



\$63,484.00, and reduced the negligence and finality penalties to \$6,348.41 and \$6,308.20, respectively.

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

### ISSUE

Whether appellant was the owner of the business during the liability period and may be held liable for the tax.

### FACTUAL FINDINGS

1. Appellant operated several Togo's and Baskin Robbins locations in California beginning in February 2009. During the liability period, appellant operated four business locations: one combined Togo's and Baskin Robbins location in Tulare (Tulare Togo's); a Togo's location at California State University, Bakersfield (CSUB Togo's); a Togo's location on Ming Avenue in Bakersfield (Ming Togo's); and a Togo's location in Clovis (Clovis Togo's).<sup>4</sup>
2. During the liability period, appellant reported the following: total sales of \$898,476; purchases subject to use tax of \$10,146 for the third quarter of 2015 (3Q15); claimed nontaxable sales of \$598,061; and a taxable measure of \$310,561.<sup>5</sup>
3. For audit, appellant provided federal income tax returns for 2014 and 2015; a general ledger; profit and loss (P&L) statements; sales and use tax worksheets; and an incomplete set of bank statements from three bank accounts, including the following: (1) a Chase bank account for the Clovis Togo's for the liability period; (2) a Bank of America account for the Clovis Togo's for the period 1Q16 through 2Q17; and (3) a Bank of

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<sup>4</sup> According to CDTFA's decision, appellant operated the Tulare Togo's location from October 26, 2009, through August 10, 2015; CSUB Togo's from June 14, 2011, through September 30, 2016; Ming Togo's from October 1, 2014, through July 19, 2015; and Clovis Togo's from February 9, 2009, through September 30, 2017.

<sup>5</sup> Appellant claimed deductions of \$594,552 for exempt sales of food products and \$3,509 for sales tax reimbursement included. Reported taxable measure of \$310,561 was comprised of reported taxable sales of \$300,415 (\$898,476 - \$594,552 - \$3,509) and purchases subject to use tax of \$10,146.

America account for the Tulare Togo's, Ming Togo's, and CSUB Togo's.<sup>6</sup> CDTFA also obtained appellant's Forms 1099-K, credit card sales data.<sup>7</sup>

4. CDTFA found that the gross receipts that appellant reported on its federal income tax returns exceeded the total sales that appellant reported on its sales and use tax returns by \$382,990 for 2014 and \$303,325 for 2015. Appellant asserted that the differences represented sublease income for the Tulare Togo's, CSUB Togo's, and Ming Togo's locations. CDTFA also found that the total sales recorded on appellant's P&L statements exceeded the total sales reported on appellant's sales and use tax returns by \$341,538 for 2014, \$303,325 for 2015, and \$158,751 for 2016.
5. CDTFA compared appellant's total reported taxable sales to the cost of goods sold recorded in appellant's P&L statements to determine book markups<sup>8</sup> of 58.33 percent for 2014, -7.72 percent for 2015,<sup>9</sup> and 227.17 percent for 2016. CDTFA noted that appellant's book markups were lower than CDTFA expected based on its audits of similar businesses.<sup>10</sup>
6. CDTFA used bank deposits as recorded on bank statements for three separate accounts to establish audited total sales. CDTFA then calculated audited taxable sales. For the Clovis Togo's, CDTFA used appellant's POS reports for 2016 to calculate a ratio of taxable to total sales. CDTFA applied the taxable to total sales ratio to appellant's total Clovis bank deposits.<sup>11</sup>

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<sup>6</sup> CDTFA's decision states that appellant did not provide bank statements for one of the accounts for the months of February, March, and April 2016. CDTFA did not compute estimated total sales amounts for those months.

<sup>7</sup> The Form 1099-K is an Internal Revenue Service form which shows amounts paid to the merchant by customers using some type of payment card (i.e., credit card or debit card) or third-party network (e.g., PayPal).

<sup>8</sup> "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  $\text{markup amount} \div \text{cost}$ . In this example, the markup percentage is 42.86 percent ( $.30 \div .70 = 0.42857$ ). A "book markup" (sometimes referred to as an "achieved markup") is one that is calculated from the retailer's records. A book markup is calculated from a markup factor by subtracting 100 percent from the markup factor (written as a percentage).

<sup>9</sup> A negative markup is calculated when the recorded costs exceed recorded sales.

<sup>10</sup> CDTFA did not indicate what book markup rate it expected for this type of business.

<sup>11</sup> The amount of Clovis Togo's bank deposits included sales made by appellant at the Tulare Togo's location which closed during the period 4Q15. These sales amounts were not included in the measure of audited taxable sales for the Tulare Togo's.

7. CDTFA scheduled appellant's bank deposits from the account used to operate the Tulare Togo's, CSUB Togo's, and Ming Togo's locations. CDTFA reviewed appellant's Forms 1099-K to determine the ratio of deposits for each location and then allocated the total deposits based on those ratios. For the Tulare Togo's, CDTFA applied taxable to total sales ratios (split between the Togo's and Baskin Robbins businesses) to appellant's Tulare Bank Deposits. For the Ming Togo's and CSUB Togo's, CDTFA calculated and applied a weighted taxable to total sales ratio.
8. In total, CDTFA calculated audited taxable sales of \$1,149,016, which, when compared to appellant's reported taxable sales, revealed an understatement of \$838,455.
9. On December 4, 2017, CDTFA issued the aforementioned NOD.
10. By letter dated March 14, 2018, appellant filed the administrative protest.
11. On May 27, 2020, CDTFA issued a decision ordering a reaudit to: 1) delete bank deposits from credit card transactions for the Tulare Togo's for the period August 11, 2015, through December 31, 2015, from audited total sales (because appellant provided evidence of a sale of that location); and 2) reduce audited total sales for the Clovis Togo's by 2.26 percent to adjust for optional tips included in credit card payments.
12. In a September 11, 2020 letter, CDTFA notified appellant that the reaudit resulted in a reduction of tax from \$68,901.22 to \$63,484.00, and reductions of the negligence and finality penalties to \$6,348.41 and \$6,308.20, respectively.
13. This timely appeal followed.

#### DISCUSSION

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.*)

Every person desiring to engage in or conduct business as a seller within this state must file with CDTFA an application for a seller's permit for each place of business, upon a form

prescribed by CDTFA which sets forth the name under which the applicant transacts or intends to transact business, the location of its place or places of business, and such other information as CDTFA may require. (R&TC, § 6066(a).) A seller's permit may be held only by persons actively engaging in or conducting a business as a seller of tangible personal property, and any person not so engaged must surrender its permit to CDTFA for cancellation. (R&TC, § 6072; Cal. Code Regs., tit. 18, § 1699 (f), (f)(1).) The permitholder has the burden of establishing that CDTFA received notice to cancel the permit. (Cal. Code Regs., tit. 18, § 1699(f)(2).)

A permitholder who fails to surrender its seller's permit upon transfer of a business is liable for any tax, interest, and penalty incurred by the transferee if the permitholder has actual or constructive knowledge that the transferee is using the permit in any manner, including filing sales and use tax returns under the permit number. (*Appeal of Pasatiempo Investments, Ltd.*, 2020-OTA-069P; R&TC, § 6071.1(a); Cal. Code Regs., tit. 18, §1699(f)(2).)

Here, appellant does not dispute the audit method or the calculation of tax. Instead, appellant asserts that it is not liable for the tax on sales made at any of the business locations. Appellant argues that it was not responsible for the day-to-day operations. Instead, appellant asserts that it was "carrying notes" for these businesses and received payments as a result of the "notes."<sup>12</sup> During CDTFA's appeals process, appellant asserted that the Tulare Togo's, CSUB Togo's, and Ming Togo's were subleased to other operators during the liability period. For the CSUB Togo's and Ming Togo's locations, appellant asserted that it ceased all business operations in September or October 2015 because the subleases violated appellant's own lease agreement with its landlord. In addition, appellant asserted that it sold the Tulare Togo's location in June 2014 and notified CDTFA in May 2015. Thus, the question is whether appellant is liable for the tax as the retailer during the liability period.

Appellant has not provided any evidence that the businesses were sold or subleased, nor has it provided any evidence of "notes" that it held from prospective buyers. With regard to appellant's prior assertions to CDTFA, appellant has not provided OTA with any evidence of a

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<sup>12</sup> It is unclear from appellant's contentions whether the alleged "notes" were from loans made by appellant, if appellant was receiving installment payments on the sales of the businesses, or if other financial arrangements were made. Nevertheless, as discussed in greater detail appellant has not provided any evidence of such "notes" or any evidence of payment from prospective purchasers.

sublease.<sup>13</sup> Appellant's unsupported assertions are not sufficient to meet its burden of proof. (*Appeal of Talavera, supra.*)

By comparison, appellant applied for and obtained a seller's permit for the businesses, which remained open through the liability period. Appellant's seller's permit was used to file sales and use tax returns. Thus, appellant failed to establish that it sold the business. Furthermore, even if appellant transferred the business via sublease, appellant's seller's permit was still in use during the liability period.<sup>14</sup> A permit holder is liable for taxes, interest, and penalties incurred by any other person who uses the permit in any way. (*Appeal of Pasatiempo Investments, Ltd., supra*; Cal. Code Regs., tit. 18, § 1699(f)(2).)

While the foregoing is dispositive, we reiterate that appellant has not provided any evidence that it transferred any of the Togo's locations for the periods at issue. Indeed, there is significant evidence that appellant was the owner and operator of the businesses. For example, appellant's Form 1099-K data shows that the credit card processing services were in appellant's name. The lease agreements, bank accounts, merchant statements, and contracts for business expenses (such as utilities) were also in appellant's name. Furthermore, an August 26, 2015 letter from Togo's Franchisor, LLC stated that it could not approve the sale of appellant's business to a prospective buyer as a Togo's franchisee. Thus, the evidence shows that appellant was the owner and retailer for all of the Togo's business locations during all relevant periods. Accordingly, we find that appellant is liable for the tax.

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<sup>13</sup> CDTFA conceded that it had received notification from appellant on May 28, 2015, of an alleged sale of the Tulare Togo's in June 2015. However, the buyer did not obtain a seller's permit until August 11, 2015. As noted above, the audited sales for this location were adjusted in the reaudit to exclude sales made after August 10, 2015. Appellant has not provided evidence to support an earlier sale date.

<sup>14</sup> According to CDTFA's decision, appellant contended that its seller's permit and banking information were used by another party. However, it is unclear whether this contention was made with respect to one Togo's location or all of them. Additionally, appellant has not specifically raised this argument in its appeal with OTA.

HOLDING

Appellant was the owner of the business during the liability period and is liable for the tax.

DISPOSITION

Sustain CDTFA’s decision to reduce the tax, negligence penalty, and finality penalty to \$63,484.00, \$6,348.41, and \$6,308.20, respectively, and to make no other adjustments.

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Keith T. Long  
Administrative Law Judge

We concur:

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Sheriene Anne Ridenour  
Administrative Law Judge

DocuSigned by:  
  
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Teresa A. Stanley  
Administrative Law Judge

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