

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

In the Matter of the Appeal of:  
**J. ASLAM**

) OTA Case No. 18011842  
) CDTFA Case ID 844825  
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**OPINION**

Representing the Parties:

For Appellant:

Bruce E. Nelson

For Respondent:

Chad Bacchus, Tax Counsel IV  
Randy Suazo, Hearing Representative  
Jason Parker, Chief of Headquarters  
Operations

For Office of Tax Appeals:

Deborah Cumins,  
Business Taxes Specialist III

N. DANG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, J. Aslam (appellant) appeals an adverse decision issued by the California Department of Tax and Fee Administration (CDTFA) in response to appellant’s petition for redetermination of a Notice of Determination (NOD) proposing a deficiency of \$53,064.87 tax plus applicable interest for the period January 1, 2011, through December 31, 2013 (liability period).<sup>1</sup> Thereafter, CDTFA conceded to reduce the tax portion of its deficiency determination to \$31,986.66.<sup>2</sup>

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<sup>1</sup> The sales and use taxes were formerly administered by the State Board of Equalization (SBE). In 2017, the relevant functions of SBE 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 SBE.

<sup>2</sup> This is the result of a \$258,173 reduction in taxable measure.

Office of Tax Appeals Administrative Law Judges Nguyen Dang, Suzanne B. Brown, and Andrew Wong held an oral hearing for this matter on December 15, 2020.<sup>3</sup> At the conclusion of the hearing, we closed the record and submitted this matter for decision.

### ISSUE

Whether the measure for unreported taxable sales should be further reduced.

### FACTUAL FINDINGS

1. During the liability period, appellant operated two adjacent convenience stores named Panoche Mobil (Mobil) and Panoche Shell.
2. At both store locations, appellant sold typical convenience store merchandise such as cigarettes, tobacco products, beverages, snack items, lotto, and phone cards. Appellant also sold beer at the Mobil store.
3. CDTFA audited appellant's returns for the liability period and ultimately determined (among other things) that appellant had underreported his taxable sales by \$378,870.
4. CDTFA's determination is based on a comparison of appellant's reported taxable sales to audited taxable sales, which CDTFA established via a markup of cost analysis.<sup>4</sup>
5. Reduced to its simplest form, this analysis involved multiplying appellant's taxable inventory purchases (i.e., inventory that is subject to tax when sold) by the markup factor on that inventory to compute audited taxable sales for the liability period.<sup>5</sup>
6. Appellant disputes only CDTFA's calculation of the taxable inventory purchases for the Mobil store.
7. CDTFA computed taxable inventory purchases for the Mobil store using a test basis. Specifically, CDTFA examined appellant's purchase invoices from February 2011, September 2012, and June 2013 (test period), and compared appellant's taxable to total purchases as reflected on these invoices to establish a 40.22 percent "taxable purchase

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<sup>3</sup> This hearing was noticed to be held in Sacramento, California. However, to protect the health and safety of the hearing participants during the ongoing coronavirus pandemic, we instead held the hearing remotely via teleconferencing in accordance with the Governor's Executive Order N-25-20 authorizing the use of teleconferencing for public meetings during this pandemic.

<sup>4</sup> This analysis is described in detail in CDTFA's Audit Manual section 0407.10.

<sup>5</sup> The markup factor is the difference between the cost and selling price of an item when compared to the cost of that item, plus 100 percent.

ratio.” CDTFA then applied that ratio to the total inventory purchases for the entire liability period to establish taxable inventory purchases for the Mobil store.

### DISCUSSION

California imposes a sales tax on retailers, measured by the retailer’s gross receipts from sales of tangible personal property in this state, unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, § 6051.) All of the retailer’s gross receipts are presumed subject to tax, unless the retailer can prove otherwise. (R&TC, § 6091.) It is the retailer’s responsibility to maintain complete and accurate records and to make them available for examination. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).)

When 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 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.*) Mere assertions are insufficient to satisfy the taxpayer’s burden of proving error in CDTFA’s deficiency determinations. (*Ibid.*)

In conducting its audit, CDTFA utilized a well-established audit method and purchase information obtained directly from appellant’s vendors, demonstrating that the resulting deficiency determination is supported by a minimally reasonable evidentiary foundation. The burden of proof in this matter therefore lies with appellant.

The sole issue in this appeal is CDTFA’s calculation of the 40.22 percent taxable purchase ratio for the Mobil store. Appellant argues that CDTFA erred in segregating taxable and non-taxable purchases for 11 of the purchase invoices from the test period, and that furthermore, the purchase invoices used by CDTFA in conducting its audit are incomplete and nonrepresentative, and thus should not be relied upon. Instead, appellant offers an alternative solution. Appellant asserts that the taxable purchase ratio should be computed using the Mobil store’s point of sales (POS) records for May and September 2012, and June 2013, resulting in a 36.62 percent taxable purchase ratio. Appellant contends that this method is more reliable than the one chosen by CDTFA due to the fact that all Mobil store sales were recorded in its POS, and, after removing beer sales, the taxable purchase ratio computed by appellant is similar to that

of the Panoche Shell store, which sold similar items and was located within 400 feet of the Mobil store.

There is no evidence indicating that CDTFA erred in conducting its purchase segregation analysis or that appellant’s POS records are a more reliable basis for computing the taxable purchase ratio. Because appellant bears the burden of proof, this alone is fatal to appellant’s position. Moreover, it is axiomatic that, all things being equal, a test base that contains data from a wider variety of time periods will be more characteristic of the population which it is said to represent. Here, we note that CDTFA’s taxable purchase ratio is based upon purchases from three different quarters and all three years of the liability period, while appellant computed a taxable purchase ratio based on sales from only two quarters and two years. This indicates that, contrary to appellant’s position, CDTFA’s taxable purchase ratio is the more representative one.

Accordingly, we find that appellant has not shown that a different result is warranted.

HOLDING

No further adjustments are warranted to the measure for unreported taxable sales.

DISPOSITION

We sustain CDTFA’s action to reduce the tax deficiency to \$31,986.66 and to otherwise deny the petition.

DocuSigned by:  
*Nguyen Dang*  
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Nguyen Dang  
Administrative Law Judge

We concur:

DocuSigned by:  
*Suzanne B. Brown*  
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Suzanne B. Brown  
Administrative Law Judge

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

Date Issued: 2/10/2021