

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18053175
SALTON SEA VENTURES, INC.) CDTFA Account No. 101-189123
) CDTFA Case IDs: 803729, 1014920
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)
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OPINION

Representing the Parties:

For Appellant: Carmen Hernandez, Representative

For Respondent: Lisa Renati, Hearing Representative
Christopher Brooks, Tax Counsel IV

For Office of Tax Appeals: Deborah Cumins,
Business Taxes Specialist III

S. BROWN, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Salton Sea Ventures, Inc. (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA) in response to appellant’s timely petition for redetermination of a Notice of Determination (NOD) for \$318,169.86 of additional tax, plus applicable interest, for the period February 26, 2009, through December 31, 2011. In subsequent decisions, CDTFA reduced the tax liability from \$318,169.86 to \$247,042.91; granted relief of interest for the periods September 1, 2013, through March 31, 2014, and February 1, 2016, through November 30, 2016; and denied the remainder of the petitioned amount.

In addition, pursuant to R&TC section 6901, appellant appeals CDTFA’s denial of a claimed refund of \$345,472.07 (\$227,095.91 tax and \$98,429.16 interest) paid against the liability.¹

¹ The liability had been paid in full when the reaudit was completed on April 17, 2017. The claim for refund was filed June 7, 2017.

Office of Tax Appeals (OTA) Administrative Law Judges Suzanne B. Brown, Andrew J. Kwee, and Jeffrey G. Angeja held an oral hearing for this matter in Cerritos, California, on January 24, 2020. At the conclusion of the hearing, the record was closed and this matter was submitted for decision.

ISSUE

Whether appellant has shown that further adjustments are warranted to the audited understatements of reported taxable sales.

FACTUAL FINDINGS

1. Appellant operated a gas station with a mini-mart from February 26, 2009, through January 4, 2017, when it sold the business. Appellant held both a seller's permit (SR account) and, as a supplier or wholesaler of fuel, an "SG" permit for prepayment of sales tax on fuel distributions.
2. CDTFA audited appellant for the period February 26, 2009, through December 31, 2011. CDTFA examined appellant's income statements and found they were substantially accurate and supported by appellant's records.
3. CDTFA compared taxable sales recorded in appellant's income statements to taxable sales reported on appellant's sales and use tax returns, and computed the following three audit items: 1) unreported taxable sales subject to the state tax rate of \$3,616,917; 2) unreported motor vehicle fuel sales of \$509,253 subject to the state tax exemption for motor vehicle fuel (fuel tax swap);² and 3) unreported diesel fuel sales of \$1,062,470 subject to the additional tax rate set forth in R&TC section 6051.8.³
4. On March 6, 2014, CDTFA issued an NOD to appellant for \$318,169.86 tax (\$338,112.86 less an underclaimed Schedule G credit of \$19,943.00 for sales tax prepaid to distributors) and applicable interest.

² Effective July 1, 2010, legislation was enacted providing for a state excise tax rate increase and a corresponding sales and use tax rate decrease on sales of motor vehicle fuels. (R&TC, §§ 6357.7, 7360.) Under these provisions, the state excise tax increased 17.3 cents per gallon, to 35.3 cents per gallon, and the statewide sales and use tax rate on gasoline sales decreased from 8.25 percent to 2.25 percent, plus applicable district taxes. This legislation is referred to as the fuel tax swap.

³ R&TC section 6051.8(a) provides that, in addition to the statewide sales tax, an additional sales tax of 1.75 percent is imposed on a retailer's retail sales of diesel fuel; as relevant here, this additional tax rate increased to 1.87 percent for fiscal year July 1, 2011, through June 30, 2012. (R&TC, § 6051.8(b).)

5. On April 4, 2014, appellant filed a timely petition for redetermination of that NOD.
6. On April 17, 2017, CDTFA issued a reaudit report which reflected a difference between recorded and reported taxable sales of \$2,710,356, unreported motor vehicle fuel sales subject to the state tax exemption for motor vehicle fuel of \$188,492, and unreported diesel fuel sales subject to the additional tax rate of \$904,763. To establish audited amounts, the reaudit relied on appellant's records including profit and loss statements and Point-of-Sale reports. The reaudit resulted in a tax liability of \$227,095.91 (\$247,042.91 less the Schedule G credit of \$19,947.00 for sales tax prepaid to fuel distributors), as compared to the tax liability of \$318,169.86 that was determined in the original audit.
7. On June 7, 2017, appellant filed a timely claim for refund for recovery of payments that it had previously made towards the NOD liability (which payments had fully paid the tax and interest as determined pursuant to the reaudit).
8. By emails sent on June 9, 2017, and July 17, 2017, appellant stated that it disagreed with the reaudit results and argued that it only owed tax of \$82,440.77. Appellant did not specifically dispute the three measures of tax computed in the April 17, 2017 reaudit. Instead, appellant argued that the reaudit should include a tax credit of \$136,777 from its SG account. Appellant asserted that the refund of \$136,177 was reflected on its reconstructed and corrected 2009 returns for that account. Appellant further asserted that, after application of the \$136,177 overpayment to the understatement in the reaudit, the revised amount due would be \$82,440.77.⁴
9. On July 1, 2016, appellant filed a request for relief of interest based on unreasonable errors or delays by CDTFA. By memorandum dated August 17, 2017, CDTFA stated that it found there was no basis for relief of interest.
10. By memorandum dated September 19, 2017, CDTFA stated that it had audited appellant's SG returns for 2010 and 2011, and had issued a refund to appellant based on that audit. However, CDTFA had not included 2009 in the audit because the auditor had not obtained a waiver of limitations for that year. CDTFA stated that amended SG

⁴ We note that tax of \$227,095.91 as computed in the reaudit less the tax credit of \$136,777 equals \$90,318.91. Thus, it is unclear how appellant determined \$82,440.77 as the amount. In a January 23, 2019 letter, we asked appellant to provide calculations showing how its reconstructed returns resulted in a tax credit of \$136,777. We also requested appellant's computation of the \$82,440.77 because we compute \$90,318.91 (\$227,095.91 - \$136,777). In response, appellant did not provide a computation of the \$82,440.77.

- returns for 2009 could not be filed because the statute of limitations for filing a claim for refund for the SG account for that year had expired.
11. On December 20, 2017, CDTFA issued a Supplemental Decision (SD), which found no basis for changing the three audit items that were established in the April 17, 2017 reaudit, and found that appellant had not filed amended SG returns for 2009 or provided any evidence that it was due a credit on its SG returns for 2009.
 12. With respect to appellant's relief of interest, the SD ordered relief of interest for the periods September 1, 2013, through March 31, 2014, and February 1, 2016, through November 30, 2016, based on unreasonable delays for those periods. Otherwise, the SD ordered that the tax be redetermined in accordance with the reaudit report dated April 17, 2017, and that the remainder of the petition for redetermination and claim for refund be denied.
 13. On January 19, 2018, appellant filed a request for reconsideration of the SD, continuing to argue that the April 17, 2017 reaudit should be adjusted to account for a credit due on the SG returns. Appellant stated that it had taken the amended SG returns to CDTFA's San Diego field office, and was informed that the amended SG returns could not be accepted because of the statute of limitations. In a memorandum dated March 5, 2018, CDTFA responded that it did not accept appellant's amended SG returns because the statute of limitations for filing a claim for refund for those tax years had expired.⁵
 14. On May 16, 2018, CDTFA issued a Second SD in which it continued to order that the tax be redetermined in accordance with the April 17, 2017 reaudit; that interest be relieved for the periods September 1, 2013, through March 31, 2014, and February 1, 2016, through November 30, 2016; and that the petition for redetermination and claim for refund be otherwise denied.
 15. This timely appeal followed.

⁵ The memorandum also states that, even if CDTFA had accepted the amended SG returns, a credit reflected thereon would not warrant an adjustment to the liability owed under appellant's seller's permit account because the two accounts are separate accounts, and any credit or refund due under the SG account could not be used to offset a liability owed under the SR account. In an April 3, 2019 letter for the present appeal, CDTFA revised that position, stating that a credit from a taxpayer's SG account may be offset against a tax liability on the same taxpayer's sales and use tax account; however, CDTFA reiterated that here it cannot apply a credit from appellant's SG account to its sales and use tax account because there is no credit due to appellant, and in any event the statute of limitations for filing a claim for refund of payments made on the SG account has expired.

DISCUSSION

California sales tax is imposed on a retailer's retail sales in this state of tangible personal property, unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, § 6051.) It is the retailer's responsibility to maintain complete and accurate records 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.* (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 does not dispute CDTFA's calculation of the three audit items, but contends that there were overpayments for sales tax prepaid to fuel suppliers for the 2009, 2010, and 2011 tax years which should be credited against the liability here. Appellant asserts that it should receive a tax credit of \$136,777 pursuant to amended SG returns it has prepared for its fuel supplier or wholesaler account with CDTFA (SG 78-020920), covering the tax years 2009, 2010, and 2011, and that this \$136,777 credit should be applied as an offset to the tax liability owed on its sales and use tax account with CDTFA (SR 101-189123). Appellant argues that although the statute of limitations for filing a claim for refund for the amended returns for these three years has expired, the \$136,777 credit should be applied because CDTFA's audit process took too long and the statute of limitations expired during that time.

In response, CDTFA contends that, even if appellant's reconstructed SG returns could be applicable here, the amounts in those returns may actually result in an increase to appellant's tax liability because CDTFA did not audit the SG returns due to the statute of limitations having expired. Moreover, CDTFA argues that, since the time for filing a claim for refund for any of

the three years has expired, no refund would be possible even if it found evidence of an overpayment.

CDTFA relied on appellant's own records in calculating the overpayments for sales tax prepaid to fuel suppliers, and CDTFA has met its burden of establishing that its determination was reasonable. Previously we asked appellant to submit its amended SG returns to OTA for consideration and to provide calculations showing how those returns resulted in a tax credit of \$136,777; however, appellant has not done so.⁶ CDTFA audited appellant's SG returns for 2010 and 2011, and issued a refund to appellant based on that audit.⁷ While appellant has provided copies of returns filed for its SR account for each quarter of the years 2009, 2010, and 2011, including Schedule G forms listing sales tax prepayment amounts related to purchases of motor vehicle fuel, appellant has not identified the source documentation supporting the amounts on these reconstructed returns, and the reconstructed returns do not establish any additional overpayment on the SG account. Accordingly, we find no adjustment is warranted for the purported overpayment on appellant's SG return. Given these findings, we need not reach the question about application of the statute of limitations when an overpayment for an SG account is claimed as an offset to a liability due under an SR account for the same reporting period.⁸

⁶ In particular, OTA stated this request to appellant in the January 23, 2019 letter noted above. Although appellant replied to the letter, it did not provide the SG returns OTA had requested, and instead provided copies of the reconstructed SR returns.

⁷ Appellant contends, and CDTFA concedes, that it attempted to file amended SG returns for 2009 with CDTFA's San Diego office, but CDTFA refused to accept the amended returns because the statute of limitations to file a claim for refund had expired and there was no waiver on file for that year.

⁸ As relevant, the SR audit period covers the period February 26, 2009, through December 31, 2011. Appellant did not file any amended SG returns for 2009, therefore, it is unclear for what specific reporting periods appellant is claiming an alleged overpayment on its SG account. However, because appellant started operating effective February 26, 2009, any claimed overpayment under the SG account for 2009 would necessarily overlap with the timely petitioned audit period at issue in the SR account. Based on our finding that appellant failed to establish an overpayment for the SG account, we need not address what impact, if any, the timely petition and refund claims for the SR account may have for an overpayment during the same reporting periods, but made under a separate SG account.

HOLDING

Appellant has not shown that further adjustments are warranted to the audited understatements of reported taxable sales.

DISPOSITION

CDTFA’s decision is sustained.

DocuSigned by:
Suzanne B. Brown
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Suzanne B. Brown
Administrative Law Judge

We concur:

DocuSigned by:
Jeff Angeja
0D390BC3CCB14A9
Jeffrey G. Angeja
Administrative Law Judge

DocuSigned by:
Andrew J. Kwee
3CADA62FB4864CB
Andrew J. Kwee
Administrative Law Judge

Date Issued: 4/9/2020