establish that appellant purchased the property from JDZC.

Appellant did not cooperate in the audit and, as such, CDTFA admittedly does not have evidence that appellant actually sold the property at retail in this state. Nevertheless, appellant does not contend that it purchased any of the property for personal use (in such a case, appellant would still be liable for use tax; however, the measure of tax would be cost). To the contrary, appellant 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.) According to appellant's federal income tax return for this period, appellant reported gross receipts of \$243,636 to the Internal Revenue Service (IRS), and cost of goods sold of \$81,086, yet appellant reported \$0 in gross sales to CDTFA. Appellant has provided no documentation to address this discrepancy. Appellant's contention that it was merely a service provider is contradicted by the documentation showing appellant obtained title to the property in exchange for transferring the purchase price (i.e., consideration) via international bank transfer. Furthermore, appellant applied for and held a seller's permit to engage in the retail sale of tangible personal property in this state. Based on this information, we find that appellant purchased the property for purposes of retail sale and was the retailer of the property.

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

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 a discrepancy between the available government records and appellant's reported taxable sales. First, although appellant reported gross receipts and taxable sales of \$0.00 during the audit period, CBP documents established that appellant's cost of goods purchased from China during this same period was \$199,108. Second, appellant reported gross receipts of \$243,636, and \$81,086 for cost of goods sold, to the IRS for this period. Third, the goods purchased were furniture, bedding, and ceramics, the retail sale of which is taxable. Fourth, appellant applied for and held a seller's permit to engage in the retail sale of tangible personal property in this state. 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 appellant's tax liability based on the available documentation.

Appellant has the burden of establishing error in CDTFA's determination. The record contains no documentation which could be used to establish appellant's actual markup for the sale of furniture, bedding, and ceramics. Nevertheless, we believe it is reasonable and rational to assume that appellant 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. Appellant failed to present evidence or argument for any nontaxable or exempt

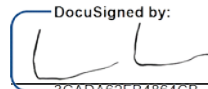
sales and, as such, we have no basis to recommend an adjustment to the liability as determined by CDTFA.<sup>8</sup>

### HOLDINGS

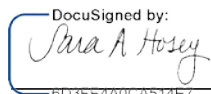
1. Appellant made retail sales of tangible personal property in this state.
2. Appellant failed to establish a basis for adjustment to the liability as determined by CDTFA.

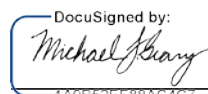
### DISPOSITION

CDTFA's action as set forth in CDTFA's decision, and as revised in its supplemental decision, is sustained.

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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: 4/30/2020

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<sup>8</sup> As relevant, audited taxable sales (\$258,840) exceed reported gross receipts on the federal income tax return (\$243,636). Nevertheless, CDTFA established cost of goods purchased from China in the amount of \$199,108, which is more than double the cost of goods sold of \$81,086 that appellant reported to the IRS. Therefore, we do not find the federal income tax returns persuasive evidence of gross receipts for sales and use tax purposes.