**OFFICE OF TAX APPEALS**

**STATE OF CALIFORNIA**

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| In the Matter of the Appeal of: | ) OTA Case No. 18012045 |
| | ) CDTFA Case ID: 495215 |
| **BRANVID, LTD.** | ) |
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## OPINION

Representing the Parties:

For Appellant: David Duncan

For CDTFA: Joseph Boniwell, Tax Counsel

For Office of Tax Appeals: Corin Saxton, Tax Counsel IV

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Branvid, Ltd., dba Big Top Rentals, (appellant) appeals an action by the California Department of Tax and Fee Administration (CDTFA[1]), denying, in part, appellant's timely petition for redetermination of a June 18, 2009 Notice of Determination (NOD) of tax of $248,167.13, plus accrued interest, for the period from January 1, 2005, through December 31, 2007 (audit period).

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

## ISSUE

Has appellant established that additional adjustments to the tax liability are warranted?

[1] Sales taxes were formerly administered by the State Board of Equalization (BOE). In 2017, functions of the BOE relevant to this case were transferred to CDTFA. (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 the BOE; and when this Opinion refers to acts or events that occurred on or after July 1, 2017, "CDTFA" shall refer to CDTFA.

## FACTUAL FINDINGS

1. Appellant's business consisted primarily of leasing tents to customers hosting outdoor events.[2] Appellant also sold tents and leased and sold related items such as tables, chairs, lights, and portable toilets.
2. For the audit period, appellant recorded total sales of $10,357,706 and reported taxable sales of $449,478.
3. A block test conducted by CDTFA of the first quarter of 2005 (1Q05)[3] showed recorded total sales of $561,305. Of that amount, appellant recorded sales for resale of $262,530, $14,204 as taxable sales and the remainder of $284,571 as nontaxable lease receipts.
4. With respect to the lease receipts that appellant had regarded as nontaxable ($284,571 in 1Q05), CDTFA computed that 53.33 percent[4] of that amount represented taxable lease receipts that had been recorded incorrectly as nontaxable and determined that $151,762 of the lease receipts were subject to tax.
5. CDTFA computed lease receipts of $5,063,788 for the audit period and applied the 53.33 percent error rate to compute audited taxable lease receipts of $2,700,525, which it reduced to account for tent frames appellant purchased tax-paid and leased in substantially the same form as acquired. Thus, CDTFA calculated a deficiency measure of $2,684,881 for unreported taxable lease receipts (audit item 1).
6. To establish audited disallowed sales for resale, CDTFA examined appellant's records for 1Q05 on an actual basis and determined that $36,996 of the $262,530 in recorded sales for resale, or 14.0921 percent, were taxable lease receipts. CDTFA applied that error ratio to recorded sales for resale for the remainder of the audit period to compute total disallowed sales for resale of $682,683 for the audit period (audit item 2).
7. CDTFA also examined appellant's purchase invoices for the audit period and allowed a deduction for tax-paid purchases resold of $195,941 to account for tax appellant paid on purchases of tent frames and on purchases of portable toilets (audit item 3).[5]

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[2] Appellant's seller's permit was closed effective December 31, 2015.

[3] A block test is the examination of a block period of time (for example, day, week, month, or quarter).

[4] $151,762 ÷ $284,571 = 53.33 percent.

[5] Audit items 1 and 2 include charges for portable toilet rentals, which are taxable even if leased in substantially the same form as acquired. (Cal. Code Regs., tit. 18, § 1660 (d)(1).

Additionally, CDTFA allowed a credit of $15,714 based on the difference between recorded and reported sales tax accruals (audit item 4).

8. CDTFA acknowledged that appellant paid sales tax reimbursement on its purchases of tent frames but initially determined that appellant did not lease tent frames in substantially the same form as acquired and on that basis found appellant's leases of tent frames to be taxable. Thereafter, appellant provided a January 2005 "Purchase Price List" that lists the prices of various sizes of tent tops and tent frames. Because the prices listed on this document show that the price of frames constitutes 55 percent of the total price, CDTFA estimated that $1,304,864 (i.e., 55 percent) [6] of the deficiency measure calculated for audit item 1 comprises tent frame leases.[7]

9. Based on the audit, CDTFA issued an NOD to appellant on June 18, 2009, for $248,167.13 in tax, plus accrued interest.

10. By letter dated July 16, 2009, appellant filed a timely petition for redetermination disputing audit items 1 and 2 only.[8]

11. On September 23, 2014, CDTFA's Appeals Bureau held an appeals conference in this matter. On November 30, 2016, CDTFA's Appeal Bureau issued a Decision and Recommendation (D&R), recommending that interest beginning August 1, 2009, be reduced by one-half in accordance with the Managed Audit Program Participation Agreement. CDTFA also recommended that interest be fully relieved "for a two-month period, in addition to the period July 12, 2015, through November 30, 2016." Regarding audit item 1, CDTFA found in its D&R that appellant's tent frames were leased in substantially the same form as acquired and that the deficiency measure for audit item 1

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[6] CDTFA's calculation of this $1,304,864 figure is complicated; however, appellant did not dispute the calculations in the first audit, and only the 55 percent frame percentage is at issue with respect to audit item 1.

[7] While the audit working papers show that appellant disputed audit item 2 in its entirety, the audit working papers do not clearly explain the basis of this dispute. The April 20, 2009 Results of Discussion of Audit Findings (included in exhibit 3 of CDTFA's reply brief) states that appellant disputes audit item 2 on the same basis as audit item 1. However, this document identifies the entirety of audit item 2 as being in dispute, and if the basis of appellant's dispute of audit item 2 was the same as its dispute of audit item 1, only a portion of the deficiency measure (i.e., the amount attributable to frame leases) would be in dispute. Presumably, CDTFA did not estimate the amount of frame leases included in audit item 2 because appellant disputed the entire deficiency measure for audit item 2 on the basis that these transactions were sales for resale.

[8] The record does not contain a copy of the petition for redetermination, and this statement is taken from CDTFA's Decision and Recommendation.

should be reduced.[9] CDTFA allowed a deduction for tax-paid purchases resold of $195,941 to account for tax appellant paid on purchases of tent frames of $169,990, and tax appellant paid on purchases of portable toilets of $25,951 (audit item 3). On May 1, 2017, CDTFA completed a reaudit implementing the D&R's findings.

12. Appellant requested a board hearing and was scheduled to appear before the Board of Equalization (BOE) on November 16, 2017, but appellant's hearing was postponed.

13. On July 10, 2018, the Office of Tax Appeals (OTA) received appellant's opening brief.[10]

14. In subsequent briefing, CDTFA acknowledged that an adjustment is warranted for audit item 2 to take into account nontaxable tent frame leases. Accordingly, CDTFA reduced the 1Q05 disallowed sales for resale and reduced the error rate to 11.2251 percent, which reduced the deficiency measure for audit item 2.

15. On appeal, appellant submitted evidence that showed that 70.9 percent of tent leases are attributable to nontaxable lease of tent frames. Based on that percentage, CDTFA performed a reaudit which reduced the error rate to 10.3750 percent. CDTFA recommended that the measure of unreported taxable tent leases be reduced to $1,002,769 for audit item 1, and that disallowed claimed exempt sales for the audit period be reduced to $501,739 for audit item 2.

## DISCUSSION

A retailer owes sales tax on its gross receipts from the retail sale of tangible personal property (TPP) in California. (R&TC, § 6051.) All gross receipts are presumed to be subject to tax unless the contrary is established. (R&TC, § 6091.) The burden to prove that a sale is not taxable is on the seller unless it is established that the seller takes a certificate from the purchaser that shows the tangible personal property is subject to resale. (*Ibid*.) When sales tax does not apply, use tax applies to the storage, use, or other consumption of TPP purchased from any retailer for storage, use, or other consumption in this state, measured by the sales price, unless

[9] Because the deficiency measure for audit item 2 also includes frame leases, CDTFA's D&R should have recommended a similar adjustment for audit item 2. Presumably, this oversight is due to appellant's concession of audit item 2 following the appeals conference. As explained further, CDTFA has now addressed this oversight.

[10] Appellant previously requested an oral hearing before BOE. Pursuant to Assembly Bill 102, The Taxpayer Transparency and Fairness Act of 2017, as amended by Assembly Bill 131 (2017-18 Reg. Sess.), the duty of processing administrative appeals for sales and use taxes was transferred from BOE to OTA. Appellant did not respond to OTA's letter regarding an oral hearing. Therefore, appellant waived the right to an oral hearing and the matter is decided based on the written record.

that use is specifically exempted or excluded by statute. (R&TC, §§ 6201, 6401.) A "lease" or "rental" is a granting of possession of TPP by a lessor to a lessee for a consideration. (R&TC, §§ 6006.1, 6006.3.) Generally, a lease of TPP is a continuing sale and purchase for the duration of the lease, and tax is due on the rentals payable. (R&TC, §§ 6006.1, 6010.1; Cal. Code Regs., tit. 18, § 1660(b)(2), (c)(1).) However, a lease of TPP is not a continuing sale and purchase, and therefore is not subject to tax, if the lessor leases it in substantially the same form as acquired and the lessor made a timely election to pay California sales tax reimbursement or use tax measured by the lessor's purchase price of the property. (R&TC, §§ 6006(g)(5), 6010(e)(5); Cal. Code Regs., tit. 18, § 1660(b)(1)(E), (c)(2).) If a lessor did not pay sales tax reimbursement or use tax to its vendor when it purchased the TPP and the lessor does not want to pay use tax measured by its rental charges, the lessor must timely report and pay tax measured by the full purchase price with its return for the period during which the property is first placed into rental service. (Cal. Code Regs., tit. 18, § 1660(c)(2).) If the lessor does not make a timely election to pay tax on the purchase price, the lessor may not retroactively do so. (*Action Trailer Sales, Inc. v. State Bd. of Equalization* (1975) 54 Cal.App.3d 125, 131-132 (*Action Trailer Sales*).) The relevant time for election of payment of tax occurs when the property owner uses the TPP by leasing it. (*Ibid*.)

When 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. (*Appeal of Talavera*, 2020-OTA-022P.) 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. (*Ibid*.) Unsupported assertions are not enough to satisfy a taxpayer's burden of proof. (*Ibid*.)

Here, the taxable sales appellant reported constitute only a small fraction of the gross receipts recorded. Thus, CDTFA was justified in concluding that additional investigation was warranted. (See R&TC, § 6481.) CDTFA performed an audit and three reaudits based on appellant's own records and information submitted during the audit and on appeal. Therefore,

we find CDTFA has established that its determination is reasonable and rational, and the burden shifts to appellant to provide evidence from which a more accurate determination may be made.

Appellant initially argued that it should be relieved of its tax liability because it based its reporting on oral advice from CDTFA. The Sales and Use Tax Law, however, does not provide for relief on this basis.[11] Appellant also argued that it remitted use tax based on the cost of its rental items sometime in 2004; however, appellant has not provided any support for this assertion, and therefore we find it to be unpersuasive. Furthermore, even if appellant had paid use tax on the cost of rental items sometime in 2004, our conclusion would remain the same because such payments would not constitute a timely election to pay tax on cost. (Cal. Code Regs., tit. 18, § 1660(c)(3); see also *Action Trailer Sales, supra*, 54 Cal.App.3d, at pp. 131-132.)

Similarly, with respect to appellant's argument that it paid sales tax reimbursement on the materials it used to construct its tent tops, we note that appellant has not provided any evidence in support of this argument, and in fact conceded that it did not pay tax on materials purchased to construct tent tops. Additionally, even if we were to find that appellant paid sales tax reimbursement on the materials used to construct tent tops, these materials were not leased in substantially the same form as acquired, and therefore the tent top leases would still be taxable.[12] (Cal. Code Regs., tit. 18, § 1660(c)(2).) Appellant's assertion on appeal is that tent frames constitute 67 percent of costs, rather than the 55 percent initially determined by CDTFA. Based on additional information appellant provided on appeal, CDTFA recalculated and found tent frames used in substantially similar form comprised 70.9 percent of appellant's costs, and CDTFA applied that percentage to re-determine nontaxable frame leases.

[11] R&TC section 6596 provides relief of taxes under specified circumstances when a taxpayer reasonably relies on erroneous written advice. Appellant has not presented any written advice upon which it based its tax treatment of leases.

[12] However, in this scenario, an adjustment to the deduction for tax-paid purchases resold would be warranted.

## HOLDING

Appellant has not shown that additional adjustments to the tax liability beyond what CDTFA conceded, in its D&R and in this appeal, are warranted.

## DISPOSITION

CDTFA's actions in reducing the audit item 1 deficiency measure to $1,002,769, reducing the audit item 2 deficiency measure to $501,739, deleting the audit item 3 allowable deduction by $169,990, relieving interest by one-half beginning August 1, 2009, and relieving interest fully for a two-month period, in addition to the period July 12, 2015, through November 30, 2016, and otherwise denying the petition for redetermination, are sustained.

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Teresa A. Stanley
Administrative Law Judge

We concur:

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Suzanne B. Brown
Administrative Law Judge

DocuSigned by:
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Josh Lambert
Administrative Law Judge

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