

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
A. AMAS

) OTA Case No. 18083633
) CDTFA Case ID 951626
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OPINION

Representing the Parties:

For Appellant:

A. Amas

For Respondent:

Randy Suazo, Hearing Representative
Christopher Brooks, Tax Counsel IV
Jason Parker, Chief of Headquarters
Operations

For Office of Tax Appeals:

Deborah Cumins,
Business Taxes Specialist III

K. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, A. Amas (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)¹ in response to appellant’s timely petition for redetermination of a Notice of Determination (NOD) dated April 18, 2016. The NOD is for \$54,497.21 of additional tax, plus applicable interest, and a negligence penalty of \$5,449.77, for the period January 1, 2013, through December 31, 2015 (audit period). In its decision, CDTFA deleted the negligence penalty and denied the remainder of the petitioned amount.

Office of Tax Appeals Administrative Law Judges Keith T. Long, Josh Aldrich, and Daniel K. Cho held an oral hearing for this matter, on October 15, 2020.² At the conclusion of the hearing, the record was closed and this matter was submitted for decision.

¹ Sales and use 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 referring to acts or events that occurred before July 1, 2017, “CDTFA” shall refer to the BOE; and when referring to acts or events that occurred on or after July 1, 2017, “CDTFA” shall refer to CDTFA.

² The oral hearing was noticed for Cerritos, California, but conducted electronically due to Covid-19.

ISSUE

Whether appellant has shown that adjustments are warranted to the audited understatement of reported taxable sales.

FACTUAL FINDINGS

1. Appellant operated a restaurant in San Francisco, California, selling Middle Eastern style food, beverages, beer, and wine, beginning in November 1996.
2. During the audit period, appellant reported total sales of \$582,512, claimed a deduction of \$43,931 for sales tax reimbursement included in gross receipts, and reported taxable sales of \$538,581.
3. Appellant did not provide any books or records for the audit. Instead, appellant asserted that a fire at the restaurant destroyed most of his records.
4. Upon audit, CDTFA obtained appellant's form 1099-K³ merchant card sales data for 2013 and 2014. CDTFA also obtained appellant's California income tax returns for 2013 and 2014.
5. CDTFA compared appellant's California income tax returns to his sales and use tax returns. CDTFA found that the gross receipts that appellant reported on his 2013 California income tax returns exceeded the taxable sales that appellant reported on his sales and use tax returns for that year by \$221,013. CDTFA found that the gross receipts that appellant reported on his 2014 California income tax return exceeded the taxable sales that appellant reported on his sales and use tax returns for that year by \$214,074. CDTFA also noted that the costs of goods sold (COGS) that appellant reported on his California income tax returns exceeded the taxable sales that appellant reported on his sales and use tax returns.
6. CDTFA examined appellant's form 1099-K merchant card sales data for 2013 and 2014 and found appellant's credit card receipts, excluding sales tax and estimated tips, exceeded the taxable sales that appellant reported on his sales and use tax returns by \$165,837 for 2013 and \$151,627 for 2014.

³The form 1099-K is an Internal Revenue Service form which reports amounts paid to the merchant by customers using some type of payment card (i.e., credit card or debit card) or third-party network (e.g., Pay Pal).

7. CDTFA established audited taxable sales for 2013 by reducing the gross receipts that appellant reported on his 2013 California income tax return of \$424,982 by the sales tax reimbursement that appellant claimed on his sales and use tax returns of \$16,409 to find audited taxable sales of \$408,573. CDTFA compared the audited taxable sales to reported taxable sales and found unreported taxable sales of \$221,013 for 2013, which represented an error rate of 117.84 percent. CDTFA applied the error rate to appellant's reported taxable sales to find the unreported taxable sales in each quarter of 2013.
8. CDTFA established audited taxable sales for 2014, by reducing the gross receipts that appellant reported on his 2014 California income tax returns of \$419,263 by the sales tax reimbursement that appellant claimed on his sales and use tax returns of \$16,512 to find audited taxable sales of \$402,751. CDTFA compared the audited taxable sales to reported taxable sales and found unreported taxable sales of \$214,074 for 2014, which represented an error rate of 113.46 percent. CDTFA applied the error rate to appellant's reported taxable sales to find the unreported taxable sales in each quarter of 2014.
9. CDTFA combined the error rates for 2013 and 2014 to calculate an average error rate of 115.64 percent. CDTFA applied the 115.64 percent error rate to the taxable sales that appellant reported on his sales and use tax returns for 2015 and found unreported taxable sales of \$187,738. CDTFA combined the unreported taxable sales for 2013, 2014, and 2015 to find total unreported taxable sales of \$622,824 (rounded).
10. On April 18, 2016, CDTFA issued an NOD for tax of \$54,497.21, plus applicable interest, and a negligence penalty of \$5,449.77.
11. On July 12, 2018, CDTFA issued a decision, deleting the negligence penalty and otherwise denying the petition. This timely appeal followed.

DISCUSSION

California imposes sales tax on a retailer's gross receipts from the retail sale of tangible personal property in this state unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, §§ 6012, 6051.) For the purpose of the proper administration of the Sales and Use Tax Law and to prevent the evasion of the sales tax, the law presumes that all gross receipts are subject to tax until the contrary is established. (R&TC, § 6091.)

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 sufficient to satisfy a taxpayer's burden of proof. (*Ibid.*)

In general, sales of food for human consumption are exempt from tax. (R&TC, § 6359.) 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 if the food is sold for consumption at facilities provided by the retailer (R&TC, § 6359(d)(2)) or if the food is sold as hot prepared food products (R&TC, § 6359(d)(7)).

Here, appellant did not provide books or records for the audit. As a result, CDTFA compared appellant's California income tax returns for 2013 and 2014 to his sales and use tax returns for those years. CDTFA found a discrepancy between appellant's recorded gross receipts and appellant's reported taxable sales. Appellant was unable to provide documentation to explain the discrepancy. Therefore, we find that it was reasonable and rational for CDTFA to calculate an error ratio from appellant's California income tax returns to project appellant's unreported taxable sales. As such, the burden shifts to appellant to demonstrate that reductions are warranted.

On appeal, appellant does not specifically dispute the measure of unreported taxable sales. Instead, appellant asserts, without evidence, that his records were destroyed by either a fire at the restaurant or as a result of vandalism at his bookkeeper's office.

Appellant has not offered any evidence, or even an explanation, to show that the gross receipts reported on his income tax returns were overstated. The available evidence does not suggest that reductions to those amounts are warranted. Therefore, appellant has not met his burden of proof. (See *Appeal of Talavera*, 2020-OTA-022P.) Accordingly, we find that no adjustment is warranted to the audited amount of taxable sales.

With respect to appellant's request to resolve this matter through an offer in compromise, the Office of Tax Appeals has no authority to either settle or compromise a tax liability, and our

jurisdiction in this case is limited to determining the correct amount of an appellant’s tax liability. (*Appeals of Dauberger, et al.* (82-SBE-082) 1982 WL 11759.)⁴

HOLDING

Appellant has not shown that adjustments are warranted to the audited understatement of reported taxable sales.

DISPOSITION

Sustain CDTFA’s decision to delete the negligence penalty and to otherwise deny the petition.

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Keith T. Long
Administrative Law Judge

We concur:

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Josh Aldrich
Administrative Law Judge

DocuSigned by:

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Daniel K. Cho
Administrative Law Judge

Date Issued: 12/2/2020

⁴ CDTFA has various programs that appellant may wish to explore when this appeal is concluded. CDTFA’s decision provided appellant information to contact CDTFA’s San Francisco District Office to establish an Installment Payment Arrangement or to contact CDTFA’s Offer in Compromise Section.