

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

In the Matter of the Appeal of:

**J. NADER**) OTA Case No. 19014160  
) CDTFA Account No. 101-148360  
) CDTFA Case ID 791328  
)  
)  
)**OPINION**

Representing the Parties:

For Appellant:

R. Todd Luoma, Attorney

For Respondent:

Kevin C. Hanks  
Chief, Headquarters Operations Bureau

N. DANG, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 6561, J. Nader (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)<sup>1</sup> in response to appellant's timely petition for redetermination of a Notice of Determination (NOD) for the period July 1, 2009, through December 31, 2012 (audit period). The NOD is for \$297,715.28 tax, a negligence penalty of \$29,771.58, plus applicable interest.

Appellant waived the right to an oral hearing, and therefore, we decide the matter based on the written record.

**ISSUE**

Whether additional adjustments are warranted to unreported taxable vehicle sales.

**FACTUAL FINDINGS**

1. During the audit period, appellant operated a used car dealership in Fremont, California.
2. CDTFA audited appellant, finding that appellant underreported its taxable vehicle sales.
3. In the absence of any sales records, CDTFA initially used purchase information and

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<sup>1</sup> Prior to July 1, 2017, CDTFA's sales and use tax functions were administered by the State Board of Equalization (BOE). (See Gov. Code, § 15570.22.) Therefore, for ease of reference, when this opinion refers to acts or events that occurred prior to July 1, 2017, "CDTFA" shall refer to BOE.

estimated average markups to establish unreported taxable vehicle sales of \$3,221,666.

Although the NOD issued to appellant is based on this amount, thereafter CDTFA made two additional adjustments in light of new information it obtained.

4. The first adjustment reduced unreported taxable vehicle sales by \$625,354 and was made based on vehicle license fee information obtained from the DMV.<sup>2</sup>
5. Thereafter, appellant provided sales records for the period July 1, 2010, through December 31, 2011 (test period), showing additional taxable vehicle sales which were not reported to DMV.
6. CDTFA therefore decided to use appellant's sales records to compute unreported taxable vehicle sales. CDTFA compared appellant's recorded to reported taxable vehicle sales for the test period to establish an error percentage, which it then applied to reported taxable vehicle sales for the remaining quarters of the liability period.<sup>3</sup> This resulted in an increase of \$513,480 to unreported taxable vehicle sales.
7. After these adjustments, the final measure of tax for unreported taxable vehicle sales is \$3,109,792 ( $\$3,221,666 - \$625,354 + \$513,480$ ), resulting in a reduced tax of \$276,463 and a corresponding negligence penalty of \$27,646.35.

### DISCUSSION

If CDTFA is not satisfied with the amount of tax reported by the taxpayer, or if a person fails to make 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.) CDTFA has a minimal, initial burden of showing that its determination was reasonable and rational. (Cf. *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. (Cf. *Schuman Aviation Co. Ltd., supra* at p. 950; *Appeal of Myers, supra*.) Unsupported assertions are not

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<sup>2</sup> Pursuant to Revenue and Taxation Code, part 5, chapter 2, article 1 (§ 10751 et seq.) vehicles that are required to be registered in this state are subject to a 0.65 percent license fee based on the selling price of the vehicle. Using this information, CDTFA was able to extrapolate appellant's taxable vehicle sales from the vehicle license fees it paid to DMV.

<sup>3</sup> By comparing vehicle identification numbers, CDTFA was able to properly account for any duplicates between appellant's recorded and DMV reported sales.

sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

We find CDTFA's use of sampling, which is an established audit method (see CDTFA's Audit Manual § 0405.20), in conjunction with appellant's own sales records, provides the minimum rational foundation necessary to support CDTFA's determination of appellant's taxable vehicle sales. The burden of showing error in this determination therefore shifts to appellant.

Appellant contends that CDTFA should redetermine unreported taxable vehicle sales using the vehicle license fee information obtained from the DMV, as was done in CDTFA's first adjustment. Appellant asserts that in contrast to its sales records, this information forms a more reliable basis for computing the deficiency measure since it covers the entire audit period and does not require the use of sampling. We disagree.

Computing unreported taxable vehicle sales as appellant suggests would clearly result in an erroneous and deficient estimate of taxable vehicle sales, due to the undisputed fact that appellant did not report all vehicle sales to the DMV. Appellant's sales records are the only evidence which shows all of appellant's vehicle sales. While they do not cover the entire audit period, they nevertheless remain the best available evidence of the vehicle sales which appellant did not report to the DMV. We find that appellant's lack of complete sales records in this regard necessitates the use of sampling. (See, e.g., CDTFA's Audit Manual § 0405.20.) The accuracy of an estimate computed using sampling depends primarily on the characteristics of the sample (i.e., the percentage of underreporting) being representative of the entire audit period. (*Ibid.*) There is no evidence to either support or refute that appellant's sales records were representative of the audit period. However, as appellant bears the burden of proof in this case, we must conclude that no further adjustments are warranted.

HOLDING

No additional adjustments are warranted to unreported taxable vehicle sales.

DISPOSITION

CDTFA’s decision to reduce the determined amount of tax to \$276,463.00 and the negligence penalty to \$27,646.35, but to otherwise deny the petition, is sustained.

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*Nguyen Dang*  
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Nguyen Dang  
Administrative Law Judge

We concur:

DocuSigned by:  
*Andrew Wong*  
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Andrew Wong  
Administrative Law Judge

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

Date Issued: 5/7/2020