OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 19034545
	) CDTFA Account No. 100-081179
MARCO'S TRATTORIA PIZZERIA, INC.	) CDTFA Case ID 869616
	)
	)
	)

OPINION

Representing the Parties:

For Appellant:	M. Capanni, Owner and President
For Respondent:	Scott A. Lambert, Hearing Representative
For Office of Tax Appeals:	Deborah Cumins, Business Taxes Specialist III

A. WONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Marco's Trattoria Pizzeria, 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), which assessed a tax liability of $68,267.83, plus applicable interest, for the audit period of October 1, 2009, through June 30, 2013 (audit period).[1] In a subsequent decision, CDTFA reduced the understated measure of tax from $738,992 to $547,727; granted relief of interest for the period April 1, 2018, through June 30, 2018; 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 $8,310.58 for the period January 1, 2013, through June 30, 2013.

Appellant waived its right to an oral hearing; therefore, we are deciding this matter based solely on the written record.

[1] The Board of Equalization (Board) formerly administered business taxes and fees. On July 1, 2017, CDTFA took over these duties. (Gov. Code, § 15570.22.) When describing acts or events that occurred before July 1, 2017, the use of the term "CDTFA" shall refer to its predecessor, the Board.

ISSUES

1. Whether CDTFA timely issued the NOD.
2. Whether an adjustment to the measure of tax for the final sale of equipment included in the sale of Café Marco is warranted.
3. Whether an adjustment to the understatement of reported taxable sales for the first two quarters of 2013 is warranted, and whether appellant has overpaid its tax liability for those two quarters.
4. Whether interest relief is warranted for periods other than the period April 1, 2018, through June 30, 2018.

FACTUAL FINDINGS

1. Since July 2002, appellant has operated Marco's Trattoria, a restaurant serving Italian-style food and alcoholic beverages. In addition to taking orders in the restaurant, appellant took to-go and delivery orders through its website and third-party online services.
2. For part of the audit period, appellant also operated Café Marco, a café that it sold to Michael Quinones, an unrelated third party, on September 30, 2010. The sale of Café Marco included kitchen equipment. Appellant filed an Internal Revenue Service (IRS) Form 4797 (Sales of Business Property), which showed that it sold Café Marco's kitchen equipment for $15,000.
3. For the audit period, appellant reported total sales of $3,158,440, claimed deductions totaling $452,355 for exempt sales of food items, and reported taxable sales of $2,706,085 on its sales and use tax returns. Appellant did not report the sale of Café Marco's kitchen equipment for $15,000 to CDTFA.
4. During the audit, CDTFA obtained five waiver forms relating to the otherwise applicable three-year statute of limitation, which would have begun to run on January 31, 2013, for the fourth quarter of 2009 (4Q09), the first quarter of the audit period. Appellant's owner and president, M. Capanni, signed the first four waiver forms. On July 24, 2014, Mr. Capanni executed a power of attorney (POA), which granted Karen Moore the power to represent appellant in sales and use tax matters. Ms. Moore signed the fifth waiver form pursuant to the POA. The details for each of the five waiver forms are as follows:

a. On January 14, 2013, Mr. Capanni signed a waiver form that, per its terms, extended the deadline by which CDTFA could issue an NOD to appellant for the period of October 1, 2009, through March 31, 2010, to July 31, 2013.

b. On July 1, 2013, Mr. Capanni signed another waiver form that, per its terms, extended the deadline by which CDTFA could issue an NOD to appellant for the period of October 1, 2009, through September 30, 2010, to January 31, 2014.

c. On December 23, 2013, Mr. Capanni signed a third waiver form that, per its terms, extended the deadline by which CDTFA could issue an NOD to appellant for the period of October 1, 2009, through June 30, 2011, to October 31, 2014.

d. On September 30, 2014, Mr. Capanni signed a fourth waiver form that, per its terms, extended the deadline by which CDTFA could issue an NOD to appellant for the period of October 1, 2009, through September 30, 2011, until January 31, 2015.

e. On January 14, 2015, Ms. Moore signed a fifth waiver form that, per its terms, extended the deadline by which CDTFA could issue an NOD to appellant for the period October 1, 2009, through December 31, 2011, until April 30, 2015.

5. For the audit, petitioner provided the following books and records: bank statements for the audit period; federal income tax returns for 2009, 2010, 2011, and 2012; general ledgers (GL) for 2010, 2011, and 2012; online sales records; GL sales summaries for the first two quarters of 2013; and Point-of-Sale (POS) records for the first two quarters of 2013.

6. During a revised audit, CDTFA concluded that appellant had reported more accurately in the first two quarters of 2013 than it had in the earlier part of the audit period.[2] Accordingly, CDTFA decided to use 2Q13 as a test period.

7. In its review of available records, CDTFA found that appellant had not recorded cash sales on its monthly sales worksheets or in the GL prior to January 1, 2013. Accordingly, CDTFA computed a percentage of cash sales to reported sales of 7.08 percent for 2Q13,

[2] CDTFA initially conducted an audit using the credit card ratio method but concluded that method was not appropriate. In preparing a revised audit, CDTFA noted that appellant's reported taxable sales increased markedly in 2013, with an average amount of reported quarterly tax of $15,743 for the period October 1, 2009, through December 31, 2012, compared to an average amount of reported quarterly tax of $21,631 for the first two quarters of 2013.

applied that percentage to reported taxable sales for periods through 2012, and established unreported cash sales of $189,584.

8. To establish the understatement for the first two quarters of 2013, CDTFA compared recorded restaurant sales of $278,412 for 2Q13 to reported total sales of $237,809 for that quarter to compute an understatement of $40,603, which represented an error rate of 17.07 percent. CDTFA applied the 17.07-percent error rate to reported taxable sales for the first two quarters of 2013 to establish an understatement of $82,053.

9. In the revised audit, CDTFA also disallowed all of appellant's claimed exempt sales of food ($452,355) and established an audit item of $15,000 for the unreported sale of kitchen equipment with the sale of Café Marco in September 2010.

10. On April 24, 2015, CDTFA issued the NOD to appellant, with a copy to Ms. Moore, for tax of $68,267.83, plus applicable interest.

11. On April 28, 2015, appellant filed a timely petition for redetermination.

12. On January 26, 2017, CDTFA issued a Decision and Recommendation (D&R), recommending a reduction of $138,461 in the amount of unreported cash sales, from $189,584 to $51,123, and otherwise recommending denial of the petition.[3]

13. This matter was scheduled for a hearing before the Board of Equalization (Board) in September 2017.[4]

14. On September 20, 2017, appellant filed an opening brief for the Board hearing. In the opening brief, appellant raised issues and contentions that had not been addressed in the D&R.[5] Accordingly, CDTFA regarded the opening brief as a Request for Reconsideration and prepared a Supplemental Decision (SD) to address those issues and contentions.

15. On September 20, 2017, appellant also filed a claim for refund of $8,310.58, contending that it had overpaid its tax liability for the first two quarters of 2013.

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[3] CDTFA's Appeals Bureau, which issued the D&R, found that the percentage of unreported cash sales should be computed differently, reducing it from 7.08 percent to 1.91 percent.

[4] The Office of Tax Appeals took over the conduct of business taxes and fees appeals hearings from the Board effective January 1, 2018, pursuant to the Taxpayer Transparency and Fairness Act of 2017.

[5] The D&R stated that appellant had conceded the audit understatements of $15,000 for the unreported sale of equipment, $82,053 for unreported sales for the first two quarters of 2013, and $452,355 for disallowed claimed exempt sales of food. Subsequently, appellant claimed it had never conceded any of the audited amounts of understatement.

16. On January 9, 2018, CDTFA's Appeals Bureau held a second appeals conference with appellant and representatives of CDTFA's Business Tax and Fee Division.

17. On November 16, 2018, CDTFA issued the SD, in which it sustained its previous decision to reduce the audited understatement of reported cash sales from $189,584 to $51,123; established a credit measure of $52,804 for unclaimed exempt food sales by Café Marco;[6] granted relief of interest for the period April 1, 2018, through June 30, 2018; and otherwise denied the petition and the claim for refund.

18. This timely appeal followed.

DISCUSSION

Issue 1: Whether CDTFA timely issued the NOD.

Every NOD must be mailed within three years after the last day of the calendar month following the quarterly period for which the amount is proposed to be determined or within three years after the return is filed, whichever period expires later. (R&TC, § 6487(a).) If, before the expiration of the time prescribed in R&TC section 6487, the taxpayer has consented in writing to the mailing of the notice after such time, the notice may be mailed at any time prior to the expiration of the period agreed upon. (R&TC, § 6488; Cal. Code Regs., tit. 18, § 1698.5(b)(3).) The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. (R&TC, § 6488.)

California Code of Regulations, title 18, section (Regulation) 5523.1(a) and (b), which was in effect at the time appellant signed the POA,[7] required the adoption of a standard POA form containing the following: the taxpayer's name, telephone number, taxpayer identification number, account or permit number(s), and mailing address; the name, address (including email, if any) and telephone and facsimile number of the appointed representative; the tax matters in which the representative is authorized to represent the taxpayer; the scope of the representative's

[6] CDTFA found that the claimed deductions totaling $452,355, which had been identified on appellant's returns as exempt sales of food, were in fact recorded nontaxable tips. However, CDTFA also found that the total sales amounts recorded on appellant's sales tax worksheets had already been adjusted for tips. Thus, since the claimed amounts duplicated the amounts already netted from total sales, CDTFA found that the $452,355 was properly disallowed. However, CDTFA also found that, for the period the café was open, appellant did make exempt sales of food, and it established a separate credit audit item for those exempt sales.

[7] This Regulation, in the Rules for Tax Appeals adopted by the Board, is no longer in effect, but it was in effect at the time the POA was provided by appellant in this matter.

authority; the tax period(s) for which the authorization is granted; a statement that the POA revokes all prior powers of attorney, with any exceptions to the revocation; the time period during which the POA shall be in effect; and the signature(s) and title of all affected taxpayers and date of signature. In lieu of the standard form, any POA form containing all the provisions required by Regulation 5523.1(b) may be accepted, including a statutory form POA that complies with Probate Code section 4401. (Cal. Code Regs., tit. 18, § 5523.1(c).)

There is no dispute that the three-year statute of limitations set forth in R&TC section 6487 applies here. In the absence of a waiver of the statute of limitations, the statute of limitations would have expired for the first quarter of the audit period (4Q09) on January 31, 2013. However, CDTFA obtained five waiver forms from appellant, four of which were signed by Mr. Capanni. The last waiver form was signed by Ms. Moore, for whom appellant had provided a POA on July 24, 2014. The first waiver form was signed on January 14, 2013, and each of the subsequent waiver forms was signed before the expiration of the period for issuing an NOD established in the prior waiver form. The final waiver form extended the period for issuing an NOD until April 30, 2015, and CDTFA issued the NOD before that date, on April 24, 2015. Thus, unless appellant proves that any of the waiver forms is invalid, CDTFA timely issued the NOD before the final waiver form expired.

On appeal, appellant contends that the NOD was not issued timely, arguing that the waiver forms are not valid for various reasons, each of which will be addressed below.

First, appellant asserts that Mr. Capanni, appellant's owner and president, does not recall signing the waiver forms, so he denies signing them, and appellant contends that they are invalid. However, Mr. Capanni's alleged inability to recall signing the waiver forms is not evidence that he did not sign them. Appellant has not provided evidence, or even argued, that Mr. Capanni's signature was forged on the first four waiver forms. Thus, we reject appellant's first argument.

Appellant also argues that the final waiver form is invalid because Ms. Moore was not authorized to sign it. Specifically, appellant asserts that the POA for Ms. Moore is invalid because it was not acknowledged before a notary public or signed by at least two witnesses as purportedly required by Probate Code section 4122.

Here, Mr. Capanni executed a POA dated July 24, 2014, which granted Ms. Moore the power to represent appellant in sales and use tax matters, and there is no evidence or argument that this POA was subsequently revoked. This signed POA complied with Regulation 5523.1

since it included the elements required in that regulation and, therefore, we deem it to be valid. There is no requirement in the Sales and Use Tax Law or applicable regulations, including Regulation 5523.1, that a POA be notarized or signed by witnesses to be valid for sales and use tax purposes, and appellant has failed to provide any authority indicating that Probate Code section 4122 applies here. Thus, we find appellant's argument lacking in merit.

Additionally, appellant contends that the waiver forms are not valid for the following four reasons: (1) a CDTFA representative did not countersign them; (2) on the last waiver form, an incorrect box ("original waiver") was checked rather than the correct box ("extension to original waiver"); (3) the auditor did not comply with Audit Manual section 0401.09 in certain ways, such as making entries on an Assignment Activity History (Form BOE-414Z) indicating that a supervisor had approved of obtaining of a waiver; and (4) the waiver forms signed after the first waiver form were for different "audit periods" and therefore do not represent extensions of the original waiver.

First, neither R&TC section 6488 nor Regulation 1698.5 requires a CDTFA representative to countersign a waiver form; per those authorities, only the *taxpayer* need consent to a waiver and sign the waiver form. Although the waiver form does have a line to be signed by a CDTFA representative, the lack of a countersignature is irrelevant with respect to the waiver form's validity and does not invalidate a waiver or extension.

Second, checking the incorrect box identifying an extension to a waiver as an original waiver does not invalidate the extension to the waiver because that is a minor clerical error. The nature of the extension to the waiver is clearly defined by the remaining substantive information on the waiver form.

Third, with respect to CDTFA's failure to comply with the audit manual, we note that the audit manual's direction in this regard is procedural guidance only, not legal authority. Moreover, there is no statutory or regulatory authority to invalidate valid waiver forms because the auditor did not note on Form BOE-414Z that supervisory approval was obtained.[8]

Fourth, regarding the periods for which the statutory period was extended, each waiver form extends the statutory period for issuing an NOD for the periods that would otherwise

[8] Regulation 1698.5(b)(3) does state, "Supervisory approval of the circumstances which necessitated the request for the waiver *will be documented* in the audit before the waiver is presented to the taxpayer for signature." (Italics added.) Although CDTFA's failure to comply with this Regulation does not invalidate statutorily valid waivers and extensions, we recommend that CDTFA still adhere to its own Regulation.

expire. Thus, in this case, the original waiver form extended the period for issuing an NOD for 4Q09 through 1Q10 until July 31, 2013, because those quarters would have otherwise expired on January 1, 2013, and April 30, 2013, respectively. The remainder of the audit period would not expire before July 31, 2013, regardless of whether a waiver was obtained. The first extension to the waiver extended the period for issuing an NOD until January 31, 2014, and it applied to periods that would expire before that date, 4Q09 through 3Q10. Each subsequent waiver form is applicable to a longer period because the statute of limitations relative to additional quarters would otherwise expire. For the above-stated reasons, we reject each of the additional four arguments raised by appellant.

Citing *Appeal of Meyer* (96-SBE-012) 1996 WL 463771, appellant further contends that the statute of limitation must be strictly construed "irrespective" of any waiver (i.e., appellant purports that the three-year statute of limitation applicable here cannot be extended regardless of what the Sales and Use Tax Law states). *Appeal of Meyer* concerns a statute of limitation for a taxpayer to file a claim for refund in the franchise and income tax context. Although this case does state that statutes of limitation are strictly construed, it does not hold that such is the case *irrespective of any waiver* as appellant contends. Appellant either misreads or misrepresents this case, so we dismiss this contention.

Appellant similarly argues that, "notwithstanding any alleged waiver of limitation," the only time CDTFA may collect any deficiency subsequent to the running of the statute of limitations is in instances of fraud and CDTFA has not established fraud, or even negligence, in this case.

Appellant again misconstrues the law. It is correct that an NOD can be issued after the expiration of the statute of limitations only in instances of fraud. However, waivers extend the period for issuing NOD's, thus extending the date on which the statute of limitations expires. Therefore, the NOD in this matter was issued before the expiration of the statute of limitations, as extended by the valid waiver forms signed by appellant's president and by Ms. Moore, in accordance with the valid POA.

Appellant further argues that CDTFA is subject to any and all applicable statutes dealing with waivers, including California Code of Civil Procedure section 360.5. However, this section applies to civil actions in superior/trial court, not to state tax agencies and their administrative processes (the R&TC governs CDTFA and its administration of business taxes and fees).

Appellant has failed to show, or to cite to any authority indicating, that this Civil Procedure Code section applies to CDTFA or that it either supplements or supplants the application of R&TC sections 6487 and 6488 in this case. Accordingly, appellant's unsupported argument lacks merit.

Finally, appellant argues that CDTFA has not proven that the NOD was mailed on the date shown on the NOD (April 24, 2015). Appellant contends that it requested proof of service of the NOD, but CDTFA had not produced such a document. We disagree that such a document is required for an NOD to be valid.

CDTFA is required to give a retailer written notice of its determination. (R&TC, § 6486.) The notice shall be placed in a sealed envelope, with postage paid, addressed to the retailer at his or her address at is appears in CDTFA's records. (*Ibid*.) The giving of notice shall be deemed complete at the time of the deposit of the notice in the United States Post Office, or a mailbox, sub-post office, substation or mail chute or other facility regularly maintained or provided by the United States Postal Service. (*Ibid*.)

Here, the records provided by CDTFA include a copy of the NOD addressed to appellant and a copy of the NOD addressed to Ms. Moore, appellant's representative, when the NOD was issued. The NOD is dated April 24, 2015. Appellant has not supported its assertion that the NOD may not have been mailed on the date shown on the NOD. Moreover, we note that appellant filed its petition for redetermination on April 28, 2015, which is evidence that appellant received the NOD on or prior to that date. Accordingly, we reject appellant's final argument.

In sum, we find that CDTFA issued the NOD prior to April 30, 2015, the last date for timely issuing an NOD as established in the final waiver form in a series of waiver forms. We find that all five of the waiver forms, as well as the POA granting Ms. Moore the authority to sign the last waiver form, were valid. Thus, the NOD was issued timely and we reject appellant's arguments to the contrary.

Issue 2: Whether an adjustment to the measure of tax for the final sale of equipment included in the sale of Café Marco is warranted.

California imposes sales tax on a retailer measured by its gross receipts from its retail sales of tangible personal property in this state, unless the sales are 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.)

In general, when a person sells a business which is required to hold a seller's permit, tax applies to the gross receipts from the retail sale of tangible personal property held or used by that business in the course of its activities requiring the holding of the seller's permit. (Cal. Code Regs., tit. 18, § 1595(b)(1).) Tax does not apply to a transfer of all or substantially all the property held or used by a person in the course of activities for which the person is required to hold a seller's permit, provided that after the transfer the real or ultimate ownership of the property is substantially similar to that which existed before the transfer. (Cal. Code Regs., tit. 18, § 1595(b)(2).)

Sales of food products for human consumption are exempt from tax. (R&TC, § 6359.) Tax also does not apply to either the sale, or the storage, use, or other consumption, of containers when sold or leased without the contents to persons who place food products for human consumption in the containers for shipment, provided the food products will be sold. (R&TC, § 6364(d); Cal. Code Regs., tit. 18, § 1589(b)(1)(E).)

It is undisputed that appellant sold Café Marco on or about September 30, 2010. Appellant filed an IRS Form 4797, which showed that it sold Café Marco's kitchen equipment for $15,000. But appellant failed to report this sale of equipment on its sales and use tax return.

On appeal, appellant argues that this sale was not subject to tax because (1) it sold all or substantially all of the property used to operate the café, and (2) 90 percent of the personal property sold with the café consisted of food products or containers that held or prepared food or items for human consumption.

Here, while there is no dispute that appellant sold the entire business of Café Marco, the café was sold to Michael Quinones, a third party who was not an owner of appellant. Thus, the real or ultimate ownership after the sale is not similar to the ownership that existed prior to the transfer. Accordingly, the sale of equipment is not exempt.

With respect to appellant's assertion that 90 percent of the personal property sold with the café consisted of food products or containers that held or prepared food, appellant has provided a list of equipment sold. On that list, there are approximately 95 items of equipment, including chairs, bar stools, bottles, plastic storage containers, a refrigerated display case, an espresso grinder, and many other items used in preparing and storing food. In addition to that list, we have a copy of IRS Form 4797, which showed that appellant sold Café Marco's kitchen

equipment for $15,000. We find that the equipment list and IRS Form 4797 are evidence to support the sale of $15,000 in equipment, not exempt food products.

Regarding appellant's assertion that the personal property sold consisted of exempt "containers that held or prepared food," we find that appellant has misconstrued R&TC section 6364 and Regulation 1589. Those authorities provide that tax does not apply to containers when sold or leased without the contents to persons who place food products for human consumption in the containers *for shipment*. In this matter, there is no evidence or argument that any of the containers that were included in the sale of equipment were used to ship food products. There is no exemption from tax for containers that are used to prepare or to store food.

We find that the evidence supports a finding that, when appellant sold Café Marco, there was a taxable sale of equipment, which was not reported on its sales and use tax return, and that the amount of that sale was $15,000. Accordingly, we find no adjustment to the audited amount of the final sale of equipment is warranted.

Issue 3: Whether an adjustment to the understatement of reported taxable sales for the first two quarters of 2013 is warranted, and whether appellant has overpaid its tax liability for those two quarters.

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, appellant used bank deposits to establish the amounts of reported total sales, but it is impossible to determine whether all of the cash proceeds from sales had been deposited. As such, we find it was appropriate for CDTFA to utilize other audit methods to evaluate the accuracy of reported taxable sales. As relevant here, CDTFA used a direct audit method, comparing recorded and reported sales for 2Q13.[9] It then computed a percentage of error that it

[9] We note that CDTFA only utilized appellant's own records in developing the audit understatement.

applied to reported sales for 1Q13 to establish an understatement of $82,053 for both 1Q13 and 2Q13. We find that audit method appropriate in this case, and we therefore find that CDTFA has met its initial burden of showing that the determination of the understatement for the first two quarters of 2013 was reasonable and rational. Accordingly, appellant has the burden to show that adjustments are warranted and to establish a different result.

However, on appeal, appellant confuses two adjustments made by CDTFA using information from 2Q13 and apparently believes they are interrelated, which they are not. Appellant uses the unreported cash sales of $4,505 for 2Q13 in a misguided attempt to argue that the understatement of reported taxable sales of $82,053 cannot be correct. Appellant's computations and arguments in this area fail because there is no relationship between the understatement of reported taxable sales established for the first two quarters of 2013 and the understatement of reported cash sales for periods prior to 2013. Accordingly, this matter will not be addressed further.

Appellant argues that it was improper for CDTFA to compute error ratios (one for unreported taxable sales for the first two quarters of 2013 and one for unreported cash sales prior to 2013) using its records for one quarter and to apply those ratios to other portions of the audit period. Appellant asserts that it provided sufficient records, which should have been used to establish audited sales. Moreover, since CDTFA has stated that recorded and reported sales reconciled, appellant argues that recorded and reported sales should be accepted as correct.

The fact that recorded and reported sales reconcile is not, by itself, evidence that reported sales are accurate. Here, CDTFA analyzed recorded sales and found them to be understated. We have previously found that CDTFA used an appropriate audit method, and we reject appellant's assertion that CDTFA should have accepted its records without additional review.

Appellant also argues that the sales amounts compiled by CDTFA are incorrect, and it has provided a Summary of Daily Closing Reports, along with copies of Daily Closing Reports, which reflect lower amounts of sales than those scheduled by CDTFA for April 2013. Appellant contends that the entire understatement of $82,053 for the first two quarters of 2013 should be deleted and argues that it is instead due a refund of $8,310.58 for those two quarters.[10]

We have reviewed the Summary of Daily Closing Reports for April 2013. We note that, for 22 of the 30 days in April, the amount shown as "total sales" is identical to the amount shown

[10] We are unable to find a computation of this $8,310.58 figure in the record.

in CDTFA's schedule as the amount of sales paid by bankcard. For April 23, CDTFA noted that it did not have the Daily Closing Report, and it duplicated the figures for April 22 in its schedule for April 23; therefore, the figures for that day are not relevant in our comparison. For six of the remaining seven days, the amount of total sales on appellant's schedule was within $50 of the amount scheduled by CDTFA as "paid by bankcard." Thus, the evidence strongly indicates that the amounts of total sales on appellant's report are incomplete and represent only appellant's sales that were paid by credit card. There are other indications that the amounts provided by appellant are not accurate. For instance, the Daily Closing Reports provided by appellant appear incomplete because they do not include the basic information that is typically shown on a POS daily sales closing report. Also, the amounts of cash shown on the daily sales reports are negative amounts, which appears incorrect. For all these reasons, we find that the daily sales information provided by appellant is not reliable and reject appellant's assertion that the amounts scheduled by CDTFA are overstated.

Appellant also argues that recorded total sales include sales tax and tips and should therefore be reduced by 23.58 percent to compute taxable sales. Appellant provides a computation, wherein it adds the restaurant sales paid by bankcard and cash sales of $80,755 and $19,698, respectively, to compute audited total sales of $100,453. It then applies 23.58 percent to that figure to compute sales tax and tips of $23,687, which it deducts from $100,453 to compute taxable sales of $76,676 (all figures rounded).

There are various fallacies in this computation. First, the figures appellant has used for "paid by bank card" and cash sales represent sales in the restaurant only and omit online sales of $11,524. More importantly, appellant assumes that CDTFA has made no adjustment for sales tax or tips included in recorded total sales. Appellant's assumption is incorrect.

Regarding sales tax, our review of the audit working papers indicate that CDTFA has made the appropriate adjustments for sales tax included in recorded sales in its computation of audited taxable sales.

Regarding tips, we find it much more likely than not that tips would not be included in recorded cash sales. The cashier, recording a cash sale, would be unaware of any cash tips left on the table, and would only record the amount of the sale, excluding any tip. However, tips are frequently included with credit card payments, and it is possible that recorded total sales would include the tips patrons added to credit card charges. Our review of the audit working papers,

specifically a schedule on which CDTFA computed audit taxable sales for June 2013, indicates that CDTFA excluded tips with respect to credit card sales for that month. Although the record does not contain a similar schedule that computes the credit card and cash sales for April 2013, we find it more likely than not that CDTFA would have used the same procedure to compute credit card sales for April that it used for June. Thus, the evidence shows that the amounts of sales paid by bank card used to establish audited taxable sales are net of tips.

We find that the evidence does not support a finding that the audited taxable sales for 2Q13 are overstated, as appellant asserts. Therefore, we find no adjustment to the audited understatement of reported taxable sales for the first two quarters of 2013 is warranted. Since we find that there is an understatement for 2Q13, we further find that there is no overpayment, as alleged by appellant's claim for refund.

Issue 4: Whether interest relief is warranted for periods other than the period April 1, 2018, through June 30, 2018.

R&TC section 6482 provides that the amount of a deficiency determination shall bear interest from the last day of the month following the quarterly period for which the amount, or any portion thereof, should have been remitted until the date of payment. The imposition of interest is mandatory (R&TC, § 6482), and the law provides for relief of interest only under very narrow circumstances, including unreasonable error or delay by a CDTFA employee in his or her official capacity (R&TC, § 6593.5(a)(1)). A person requesting relief of interest must file a statement signed under penalty of perjury setting forth the factual basis for the relief request. (R&TC, § 6593.5(c).) Where a taxpayer requests interest relief due to an unreasonable error or delay by a CDTFA employee, relief is appropriate only when no significant aspect of the error or delay can be attributed to an act or failure to act by the taxpayer. (R&TC, § 6593.5(b).)

Appellant asserts that any interest against appellant must be waived because of unreasonable errors or delays by CDTFA. Specifically, appellant alleges two types of errors: (1) CDTFA issued an untimely NOD; and (2) CDTFA made multiple errors during the audit, including fabricating numbers not substantiated by any facts, employing improper sampling tactics when actual records were available, and negligently and excessively overestimating appellant's taxable measure. In addition, appellant asserts that it was ready, willing, and able to appear for a Board hearing in September 2017, and that it never agreed to a postponement of the

hearing. On that basis, appellant asserts that interest should be relieved for all periods beginning September 2017.

We have previously found that the NOD was issued timely. We have also found that CDTFA's audit procedures were reasonable and its computations and explanations for audit adjustments were clear. Accordingly, we reject appellant's first two alleged errors on which it based its request for relief of interest.

Regarding appellant's assertion that interest relief should be granted for periods beginning September 2017 because it was prepared for a Board hearing and did not agree to have the hearing postponed, we note that appellant raised numerous new arguments in its September 20, 2017 opening brief that had not been previously considered by CDTFA's Appeals Bureau. Since the Board hearing was not the proper venue for raising multiple new arguments that had not been answered by CDTFA's Business Tax and Fee Division or analyzed by its Appeals Bureau, it was appropriate for CDTFA to hold a second appeals conference and issue an SD to address all the new arguments raised in appellant's opening brief.

We have reviewed the entries on Form BOE-414Z and find that the delays in the audit process were the result of appointments cancelled by appellant, a change in representatives, a delay while the new representative became familiar with the case, and changes in the audit procedures to address various arguments raised by appellant. We find no unreasonable delays by CDTFA staff in the audit process. After CDTFA issued the NOD on April 24, 2015, CDTFA's Appeals Bureau issued the D&R on January 26, 2017, and we find that span of time between NOD and D&R is not unusually long for CDTFA's internal appeals process. CDTFA scheduled a Board hearing in September 2017, but then postponed the hearing to address new issues in appellant's opening brief. As noted above, that postponement was appropriate in order to provide an opportunity for CDTFA's Appeals Bureau to fully address all issues in the opening brief. The Appeals Bureau held a second appeals conference on January 9, 2018, and issued the SD on November 16, 2018. On March 16, 2019, appellant filed its Request for Appeal with the Office of Tax Appeals. We find no evidence of unreasonable delays or errors by CDTFA staff other than the three-month delay for which CDTFA has already granted relief of interest.

HOLDINGS

1. CDTFA timely issued the NOD.
2. No adjustment to the measure of tax for the final sale of equipment included in the sale of Café Marco is warranted.
3. No adjustment to the understatement of reported taxable sales for the first two quarters of 2013 is warranted; appellant has not overpaid its tax liability for those two quarters.
4. No interest relief is warranted for periods other than the period April 1, 2018, through June 30, 2018.

DISPOSITION

We sustain CDTFA's actions reducing the unreported taxable cash sales from $138,461 to $51,123; allowing a credit measure of $52,804 for unclaimed exempt food sales by Marco's Café; relieving interest for the period April 1, 2018, through June 30, 2018; and otherwise denying the petition. We also sustain CDTFA's action denying the claim for refund.

DocuSigned by:
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Andrew Wong
Administrative Law Judge

We concur:

DocuSigned by:
Josh Aldrich
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Josh Aldrich
Administrative Law Judge

DocuSigned by:
Andrea LH Long
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Andrea L.H. Long
Administrative Law Judge

Date Issued: 3/17/2020