

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

F. MARTINEZ

) OTA Case No. 19075087

) CDTFA Case ID 931024

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OPINION

Representing the Parties:

For Appellant:

J. Martinez¹

For Respondent:

Kevin Smith, Tax Counsel III
Randy Suazo, Hearing Representative
Jason Parker, Chief of Headquarters
Operations

For Office of Tax Appeals:

Richard A. Zellmer,
Business Taxes Specialist III

N. DANG, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 6561, J. Martinez (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)² affirming its deficiency determination of \$20,278.77 in tax plus accrued interest for the period April 1, 2012, through February 28, 2015 (liability period).

Office of Tax Appeals Administrative Law Judges Nguyen Dang, Andrew Wong, and Teresa A. Stanley held an oral hearing for this matter on January 20, 2021.³ At the conclusion of the hearing, we closed the record and submitted this matter for decision.

¹ We note that J. Martinez's seller's permit is held under the name F. Martinez, and that J. Martinez filed this appeal using that name.

² 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.

³ This hearing was noticed to be held in Cerritos, 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.

ISSUE

Whether a reduction to the amount of unreported taxable sales is warranted.

FACTUAL FINDINGSCDTFA's Audit

1. Appellant, doing business as El Taco Loco Restaurant, operated a restaurant in North Hollywood selling Mexican-style food and beverages.
2. CDTFA audited appellant for the liability period and determined, based on a comparison of audited to reported taxable sales, that appellant's reported taxable sales were understated by \$226,825.
3. CDTFA's deficiency determination is based primarily on a "credit card projection of sales" analysis.⁴ Generally, this audit method entails estimating a taxpayer's total sales for a given period by dividing credit card sales (i.e., sales paid for via credit card) for that period by the taxpayer's ratio of credit card sales to total sales (credit card sales ratio).⁵
4. CDTFA computed appellant's credit card sales from federal information returns filed by third-party credit card settlement entities (i.e., 1099-K forms from credit card payment processing companies), and this amount is not in dispute.
5. To compute the credit card sales ratio, CDTFA attempted to examine appellant's sales but was unable to do so because appellant had ceased business operations prior to the start of CDTFA's audit and did not maintain detailed sales records. Therefore, CDTFA observed sales made by appellant's successor (successor) on May 21, 2015, and June 9, 2015 (observation test), to compute a 30.36 percent credit card sales ratio. CDTFA determined that these sales were a sufficiently reasonable approximation of appellant's sales because the successor operated a similar business in the same location as appellant.

⁴ CDTFA computed audited taxable sales for the period April 1, 2012, through December 31, 2013, using a credit card sales ratio analysis. The resulting monthly sales average from this period and reporting error ratio from 2013 were then utilized to compute audited taxable sales for the period January 1, 2015, through February 28, 2015, and 2014, respectively. This resulted in a substantially lower amount than if CDTFA had used a credit card sales ratio analysis for those periods, which is to appellant's benefit.

⁵ This audit method is described in further detail in CDTFA's Audit Manual section 0810.12.

Business Closure

6. On March 27, 2015, CDTFA received from appellant a BOE-65 (*Notice of Closeout for Seller's Permit*) form indicating that the business had closed on November 1, 2014. Based on this information, CDTFA initially closed appellant's seller's permit with an effective date of November 1, 2014.
7. On April 23, 2015, CDTFA audit staff visited appellant's business location and found an individual, who was appellant's former employee, operating a Mexican-style restaurant under the same name as appellant's business. CDTFA therefore determined that this individual acquired the business from appellant.
8. To ascertain whether tax might be due on the transfer of the business's assets and the extent to which the successor might be held liable for any of appellant's unpaid tax liabilities, on June 16, 2015, CDTFA sent a letter to appellant and the successor requesting that they provide a bill of sale and a list of the business's fixtures and equipment.
9. In response, on June 26, 2015, CDTFA received a handwritten letter addressed from appellant. The letter states that the business was closed "on or about February 2015," appellant received no consideration in exchange for the business, and the value of the business's fixtures and equipment is \$3,000. The letter further states that "if more information is needed, please call me," and provides appellant's and the successor's telephone numbers. After receiving this information, CDTFA updated the effective close-out date of appellant's seller's permit to February 28, 2015.

DISCUSSION

If 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 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.*)

Appellant challenges two aspects of CDTFA's deficiency determination – the 30.36 percent credit card sales ratio and the February 28, 2015 closeout date of the business. We address each of these in turn.

Credit Card Sales Ratio

Here, CDTFA's established credit card sales ratio is not based upon a direct examination of appellant's sales, but rather, the examination of another entity's sales, namely, those of the successor. The reasonableness of this approach is directly proportional to the strength of the similarities between appellant's and the successor's businesses. The record indicates that the successor's business was operated by appellant's former employee as a Mexican-style restaurant under the same name and in the same location as appellant's business. We find these similarities sufficient to constitute a minimally rational foundation for CDTFA's determination. Thus, appellant bears the burden of demonstrating that a different result is warranted.

Appellant takes the position that the business's credit card sales ratio during the liability period was much higher, at 75 percent, and that CDTFA's observation test is inherently flawed because it did not consider the material differences between the successor's and appellant's businesses. Appellant contends that during the liability period, appellant provided primarily catering services to appellant's customers and that these sales were paid for exclusively by credit card. In contrast, appellant maintains that the successor operated solely as a restaurant, and that the successor made numerous changes to the business, such as adding new menu items, increasing the price of the food items sold, and renovating the restaurant. To support these claims, appellant relies upon a document entitled "customer list" and a declaration from the successor.

Our review of the evidence provided by appellant, however, indicates that it is of little probative value. For instance, appellant's customer list does not show that appellant made any catering sales to these customers. And while the successor confirmed that appellant had made catering sales during the liability period, the successor did not elaborate upon whether these sales constitute a substantial portion of appellant's business or were paid for via credit card. Appellant also failed to explain how any of the changes made by the successor would necessarily result in a substantially lower credit card sales ratio. Therefore, appellant has not established that these changes are relevant to the determination of appellant's credit card sales ratio.

For these reasons, we find that appellant has not met appellant's burden of proving that a 75 percent credit card sales ratio is justified.

Business Closure

In support of its determination that the business closed on February 28, 2015, CDTFA provided a copy of the June 18, 2015 letter addressed from appellant and merchant account statements for 2014 and 2015 showing that appellant continued to receive credit card payments through February 28, 2015. We find this evidence sufficient to satisfy CDTFA's initial burden of production.

Appellant argues that CDTFA's determination is erroneous, and that the business in fact closed on October 30, 2014, due to financial difficulties that arose after appellant's health permit was temporarily revoked. That is, appellant asserts that appellant did not make any sales after that date. In support, appellant points to the BOE-65 form appellant filed with CDTFA on March 27, 2015, and a "Business Transfer Agreement," dated December 10, 2014, which states in relevant part, that the parties agree the business "has been closed since October 30, 2014," and the seller's permit was canceled on November 1, 2014. Appellant also argues that no weight should be given to the June 18, 2015 letter because appellant did not write that letter. Finally, appellant contends that the merchant account statements are not dispositive of the business's closure date because appellant allowed the successor to use appellant's merchant account to accept credit card sales.

Beginning with the June 18, 2015 letter, we note that it was received shortly after CDTFA had sent a request to appellant and the successor for information pertaining to the transfer of the business. We can conceive of no reason or motivation for why any individual, other than appellant or the successor, would respond to CDTFA with this information. It is also notable that the letter contains the telephone numbers for appellant and the successor, inviting CDTFA to contact appellant if "more information is needed." This suggests that the letter came from appellant, as it is highly unlikely that an individual attempting to surreptitiously pose as appellant would include this statement. Thus, we find this letter to be credible evidence that appellant's business closed on February 28, 2015.

Conversely, we are unable to give any weight to the Business Transfer Agreement. Despite CDTFA's June 16, 2015 request for this document, it was not produced until January 2021, many years after appellant transferred the business to the successor. More

importantly, it is unnotarized, leaving us with no means to verify that it was executed by the parties on December 10, 2014. This agreement also states that appellant's seller's permit was closed on November 1, 2014, when CDTFA had no record of appellant requesting to close this permit until March 27, 2015, possibly indicating that this document was not executed on December 10, 2014. These facts raise strong doubts concerning the credibility of this transfer agreement.

We are left with three documents to consider – the BOE-65 form, the June 18, 2015 letter, and appellant's merchant account statements for 2014 and 2015. The first two items are based wholly on uncorroborated statements from appellant, and we can find no compelling reason for accepting one over the other. Likewise, appellant's merchant account statements fail to tip the evidentiary scales. While CDTFA does not dispute appellant's assertion that appellant allowed the successor to use appellant's merchant account, these merchant account statements provide no reliable indication of *when* this occurred. Appellant's conflicting statements, failure to properly document the business transfer and to promptly notify CDTFA of the transfer makes it impossible to determine the actual date the successor received the business. We are thus forced to conclude that the evidence stands in equipoise, and consequently, we resolve this factual ambiguity against the party bearing the burden of proof (i.e., appellant).

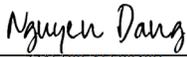
Therefore, CDTFA's determination that appellant's business closed on February 28, 2015, must be upheld.

HOLDING

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

DISPOSITION

CDTFA’s action is sustained.

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Nguyen Dang
Administrative Law Judge

We concur:

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Andrew Wong
Administrative Law Judge

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Teresa A. Stanley
Administrative Law Judge

Date Issued: 3/17/2021