

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

In the Matter of the Appeal of: ) OTA Case No. 18073411  
**MARTINEZ STEEL CORPORATION** ) CDTFA Account No. 101-623689  
 ) CDTFA Case ID 954455  
 )  
 ) Date Issued: November 1, 2019  
 )

---

**OPINION**

Representing the Parties:

For Appellant: Manuel A. Almeida, Almeida & Associates

For Respondent: Jarrett Noble, Tax Counsel III

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Martinez Steel Corporation (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)<sup>1</sup> denying appellant’s petition for redetermination of a Notice of Determination (NOD), which assessed a liability under the California Sales and Use Tax Law consisting of a \$266,269 tax liability, plus accrued interest, for the period July 1, 2012, through June 30, 2015 (liability period).

Administrative Law Judges Josh Lambert, Jeffrey G. Angeja, and Linda C. Cheng held an oral hearing for this matter in Los Angeles, California, on September 18, 2019. At the conclusion of the hearing, the record was closed and this matter was submitted for decision.

**ISSUE**

Whether an adjustment to underreported ex-tax purchases of steel materials subject to use tax is warranted.

---

<sup>1</sup> Sales taxes were formerly administered by the State Board of Equalization (board). In 2017, administration 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 the board; and when referring to acts or events that occurred on or after July 1, 2017, “CDTFA” shall refer to CDTFA.

### FACTUAL FINDINGS

1. Appellant is a California corporation that holds a seller's permit effective as of August 1, 2010. Appellant is a construction contractor<sup>2</sup> that fabricates and installs rebar steel for customers in California under lump sum contracts.
2. During the liability period, appellant purchased steel materials in the amount of \$18,374,604 under resale certificates with no tax or tax reimbursement paid or reported at the time of purchase.
3. Appellant reported and paid tax on \$15,534,190 of steel materials when appellant withdrew the steel from inventory, which is comprised of \$15,516,870 of steel materials consumed for installation purposes and \$17,320 of steel materials resold in retail sales.
4. The inventory balance as of the end of the liability period was \$2,840,414 (i.e., \$18,374,604 - \$15,534,190).
5. CDTFA concluded that the \$18,374,604 purchased steel materials were taxable at the time of purchase.
6. CDTFA issued a Report of Field Audit dated April 27, 2016, in which it determined an aggregate deficiency measure of \$3,324,712, which consisted of the following two audit items: (1) underreported ex-tax purchases of steel materials subject to use tax, measuring \$2,840,414; and (2) underreported ex-tax purchases of construction supplies subject to use tax, measuring \$484,298.
7. On May 19, 2016, CDTFA issued an NOD to appellant for the liability period, in the amount of \$266,269 in tax, plus accrued interest.
8. Appellant filed a timely petition for redetermination, contesting the NOD.
9. Appellant conceded audit item 2 and \$400,402 of audit item 1. Accordingly, appellant disputes \$2,440,012 of audit item 1. This timely appeal followed.

### DISCUSSION

California imposes 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

---

<sup>2</sup> A construction contractor is a person who agrees to perform and does perform a construction contract. (Cal. Code Regs., tit. 18, § 1521, subd. (a)(2).) A construction contract includes a contract to erect, construct, alter, or repair any building or other structure, project, development, or other improvement on or to real property. (Cal. Code Regs., tit. 18, § 1521, subd. (a)(1)(A)1.)

excluded from taxation by statute. (Rev. & Tax. Code, § 6051.) All of a retailer's gross receipts are presumed subject to tax, unless the retailer can prove otherwise. (Rev. & Tax. Code, § 6091.) In addition, the storage, use, or other consumption of tangible personal property in California is subject to use tax, unless otherwise exempt or excluded. (Rev. & Tax. Code, § 6201.) The use tax is imposed on the person actually storing, using, or otherwise consuming the property. (Rev. & Tax. Code, § 6202, subd. (a).)

With certain exceptions not relevant here, construction contractors are the consumers of materials that they furnish and install in the performance of construction contracts, and therefore they owe use tax on their use of the materials. (Cal. Code Regs., tit. 18, § 1521, subd. (b)(2)(A)1; §§ 6201, 6202, subd. (a).) Construction contractors may not purchase materials for resale unless they are also in the business of selling materials. (Cal. Code Regs., tit. 18, § 1521, subd. (b)(6)(A).) Any person who gives a resale certificate for property that he or she knows at the time of purchase is not to be resold by him or her in the regular course of business is liable to the state for the amount of tax that would be due if he or she had not given such resale certificate. (Rev. & Tax. Code, § 6094.5, subd. (b).)

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.)

During the audit period, appellant consumed \$15,516,870 of steel materials and resold \$17,320 of steel materials at retail, which is 0.1 percent of total materials pulled from inventory during the liability period. The fact that appellant consumed 99.9 percent of the materials it purchased and resold only 0.1 percent of the materials establishes that it was not engaged in the business of reselling the materials. Therefore, CDTFA's determination is reasonable and

rational, and the burden of proof shifts to the taxpayer to establish that a result differing from CDTFA's determination is warranted.

Appellant states that, during the audit period, the majority of its work consisted of lump sum contracts for fabrication and installation of rebar. However, appellant argues that its original intent was always the resale of inventory, which is part of its business model. Appellant provides "over-the-counter" sales schedules, which indicate that it made sales of steel materials as follows: (1) \$1,392,413 gross sales during the eight quarters before the liability period at issue; and (2) \$98,780 gross sales during the two quarters after the liability period at issue. Appellant argues that this indicates that it made significant resales of steel materials in other periods, and that it had intent to re-sell steel materials at the time of purchase during the liability period. However, appellant provides no evidence of the total amount of materials it purchased, nor the amount of those it consumed, so there is no way to determine whether the gross sales were comparatively significant. In other words, the gross sales might have been even less than 0.1 percent when compared to total purchases for these periods. Accordingly, appellant has not met its burden to show it was engaged in the business of selling materials, and therefore we conclude that all of appellant's purchase of materials were taxable at the time of purchase.<sup>3</sup>

---

<sup>3</sup> To the extent appellant sells any tax-paid purchases of materials prior to using them, the appropriate course is for appellant to claim a deduction (or file a timely claim for refund) for tax-paid purchases resold on a subsequent sales tax return. (Cal. Code Regs., tit. 18, § 1701, subd. (a).)

HOLDING

No adjustment is warranted to underreported ex-tax purchases of steel materials subject to use tax.

DISPOSITION

CDTFA's action is sustained.

DocuSigned by:



B90E40A720E3440...  
Josh Lambert

Administrative Law Judge

We concur:

DocuSigned by:



0D390BC3CCB14A9  
Jeffrey G. Angeja

Administrative Law Judge

DocuSigned by:



8F585B1AC0B946D  
Linda C. Cheng

Administrative Law Judge