OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18011855
	) CDTFA Account No. 100-316099
24HOURSPC.COM, INC.	) CDTFA Case ID 803446
	)
	)
	)

OPINION

Representing the Parties:

For Appellant:	Dean Lloyd, Attorney at Law
For Respondent:	Mengjun He, Tax Counsel III
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, 24HoursPC.com, Inc. (appellant) appeals a Decision and Recommendation (D&R) 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 $78,276.07, applicable interest, and a negligence penalty of $7,827.70 for the period of January 1, 2010, through June 30, 2012 (audit period).[1] In its D&R, CDTFA reduced the determined tax liability from $78,276.07 to $68,578.96 and the proposed negligence penalty from $7,827.70 to $6,857.95, and denied the remainder of the petitioned amount.

Appellant waived its right to an oral hearing; therefore, the matter is being decided based on the written record.

[1] Sales taxes were formerly administered by the Board of Equalization (BOE). Effective July 1, 2017, functions of BOE relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) When referring to acts or events that occurred before July 1, 2017, the term "CDTFA" shall refer to BOE, its predecessor.

ISSUE

Whether further adjustments are warranted to the audited understatement of reported taxable sales.[2]

FACTUAL FINDINGS

1. Appellant, a California corporation, sold refurbished computers, peripherals, miscellaneous electronic equipment, and other tangible personal property at "liquidation sales" at various locations, both inside and outside of California, from November 2003 through June 2012. The corporation was dissolved on February 24, 2014.
2. During the audit period, appellant reported total sales of $500,052; claimed deductions for exempt sales in interstate commerce of $136,136, nontaxable sales for resale of $158,425, nontaxable labor of $118,536, and sales tax of $7,636 included in reported total sales; and reported taxable sales of $79,319.
3. For audit, appellant initially provided federal income tax returns (FITR's) for 2010, 2011, and 2012, and incomplete credit card receipts and purchase invoices. Eventually, appellant provided bank records, some shipping documents, and some profit and loss statements.
4. To establish the understatement that was the basis of the NOD, CDTFA established a difference of $932,534 between total sales reported on sales and use tax returns (SUTR's) and gross receipts reported on FITR's. Using appellant's reported figures, CDTFA computed that nontaxable out-of-state sales represented 27 percent (rounded) of total sales.[3] Applying that percentage to $932,534, CDTFA computed that $253,879 of nontaxable out-of-state sales was included therein. CDTFA then computed additional taxable sales of $678,664. CDTFA also established a separate audit item for disallowed claimed nontaxable sales for resale of $148,272 ($158,425 claimed sales for resale - $10,153 for which appellant provided documentation). CDTFA allowed the claimed amount of nontaxable labor ($118,536) even though appellant provided no supporting documentation.

[2] Appellant has not appealed the negligence penalty, so we will not address it as a separate issue.

[3] Claimed exempt interstate sales of $136,136 ÷ reported total sales of $500,052 = 27.2244 percent. We note that, technically, appellant's claimed exempt interstate sales are actually nontaxable out-of-state sales.

5. During CDTFA's internal appeals process, appellant provided additional records, prompting CDTFA to conduct a reaudit. In the reaudit, CDTFA established the cost of purchases of merchandise that was shipped out of state ($372,924). It then added the markups that were reflected on appellant's FITR's to establish audited nontaxable out-of-state sales of $491,500. To compute audited taxable sales of $804,769, CDTFA reduced gross receipts reported on appellant's FITR's ($1,432,594) by the following: audited nontaxable out-of-state sales ($491,500); nontaxable sales for resale for which appellant had provided documentation ($10,153); and the amounts of nontaxable labor ($118,536) and sales tax included in reported total sales ($7,636) that appellant had claimed on SUTR's. CDTFA compared audited taxable sales of $804,769 to reported taxable sales of $79,319 to establish the audited understatement of reported taxable sales of $725,450.
6. This timely appeal followed.

DISCUSSION

The California sales tax is imposed on a retailer and measured by the retailer's gross receipts from all of its retail sales of tangible personal property in this state, unless a sale is 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.) The retailer bears the burden of establishing its entitlement to any claimed deduction or exemption. (*Paine v. State Bd. of Equalization* (1982) 137 Cal.App.3d 438, 443.)

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.)

In this case, we find that CDTFA has used a reasonable audit approach and has made reasonable assumptions, using the limited records available, to establish the audited understatement of reported taxable sales in the reaudit. Accordingly, appellant has the burden of proof to show that any adjustments are warranted.

In its opening brief, appellant alleges that the majority of its business consisted of nontaxable liquidation sales made outside the state of California. With that brief, appellant provided an accordion folder that included numerous purchase invoices showing that merchandise it purchased from its vendor was shipped to itself at locations outside of California; several shipping documents; bank statements for two bank accounts; and transaction histories for an American Express account and a PayPal account. According to appellant, the available documentation shows that Mr. Tae Lee, a 50-percent shareholder in the business, was outside of California for various extended periods of time during the audit period. Appellant contends that all sales not reported as taxable sales on its SUTR's were nontaxable sales made out-of-state. On that basis, appellant requests that the liability be reduced to zero.

On the issue of whether appellant has supplied sufficient evidence to support such an adjustment, appellant asserts that it is unable to provide documentation requested by CDTFA because most of its records were left at its rented business premises when appellant was evicted in October 2011. In its opening brief, appellant claims that appellant's former landlord refused to return items left at the business premises unless appellant paid storage costs of $500 per day, which Mr. Lee was financially unable to pay (he had recently filed for bankruptcy). Appellant also asserts that it provided a truck travel logbook to CDTFA's audit staff that would have showed that it regularly transported merchandise to locations outside California for sale. Since appellant maintains that it is unable, through no fault of its owners, to provide the documentation requested by CDTFA, it argues that the available documentation should be accepted as adequate to support its argument that all taxable sales have been reported.

We reject appellant's argument that the available records should be accepted as adequate to show that all taxable sales have been reported on its SUTR's because its failure to produce records is purportedly the result of circumstances beyond its control. Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (See *Riley B's, Inc. v. State Bd. of Equalization*, *supra*, 61 Cal.App.3d 610, 616; *Appeal of Magidow*, *supra*.) Rather, 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).) Here, appellant has failed to support its assertion that documentation supporting adjustments existed or that such documentation was lost through no fault of its own. Further, appellant has failed to prove, and the audit working papers do not evidence, that a truck travel logbook existed, that

appellant provided such a logbook to CDTFA, or that CDTFA failed to return it. Accordingly, we reject appellant's argument that the lack or loss of such records somehow renders the remaining evidence provided by appellant on appeal adequate to adjust the remaining tax liability to zero.

With respect to the evidence that appellant provided with the appeal, we note that the total of the purchase documents and shipping records provided with appellant's opening brief represent purchases of $216,294, which is less than the $372,924 cost of merchandise used in the reaudit to compute the amount of nontaxable out-of-state sales. Appellant has failed to prove that these purchases of $216,294 were not part of the larger amount of purchases already used in the reaudit computations of audited nontaxable out-of-state sales. Similarly, with regard to the bank records, appellant has failed to establish (or even provide a calculation showing) that the total deposits from out-of-state customers exceeded the $491,500 already regarded as nontaxable sales in interstate commerce in the reaudit. On these bases, we conclude that the information provided with appellant's brief is not sufficient to document that the audited amount of nontaxable out-of-state sales should be increased and that appellant has not established that further adjustments are warranted.

Regarding appellant's contention that the supplied records (i.e., the bank statements and transaction histories) are evidence that Mr. Lee was outside the state of California for extended periods, even if we accepted that this evidence documents Mr. Lee's extended absences from California, such evidence does not prove that appellant ceased selling at liquidation sales in California during the audit period. Further, such evidence offers no documentation of sales outside California or data from which an amount of nontaxable sales could be determined. Thus, we find that the evidence of Mr. Lee's absences from California is not a basis for adjusting the audited understatement of reported taxable sales.

In sum, we find that appellant has provided insufficient evidence to support an increase in the allowed amounts of nontaxable sales. Accordingly, we find that no further adjustment is warranted.

HOLDING

No further adjustments are warranted to the audited understatement of reported taxable sales.

DISPOSITION

CDTFA's action to reduce the audited understatement of tax to $68,578.96 and the negligence penalty to $6,857.95, and to otherwise deny the petition for redetermination is sustained.

DocuSigned by:
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Andrew Wong
Administrative Law Judge

We concur:

DocuSigned by:
Nguyen Dang
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Nguyen Dang
Administrative Law Judge

DocuSigned by:
8B585BEAC08946D...
Linda C. Cheng
Administrative Law Judge

Date Issued: 2/27/2020