OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **M. BECERRA** **dba El Kora Mexican Restaurant**	OTA Case No. 18113991 CDTFA Case ID 221-029

OPINION

Representing the Parties:

For Appellant:	M. Becerra Flora Estrada, Witness
For Respondent:	Ravinder Sharma, Hearing Representative Chad Bacchus, Tax Counsel IV Jason Parker, Chief of Headquarters Ops.
For Office of Tax Appeals:	Deborah Cumins, Business Taxes Specialist III

A. WONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, M. Becerra (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA), which denied appellant's petition for redetermination of a Notice of Determination (NOD) dated January 9, 2017.[1] The NOD is for tax of $24,053.49, a failure-to-file penalty of $668.47, and applicable interest, for the period April 1, 2013, through March 31, 2016 (audit period).

Office of Tax Appeals (OTA) Administrative Law Judges Andrew Wong, Daniel K. Cho, and Huy "Mike" Le held an oral hearing for this matter via videoconference on

[1] The State Board of Equalization (BOE) formerly administered sales taxes. In 2017, BOE functions relevant to this case transferred to CDTFA. (Gov. Code, § 15570.22.) For ease of reference, when we refer to acts or events that occurred before July 1, 2017, "CDTFA" shall refer to BOE; and when we refer to acts or events that occurred on or after July 1, 2017, "CDTFA" shall refer to CDTFA.

February 23, 2021.[2] At the conclusion of the oral hearing, we closed the record and submitted this matter for decision.

ISSUES

1. Whether a reduction to either unreported taxable sales or disallowed claimed deductions is warranted.
2. Whether relief of the failure-to-file penalty is warranted.

FACTUAL FINDINGS

1. Appellant, an individual and sole proprietor, operates a restaurant serving Mexican-style food, beer, wine, and liquor in Spring Valley, California.
2. Appellant provided cash register Z-tapes,[3] along with merchandise and expense purchase invoices, to an outside accountant, who prepared appellant's sales and use tax returns (SUTRs).
3. During the audit period, appellant reported total sales of $378,779 and taxable sales of $277,747. Appellant claimed deductions totaling $101,032, which consisted of the following: $6,410 for nontaxable sales for resale during the second quarter of 2015 (2Q15); and $94,622 for exempt sales of food products during the period 2Q13 through 1Q15.
4. Appellant did not file SUTRs for 4Q15 and 1Q16.
5. For audit, appellant provided cash register Z-tapes for the audit period; monthly sales and expense summaries for the audit period; various merchandise and expense purchase invoices; various credit card merchant statements; and various bank statements.
6. CDTFA compiled recorded total sales of $53,807 and recorded cost of goods sold of $11,338 from the monthly sales and expense summaries for 1Q14. Using those figures, CDTFA computed a markup of 374.6 percent.[4] CDTFA considered the markup

[2] We held the oral hearing via videoconference with the parties' consent due to the coronavirus/COVID-19/pandemic-related impact on in-person public gatherings.

[3] A cash register Z-tape is the portion of the cash register tape that summarizes sales by category for a certain period of time (i.e., a day or a shift).

[4] "Markup" is the amount by which the cost of merchandise is increased to set the retail price. For example, if the retailer's cost is $.70 and it charges customers $1.00, the markup is $0.30. The formula for determining the markup percentage is markup amount ÷ cost. In this example, the markup percentage is 42.86 percent (.30 ÷ .70 = 0.42857).

reasonable for this type of business,[5] so it concluded that recorded sales for the quarter were substantially accurate.

7. CDTFA used appellant's cash register Z-tapes to compile total sales of $578,414 for the audit period.

8. CDTFA compared audited total sales of $578,414 to reported total sales of $277,747 to compute an audited total understatement of $300,668.[6]

9. Although appellant had claimed deductions of $6,410 for nontaxable sales for resale and $94,622 for exempt sales of food products, CDTFA did not expect a dine-in restaurant either to make sales for resale or to have exempt sales of cold food to go.

10. CDTFA disallowed the claimed deduction of $6,410 for nontaxable sales for resale because appellant did not provide supporting documentation.

11. CDTFA found that the claimed deduction of $94,622 in exempt sales of food products resulted from a misprogrammed cash register key. Appellant was unaware of this, did not collect sales tax reimbursement for sales rung on that key, and inadvertently claimed those sales were exempt food sales. Appellant also did not provide documentation supporting the exempt nature of these food sales. Accordingly, CDTFA disallowed the claimed deductions of $94,622 for exempt sales of food products.

12. Thus, the audited total understatement of $300,668 consisted of the following: unreported taxable sales of $199,636; a disallowed claimed deduction of $6,410 for nontaxable sales for resale; and disallowed claimed deductions of $94,622 for exempt sales of food products.

13. On January 9, 2017, CDTFA issued an NOD for tax of $24,053.49 and a failure-to-file penalty of $668.47 (applicable to 4Q15 and 1Q16). Appellant petitioned for redetermination, and CDTFA issued a decision denying the petition. This timely appeal followed.

[5] CDTFA expected a markup of at least 250 percent.

[6] We compute $300,667. The $1 difference is due to rounding.

DISCUSSION

Issue 1: Whether a reduction to either unreported taxable sales or disallowed claimed deductions is warranted.

California imposes upon a retailer a sales tax measured by the 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, § 6051.) A retailer includes every seller who makes a retail sale or sales of tangible property. (R&TC, § 6015(a)(1).) For the purpose of the proper administration of the Sales and Use Tax Law and to prevent the evasion of the sales tax, it is presumed that all gross receipts are subject to the sales tax until the contrary is established. (R&TC, § 6091.) It is the retailer's responsibility to maintain complete and accurate records to support reported amounts and to make them available for examination. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)1).)

If CDTFA is not satisfied with the amount of tax reported by the taxpayer, or if any person fails to file a return, CDTFA may determine the amount required to be paid based on any information that 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*.) To satisfy the burden of proof, a taxpayer must prove (1) that the tax assessment is incorrect, and (2) the proper amount of the tax. (*Appeal of AMG Care Collective*, 2020-OTA-173P.)

In general, sales of food are exempt from tax. (R&TC, § 6359(a).) 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 when the food is furnished, prepared, or served for consumption at tables, chairs, or counters or from trays, glasses, dishes, or other tableware provided by the retailer (R&TC, § 6359(d)(2)) or when the food is sold as hot prepared food products (R&TC, § 6359(d)(7)).

In this audit, CDTFA used appellant's cash register Z-tapes to compile audited total sales. CDTFA found appellant did not make any nontaxable sales at the restaurant;[7] appellant did not dispute this finding or provide evidence to the contrary during the audit. As a result, CDTFA used the amount of audited total sales as audited taxable sales. We find CDTFA has shown that its determination, based on appellant's own records, is reasonable and rational. Therefore, appellant has the burden to establish that adjustments are warranted.

On appeal, appellant states that he appealed in hopes of lowering the overall amount of the liability. Appellant states that he trusted an outside accountant to file paperwork timely and to report the restaurant's sales correctly. Appellant states that he had no idea the amounts reported on SUTRs were incorrect, and he requests a reduction of the determined amount.

At the oral hearing, appellant made three arguments. First, appellant argues that he is not responsible for the tax liability because he entrusted an outside accountant with the responsibility for his sales and use tax matters. Second, appellant requests relief of his tax liability because of economic hardship resulting from the coronavirus/COVID-19 pandemic. Third, appellant notes that he has a history of good tax compliance.

Here, the audited total understatement of reported taxable sales represents the difference between reported taxable sales and sales compiled from appellant's cash register Z-tapes. Appellant has not offered any evidence, or even argument, that the sales compiled from the cash register Z-tapes were inaccurate, that CDTFA erred in its computations, or that the tax assessment is otherwise incorrect. Thus, we conclude that a reduction to any portion of the audited total understatement on these bases is not warranted.

Regarding appellant's first argument that he is not responsible for the tax liability because he entrusted an outside accountant with his sales and use tax matters, appellant operates the restaurant as a sole proprietor and is the retailer here. R&TC section 6051 imposes the sales tax on the retailer, so that the retailer is the taxpayer. (*GMRI, Inc. v. CDTFA* (2018) 21 Cal.App.5th 111, 118.) The taxpayer relationship is between the retailer and the state, and the sales tax is a direct obligation of the retailer. (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081,

[7] During the oral hearing, CDTFA asserted that appellant's sales were subject to the "80-80 rule." The 80-80 rule provides that when more than 80 percent of a retailer's gross receipts are from sales of food products, and over 80 percent of its retail sales of food are subject to tax, then cold food sold in a form suitable for consumption on the retailer's premises is subject to tax even if it is purchased for "take out" or "to go." (R&TC, § 6359(d)(6); Cal. Code Regs., tit. 18, § 1603(c)(1).) In its audit working papers, CDTFA made no mention of the 80-80 rule, but stated that all of appellant's sales of food were taxable, suggesting that appellant made no sales of cold food to go.

1104.) Accordingly, appellant is directly responsible to the state for the sales tax liability at issue. Appellant has not provided any authority (nor are we aware of any) that would either require or permit us to transfer this primary liability for sales tax to a third-party accountant. We conclude that appellant's first argument lacks merit.

Regarding appellant's second argument requesting relief of his tax liability due to economic hardship resulting from the coronavirus/COVID-19 pandemic, OTA's role in these proceedings is to determine appellant's correct amount of tax liability. (R&TC, § 7081.) To that end, we are not authorized to relieve sales taxes based on this argument. And appellant has not provided any authority (nor are we aware of any) to the contrary. Accordingly, we conclude that we have no authority to relieve appellant of his tax liability because of either economic hardship or COVID-19-related impacts.[8]

Regarding appellant's third argument requesting relief of taxes due to his history of good tax compliance, we note that the Internal Revenue Service has a program to abate timeliness-related penalties that a taxpayer incurred for the first time based on a taxpayer's history of timely filing and payment. However, there is no such "first-time" abatement or relief program available for California sales or use taxes. Accordingly, we conclude that appellant's third argument is unavailing.

For the foregoing reasons, we conclude that a reduction to either unreported taxable sales or disallowed claimed deductions is not warranted.

Issue 2: Whether relief of the failure-to-file penalty is warranted.

If a person fails to make a return, CDTFA will estimate the tax the person is required to pay the state and add a 10 percent penalty (commonly known as a failure-to-file penalty). (R&TC, § 6511.) OTA may relieve the failure-to-file penalty if it finds that the person's failure to file a return was due to reasonable cause and circumstances beyond the person's control and occurred notwithstanding the exercise of ordinary care and in the absence of willful neglect. (R&TC, § 6592(a).)

[8] Although OTA cannot relieve sales taxes due to economic hardship or COVID-19-related impacts, CDTFA may under certain conditions. (See https://www.cdtfa.ca.gov/formspubs/pub56.pdf [information in English regarding CDTFA's Offer in Compromise program]; https://www.cdtfa.ca.gov/formspubs/pub56s.pdf [information in Spanish regarding CDTFA's Offer in Compromise program]; https://www.cdtfa.ca.gov/services/covid19.htm [information in English regarding availability of COVID-19 relief, filing extensions, and payment plans from CDTFA]; and https://www.cdtfa.ca.gov/services/covid19-es.htm [information in Spanish regarding availability of COVID-19 relief, filing extensions, and payment plans from CDTFA].)

On appeal, appellant alleges that his failure to file returns for 4Q15 and 1Q16 was due to reasonable cause: he relied on an outside accountant to file SUTRs for those two quarters, but the accountant failed to do so, and appellant was unaware of the failure.

Here, appellant chose to delegate the task of preparing and filing his SUTRs for 4Q15 and 1Q16 to an outside accountant. However, delegating this task does not relieve appellant of his duty to file the SUTRs. Appellant, not the accountant, is the seller and liable for the sales tax, so he bears the responsibility for filing SUTRs. (See R&TC, § 6452 ["For purposes of the sales tax, a return shall be filed by every seller and also by every person who is liable for the sales tax"].) We find that appellant had the duty to file SUTRs, but has not shown that his failure to do so was due to reasonable cause. Accordingly, we conclude that relief of the failure-to-file penalty is not warranted.

HOLDINGS

1. A reduction to either unreported taxable sales or disallowed claimed deductions is not warranted.
2. Relief of the failure-to-file penalty is not warranted.

DISPOSITION

Sustain CDTFA's decision to deny the petition for redetermination.

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Andrew Wong
Administrative Law Judge

We concur:

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Daniel Cho
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Daniel K. Cho
Administrative Law Judge

DocuSigned by:
Huy "Mike" Le
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Huy "Mike" Le
Administrative Law Judge

Date Issued: 5/12/2021