OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 19034565
	) CDTFA Case IDs 919345, 934801
FINE ART GROUP, LLC	)
	)
	)
	)

OPINION

Representing the Parties:

For Appellant:	Sima Kahali, CPA, Tax Consultant
For Respondent:	Randy Suazo, Hearing Representative Christopher Brooks, Tax Counsel IV Jason Parker, Chief of Headquarters Ops.
For Office of Tax Appeals:	Richard Zellmer, Business Tax Specialist III

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section and 6561, Fine Art Group, LLC, (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA),[1] denying appellant's petition for redetermination of the Notice of Determination (NOD) of $32,334.58 tax, and applicable interest, due for the period July 1, 2011, through March 31, 2014 (audit period). In its subsequent decision, CDTFA reduced the understated measure of tax from $390,683 to $375,402, resulting in reductions to the tax, and denied the remainder of the petition.

In addition, pursuant to R&TC section 6901, appellant appeals CDTFA's denial of its protective claim for refund of $8,000 in tax that it paid towards the NOD.

Office of Tax Appeals Administrative Law Judges Teresa A. Stanley, Michael F. Geary, and Josh Aldrich held an oral hearing for this matter in Sacramento, California, on

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

December 15, 2020, after which the record was closed, and the parties submitted the matter for decision.[2]

ISSUE

Are further adjustments warranted to the audited understatement of sales tax for the audit period; more specifically, should the measure of disallowed claimed exempt sales in interstate commerce be further reduced?[3]

FACTUAL FINDINGS

1. Appellant is a retailer of art based in Hercules, California. Appellant conducts art exhibitions in hotels throughout California as well as other states and makes sales of art at the exhibitions.[4]
2. CDTFA audited appellant for the audit period, for which appellant reported total sales of $1,886,040 and claimed deductions of $1,315,588 for exempt sales in interstate commerce, resulting in reported taxable sales of $570,452. Because appellant's only claimed deduction was for sales in interstate commerce, CDTFA decided to examine those claimed exempt sales.
3. Appellant was only able to provide shipping documents for the period January 1, 2013, through March 31, 2014. Thus, CDTFA decided to perform a block test[5] of claimed exempt sales in interstate commerce using that period (test period). For the test period, CDTFA examined all of appellant's sales invoices, which totaled $1,057,114 (excluding sales tax and shipping charges). CDTFA considered a sale taxable if: 1) the sales invoice showed that sales tax reimbursement was charged, or 2) the sales invoice did not show that sales tax reimbursement was charged and appellant was not able to provide

[2] This matter was set for hearing in Sacramento but was conducted electronically to provide for the safety of participants and observers during the COVID-19 pandemic.

[3] CDTFA initially asserted an offset; however, CDTFA has since confirmed that it does not intend to pursue an increase in the audited understatement and conceded it is not requesting an offset for excess bank deposits.

[4] An "art advisor," employed by appellant, is present at exhibitions and handles delivery and shipment issues for appellant. Appellant argued that its art advisors did not provide appellant with shipping documents, although appellant reimbursed the art advisors for shipping charges claimed in monthly reimbursement requests.

[5] A block sample is a generally accepted audit tool which examines transactions from a representative portion of an audit period and applies the findings to the audit period. It is typically used when complete records are not available for the entire audit period.

documentation, such as shipping documents, to show that the sale was an exempt sale in interstate commerce. In this manner, CDTFA compiled taxable sales of $616,474 for the test period. This amount was subtracted from total sales for the test period of $1,057,114 to compute audited exempt sales in interstate commerce of $440,640 for the test period. This amount was subtracted from claimed deductions for sales in interstate commerce for the test period of $626,768 to compute disallowed sales in interstate commerce for the test period of $186,128. This amount was divided by claimed deductions for sales in interstate commerce for the test period of $626,768 to compute an error ratio of 29.7 percent. The error ratio of 29.7 percent was applied to claimed deductions for sales in interstate commerce for the audit period of $1,315,588 to compute disallowed sales in interstate commerce of $390,683.[6]

4. CDTFA issued an NOD to appellant on August 27, 2015, for the deficiency disclosed in the audit.
5. Appellant filed a timely petition for redetermination of the NOD. Appellant also made several payments toward the NOD and filed a claim for refund for recovery of those payments.
6. CDTFA held an appeals conference with appellant on July 26, 2016.
7. In its January 27, 2017 Decision, CDTFA accepted a sale made on May 24, 2013 (for $2,030), to L. Marris, as an exempt sale in interstate commerce, recommended a reaudit to make that adjustment, and otherwise denied appellant's petition and claim for refund.
8. CDTFA prepared a reaudit in accordance with the CDTFA Decision, which reduced the error ratio to 29.37 percent and measure of tax from $390,683 to $386,422.
9. Appellant filed this appeal and submitted supporting documentation.
10. On appeal, CDTFA agreed to accept an additional sale (this one to D. Antone, for $5,250) as an exempt sale in interstate commerce and prepared a second reaudit, which further reduced the measure of tax from $386,422 to $375,402. CDTFA otherwise recommended denial of further adjustments and appellant's claim for refund of $8,000.

[6] We compute $390,730. The difference is due to rounding.

DISCUSSION

California imposes sales tax on a retailer's sales of tangible personal property in this state. (R&TC, § 6051.) The tax is measured by the retailer's gross receipts unless the sale is specifically exempt or excluded from taxation by statute. (*Ibid*.) A retailer's gross receipts are all presumed subject to tax unless the retailer can prove otherwise. (R&TC, § 6091.)

Unless otherwise expressly agreed, title to tangible personal property that is sold passes to the purchaser at the time and place at which the seller completes its performance with respect to the physical delivery of that property. (Cal. U. Com. Code, § 2401 (2); Cal. Code Regs., tit. 18, § 1628(b)(3)(D).) If a contract of sale requires delivery to a destination, title passes when the property is delivered there. (Cal. U. Com. Code, § 2401(b).)

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 which may come into its possession. (R&TC, § 6481.) When a taxpayer challenges a determination, 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*.)

Appellant argues that some of the sales for the test period were exempt sales in interstate commerce. Appellant identified three sales for which it obtained sworn declarations (Forms BOE-52) supporting the contention that the purchased artworks were delivered outside of California. Appellant identified other sales that it asserts are exempt sales in interstate commerce. We address each sale separately, below. Appellant further contends that one sale during the test period was a nontaxable sale for resale in Mexico. Appellant asserts that allowing a deduction for the identified purchases will decrease the error ratio, which will in turn decrease the measure of tax.

In addition to challenging CDTFA's findings, appellant proposes a methodology other than that used by CDTFA (described above). Appellant's proposed method is to first add the sales for which no tax was charged on the invoice, but were considered taxable by CDTFA, to compute the total errors. Then appellant would divide the total errors by reported total sales for

the test period of $1,059,268 to compute the error ratio, which appellant would apply to reported total sales for the audit period of $1,886,040 to compute the understatement.

In its brief, CDTFA points out that sales that were taxed during the test period totaled $497,860, but during the test period, appellant reported taxable sales of only $432,500. Thus, for the test period, appellant did not report as taxable 13 percent of the sales for which appellant charged its customers sales tax reimbursement. Therefore, there are two categories of errors here: 1) taxed sales that were not reported as taxable; and 2) sales that were not taxed but were deemed taxable.[7] CDTFA's audit method accounts for both types of errors, and thus, we find it to be a correct procedure. Appellant's method accounts for sales that were not taxed but were deemed taxable, but appellant's method does not account for the taxed sales that were not reported as taxable. The evidence shows that appellant did not report as taxable significant amounts of sales that were taxed. These types of errors must be accounted for in the audit, and the failure to do so is a fatal flaw. For this reason, we reject appellant's method.

Here, appellant claimed deductions totaling $1,315,588 for exempt sales in interstate commerce but provided shipping documents only for the period from January 1, 2013, through March 31, 2014.[8, 9] In other words, no records were provided for 6 of the 11 quarters at issue. Under the circumstances, CDTFA's use of a block sample to test the validity of the deductions was reasonable, and CDTFA appears to have correctly employed the methodology to establish a reasonable estimate of taxable sales. Therefore, the burden of proof shifts to appellant to show errors in the audit. (*Appeal of Talavera*, *supra*.)

Appellant identifies specific disallowed sales it believes were exempt sales in interstate commerce. R&TC section 6396 provides an exemption from tax when pursuant to a contract, tangible personal property must be delivered to a point outside this state by the retailer by means of facilities operated by the retailer or delivery by the retailer to a carrier, customs broker, or forwarding agent. Sales tax applies when the property is delivered to the purchaser or its

[7] Although the understatement is all characterized as "disallowed sales in interstate commerce," it is clear from the audit method that the understatement includes taxed sales that were not reported as taxable.

[8] At the hearing, appellant argued that many shipping documents were provided that were never mentioned by the auditor. Appellant has not presented evidence that the auditor failed to schedule any shipping documents that were within the test period.

[9] Appellant alleged that a disgruntled employee was an informant who provided information to CDTFA that was "very untrue." Appellant believes this former employee may have stolen some missing shipping documents. Appellant has not provided evidence of stolen documents or false statements made to CDTFA.

representative in this state, regardless of whether the intention of the purchaser is to transport the property to a point outside this state, and whether or not the property is actually so transported. (Cal. Code Regs., tit. 18, § 1620(a)(3)(A).) Sales tax does not apply when, pursuant to a contract of sale, property is required to be shipped to a point outside this state and is actually shipped to a point outside this state. (Cal. Code Regs., tit. 18, § 1620(a)(3)(B).)

In general, sales tax also does not apply when property is sold to a purchaser for shipment abroad and is shipped or delivered by the retailer to the foreign country. (Cal. Code Regs., tit. 18, § 1620(a)(3)(C).) However, sales tax applies when, prior to an irrevocable commitment of the property into the process of exportation, the property is delivered in this state to the purchaser or the purchaser's representative. (*Ibid*.) Bills of lading or other documentary evidence of the delivery of the property to a carrier, customs broker, or forwarding agent for shipment outside this state must be retained by the retailer to support the claimed exemption. (Cal. Code Regs., tit. 18, § 1620(a)(3)(D).) A retailer seeking an exemption or exclusion bears the burden of proving by credible evidence that the statutory requirements have been satisfied. (*Appeal of Thomas Conglomerate*, 2021-OTA-030P.)

Appellant submitted three declarations which were signed by purchasers under penalty of perjury (using a form provided by CDTFA, Form 52, Certificate of Verification Out of State Delivery (Form 52)). OTA's Rules for Tax Appeals allows parties to submit declarations in lieu of witness testimony so long as they are signed under penalty of perjury. (Cal. Code Regs., tit. 18, § 30412(b), former § 30420(c).) The other party has 30 days to submit questions for the witness to OTA, after which time the right to propose questions will be waived. (*Ibid*.) Under the rules in existence at the time of briefing and oral hearing for this appeal, the declaration would "be given the same effect as if the witness had testified orally." (Cal. Code Regs., tit. 18, former § 30420(c).) Pursuant to the rule effective as of March 1, 2021, sworn declarations may be admitted into evidence in lieu of testimony, and the administrative law judges hearing the matter will determine the credibility of, and the weight to be given to, a sworn declaration. (Cal. Code Regs., tit. 18, § 30214(c).)

Each of the three Form 52 declarants stated that their purchases were delivered to them outside of California: (1) a purchase on March 16, 2013, by D. Antone totaling $5,250; (2) a purchase on July 5, 2013, by I. Schneir totaling $9,000; and (3) a purchase on September 20, 2013, by D. Bentley totaling $1,142. CDTFA was able to contact D. Antone to

verify the contents of his declaration and allowed the $5,250 exemption. CDTFA could not reach the other two declarants and made no changes to the audit based on those declarations.

With respect to the purchase by Mr. I. Schneir, CDTFA argued that it could not reach him to verify the contents of Form 52. At the hearing Mr. I. Schneir testified and confirmed that his purchase (for $9,000) was delivered to him in Canada, which he stated on the Form 52 he signed. CDTFA questioned Mr. I. Schneir, who confirmed that he received the actual artwork in Canada, not just the authentication paperwork. CDTFA also confirmed by questioning Mr. I. Shneir that he did not take possession of the artwork in California prior to its shipment to Canada. When asked whether CDTFA's position had changed based on Mr. I. Shneir's testimony, CDTFA declined to take a position. Based on the contents of the Form 52 and Mr. I. Shneir's testimony, we find that the purchase for $9,000 should be allowed as an exempt sale in interstate commerce.

The purchaser D. Bentley (for $1,142) did not attend the hearing but did attest under penalty of perjury on Form 52 that his purchase was delivered to him in Kentucky. Besides bills of lading, CDTFA can, and does, accept "other documentary evidence," in addition to bills of lading, to support a claimed exemption. (Cal. Code Regs., tit. 18, § 1620(a)(3)(D).) CDTFA's Field Audit Manual (FAM) section 0414.10 (January 2000) lists several types of evidence that may be used to support a claimed exempt sale in interstate commerce.[10] The FAM further addresses the use of Form 52 (now CDTFA Form 52) as an additional means of verifying the claimed exemption. (See FAM, § 1414.12, February 2002.) Moreover, as indicated above, declarations signed under penalty of perjury may be submitted into evidence. (Cal. Code Regs., tit. 18, § 30214(b).) Pursuant to California Code of Regulations, title 18, section 30420(c), the version in effect when the hearing was conducted and the record was closed, provided that such sworn declarations would be given the same effect as if the witness had testified at the hearing.

Appellant alleges that the Form 52 declarations were requested during the audit for the purpose of verifying the claim. After obtaining a copy of D. Bentley's declaration, CDTFA asserts that it could not verify the contents of the declaration. Additionally, CDTFA initially alleged that the date on the declaration was approximately one and one-half months after the date of the sale; however, the date of the invoice is listed as September 20, 2013, and the delivery

[10] CDTFA's Audit Manual summarizes CDTFA's audit policies and procedures. We refer to it here because it establishes that CDTFA has a defined procedure for verification of exempt sales in interstate commerce. With the goal of consistent treatment of retailers who are similarly situated, it is relevant for us to consider CDTFA's standard policy.

date was shown as September 30, 2013. Moreover, the declarant stated that he could not remember the exact date his purchase was delivered, but that it was delivered to "our home in Kentucky." CDTFA argues that there was no evidence of shipping charges for the sale purportedly delivered to Kentucky. At the hearing, appellant countered that it was a common business practice to waive shipping fees when negotiating a sale. Furthermore, CDTFA can, and does, accept "other documentary evidence," in addition to bills of lading, to support a claimed exemption. (Cal. Code Regs., tit. 18, § 1620(a)(3)(D).)

Appellant used Form 52 to obtain a sworn statement from its customer, D. Bentley. CDTFA did not timely object to D. Bentley's declaration, and when given an opportunity to hold the record open to send written questions to him, CDTFA declined the opportunity to do so. We therefore find that the sale of $1,142 should be allowed as an exempt sale in interstate commerce.

Appellant contends that an August 24, 2013 sale to T. Tan (for $15,922) should be accepted as an exempt sale in interstate commerce. Appellant provided a copy of a DHL invoice to support that the property was shipped out of state. Appellant points out that the purchaser has an address in Singapore. We note that CDTFA accepted this sale as exempt on its audit schedule 12B-3. Consequently, no adjustment is warranted.

Appellant contends that two sales[11] totaling $7,996 should not be considered errors in the test because appellant issued a separate invoice for the sales tax after the sales invoices were issued.[12] Appellant provided a copy of an invoice dated April 23, 2014, charging the customer $691.17 for sales tax on two separate sales. However, appellant has not shown that it reported the tax on these two sales on its sales and use tax returns. The sales tax invoice is dated in a quarter other than when the sales were made. On our record appellant has not met its burden to show that appellant reported and paid that sales tax. Since appellant has not tied the invoice to any sales tax report, we make no adjustment for the sales totaling $7,996.

Appellant contends that a $1,500 sale to J. Hochwalt on February 16, 2013, should be accepted as an exempt sale in interstate commerce. The auditor's notes state that delivery of this

[11] One sale dated November 22, 2013, in the amount of $5,846 and a second sale dated January 22, 2014, in the amount of $2,150.

[12] One invoice specifies the purchaser as Roy and the other as Troy. In its exhibits, appellant shows both purchases being made by Troy. The confusion regarding the name does not influence our decision.

purchase was made to the customer's hotel room.[13] Appellant has not provided shipping documentation or other evidence to refute the in-state delivery or to support that the property was shipped out of state. Therefore, we conclude that no adjustment for this sale should be made.

Appellant contends that a $2,500 sale to G. Bryan, dated June 24, 2013, should be treated as an exempt sale in interstate commerce, because this sale occurred in Texas. The auditor's notes indicate that the purchaser picked up the property (presumably in California). Appellant has provided no evidence to support that the property at issue was shipped out-of-state or that the sale occurred in Texas. Therefore, we conclude that no adjustment for this sale should be made.

Appellant contends that a $1,450 sale to L. Navarro, dated March 8, 2014, should be treated as an exempt sale in interstate commerce, because this sale occurred in Texas. The auditor's notes indicate that the purchaser picked up the property. Appellant provided no evidence to support that the property at issue was shipped out-of-state or that the sale occurred in Texas. Therefore, we conclude that no adjustment for this sale should be made.

In addition to its assertion that additional sales in interstate commerce should be allowed, appellant claims that one sale in the test period was a nontaxable sale for resale that should have been excluded from the measure of tax. With respect to sales for resale, the burden to prove that a sale of tangible personal property is not at retail is upon the seller unless the seller timely takes in good faith a certificate from the purchaser that the property is purchased for resale. (R&TC, § 6091; *Appeal of V.A. Auto Sales*, *Inc.*, 2019-OTA-299P.) If the seller does not timely obtain a valid and complete resale certificate, the seller will be relieved of liability for the tax only where the seller shows that the property was: 1) resold by the purchaser and was not used by the purchaser for any purpose other than retention, demonstration, or display while holding it for sale in the regular course of business; 2) held for resale by the purchaser and was not used for any purpose other than retention, demonstration, or display, while being held for sale in the regular course of business; or 3) consumed by the purchaser and tax was reported or paid by the purchaser on the purchaser's returns or in an audit of the purchaser. (Cal. Code Regs., tit. 18, § 1668(e).)

A resale certificate must contain the following essential elements: (1) the signature of the purchaser, purchaser's employee, or authorized representative of the purchaser; (2) the name and

[13] When referring to the auditor's notes, it is our understanding that the auditor's comments are based on the content of invoices provided by appellant. We do not have the actual invoices in our record. Appellant did not dispute the accuracy of the notes.

address of the purchaser; (3) the purchaser's seller's permit number, or if the purchaser is not required to hold a permit because the purchaser sells only property of a kind the retail sale of which is not taxable, or because the purchaser makes no sales in this state, the purchaser must include on the certificate a sufficient explanation as to the reason the purchaser is not required to hold a California seller's permit in lieu of a seller's permit number; (4) a statement that the property described in the document is purchased for resale, including the phrase "for resale" with a description of the kind of property to be purchased for resale; and (5) the date of execution of the document. (Cal. Code Regs., tit. 18, § 1668(b)(1), (2).) An otherwise valid resale certificate will not be considered invalid solely on the ground that it is undated. (Cal. Code Regs., tit. 18, § 1668(b)(2).) A certificate is timely if it is taken at any time before the seller bills the purchaser for the property, or any time within the seller's normal billing and payment cycle, or any time at or prior to delivery of the property to the purchaser. (Cal. Code Regs., tit. 18, § 1668(a).)

In support of its contention that a sale during the test period was a nontaxable sale for resale, appellant provided a copy of a document written in Spanish and titled, "Cedula De Identificacion Fiscal (CIF)," dated March 8, 2017, which CDTFA states is a tax identification card, for a company named Wah Diseño of Mexico City, as evidence that the sale was a nontaxable sale for resale to a Mexican merchant. Appellant did not provide evidence for this transaction. On the contrary, the auditor noted that the purchaser took possession of the property and shipped it to an undesignated location. When the property is delivered to the purchaser or the purchaser's representative in this state prior to commitment to the process of exportation, the sale is taxable. (Cal. Code Regs., tit. 18, § 1620(a)(3)(C).) Appellant testified that the purchaser presented a valid resale certificate. The alleged certificate was not submitted as evidence in this appeal. To the extent that appellant alleges that the CIF contains the essential elements of a valid resale certificate, we find that it does not meet the requirements. Among other things, the CIF is dated almost four years after the sale, so it could not have been timely taken by appellant, which could not have relied upon it to fail to collect sales tax reimbursement from the purchaser.[14]

For these reasons, we conclude that the evidence is insufficient to support the sale as an exempt sale in interstate or foreign commerce or that it was a sale for resale. As such, we find that no adjustments are warranted.

[14] Because we find that the certificate was not timely taken, we need not address appellant's other contentions with respect to this sale; namely, whether the CIF is in fact a resale certificate or whether CDTFA failed to follow its Publication 32, which is not in evidence and is no longer available.

We find that appellant is entitled to further adjustments to the measure of disallowed claimed exempt sales in interstate commerce, in addition to those already allowed by CDTFA, for the sale to Mr. I. Schneir for $9,000, and the sale to Mr. D. Bentley for $1,142.

HOLDING

The measure of disallowed claimed exempt sales in interstate commerce is further reduced for the test period by allowing the claimed exempt sales totaling $10,142.

DISPOSITION

Appellant is entitled to adjustments for two sales delivered outside of California.[15] CDTFA's denial of the petition and claim for refund is sustained in all other respects.

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Teresa A. Stanley
Administrative Law Judge

We concur:

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Michael F. Geary
Administrative Law Judge

[15] CDTFA is responsible for recalculating the error ratio for the test period and for the adjustments to the disallowed claimed exempt sales in interstate commerce based on that ratio.

J. ALDRICH, concurring in part and dissenting in part:

The majority finds that an adjustment is warranted for the September 20, 2013 sale to D. Bentley in the amount of $1,142. As discussed by the majority, a retailer seeking an exemption or exclusion bears the burden of proving by credible evidence that the statutory requirements have been satisfied. (*Appeal of Thomas Conglomerate*, 2021-OTA-030P.) Here, appellant is seeking a claimed exemption for interstate sales. California Code of Regulations, title 18, section 1620(a)(3)(D) governs the proof requirements for a retailer claiming the exemption. It provides as follows: "bills of lading or other documentary evidence of the delivery of the property to a carrier, customs broker, or forwarding agent for shipment outside this state **must be retained** by the retailer to support deductions taken under (B) above." (Cal. Code Regs., tit. 18, § 1620(a)(3)(D) [Emphasis added].)

Appellant's representative testified that it would often use shipping fees, or the waiver thereof, as a point of negotiation or possible discount during a prospective sale. Appellant does not purport to be a carrier, customs broker, forwarding agent, or otherwise involved in the shipping industry. Thus, even if that kind of discount occurred in this sale there would still be a shipping expense to appellant. That shipping expense would have generated the kind of documentation that would conform with California Code of Regulations, title 18, section 1620(a)(3)(D). Yet, appellant admitted that it did not retain shipping information for many of the transactions at issue. Appellant did not provide bills of lading, shipping records such as a FedEx tracking number, or other contemporaneous documentation that support its claim.

In lieu of shipping documentation, appellant submitted a Form 52 that appears to be signed by D. Bentley. The form was signed more than five years after the transaction. There were no shipping charges for the transaction according to the audit or other documentary evidence to support the same. While other Form 52s were accepted by CDTFA, this Form 52 was rejected because CDTFA was unable to contact the purchaser to verify the information therein. CDTFA, in its November 9, 2019 opening brief, reiterated that it attempted to contact the purchaser, but was unable to verify the contents of the Form 52. During the hearing, CDTFA argued that it had made multiple unsuccessful attempts to contact D. Bentley. Casting further doubt on the veracity of this Form 52, CDTFA indicated that the original document was not

provided directly to CDTFA, and CDTFA was not involved in the Form 52 process as addressed in Audit Manual section 0414.12.[16]

The majority argues that this Form 52 "be given the same effect as if the witness had testified orally." (Cal. Code Regs., tit. 18, § 30420(c) (effective 1/1/19 to 2/28/21).) The weight we give evidence and the admissibility of the same are two separate and distinct issues. When there are defects or conflicting information in the record, evidence must be given its appropriate weight.

While the majority notes that CDTFA may accept other forms of proof, appellant bears the burden. Appellant did not produce a subsequent document, arrange for verification, or produce the declarant as a witness at the oral hearing. Stated differently, appellant failed to rehabilitate the Form 52 after notice and the opportunity to do so. Here, the defects in the verification process detract from the credibility of the statements therein. For these reasons, I give this Form 52 little weight. Based on the foregoing, I find that appellant did not meet its burden here. Thus, I do not join the majority regarding this adjustment. I otherwise concur.

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Josh Aldrich
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Josh Aldrich
Administrative Law Judge

Date Issued: 3/23/2021

[16] In pertinent part, CDTFA's Audit Manual section 0414.12 currently provides: "It should be emphasized that the return of the certificate may or may not be accepted as support for the claimed exemption. [¶] … The taxpayer should prepare the certificate to be completed in triplicate. It is recommended that the certificate be returned directly to the CDTFA. … [¶] … [¶] … The taxpayer's customer should send the originally signed and completed certificate to the CDTFA …." (Accessed 03/08/21.)