

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

BALLAJ

) OTA Case No. 19075074
) CDTFA Account No. 50-004739
) CDTFA Case ID 932085
)
)
)

OPINION

Representing the Parties:

For Appellant:

N. Ballaj

For Respondent:

Courtney Daniels, Tax Counsel III
Stephen Smith, Tax Counsel IV

K. LONG, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 30261, Ballaj (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA) denying appellant’s petition for redetermination of the Notice of Determination (NOD) which assessed a liability under the California Cigarette and Tobacco Products Tax Law consisting of \$34,605.93 tax, and applicable interest, for the period October 19, 2010, through December 31, 2012 (audit period).

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

ISSUE

Whether appellant has established that adjustments are warranted to the measure of unreported taxable distributions of tobacco products.

FACTUAL FINDINGS

1. Appellant, a California corporation, operated as a licensed tobacco products distributor in Los Angeles, California. Appellant obtained a tobacco products distributor’s license effective October 19, 2010, and it was closed effective December 31, 2012.

2. During the audit period, appellant reported taxable distributions of tobacco totaling \$6,574.
3. CDTFA performed an audit of the business for the period October 19, 2010, through December 31, 2012. For the audit, CDTFA reviewed appellant's sales invoices for the period November 2011 through December 2012, shipping documents, purchase invoices, and bank statements. CDTFA also obtained reports of sale from Sierra Network and a manufacturer's report¹ from CDTFA's own database.
4. CDTFA found that appellant made purchases of untaxed tobacco products (Al Fakher brand) from Sierra Network beginning in November 2011.²
5. CDTFA compared appellant's purchase invoices to Sierra Network's reports of sale and found no differences. Based on this information, CDTFA found that appellant purchased 10,074 kilograms of tobacco products from Sierra Network without payment of tax.
6. CDTFA reviewed the sales invoices that appellant issued to California customers and found that appellant recorded distributions of untaxed tobacco products to California customers totaling \$11,947 or 393.93 kilograms of tobacco by weight.
7. CDTFA scheduled the sales invoices that appellant issued to out-of-state customers. CDTFA noted that not all of appellant's sales invoices were supported by shipping documents. However, CDTFA accepted all of appellant's invoices to out-of-state customers as valid nontaxable sales in interstate commerce. CDTFA found that appellant made sales of untaxed tobacco products to out-of-state customers totaling \$158,748.19 or 5,234.30 kilograms of tobacco by weight.
8. CDTFA subtracted the total sales (California and out-of-state) for which appellant provided sales invoices from the total tobacco recorded on appellant's purchase records and found that appellant made distributions of untaxed tobacco products for which no

¹ According to CDTFA, it generated the manufacturer's report from a database compilation of various tobacco manufacturers' reports of sale.

² CDTFA found that appellant made purchases of untaxed Al Fakher brand tobacco products beginning in November 2011. On appeal, appellant provided a schedule of its sales of Al Fakher brand tobacco products during the period 2010 through 2013 (after the closure of appellant's tobacco products distributor's license). We also note that appellant did not report any taxable distributions of tobacco products during the fourth quarter of 2010. As such, it appears that appellant made additional distributions of untaxed tobacco products, which were not included in the audit. However, CDTFA has not assessed any tax for appellant's distributions of untaxed tobacco products during the year 2010. Additionally, the year 2013 is not included in the audit period. Therefore, we will not disturb CDTFA's determination here.

invoice was provided measuring 4,446 kilograms. Since appellant did not provide any supporting documentation, CDTFA concluded that appellant made additional distributions to California customers totaling 4,446 kilograms.

9. CDTFA calculated the wholesale value of appellant's audited taxable distributions of tobacco to be \$7,993 per month or \$23,978 per quarter. CDTFA applied the amount of appellant's audited taxable distributions of tobacco products to the period November 2011 through December 2012 to find audited distributions of \$111,899 (rounded) for that period.
10. CDTFA combined appellant's reported taxable distributions for the first quarter of 2011 (1Q11) through 3Q11 with appellant's audited taxable distributions for November 2011 through December 2012 to find total audited taxable distributions of \$117,363. CDTFA reduced appellant's audited taxable distributions of tobacco by appellant's reported taxable distributions to calculate appellant's unreported taxable distributions of \$110,608.
11. On November 13, 2015, CDTFA issued the above-referenced NOD. Appellant filed a timely petition for redetermination, which CDTFA denied. This appeal followed.

DISCUSSION

The Cigarette and Tobacco Products Law requires every person desiring to engage in the sale of tobacco products as a distributor to apply with CDTFA for a distributor's license. (R&TC, § 30140.) A distributor shall apply for and obtain a license for each place of business at which it engages in the business of distributing tobacco products. (*Ibid.*) Every distributor shall pay a tax upon his or her distribution of tobacco products based upon the wholesale cost of these products. (R&TC, §§ 30101, 30123, 30131.2(b).) "Distributor" includes every person who distributes tobacco products, or who sells or accepts orders for tobacco products which are to be transported from a point outside this state to a consumer within this state. (R&TC, § 30011.) The term "distribution" includes: (1) the sale of untaxed tobacco products in this state; (2) the use or consumption of untaxed tobacco products in this state; and (3) the placing in this state of untaxed tobacco products in a vending machine or in retail stock for purposes of selling these items to consumers. (R&TC, § 30008.) However, tax does not apply to sales of tobacco products which are shipped to a point outside of this state. (Cal. Code Regs., tit. 18, § 4080(a).) "Use or consumption" includes the exercise of any right or power over tobacco products incident to their ownership, other than the sale of tobacco products or the keeping or retention by a

licensed distributor for sale. (R&TC, § 30009.) Unless the contrary is established, it shall be presumed that all tobacco products manufactured in this state or transported to this state, that are no longer in the possession of the distributor, have been distributed. (R&TC, § 30109.)

Generally, where a taxpayer challenges the additional tax, the government 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.) Where CDTFA has met its initial burden, the burden of proof shifts to the taxpayer to explain why CDTFA's asserted deficiency is not valid. (*Riley B's, Inc. v. State Bd. of Equalization* (1976) 61 Cal.App.3d 610, 615-616). 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 computing the deficiency measure, CDTFA compared the amount of untaxed tobacco products recorded in appellant's purchase records to the distributions of tobacco that appellant reported on its returns. CDTFA also reviewed appellant's sales invoices and found that appellant made distributions of untaxed tobacco products to California customers, which appellant did not report on its returns. We note that CDTFA made an allowance for nontaxable sales to out-of-state customers which appellant recorded on its sales invoices, regardless of whether the invoices were supported by shipping documents. Nevertheless, CDTFA found that appellant purchased and distributed 4,446 kilograms of tobacco for which no invoices were supplied. Because appellant's purchase records and sales invoices were the best available evidence of appellant's distributions of untaxed tobacco products, we find CDTFA's determination to be reasonable and the burden shifts to appellant to demonstrate otherwise.

Appellant argues that its sales were not taxable distributions because the sales were made to customers outside of this state. In support of its contentions, appellant provided some invoices issued to out-of-state customers with shipment tracking numbers. Initially, we note that all of appellant's invoices were issued prior to the audit period. Therefore, appellant's invoices are not evidence that it made additional nontaxable sales to out-of-state customers during the audit period. Additionally, appellant concedes that the shipment tracking numbers cannot be verified due to their age. There is also reason to question the validity of appellant's invoices because of math errors contained within them. Thus, even if the invoices were issued during the audit

period, we could not conclude from the invoices alone whether a reduction to the measure of unreported tobacco distributions is warranted.


Similarly, appellant provided a schedule which purports to show its sales of untaxed Al Fakher brand tobacco products. However, the schedule of sales does not include the dates of any alleged sales or appellant’s customer’s shipping addresses. As a result, we cannot determine whether the recorded sales occurred during the liability period, or to whom appellant made the sales. Indeed, appellant has not provided any evidence that it made additional sales of untaxed tobacco products to out-of-state customers *during the audit period*. Based on the foregoing, we find that no adjustments are warranted.

HOLDING

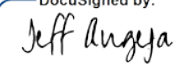
Appellant has failed to establish that adjustments are warranted to the measure of tax.

DISPOSITION

CDTFA’s action in denying the petition for redetermination is sustained.

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Keith T. Long
Administrative Law Judge

We concur:

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Jeffrey G. Angeja
Administrative Law Judge

DocuSigned by:

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Daniel K. Cho
Administrative Law Judge

Date Issued: 4/6/2020