

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

In the Matter of the Appeal of:  
**Y. HUANG**  
**dba New Canton Restaurant**

) OTA Case No. 20035964  
) CDTFA Case No. 097-048  
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**OPINION**

Representing the Parties:

For Appellant:

Andre H. Leung, Representative

For Respondent:

Jason Parker, Chief of Headquarters  
Operations

For Office of Tax Appeals:

Lisa Burke, Business Taxes Specialist III

K. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Y. Huang (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)<sup>1</sup> denying appellant’s petition for redetermination of a Notice of Determination (NOD) issued on November 7, 2017. The NOD is for \$27,405.63 in tax, 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 appellant has established that a reduction to the amount of unreported taxable sales is warranted.

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<sup>1</sup> Sales and use taxes were formerly administered by the Board of Equalization (board). Effective July 1, 2017, functions of the board relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) When referring to acts or events that occurred before July 1, 2017, “CDTFA” shall refer to its predecessor, the board.

FACTUAL FINDINGS

1. Appellant has operated a restaurant specializing in Chinese cuisine since December 1, 2008. The restaurant, which had indoor seating for approximately 50 customers during the audit period, sold meals for dining in or on a take-out basis from 10:30 a.m. to 9:00 p.m. seven days per week.
2. For the audit period, appellant reported total sales of \$1,005,446, claimed deductions of \$82,041 for sales tax reimbursement included in reported total sales, and reported taxable sales of \$923,406.
3. For audit, appellant provided the following: federal income tax returns for 2013 and 2014; bank statements; handwritten monthly sales summaries for the audit period; a box of guest checks and daily merchant settlement receipts reflecting that appellant made both cash and credit card sales for a period including September 30, 2015, through January 24, 2016; and guest checks and daily merchant settlement receipts reflecting that appellant made both cash and credit card sales for 20 days during the period February 1, 2016, through March 3, 2016.<sup>2</sup>
4. CDTFA determined that appellant did not maintain enough guest checks and merchant settlement receipts to support her monthly sales summaries.
5. CDTFA examined appellant's bank statements and compiled credit card deposits totaling \$1,053,449. CDTFA adjusted appellant's credit card deposits to exclude sales tax reimbursement collected and an estimated amount for tips. CDTFA compared appellant's adjusted credit card deposits with appellant's reported taxable sales and found that appellant's adjusted credit card deposits represented 97 percent of reported taxable sales, on average. CDTFA also found that in 3Q13 and 4Q13, appellant's adjusted credit card deposits exceeded reported taxable sales. Based on this information, CDTFA concluded that appellant failed to report a significant portion of her cash sales.
6. To establish audited sales, CDTFA performed a credit-card-sales-ratio analysis. CDTFA tested appellant's credit card sales for 45 days as follows: CDTFA examined randomly selected guest checks and credit card merchant statements for 24 days of the period September 30, 2015, through January 24, 2016; CDTFA examined the 20 days of guest

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<sup>2</sup> CDTFA requested that appellant provide all of her guest checks and credit card merchant statements for the month of February 2016.

checks and credit card merchant statements that appellant provided during the period February 1, 2016, through March 3, 2016; and CDTFA observed appellant's business operations for a full day on Thursday, February 25, 2016.

7. CDTFA compiled total sales of \$47,275 and credit card receipts of \$37,138 for the test period. CDTFA found that 7.80 percent of appellant's credit card sales were optional tips (audited tip ratio). After reducing appellant's credit card receipts by the audited tip ratio, CDTFA found that appellant's credit card sales comprised 72.43 percent of appellant's total sales (audited credit-card-sales ratio).<sup>3</sup>
8. CDTFA reduced appellant's total credit card deposits of \$1,053,449 for the audit period by the audited tip ratio of 7.80 percent. CDTFA further reduced appellant's credit card deposits to exclude sales tax reimbursement and computed audited credit card deposits of \$891,965. CDTFA applied the credit-card-sales ratio to the audited credit card deposits and found audited taxable sales of \$1,231,568, which exceeded appellant's reported taxable sales for the audit period by \$308,163.
9. CDTFA compared audited taxable sales with the purchases reported on appellant's federal income tax returns, and computed achieved markups of 270.39 percent and 252.45 percent for 2013 and 2014, respectively. Because the achieved markups were in line with the book markup of at least 250 percent that CDTFA had expected for this business, CDTFA concluded that the results of the credit-card-sales-ratio analysis were reasonable.
10. The NOD issued on November 7, 2017, is based on a deficiency measure of \$308,163. Appellant timely filed a petition for redetermination disputing the liability in its entirety. On February 7, 2020, CDTFA issued its Decision denying the petition.
11. Appellant timely filed a Request for Reconsideration, arguing that an alternative 45-day test period (January 30-31, 2016, February 26, 2016, and November 10, 2017, through December 20, 2017) reflects a higher credit-card-sales ratio than the credit-card-sales

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<sup>3</sup> CDTFA states that its analysis of the records from the period September 30, 2015, through January 24, 2016, showed that sales paid by credit card represented 66 percent of appellant's total sales, with an average of 16 sales paid with cash each day. However, for the period after CDTFA had asked appellant to save her records, sales paid by credit card represented 79 percent of appellant's total sales, with an average of nine sales paid with cash each day. Results of the one-day observation test show that sales paid by credit card represent 84.52 percent of appellant's total sales that day, with 10 sales paid with cash. We note that increasing the credit-card-sales ratio would result in a reduction to the amount of unreported taxable sales.

ratio used in the audit. Since the higher ratio is in line with the credit-card-sales ratio of 84.52 percent observed by CDTFA on February 25, 2016, appellant argued that the alternative 45-day test period yields more reasonable results. To support her computation of a higher credit-card-sales ratio for the alternative test period, appellant provided handwritten sales worksheets listing the amounts recorded in guest checks but did not provide the guest checks. Additionally, appellant argued that she is suffering from a financial hardship which should be given consideration.

12. On June 18, 2020, CDTFA issued a Supplemental Decision denying appellant's petition. This appeal to OTA 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.*)

Here, appellant did not provide a complete set of books or records to verify the accuracy of her monthly sales reports and monthly sales summaries. CDTFA examined the available books and records and identified discrepancies, which appellant is unable to explain.

To calculate the taxable measure, CDTFA used sales receipts and merchant credit card statements from three periods, including a one-day observation of the business. We note that CDTFA's Audit Manual section 0810.30 requires three full days of observation testing when

used as a method to project sales for a restaurant or bar.<sup>4</sup> However, the taxable measure is not based on a one-day observation test. Instead, the results of the observation were combined with amounts recorded in appellant's guest checks and daily merchant settlement receipts for 44 days to compute the audited credit-card-sales ratio and the audited tip ratio. Considering all the foregoing, we find that it was reasonable and rational for CDTFA to use a credit-card-sales ratio of 72.43 percent to calculate appellant's taxable sales. Therefore, the burden of proof shifts to appellant to demonstrate that reductions are warranted.

On appeal, appellant concedes to unreported taxable sales of \$139,038. Appellant applies the credit-card-sales ratio of 84.52 percent that CDTFA found during its one-day observation test to determine her own measure of unreported taxable sales. Appellant asserts that a different 45-day test period<sup>5</sup> more closely resembles and supports the 84.52 ratio from CDTFA's one-day observation test.<sup>6</sup> However, appellant has not provided sufficient evidence to support the accuracy of the proposed 84.52 percent credit-card-sales ratio.<sup>7</sup> For example, during her appeal to CDTFA, appellant provided handwritten sales worksheets listing the amounts recorded on guest checks for the alternative 45-day period. Appellant asserted that these worksheets supported the use of an 84.52 percent credit-card-sales ratio. Appellant did not provide documentation (such as the actual guest checks) to support the accuracy of the handwritten sales worksheets. Similarly, appellant has not provided supporting documents in her appeal to OTA.<sup>8</sup>

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<sup>4</sup> CDTFA's Audit Manual summarizes CDTFA's audit policies and procedures. It is a useful resource that OTA may look to for guidance in interpreting the law; however, the Audit Manual is not binding legal authority, and should not be cited as such. As such, OTA will exercise its own independent judgement in determining the proper weight, if any, to afford CDTFA's construction of the law, as set forth in the Audit Manual. (See *Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 25.)

<sup>5</sup> As noted above, this alternative test period includes: January 30, 2016, January 31, 2016, February 26, 2016, and the period November 10, 2017, through December 20, 2017. Appellant did not provide any explanation as to why these dates were chosen.

<sup>6</sup> Appellant also asserts that no consideration was given to her financial ability to pay the tax. We note that CDTFA administers settlement and Offer in Compromise programs. OTA does not have jurisdiction over these programs. Further, there is no provision within the Sales and Use Tax Law which allows OTA to reduce the tax based on a taxpayer's ability to pay.

<sup>7</sup> During CDTFA's appeals process, appellant provided handwritten daily sales worksheets that allegedly support the 84.52 percent credit-card-sales ratio. However, appellant has not provided any source documents to support the daily sales worksheets' accuracy.

<sup>8</sup> Appellant also did not provide a set of the handwritten sales worksheets to OTA. The only evidence of the handwritten sales worksheets were those attached to CDTFA's supplemental decision denying appellant's petition for redetermination.

By contrast, the audited credit-card-sales ratio that CDTFA used during the audit is supported by guest checks and daily merchant settlement receipts. Thus, appellant has not provided any evidence to support her position, and we have no way to verify whether the audited credit-card-sales ratio is incorrect. Appellant's unsupported assertions are insufficient to satisfy the burden of proof. (*Appeal of Talavera, supra.*)

With respect to the 84.52 percent credit-card-sales ratio observed during CDTFA's one-day observation test, we reiterate that the CDTFA Audit Manual does not deem one full day of observation testing to be sufficiently reliable to project sales for a restaurant or bar. However, CDTFA did not merely use the observation test results to make its determination but combined it with appellant's records for 44 days to compute the audited credit-card-sales ratio of 72.43 percent. As previously discussed, CDTFA's audit method was reasonable and rational. Appellant has not provided sufficient evidence that the audited credit-card-sales ratio should be revised to match the observation test results or to match any other test period. Therefore, we find no basis to substitute appellant's asserted credit-card-sales ratio for the results of the audit.

#### HOLDING

No reduction to the amount of unreported taxable sales is warranted.

#### DISPOSITION

Sustain CDTFA's decision to deny the petition.

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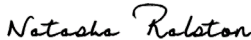


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Keith T. Long  
Administrative Law Judge

We concur:

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Natasha Ralston  
Administrative Law Judge

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Huy "Mike" Le  
Administrative Law Judge

Date Issued: 6/16/2021