

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 19054778  
**THE PARTNERSHIP OF E. LEON AND** ) CDTFA Case ID 961341  
**M. LEON** )  
\_\_\_\_\_ )

**OPINION**

Representing the Parties:

For Appellant: Juan Guzman, CPA  
For Respondent: Jason Parker, Chief of  
Headquarters Operations

For Office of Tax Appeals: Lisa Burke, Business Taxes Specialist III

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, the partnership of E. Leon and M. Leon (appellant), dba Ruben’s Tacos-Riverside, appeals a Decision and Supplemental Decision issued by respondent California Department of Tax and Fee Administration (CDTFA) denying appellant’s petition for redetermination of a Notice of Determination (NOD) issued on June 17, 2016. The NOD is for tax of \$20,152.31, plus applicable interest, for the period October 1, 2012, through September 30, 2015 (audit period).

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

**ISSUE**

Whether any reduction to the amount of unreported taxable sales is warranted.

**FACTUAL FINDINGS**

1. During the audit period, appellant operated two restaurants. On September 15, 1997, appellant began operating a restaurant located in Riverside, California (Riverside location). The Riverside location was open daily from 9:30 a.m. to 11:00 p.m. Appellant

- also operated a restaurant in the City of Jurupa Valley, California (Jurupa Valley location) from December 3, 2003, through October 8, 2013. For the audit period, appellant reported total sales of \$1,144,866, and claimed deductions totaling \$45,853 for sales tax reimbursement included in reported total sales, which resulted in reported taxable sales of \$1,099,013.<sup>1</sup>
2. During the audit, appellant provided its monthly bank statements for the fourth quarter of 2012 (4Q12) and the year 2014, plus cash register Z-tapes (Z-tapes) for the month of December 2015.<sup>2</sup>
  3. CDTFA observed appellant's operations at its Riverside location for two days. On Thursday, December 10, 2015, CDTFA observed taxable sales of \$1,130.16, and on Wednesday, December 16, 2015, CDTFA observed taxable sales of \$1,059.76. CDTFA combined the results of its observation tests with taxable sales recorded in the Z-tapes provided by appellant for the other days in December 2015 to compute average daily taxable sales of \$1,088.18. For the Riverside location, CDTFA then computed average quarterly taxable sales of \$97,937 ( $\$1,088.18 \times 90$  days)<sup>3</sup> and taxable sales of \$1,175,244 for the audit period ( $\$97,937 \times 12$  quarters).
  4. CDTFA relied on the prior audit for information to establish audited taxable sales for the Jurupa Valley location because appellant sold it on October 8, 2013, and appellant provided no records for that location. In the prior audit, CDTFA computed average daily taxable sales of \$362 for that location based on a one-day observation test on Wednesday, December 19, 2012, and Z-tapes provided by appellant for the period October 5, 2012, through October 11, 2012. For the audit at issue here, CDTFA used average daily taxable sales of \$362 to compute taxable sales of \$133,216 for the Jurupa Valley location for the period October 1, 2012, through October 8, 2013 (when appellant closed the restaurant).
  5. CDTFA combined audited taxable sales of \$1,175,244 for the Riverside location with audited taxable sales of \$133,216 for the Jurupa Valley location to establish audited

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<sup>1</sup> No deficiency measure was established in a prior audit for the period April 1, 2009, through June 30, 2012.

<sup>2</sup> A cash register Z-tape is the portion of the cash register tape that summarizes sales by category for a certain time period (e.g., a day or a shift)

<sup>3</sup> CDTFA computed this total by multiplying \$1,088.18 by 90 days. A difference in \$0.80 appears to be due to rounding ( $\$97,937 - 97,936.20 [\$1,088.18 \times 90 \text{ days}] = \$0.80$ ).

taxable sales of \$1,308,460 for the audit period. CDTFA compared audited taxable sales for each quarter with appellant's quarterly reported taxable sales, and accepted the accuracy of the reported amounts for 2Q14, 4Q14, 1Q15, 2Q15, and 3Q15 because the reported amounts for those quarters either exceeded the audited amounts or represented reporting error rates that were less than 10 percent. Differences between audited taxable sales and reported taxable sales for the remaining quarters totaled \$253,877.

6. As an alternative audit method, CDTFA obtained appellant's credit card payment information reported by its merchant services providers to the IRS (1099-K forms) for the period October 1, 2012, through December 31, 2014, and prepared a credit-card-sales ratio analysis, resulting in average daily taxable sales of \$2,516.<sup>4</sup> Because average daily taxable sales of \$2,516 substantially exceeded the sales observed in CDTFA's observation tests, CDTFA decided to rely on the average daily taxable sales resulting from its observation tests rather than the results of its credit-card-sales ratio analysis.
7. The NOD issued by CDTFA to appellant on June 17, 2016, is based on a deficiency measure of \$253,877, consisting entirely of unreported taxable sales established from a projection of average daily taxable sales. Appellant timely filed a petition for redetermination contending that CDTFA's estimate of its average daily taxable sales is inaccurate. In its Decision issued on October 9, 2018, and Supplemental Decision issued on April 8, 2019, CDTFA denied appellant's petition for redetermination. This timely appeal followed.

### DISCUSSION

California imposes a 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.) Although gross receipts from the sale of "food products" are generally exempt from the sales tax, sales of

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<sup>4</sup> Based on the results of its observation tests on December 10, 2015, and December 16, 2015, CDTFA computed that the ratio of appellant's sales paid by credit card (credit card payments) to its total sales (credit-card-sales ratio) would have been 32.90 percent when the sales tax rate was 7.75 percent, as it was during 4Q12. Assuming that the sales tax rate was 8.00 percent, as it was after 4Q12, CDTFA computed a credit-card-sales ratio of 32.97 percent. CDTFA divided appellant's credit card sales for the periods October 1, 2012, through December 31, 2012, and January 1, 2013, through December 31, 2014, by the respective credit-card-sales ratios to compute taxable sales of \$2,037,677, which represented average taxable sales of \$2,516 per day.

hot food and sales of food served in a restaurant are subject to tax. (R&TC, § 6359(a), (d)(1), (d)(2) & (d)(7).)

If CDTFA is not satisfied with the amount of tax reported by the taxpayer, CDTFA may determine the amount required to be paid on the basis of any information within its possession or that may come into its possession. (R&TC, § 6481.) 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.*)

Here, appellant did not provide its income tax returns, sales or purchase journals, merchandise purchase invoices, guest checks, or Z-tapes for the audit period (Z-tapes were only provided for one month), sufficient to verify its reported taxable sales. CDTFA's determination is reasonable because it was based on direct observation of appellant's sales and appellant's own sales records.<sup>5</sup> We find it reasonable for CDTFA to conclude that appellant's taxable sales were underreported and to determine audited taxable sales based on its observation tests. Therefore, the burden shifts to appellant to establish with documentation or other evidence that a reduction to the audited taxable measure is warranted.

Appellant contends that its reported taxable sales for 3Q14 should be accepted as accurate because audited taxable sales of \$97,937 for that quarter were estimated based on tests from December 2015, which was more than a year after the close of the audit period, and the difference between audited taxable sales of \$97,937 and reported taxable sales of \$86,808 for that quarter is not significant. However, there is no evidence to suggest that appellant's average daily sales from December 2015 are substantially different from those in 3Q14. Also, the error percentage for 3Q14 is 12.82 percent ( $[\$97,937 - \$86,808] \div \$86,808$ ), which is not an insignificant amount, and, even if it were, this is simply not a basis for accepting appellant's reported sales.

Additionally, appellant contends that audited taxable sales for its Jurupa Valley location are overstated because they were computed from a combination of average daily sales obtained via appellant's Z-tapes and CDTFA's one-day observation test. Appellant offers no explanation

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<sup>5</sup> We note that CDTFA did not use the results of its credit-card-sales ratio analysis to establish audited taxable sales, to the benefit of appellant.

for why the use of more than one source of information to compute daily average sales is unreasonable, nor does appellant dispute the accuracy of the sales recorded either on its Z-tapes or by CDTFA during its observation of appellant’s business. In fact, average daily sales between CDTFA’s one-day observation test and appellant’s Z-tapes are substantively similar, and the use of multiple, reliable sources of information only strengthens, not weakens, our confidence in CDTFA’s determination of appellant’s average daily sales.

Appellant has provided no documentation or other evidence to support any adjustment, and, thus, we conclude that appellant has failed to meet its burden of establishing that any reduction to the audited taxable measure is warranted.

HOLDING

Appellant has not established that any reduction to the amount of unreported taxable sales established by audit is warranted.

DISPOSITION

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

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*Josh Lambert*  
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Josh Lambert  
Administrative Law Judge

We concur:

DocuSigned by:  
*Andrew Wong*  
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Andrew Wong  
Administrative Law Judge

DocuSigned by:  
*Nguyen Dang*  
77AFD3EA552843B...  
Nguyen Dang  
Administrative Law Judge

Date Issued: 12/21/2020