

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

In the Matter of the Appeal of:  
**R. HERNANDEZ,**  
**dba Raliberto’s Taco Shop**

) OTA Case No. 19095305  
) CDTFA Account No. 101-134942  
) CDTFA Case ID 997734  
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**OPINION**

Representing the Parties:

For Appellant:

Peter P. Guerrero, Enrolled Agent

For Respondent:

Jason Parker,  
Chief, Headquarters Operations Bureau

For Office of Tax Appeals:

Deborah Cumins,  
Business Tax Specialist III

A. WONG, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 6561, R. Hernandez (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA) denying appellant’s petition for redetermination of a Notice of Determination (NOD), which assessed a tax liability of \$86,899.29, applicable interest, and a negligence penalty of \$8,689.97 for the period of April 1, 2013, through June 30, 2016 (audit period).<sup>1</sup>

Appellant waived his right to an oral hearing, so we are deciding this matter based on the written record.

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<sup>1</sup> The State Board of Equalization (BOE) formerly administered sales and use taxes. On July 1, 2017, CDTFA succeeded the BOE with respect to administering those taxes. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to acts or events that occurred before July 1, 2017, “CDTFA” shall refer to its predecessor, the BOE; when this Opinion refers to acts or events that occurred on or after July 1, 2017, “CDTFA” shall refer to CDTFA.

## ISSUE

Whether adjustments are warranted to the audited understatement of reported taxable sales.<sup>2</sup>

## FACTUAL FINDINGS

1. Appellant has operated restaurants serving Mexican-style cuisine since April 2008. During the audit period, he operated only one restaurant, in Crescent City.
2. During the audit period, appellant reported total sales and taxable sales of \$775,196, claiming no deductions.
3. For audit, appellant provided cash register z-tapes for 35 days in January, March, April, May, and September 2016.<sup>3</sup>
4. CDTFA observed the restaurant's operations on Thursday, Friday, and Saturday, September 8, 9, and 10, 2016. For those three days, CDTFA compiled total sales, net of tax reimbursement, of \$1,793, \$2,274, and \$1,871, respectively.<sup>4</sup> CDTFA had also observed the restaurant's operations on Tuesday, June 25, 2013, and Friday and Saturday, October 23 and 24, 2015.<sup>5</sup> For those three days, CDTFA compiled total sales, net of tax reimbursement, of \$705, \$1,588 and \$1,311, respectively.
5. During the three days of observation in September 2016, CDTFA noted numerous cancelled transactions. Appellant explained that he typically cancelled transactions for three reasons: (1) telephone orders rung on the cash register were immediately cancelled after the orders were printed and provided to the kitchen; the orders were re-rung on the cash register when customers came to pick up their orders; (2) group orders were cancelled and re-rung individually when group members paid separately; and (3) incorrect orders were cancelled and rung correctly. CDTFA reviewed the cancelled transactions and disallowed those that had *not* been re-rung. CDTFA added these

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<sup>2</sup> Appellant has not appealed the negligence penalty, so we will not address it as a separate issue.

<sup>3</sup> A cash register z-tape is the portion of the cash register tape that summarizes sales by category for a certain time period (e.g., a day or a shift).

<sup>4</sup> These amounts include disallowed cancelled transactions, which are explained in the next factual finding.

<sup>5</sup> CDTFA conducted the June 25, 2013, October 24, 2015, and October 25, 2015 observations with respect to a different (and earlier) audit of appellant's business; CDTFA used the results in this audit because those observations occurred in the audit period at issue.

- disallowed cancelled transactions to the total sales reflected on the cash register tapes to establish audited total sales for each of the three days of observation in September 2016. For these three days, CDTFA disallowed 42.4 percent of the cancelled transactions.
6. From the 35 days of z-tapes, CDTFA compiled taxable sales of \$51,656 and cancelled transactions of \$13,290. CDTFA applied the 42.4 percentage to the cancelled transactions to compute disallowed cancelled transactions of \$5,635. Accordingly, for these 35 days, CDTFA established audited taxable sales of \$57,291 (\$51,656 + \$5,635).
  7. To audited taxable sales of \$57,291 for 35 days, CDTFA added taxable sales of \$9,542 from the six days of observation,<sup>6</sup> computing taxable sales of \$66,833 for 41 days and average daily sales of \$1,630 ( $\$66,833 \div 41$ ).
  8. Using the number of days the business was open in each of the quarters of the audit period, CDTFA computed audited taxable sales of \$1,921,864 for the audit period.<sup>7</sup> CDTFA then compared audited taxable sales of \$1,921,864 to reported taxable sales of \$775,196, computing audited unreported taxable sales of \$1,146,665 for the audit period.
  9. CDTFA concluded that the understatement of \$1,146,665 was the result of negligence.
  10. On January 13, 2017, CDTFA issued an NOD for tax of \$86,899.29 and a negligence penalty of \$8,689.97.
  11. On February 10, 2017, appellant filed a timely petition for redetermination.
  12. On August 27, 2019, CDTFA issued a decision, denying the petition.
  13. This timely appeal followed.

### DISCUSSION

California imposes a sales tax on a retailer measured by the gross receipts from retail sales in this state of tangible personal property, unless a sale is specifically exempt or excluded from taxation by statute. (R&TC, § 6051.) It is the retailer's responsibility to maintain complete

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<sup>6</sup>  $\$705 + \$1,588 + \$1,311 + \$1,793 + \$2,274 + \$1,871 = \$9,542$ .

<sup>7</sup> We note that there were 1,187 days in the audit period (275 days in the last three quarters of 2013, 365 days each in 2014 and 2015, and 182 days in the first two quarters of 2016). However, CDTFA used a total of 1,179 days for the audit period in its computations. The audit working papers state that appellant's restaurant was open seven days a week and did not note any closures for holidays, vacations, maintenance, etc. Thus, it is not clear to us why CDTFA did not include all of the days in the audit period in its computations. However, because this discrepancy favors appellant, we will not address it further.

and accurate records and to make them available for examination. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).)

If 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.)

In general, sales of food for human consumption are exempt from tax. (R&TC, § 6359(a).) However, certain sales of food are excluded from the exemption (and are thus subject to tax). As relevant here, sales of food are subject to tax when the food is sold for consumption at a retailer's facilities (i.e., not "to go"), when the "80-80 rule" applies, or when the food is sold as hot prepared food products. (R&TC, § 6359(d)(2), (6) & (7).)

The 80-80 rule applies when more than 80 percent of a retailer's gross receipts are from sales of food products, and over 80 percent of its retail sales of food are subject to tax. (R&TC, § 6359(d)(6); Cal. Code Regs., tit. 18, § 1603(c)(3).) When the 80-80 rule applies, then sales of cold food sold in a form suitable for consumption on the retailer's premises is subject to tax even if it is purchased "to go." (R&TC, § 6359(d)(6); Cal. Code Regs., tit. 18, § 1603(c)(1)(A).) A retailer may avoid the application of the 80-80 rule by keeping a separate accounting of its sales of cold food "to go" which are in a form suitable for consumption on the retailer's premises. (R&TC, § 6359(f); Cal. Code Regs., tit. 18, § 1603(c)(1)(A).)

Here, based on its review of appellant's menu and its observation of appellant's business operations, CDTFA concluded that the 80-80 rule applied and that all of appellant's sales were subject to tax. Appellant has not disputed this conclusion and did not claim any exempt sales of food on its sales and use tax returns. Accordingly, we find that all of appellant's sales are taxable.

Upon audit, the only records provided by appellant were cash register z-tapes for some portions of four of the last six months of the audit period and one month after the audit period (September 2016). Appellant did not provide summary records of sales or purchases (i.e., a sales journal, or even income tax returns, or a purchase journal) or source documents for purchases. Under these circumstances, we find it was appropriate for CDTFA to utilize alternate auditing methods to establish audited taxable sales. Further, since the only available records were cash register z-tapes, we find it was logical for CDTFA to use those documents, along with observations of the business, to establish average daily sales and to project those sales to the audit period. Thus, we find that CDTFA has shown that its determination is reasonable and rational. Accordingly, the burden of proof shifts to appellant to establish that adjustments are warranted.

In his opening brief, appellant argues that the audited average daily sales were computed using information primarily from years for which his sales were greater than sales in earlier years. Appellant claims that he is in the process of developing a spreadsheet to show the actual amounts.

Appellant has not provided a spreadsheet. However, based on the information before us, we find that appellant is correct: the available information from the observation tests and cash register z-tape data shows that appellant's sales were lower in earlier periods.<sup>8</sup>

Examining the data from the 35 cash register z-tapes and the three observation tests from 2016, we find that appellant's average daily sales for Fridays and Saturdays in 2016 were higher than average daily sales for the other days of the week in 2016. Specifically, we computed average daily sales of \$1,881 for Fridays and Saturdays in 2016 and average daily sales of \$1,537 for Sundays through Thursdays (which we will refer to as "weekdays") in 2016. The available data also shows an increase in Friday and Saturday sales from 2015 to 2016. Specifically, average daily sales of \$1,881 for Fridays and Saturdays in 2016 were approximately 30 percent higher than the average daily sales of \$1,450 for Fridays and Saturdays in 2015 (based on the Friday and Saturday observation tests on October 23 and 24, 2015).<sup>9</sup> With this

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<sup>8</sup> This trend is also corroborated by appellant's reported taxable sales, which were lower in the earlier quarters of the audit period than the latter quarters. For example, appellant reported taxable sales of \$40,267 and \$29,517 for the first two quarters of the audit period, and \$89,159 and \$87,210 for the last two quarters of the audit period.

<sup>9</sup>  $\$1,450 \times 1.3 = \$1,885$ .

information, we have extrapolated backwards to calculate sales for the earlier parts of the audit period.

Specifically, we have reduced the sales each year by a factor of 1.3 to compute average daily weekday sales of \$1,182 for 2015 ( $\$1,537 \div 1.3$ ), \$909 for 2014 ( $\$1,182 \div 1.3$ ), and \$699 for 2013 ( $\$909 \div 1.3$ ).<sup>10</sup> Similarly, we have computed average daily Friday and Saturday sales of \$1,447 for 2015 ( $\$1,881 \div 1.3$ ),<sup>11</sup> \$1,113 for 2014 ( $\$1,447 \div 1.3$ ), and \$856 for 2013 ( $\$1,113 \div 1.3$ ). We have applied those average daily rates to the numbers of weekdays and the numbers of Fridays and Saturdays in each year or partial year of the audit period to compute audited taxable sales of \$1,314,084.<sup>12</sup> Comparing audited taxable sales of \$1,314,084 to reported taxable sales of \$775,196, we compute an audited understatement of reported taxable sales of \$538,888. Thus, we find that a result differing from CDTFA's determination is warranted.

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<sup>10</sup> In comparison to the audited average daily weekday sales of \$699 for 2013, CDTFA observed sales of \$705 during its observation test on Tuesday, June 25, 2013.

<sup>11</sup> In comparison to the audited average daily Friday and Saturday sales of \$1,447 for 2015, CDTFA observed average daily sales of \$1,450 during its observation tests on Friday, October 23, 2015, and Saturday, October 24, 2015.


<sup>12</sup>  $(\$1,537 \times 130 \text{ weekdays in 2016 [partial]}) + (\$1,881 \times 52 \text{ Fridays/Saturdays in 2016 [partial]}) + (\$1,182 \times 261 \text{ weekdays in 2015}) + (\$1,447 \times 104 \text{ Fridays/Saturdays in 2015}) + (\$909 \times 261 \text{ weekdays in 2014}) + (\$1,113 \times 104 \text{ Friday/Saturdays in 2014}) + (\$699 \times 197 \text{ weekdays in 2013 [partial]}) + (\$856 \times 78 \text{ Fridays/Saturdays in 2013 [partial]}) = \$1,314,084.$

HOLDING


The audited understatement of reported taxable sales should be decreased from \$1,146,665 to \$538,888.


DISPOSITION

Reduce the audited understatement of reported taxable sales from \$1,146,665 to \$538,888; reduce the negligence penalty accordingly; but otherwise deny the petition.

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Andrew Wong  
Administrative Law Judge

We concur:

DocuSigned by:  
  
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Daniel K. Cho  
Administrative Law Judge

DocuSigned by:  
  
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Suzanne B. Brown  
Administrative Law Judge

Date Issued: 5/29/2020