

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
GRB INVESTMENTS, INC.

) OTA Case No. 18032470
) CDTFA Account No. 097-761435
) CDTFA Case ID 848489
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)
)

OPINION

Representing the Parties:

For Appellant: Raman Zoobalan, Enrolled Agent
Shawn Zali

For Respondent: Randy Suazo, Hearing Representative

For Office of Tax Appeals: Deborah Cumins,
Business Tax Specialist III

N. DANG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, GRB Investments, Inc. (appellant), dba Wienerschnitzel #390, 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) for the period October 1, 2010, through September 30, 2013 (liability period).

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

ISSUE

Whether additional reductions are warranted to unreported taxable sales.

FACTUAL FINDINGS

1. During the liability period, appellant operated a Wienerschnitzel franchise restaurant.
2. CDTFA audited appellant, initially finding that it had underreported its taxable sales for the liability period by \$802,398 based on a comparison of appellant’s reported taxable sales against an average computed from three similar franchise restaurants.

3. On October 1, 2014, CDTFA issued an NOD to appellant for \$64,456.50 tax, a negligence penalty of \$6,445.65, and applicable interest.
4. Thereafter, CDTFA obtained a report showing the net sales appellant had reported to its franchisor for the period January 1, 2011, through September 30, 2013. CDTFA confirmed with the franchisor that the net sales reflected on this report did not include sales tax. A comparison of net sales to reported taxable sales for that period indicates that appellant underreported its taxable sales to CDTFA by \$282,583, or 41.68 percent.
5. For the fourth quarter of 2010 (4Q10), CDTFA applied the 41.68 underreporting percentage to reported taxable sales for that same period to compute unreported taxable sales of \$24,856.
6. In total, CDTFA determined that appellant had underreported its taxable sales by \$307,439 (\$282,583 + \$24,856) for the liability period.
7. On July 13, 2016, CDTFA issued a reaudit report reflecting the above reduction to unreported taxable sales and deleting the negligence penalty.

DISCUSSION

Appellant contends that the measure of tax should be reduced for three reasons: (1) appellant included sales tax in the net sales it reported to its franchisor; (2) no allowance was provided for inventory shrinkage; and (3) appellant made nontaxable sales, such as gift cards.

Franchisor reporting and inventory shrinkage

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

Here, CDTFA computed audited taxable sales on an actual and sample basis using net sales as reported by appellant to its franchisor. This amount already accounts for inventory shrinkage because it represents only inventory that appellant actually sold. CDTFA also confirmed with the franchisor that *net* sales did not include sales tax. Appellant has not provided any evidence in rebuttal, nor does it contest CDTFA's use of sampling for 4Q10.

Therefore, appellant has failed to meet its burden of proving error.

Nontaxable sales

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 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.)

A taxpayer seeking an exemption from tax bears the burden of proving that the statutory requirements for the exemption have been satisfied. (*Paine v. State Bd. of Equalization* (1982) 137 Cal. App.3d 438, 445.) Plainly, this requires appellant to identify the transactions it asserts are not subject to tax. Appellant has not identified any nontaxable sales other than gift cards.¹ Appellant, however, failed to provide any evidence to substantiate that it made any gift card sales.

Accordingly, appellant has failed to establish that a reduction is warranted for nontaxable sales.

¹ Gift cards are merely credit memorandums and are not tangible personal property within the meaning of the Sales and Use Tax Law. (See R&TC, § 6016.)

HOLDING

No additional reductions are warranted.

DISPOSITION

We sustain CDTFA’s action to reduce unreported taxable sales to \$307,439, delete the negligence penalty, and to otherwise deny the petition.

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Nguyen Dang
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Nguyen Dang
Administrative Law Judge

We concur:

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Alberto T. Rosas
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Alberto T. Rosas
Administrative Law Judge

DocuSigned by:
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Andrew Wong
Administrative Law Judge

Date Issued: 6/12/2020