OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **RHINO READY MIX TRUCKING, INC.**	OTA Case No. 18103871 CDTFA Case ID: 934005

OPINION

Representing the Parties:

For Appellant:	Jamie A. Barragan, Representative
For Respondent:	Kevin B. Smith, Tax Counsel III Stephen Smith, Tax Counsel IV Damian Armitage, Hearing Rep.
For Office of Tax Appeals:	Deborah Cumins, Business Taxes Specialist III

J. ALDRICH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 60501, Rhino Ready Mix Trucking, Inc. (appellant) appeals California Department of Tax and Fee Administration's (CDTFA)[1] partial denial of a claimed refund for the period April 30, 2009, through September 30, 2013 (claim period).[2]

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

[2] According to CDTFA, appellant claimed a total amount of refunds of $36,276.00 at the appeals conference. CDTFA granted refunds totaling $24,063.56 and denied the balance of $12,212.44. Therefore, CDTFA's Decision and Recommendation (D&R) lists that amount as the amount in dispute. However, appellant clarified that it is claiming total refunds of $35,052.66, if it is decided that the safe-harbor percentages shown in California Code of Regulations, title 18, section 1432 are not applicable. Alternatively, appellant lists a total claimed amount of $47,325.95 if the safe-harbor percentages are applied. Since the revised total amount claimed is $35,052.66, the current amount of the partially denied claims is $10,989.10 ($35,052.66 - $24,063.56).

Office of Tax Appeals' Administrative Law Judges Teresa A. Stanley, Keith T. Long, and Josh Aldrich, held an oral hearing for this matter on August 26, 2020.[3] At the conclusion of the hearing, the record was closed, and the matter was submitted for decision.

ISSUES[4]

Whether appellant has established that it is entitled to receive an additional amount of tax refund for the claim period of April 30, 2009, through September 30, 2013, which will encompass the following:

1. Whether the safe-harbor percentage of 15 percent, established by California Code of Regulations, title 18, section (Regulation) 1432, should be used to establish the exempt off-road use of diesel in bottom dump trucks and cement powder truck.
2. Whether adjustments are warranted to the percentage of exempt use of diesel fuel (diesel) in the operation of power take off (PTO) equipment in cement trucks.
3. Whether adjustments are warranted to the percentage of off-highway use of diesel related to the operation of the cement trucks.

FACTUAL FINDINGS

1. Appellant operated a trucking company from June 2005 through December 2017. It operated a fleet of trucks including cement mixer trucks used to deliver ready mix concrete, bottom-dump trucks used to deliver sand and gravel, and a powder truck used to deliver powder cement.

[3] The hearing was noticed for Sacramento and conducted electronically due to COVID-19.

[4] On July 30, 2020, appellant submitted its pre-hearing conference statement. Therein, appellant filed a request to consolidate this appeal with another appeal matter for a later claim period, which we denied because the other appeal is still pending before CDTFA and, as such, we lack jurisdiction. At the beginning of the hearing, Judge Aldrich stated the issues to be decided, which did not include the consolidation request. He asked both parties if the issues were correct, and both parties answered in the affirmative. During appellant's rebuttal, appellant raised the issue of the consolidation request denial. The request was addressed by the lead administrative law judge (ALJ) in the August 6, 2020 Minutes and Orders, which is consistent with OTA Rules for Tax Appeals section 30421(c): "The Lead ALJ assigned to a Panel or a Presiding ALJ may decide prehearing motions, order additional briefing on the issue, or defer a decision until the date of the hearing. The timing and response shall be at the discretion of the Lead ALJ or a Presiding ALJ." (Cal. Code Regs., tit. 18, § 30421(c).) Therefore, we address it no further.

Appellant also asked that credit interest be applied to any additional refund. If an additional refund is owed, CDTFA indicated that credit interest will be allowed. Thus, the granting of interest is not a disputed matter.

2. All trucks in appellant's fleet were powered by diesel. The trucks were fueled from a storage tank located on site. Appellant purchased diesel from its suppliers for use in its trucks, and paid excise tax thereon.
3. Appellant's trucks consumed tax-paid diesel when operated off public highways and in the operation of PTO equipment.[5]
4. Appellant filed timely claims for refund pursuant to R&TC section 60501 for the claim period.
5. CDTFA conducted an audit to evaluate the amounts of the claimed refunds. Using appellant's records of gallons of diesel consumed by vehicle category, CDTFA computed percentages of diesel used by each type of vehicle operated by appellant.
6. CDTFA then conducted tests to establish percentages of diesel used in an exempt manner.
7. For the cement mixers, CDTFA conducted 10 separate tests to establish the percentage of diesel used to operate PTO equipment and the percentage of diesel used off highway.
8. CDTFA worked with appellant's representative to design the tests used to establish the percentage of diesel used to operate PTO. For each test, appellant recorded the amounts of diesel used in the completion of a job that required use of the PTO equipment. Then, appellant conducted a "mimic" test, driving the same route as it drove for the job, with similar periods of idling.[6] The difference between the gallons of diesel used for the job and the gallons of diesel used without operation of the PTO equipment represented the gallons used in an exempt manner to operate the PTO equipment.
9. For six of the 10 tests, CDTFA staff was at the site to observe the tests. The computed percentages of diesel used to operate PTO equipment were 11.61, 14.66, 3.49, 17.71, 12.72, and 17.99 percent. The remaining four tests were conducted by appellant, without

[5] PTO equipment is used to turn the drums in the cement mixer trucks and to pour out concrete.

[6] Generally, a mimic test is one in which a test activity (route/delivery) is repeated (mimicked) the next day or about the same time (to capture similar road conditions) by the same driver and truck. During the mimic run, the truck abstains as much as possible from any exempt activities (running of PTO, driving off road). However, the mimic tests conducted by appellant, as designed by its representative, were meant to capture PTO operation only, not off-highway driving. Therefore, in this case, trucks were driven off highway during all mimic runs.

observation by CDTFA staff, and the computed percentages of diesel used to operate PTO equipment were 43.48, 93.62, 39.08, and 31.46 percent.[7]

10. CDTFA concluded that the test results which yielded 93.62 percent (NW Side of Metro Plant test) and 3.49 percent (Horace Mann Avenue test) diesel used to operate PTO equipment test results were "outliers," and it removed those two tests from its computation of the 23.79 percent audited weighted average percentage of diesel used to operate PTO equipment.

11. CDTFA applied 23.79 percent diesel used to operate PTO equipment to the audited number of gallons used to operate the cement mixers to compute 133,247 gallons of diesel used to operate PTO equipment.

12. CDTFA used the data from eight of the ten tests, excluding the same two outliers, to establish the number of miles appellant drove the cement mixers on the highway and off the highway. For each trip, CDTFA computed a percentage of gallons used in an exempt manner for off-highway driving and idling. In its computations, CDTFA used 3.30 miles per gallon (MPG), to represent the slower driving and idling associated with off-highway use. Specifically, CDTFA used the number of off-highway miles established in each test and 3.30 MPG to compute the gallons used off-highway (driving and idling). CDTFA opined that 3.30 MPG was lower than the MPG consumed during on-highway driving and that the use of the lower than normal MPG would capture both the off-highway driving and idling. CDTFA computed that 4.39 percent of gallons used by the cement trucks was used in off-highway driving and idling.

13. CDTFA applied 4.39 percent to the audited number of gallons used to operate the cement mixers to compute 24,593 gallons of diesel used in off-highway driving and idling by the cement mixers.

[7] For ease of reference, the 10 test locations, dates, and respective PTO percentages are as follows: 1) Vineland Road occurred January 3, 2014, the PTO percentage was 39.08; 2) the Quin and Petrol test occurred February 8, 2014, the PTO percentage was 43.48; 3) the NW Side of Metro Plant test occurred February 15, 2014, the PTO percentage was 93.62; 4) the W of 99, Panama Ln test occurred February 15, 2014, the PTO percentage was 31.46; 5) the Chester Avenue test occurred June 3, 2014, the PTO percentage was 11.61; 6) the Horace Mann Avenue test occurred June 3, 2014 with a PTO percentage of 3.49; 7) the Kimberlina test occurred between June 3-4, 2014, the PTO percentage was 14.66; 8) the Southernwood test occurred June 4, 2014, the PTO percentage was 17.71; 9) the Station Road test occurred between June 4-5, 2014, the PTO percentage was 12.72; 10) the Lost Hills Oil Lease test occurred between June 4-5, 2014, the PTO percentage was 17.99.

14. CDTFA used appellant's records for the week of May 21, 2012, through May 26, 2012, to establish the percentages of off-highway use for the bottom dump trucks and the powder truck. Based on these records, CDTFA determined 1.78 percent of gallons used by the bottom dump trucks in off-highway use and 2.8 percent of gallons used by the powder truck in off-highway use.
15. For the claim period, CDTFA applied those percentages to the audited numbers of gallons used to operate the bottom dump trucks and the powder truck to compute gallons of diesel used off-highway of 10,600 gallons and 1,877 gallons, respectively.
16. CDTFA compiled total gallons of diesel used in an exempt manner of 170,316.[8] It allocated those gallons by quarter and applied the diesel tax rate applicable for each quarter to compute the amount of refund allowed of $24,063.56.
17. Appellant argued that the total amount of refund should be $36,276.[9]
18. On December 20, 2016, CDTFA held an appeals conference. At the conference, appellant asserted that an adjustment was warranted because its powder truck employed qualifying PTO equipment. And, the diesel consumed in the operation of the powder truck PTO equipment had not been accounted for in the audit.
19. On May 1, 2017, CDTFA issued a Decision and Recommendation (D&R) recommending a reaudit to establish whether the powder truck employed qualifying PTO equipment and, if so, to establish whether the audited number of gallons of diesel used in an exempt manner should be increased.
20. Subsequently, CDTFA explained that it did not recommend an adjustment to the refund amount because of the following: appellant had declined to provide diesel consumption tests for the powder truck PTO equipment; and CDTFA rejected appellant's request to use the 15 percent safe-harbor rate for exempt usage.
21. This appeal followed.

[8] We compute 170,317 (133,247 + 24,593 + 10,600 + 1,877). The difference is likely due to rounding. As such, we find the gallon difference immaterial.

[9] As noted in an earlier footnote, appellant now claims that the total amount of refund should be $35,052.66, if it is decided that the safe-harbor percentages shown in Regulation 1432 are not applicable.

DISCUSSION

The Diesel Fuel Tax Law currently imposes a tax of $0.18 on the storage, for purposes of removal, sales, or use, of diesel in this state from a terminal (i.e., fuel pump), or from the refinery, or on the entry of diesel into this state for sale or use herein. (R&TC, §§ 60050.1, 60051, 60052.) R&TC section 60501(a)(4)(A), provides a refund of the tax to those who have paid it, if the diesel was used for purposes other than operating motor vehicles upon the public highways of the state.

Regulation 1432 interprets and implements R&TC section 60501, which provides an exemption for diesel used to operate PTO equipment and used off the highway. Nonetheless, diesel consumed while idling on highway remains subject to tax. (Cal. Code Regs., tit. 18, § 1432(a)(1), (b)(1) & (d).) Persons who acquire diesel fuel tax paid and subsequently use the diesel to operate auxiliary equipment (e.g., PTO) or to operate the vehicle other than on the state's public highways are entitled to a refund of the diesel tax paid on that diesel fuel. (Cal. Code Regs., tit. 18, § 1432(c).) Effective June 21, 2016, CDTFA revised Regulation 1432 to simplify the refund process for claimed nontaxable use of diesel. As revised, Regulation 1432 combined safe-harbor percentages for the operation of "auxiliary equipment" and off-highway use in transactions occurring on and after April 1, 2016. Furthermore, Regulation 1432(c) expressly states, "The safe-harbor percentages cannot be claimed for periods prior to April 1, 2016." (*Ibid*.)

Statutes granting exemption from taxation must be reasonably, but nevertheless strictly, construed against the taxpayer. (*Standard Oil Co. v. State Bd. of Equalization* (1974) 39 Cal.App.3d 765, 769.) The taxpayer bears the burden of showing that it qualifies for the exemption. (*Ibid*.) Taxpayers are required to maintain and make available for examination on request by CDTFA or its authorized representative, all records necessary to determine the correct tax liability under the applicable tax laws, and all records necessary for the proper completion of the required tax return or report. (Cal. Code Regs., tit. 18, § 1470(a).) Users of diesel are required to maintain complete records of self-consumed diesel, inventories, purchases, receipts, and tank gaugings or meter readings, of diesel and any other fuel the use of which is subject to the diesel fuel tax. (Cal. Code Regs., tit. 18, § 1470(b)(5).) The user's records must be able to support any calculations or formulas used to claim exempt percentages of exempt usage of diesel. (*Ibid*.)

As discussed below, appellant computed two different total amounts of refund, $47,325.95 and $35,052.66. For both computed amounts, appellant claims that it used 178,983 gallons of diesel to operate PTO equipment in its cement mixers and 56,638 gallons of diesel to operate cement mixers off highway. Appellant used the safe-harbor percentage of 15 percent to compute the $47,325.95 overpayment based on the gallons of diesel used in an exempt manner by its bottom dump trucks and powder truck. In appellant's $35,052.66 computation, appellant incorporated the gallons of diesel used in an exempt manner that were established in the audit for bottom dump trucks and the powder truck.

Issue 1: Whether the safe-harbor percentage of 15 percent, established by Regulation 1432, should be used to establish the exempt off-road use of diesel in bottom dump trucks and cement powder truck.

Appellant argues that its operations were the same prior to and post April 1, 2016. Therefore, it would be equitable treatment to retroactively apply the safe-harbor percentages. As noted above, in the $47,325.95 computation appellant used the safe-harbor percentage of 15 percent to compute the gallons of diesel used in an exempt manner by its bottom dump trucks and powder truck.[10]

While appellant's operations may have stayed the same, the law did not. Regulation 1432 was amended on December 16, 2015, and readopted on May 25, 2016, effective June 21, 2016. The June 21, 2016 effective date for Regulation 1432 is unambiguous. Furthermore, the regulation expressly states, "The safe-harbor percentages cannot be claimed for periods prior to April 1, 2016." (Cal. Code Regs., tit. 18, § 1432(c).) CDTFA is bound to follow its own regulations. (See *Newco Leasing, Inc. et al. v. State Bd. of Equalization* (1983) 143 Cal.App.3d 120, 124; *Appeal of Talavera*, 2020-OTA-022P.) Here, it is undisputed that the claim period is prior to April 1, 2016. Thus, we find that the safe-harbor percentage cannot be used to establish the exempt off-road use of diesel in bottom dump trucks and cement powder truck.

[10] Regulation 1432(a)(2) provides an itemized list of safe-harbor percentages based on the kind of truck or equipment used (e.g., 25 percent for cement mixers, 40 percent for cement pumpers, 15 percent for dump trucks, 15 percent for dump trailers, 15 percent for lime spreaders, 35 percent for garbage trucks, et cetera).

Issue 2: Whether adjustments are warranted to the percentage of exempt use of diesel in the operation of power take off (PTO) equipment in cement trucks.

As noted above, in appellant's $35,052.66 computation, the only amounts that differ from those established by audit are the numbers of gallons used in an exempt manner by the cement trucks. Appellant argues that the number of gallons should be increased from 133,247 to 178,983. To achieve 178,983 gallons, appellant applied 31.95 percent diesel used in an exempt manner to the audited number of gallons of diesel used by the cement trucks, rather than the audited 23.79 percent diesel used to operate PTO equipment. Appellant used the same 10 tests conducted for the audit to compute the 31.95 percent.

To compute the 31.95 percent, appellant removed the same two outliers and a third test, known as the Chester Avenue test, which reflected 11.61 percent of diesel used to operate PTO.[11] Appellant previously acknowledged that the test is a reflective or representative sample of the appellant's operational activities. Appellant, however, asserts that the results of the Chester Avenue test are unacceptably low. Appellant argues that the differential in the MPG for this test, as compared to other tests, is evidence that its results are obviously flawed.

We do not find appellant's argument compelling. The purpose of testing is to utilize representative samples, and it is not appropriate or logical to discard a representative sample because a different result would have been preferred. We note the similarity between the results of the Chester Avenue test and the 12.72 percent rate of diesel used to operate PTO found in a test known as the Station Road test. We find that the relative similarity between those percentages is strong evidence that the Chester Avenue test results are not an aberration. We find that appellant has not shown that the Chester Avenue test should be deleted from the computation of the average percentage of diesel used by the cement trucks to operate PTO equipment.

Appellant argues that the percentage of diesel used by its cement trucks to operate PTO equipment should be increased to 31.95 percent because 31.95 percent is more in line and consistent with the rates established by other states and by the Internal Revenue Service (IRS). Appellant states further that the audited 23.79 percent diesel used to operate PTO equipment is well below the rates allowed by most other states. The rates established by other states and the

[11] See Factual Findings no. 10.

IRS, however, are not relevant to the claim period. Other tax jurisdictions may have a variety of policy or administrative reasons for their established rates, which are not germane to this case. The application of tax to diesel fuel in California, or the exemption therefrom, is not governed by other states or the IRS. Instead, it is governed by California statutes and regulations. Therefore, we reject this argument.

Regarding appellant's argument that the audited 23.79 percent diesel used to operate PTO equipment is less than the 25 percent safe-harbor percentage stated in Regulation 1432, we reiterate that the safe-harbor percentage is not applicable to these claims for refund, which involve periods before April 1, 2016. We note, however, that the safe-harbor percentage for PTO use by cement trucks **includes off-highway use**. (Cal. Code Regs., tit. 18, § 1432 (bolding added).) If we were to compare the audited percentage to the safe-harbor percentage established by Regulation 1432, the audited percentage would be 28.18 percent (23.79 percent for PTO equipment + 4.39 percent for off-highway use). Accordingly, the safe-harbor percentage is not applicable to the claim period, and the percentage established by audit is greater than the safe-harbor percentage. Thus, we find no adjustment is warranted based on appellant's argument that the 23.79 percent diesel used to operate PTO equipment established by audit is below the 25 percent safe-harbor rate established in Regulation 1432 for periods beginning April 1, 2016.

Appellant also addresses the results of various tests, arguing that they are not "realistic." One of the reasons appellant asserts that there are errors in CDTFA's tests is that the tests conducted solely by appellant reflect markedly higher rates of diesel used to operate PTO equipment than those tests observed by CDTFA. It is equally likely that the differences represent errors in the tests conducted by appellant, without observation by CDTFA. We find that this argument, and other arguments regarding whether the results of certain tests are "realistic" are opinions that are not substantiated by evidence.[12] Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (See *Appeal of Magidow* (82-SBE-274) 1982 WL 11930.) Thus, appellant has failed to meet its burden to establish that the percentage of diesel used by cement trucks to operate PTO equipment should be increased.

[12] Appellant describes a situation for which it appears that the diesel used in the mimic test may have been understated by 0.23 gallons because the diesel tank was not refilled after some apparent PTO use of the cement truck. However, that possible error is irrelevant, because the test at issue is the Horace Mann test, which resulted in 3.49 percent of diesel used to operate PTO equipment, and that test was deleted from the audit computations.

Issue 3: Whether adjustments are warranted to the percentage of off-highway use of diesel related to the operation of cement trucks.

Appellant argues that diesel used to operate cement trucks off highway should be adjusted to 10.11 percent, which is significantly higher than the audited 4.39 percent diesel for off-highway use. Appellant computed two separate off-highway percentages, 5.31 percent for off-highway travel and 4.80 percent for off-highway idling. To establish the 5.31 percent for off-highway travel, appellant used information from nine of the 10 tests conducted in the audit. Appellant included information from the outlier test known as the Horace Mann Avenue test but excluded the other outlier test known as NW side Metro Plant. Appellant then calculated 4.80 percent of diesel used for idling off-highway using six of the 10 tests. CDTFA argues that varying the selection of the tests in the computations, depending on the percentage to be computed, tends to belie the objectivity of the computations.

In rebuttal, appellant argues that in its computation of the 5.31 percent, it used the data collected during nine actual deliveries because the actual deliveries data was logically more accurate than data collected during mimic runs. Regarding the use of nine tests, rather than the eight tests CDTFA used for the other audit computations, appellant argues that the number of tests it used was dictated by the test objective, test data availability, accuracy, and reliability. Appellant has not specified, or provided supporting documentation to explain, why certain tests are more logical, accurate, or reliable with respect to the test objectives of establishing percentages of diesel used off highway for driving or idling. Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (See *Appeal of Magidow*, *supra*.) We find that it is more rational and reasonable to use the data from the same eight tests that were used to compute the various audited percentages related to cement mixers. Thus, we find no adjustment is warranted based on appellant's unsupported assertion that any of the test results provide a more "logical" result.

Likewise, appellant has not provided evidence to show that the use of data from actual deliveries rather than the data from mimic tests is more accurate than those used in the audit. In the absence of such evidence, we find no adjustment is warranted.

In addition to arguing that the 4.39 percent diesel for off-highway use established in the audit should be increased to 5.31 percent diesel used for off-highway travel, appellant argues that a separate 4.80 percent should be established as diesel used by the cement trucks while idling,

when situated off-highway. Appellant states that cement mixers travel and idle on and off-highway, always using the PTO equipment to rotate the mixing drum. Appellant states, "Given that travelling and idling are integral functions necessary to operate a vehicle, it is illogical that [diesel] used during off-highway travel would be exempt and not [diesel] used while idling off-hwy." CDTFA has not argued otherwise. CDTFA chose to use 3.30 MPG in its computations of diesel used off-highway. CDTFA stated that it used 3.30 MPG, which is lower than the on-road driving MPG, specifically to account for the slow driving and idling associated with driving off-road. In other words, CDTFA does not argue that diesel used while idling off-highway is not exempt; it asserts that it used an MPG figure that was sufficiently low to incorporate diesel used while idling off-highway.

Appellant argues that the 25 percent safe-harbor rate for cement trucks, as indicated in Regulation 1432(a)(2), does not include any amount of diesel used in off-highway travel or idling.[13] Appellant asserts further that cement trucks have three separate and independent exempt uses of diesel: operating PTO equipment; traveling off-highway; and idling off-highway. Appellant argues that Regulation 1432 addresses these three uses in three different parts of the Regulation, and that the safe-harbor rates established in Regulation 1432 do not include the use of diesel off-highway. Appellant makes this argument in rebuttal to CDTFA's assertion that the total audited percentage of off-highway use of diesel for the cement mixers of 28.18 percent (23.79 percent to operate PTO equipment + 4.39 percent off-highway use) is greater than the 25 percent safe-harbor.

As previously determined, the 25 percent safe-harbor rate is not applicable here. However, since both parties have used the 25 percent to evaluate their positions, we will evaluate appellant's description of Regulation 1432. Regulation 1432(a)(2) specifically states that off-highway use, as defined in subdivision (b) is included in the safe-harbor percentages. Regulation 1432(b) states, "If the safe-harbor percentages in subdivision (a)(2) are used to calculate the amount of the refund, no additional refund will be allowed for diesel fuel used to operate auxiliary equipment while off the highway or while idling as described in

[13] Appellant makes a different argument, in which it uses Regulation 1432(d) to support its argument that a separate adjustment for idling is warranted if the taxpayer provides evidence to support percentages in excess of the safe-harbor rate. We do not address this argument in detail because it seems to contradict appellant's later interpretation of Regulation 1432. The question to be answered is whether CDTFA's 4.39 percent for off-highway use incorporates both driving and idling off-highway. As explained in the following paragraphs, we find that it does.

subdivision (d).” Likewise, Regulation 1432(d) states, “If the safe-harbor percentages in subdivision (a)(2) are used to calculate the amount of the refund, no additional refund will be allowed for diesel fuel used to operate auxiliary equipment while idling.” Simply stated, the safe-harbor percentages include both off-highway driving and idling. Thus, appellant’s argument is without merit.

We find that CDTFA has used a logical approach to compute the percentage of diesel used off-highway by the cement trucks, by using 3.30 MPG in its computations, which it has described as lower than the MPG for on-road driving. We are unable to find an average MPG consumed in on-highway driving. However, we note that in the test conducted for January 3, 2014, there is a reference to 4.51 MPG for that test. Thus, if we use 4.51 MPG for on-road travel and 3.30 MPG for off-road travel, the 3.30 is 27 percent lower than the 4.51 (4.51 – 3.30 = 1.21; 1.21 ÷ 4.51 = 26.8 percent). In the absence of evidence to the contrary, we find that CDTFA’s use of the 3.30 MPG figure, which is 27 percent lower than the MPG for on-road driving, is adequate to compute a percentage of off-highway use that incorporates both driving and idling. Appellant has not provided supporting documentation or other evidence from which a more accurate computation can be derived. Thus, appellant has not met its evidentiary burden. Accordingly, we find that there is no basis to establish a separate percentage of diesel used by the cement trucks while idling off highway.

HOLDINGS

1. The safe-harbor percentage of 15 percent, established by Regulation 1432, does not apply to periods before April 1, 2016, and is not applicable to the claim period.
2. No adjustment is warranted to the percentage of exempt use of diesel in the operation of PTO equipment in cement trucks.
3. No adjustment is warranted to the percentage of off-highway use of diesel related to the operation of cement trucks.

DISPOSITION

Sustain CDTFA's decision to grant claims for refund totaling $24,063.56 and to otherwise deny the claim.

DocuSigned by:
Josh Aldrich
48745BB606914B4...
Josh Aldrich
Administrative Law Judge

We concur:

DocuSigned by:
0CC6C6ACCC6A44D...
Teresa A. Stanley
Administrative Law Judge

DocuSigned by:
DC88A60D8C3E442...
Keith T. Long
Administrative Law Judge

Date Issued: 11/18/2020