

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 19054829
EAST LA AUTO, INC.) CDTFA Case ID 930797
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OPINION

Representing the Parties:

For Appellant: Thomas Brambila, Jr., CPA

For Respondent: Randolph (Randy) Suazo, Hearing Representative
Jason Parker, Chief of Headquarters Operations
Christopher Brooks, Tax Counsel IV

For Office of Tax Appeals: Deborah Cumins, Business Taxes Specialist III

J. ALDRICH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, East LA Auto, Inc. (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)¹ in response to appellant’s timely petition for redetermination of a Notice of Determination (NOD) dated December 8, 2015. The NOD is for \$229,576.10 of additional tax, plus applicable interest, and a negligence penalty of \$22,957.74, for the period December 1, 2012, through March 31, 2015 (audit period). In its decision, CDTFA reduced the understated measure of tax from \$2,559,916 to \$2,512,116, which will result in a reduction to the tax; deleted the penalty; and denied the remainder of the petitioned amount.

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.

Office of Tax Appeals Administrative Law Judges Andrea L.H. Long, Suzanne B. Brown, and Josh Aldrich held an oral hearing for this matter on November 18, 2020.² At the conclusion of the hearing, the record was closed and this matter was submitted for decision.

ISSUE

Whether additional reductions to the measure of unreported taxable sales are warranted.

FACTUAL FINDINGS

1. Appellant obtained its seller's permit, with an effective start date of December 1, 2012, to operate a used car dealership. Appellant closed its business at the end of March 2015.³
2. During the audit period, appellant reported total sales of \$2,130,356, claimed nontaxable sales for resale of \$281,285, and reported taxable sales of \$1,849,071.
3. Appellant provided no records to CDTFA for audit.
4. CDTFA obtained a Consumer Motor Vehicle Recovery Corporation (CMVRC) report from the California Department of Motor Vehicles (DMV). The report included information about sales that appellant reported to DMV during the audit period (i.e., an estimated sale date; the vehicle registration date; the registered owner name and address; the make, model, year of the vehicle, and the odometer reading; the vehicle identification number (VIN); and the vehicle license fee (VLF) code).
5. The CMVRC report did not include the exact selling price for each of the reported sales. The CMVRC report did, however, include a corresponding VLF code, which identified a range of selling prices for each code. To determine the selling price for each vehicle, CDTFA used the lowest price in that range as the audited selling price.
6. CDTFA compiled sales of \$4,316,680 from the CMVRC report. CDTFA found that all the sales shown on the report were taxable sales because they appeared to be retail sales to individuals.
7. For the second quarter 2013 (2Q13) and 1Q15, appellant had reported taxable sales of \$74,600 and \$363,260, respectively. Those amounts were greater than the amounts

² The hearing was noticed for Sacramento and conducted electronically by agreement of the parties due to COVID-19.

³ Appellant's business was subsequently reorganized. It operated under a new corporation, East LA Auto Sales, Inc.

- compiled from the CMVRC report of \$68,000 and \$358,000, respectively. CDTFA accepted the amounts reported for 2Q13 and 1Q15 as substantially accurate.
8. For the audit period, excluding 2Q13 and 1Q15, the sales compiled from the CMVRC report totaled \$3,890,680.⁴ Yet, appellant reported taxable sales of \$1,411,211.⁵ CDTFA found the difference of \$2,479,469 to be an understatement of reported taxable sales.
 9. CDTFA then asked the auto auction house that appellant had utilized to provide a report of vehicles purchased by appellant. The auto auction house provided purchase information for the period October 1, 2012, through December 31, 2013.
 10. Using the VIN information provided by the auto auction house, CDTFA identified purchases of vehicles totaling \$473,400 for which there were no sales recorded on the CMVRC report. CDTFA obtained information from DMV regarding those vehicles and found that four of the cars included in those purchases represented taxable sales totaling \$24,980.⁶
 11. CDTFA concluded that there would have been similar sales that were not included on the CMVRC report during the remainder of the audit period. Accordingly, CDTFA computed that the \$24,980 represented 5.08 percent (rounded) of reported taxable sales for the period October 1, 2012, through December 31, 2013.⁷ CDTFA applied that percentage to reported taxable sales of \$1,092,163 for the period April 1, 2014, through March 31, 2015, to compute an understatement of \$55,467.⁸ CDTFA concluded that there was an additional understatement of reported taxable sales of \$80,447 for the audit period.⁹ As such, CDTFA determined that the total audited understatement of reported

⁴ \$4,316,680 - \$68,000 - \$358,000 = \$3,890,680

⁵ \$1,849,071 - \$74,600 - \$363,260 = \$1,411,211

⁶ The information from DMV showed that appellant had sold many of the vehicles for resale. For other vehicles, the information from DMV did not show any registration of the vehicle after the date of appellant's purchase, which was an indication that appellant had not sold the vehicles.

⁷ $(\$24,980 \div \$491,864) \times 100 = 5.07864$

⁸ $(\$24,980 \div \$491,864) \times \$1,092,163 = \$55,467$

⁹ $\$24,980 + \$55,467 = \$80,447$

- taxable sales was \$2,559,916.¹⁰
12. On December 8, 2015, CDTFA issued the NOD to appellant for tax of \$229,576.10 and a negligence penalty of \$22,957.74.
 13. On December 15, 2015, appellant filed a timely petition for redetermination.
 14. On November 14, 2018, CDTFA held an appeals conference with appellant's representative and representatives from the Business Tax and Fee Division (BTFD). BTFD agreed to review the CMVRC report to determine whether it included any "unwinds."¹¹ Also, BTFD agreed to delete the negligence penalty.
 15. Post-conference, BTFD identified all the transactions in the CMVRC report for which there were duplicate sales of the same vehicle (identified by VIN). BTFD concluded that the original sale was an unwind if: 1) there was a short period between the dates of the two sales, or 2) the odometer readings did not show extensive use of the vehicle between the dates of the two sales.¹² CDTFA identified six unwinds. The six selling prices thereof totaled \$47,800.
 16. On April 24, 2019, CDTFA issued its decision, which reduced the audited understatement by \$47,800 and deleted the negligence penalty. This appeal followed.

DISCUSSION

California imposes sales tax measured by a retailer's gross receipts from the retail sale of tangible personal property, unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, §§ 6012, 6051.) All gross receipts are presumed to be subject to tax until the contrary is established. (R&TC, § 6091.) It is the retailer's responsibility to maintain complete and accurate records and to make them available for examination. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).)

When CDTFA is not satisfied with the amount of tax reported by the taxpayer, or in the

¹⁰ \$2,479,469 + \$80,447 = \$2,559,916

¹¹ "Unwind" is a term used to describe a cancelled sale of a vehicle, a transaction for which the purchaser either does not take possession of the vehicle or returns the vehicle shortly after purchase and receives a refund of all amounts paid. (See CDTFA Audit Manual section 0640.05.)

¹² For several of the duplicate sales, there was a long period between the two sales and/or the vehicles had been driven several miles during the period between the two sales. Under those circumstances, CDTFA concluded that the first sale had not been cancelled. Although it is possible that some of the vehicles had been repossessed by appellant and sold again, CDTFA noted that appellant had provided no evidence to support repossessions or other bad debts.

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.*)

In this case, appellant provided no records. Since no records were provided, CDTFA utilized an alternate audit methodology. CDTFA used information from DMV to compile the sales that appellant reported to DMV, and it used information from the auto auction house to identify purchases of additional vehicles by appellant. CDTFA based its findings on objective, reliable, and verifiable data. We find CDTFA has shown that its determination is reasonable and rational. Appellant, therefore, has the burden of showing that additional adjustments are warranted.

Appellant argues that it accurately recorded and reported its sales. Appellant further argues that all the records that could have been used to support its position were either stolen or destroyed by DMV. Appellant also argues that the information CDTFA obtained from DMV is incorrect. In support of this position, appellant notes that six different duplicate transactions were included in the original audit report.

We first note that CDTFA adjusted the original audit for six duplicate transactions. Appellant has not provided specifics about the six duplicate transactions that it identified. We, therefore, cannot determine whether they are different from the transactions already addressed.¹³ It is also possible that appellant made two taxable sales of the same vehicle during the audit period.¹⁴ Even though the same vehicles appear more than once on the CMVRC report, that alone is not dispositive of whether a sale(s) occurred. Thus, we find that appellant’s reference to six “duplicate” sales is not a basis for concluding that the DMV records are incorrect.

Appellant did not provide records that are typically maintained by a used car dealer, such as a general ledger, sales journals, purchase journals, sales contracts, DMV Report of Sale forms,

¹³ See Factual Findings no. 15.

¹⁴ For instance, a vehicle may have been sold, repossessed, and then sold a second time. It is also possible that appellant may have accepted as a trade-in a car that it had previously sold, and then sold the car a second time.

or dealer jackets. Appellant asserts that some of its records were stolen. Appellant provided a police report and testimony in support. Appellant further asserts that it delivered a substantial amount, if not all, of its remaining records to DMV during the closeout of its previous dealer license, and those records were destroyed by DMV.¹⁵ In support, appellant provided a letter dated April 10, 2015, together with testimony that tends to support appellant's contention that some or all its source documents for the audit period were destroyed. We note, however, that it is appellant's responsibility to maintain sufficient business records. Moreover, appellant has not provided other third-party records to support its position (e.g., bank statements, car-loan agreements, financing agreements with its lenders, etc.). In the complete absence of business records, CDTFA relied on information recorded by DMV regarding sales appellant had reported to that agency. Appellant has not provided any evidence of errors in the CMVRC report. Appellant's unsupported assertion that its unavailable records would have supported its reported taxable sales is not sufficient to satisfy its burden of proof. (*Appeal of Talavera, supra*; see *Riley B's, Inc. v. State Bd. of Equalization* (1976) 61 Cal.App.3d 610, 616; see also *Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

CDTFA used data from DMV and from the auto auction to establish the audited understatement of reported taxable sales. Since appellant provided no records, appellant has not met its burden of proof to warrant further adjustments to the audited understatement.

¹⁵ DMV Inspector O'Connor indicated during her testimony that appellant's agent took two trips to deliver all the boxes. In the April 10, 2015 letter, she indicated that those boxes included the unused, used, and voided report of sale forms, (wholesale and used) for East LA Auto Inc. ledger books, contracts, and paperwork.

Appellant's general manager, J. Ghanem, testified that on March 17, 2015, he was informed that there had been a break-in at appellant's location. He testified that various records had been stolen (e.g., pink slips, credit card information, checkbooks, etc.). According to J. Ghanem, DMV recommended closing out the dealer's license. There was a miscommunication regarding what the DMV inspector needed and what appellant provided. Appellant provided much more information than was required, approximately 12 boxes. The DMV inspector informed appellant that it had provided too much information and that it should retrieve the boxes. Before appellant could retrieve the boxes, they were inadvertently destroyed by DMV's shredding service.

HOLDING

No further adjustments are warranted to the measure of unreported taxable sales.

DISPOSITION

Sustain CDTFA’s decision to reduce the audited understatement of reported taxable sales by \$47,800, from \$2,559,916 to \$2,512,116; to delete the negligence penalty; and to otherwise deny the petition.

DocuSigned by:

Josh Aldrich

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Josh Aldrich

Administrative Law Judge

We concur:

DocuSigned by:

Andrea L.H. Long

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Andrea L.H. Long

Administrative Law Judge

DocuSigned by:

Suzanne B. Brown

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Suzanne B. Brown

Administrative Law Judge

Date Issued: 2/1/2021