

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 19075022
SARAFIAN VIDEO, INC) CDTFA Case ID 717975
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OPINION

Representing the Parties:

For Appellant:	Joseph Boodaie, Representative Saleh Sarafian, President
For Respondent:	Joseph Boniwell, Tax Counsel Scott Claremon, Tax Counsel IV Jason Parker, Chief of Headquarters Operations
For Office of Tax Appeals:	Corin Saxton, Tax Counsel IV

K. LONG, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 6561, Sarafian Video, Inc (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)¹ denying appellant's petition for redetermination of a Notice of Determination (NOD) for a tax liability of \$69,419.30 and applicable interest, for the period July 1, 2009, through June 30, 2012 (audit period).

Office of Tax Appeals Administrative Law Judges Keith T. Long, Josh Aldrich, and Daniel K. Cho held an electronic oral hearing for this matter on August 18, 2021. At the conclusion of the hearing, the record was closed, and this matter was submitted for decision.

ISSUE

Whether adjustments are warranted to the measure of underreported taxable sales.

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

FACTUAL FINDINGS

1. Appellant has operated a videogame and electronics store in Los Angeles since July 1, 1992.
2. On February 1, 2012, CDTFA visited appellant's business location and found that in addition to making in-person sales at its business location, appellant also made sales of videogames and electronics online through Amazon.com, Inc. (Amazon). Appellant entered into a participation agreement with Amazon, which states that Amazon provides a platform for third-party sellers and buyers to negotiate and complete transactions and that Amazon is not involved in the transactions.
3. As relevant here, the participation agreement also states:

Seller Taxes. You agree that it is the seller's responsibility to determine whether Seller Taxes apply to the transactions and to collect, report, and remit the correct Seller Taxes to the appropriate tax authority, and that Amazon is not obligated to determine whether Seller Taxes apply and is not responsible to collect, report, or remit any sales, use, or similar taxes arising from any transaction, except to the extent Amazon expressly agrees to collect taxes or other transaction-based charges in connection with a collection service made available by Amazon and used by seller. "Seller Taxes" means any and all sales, goods, and services, use excise import, export, value added, consumption and other taxes and duties assessed, incurred or required to be collected or paid for any reason in connection with any advertisement, offer or sale of products by you on or through the site, or otherwise in connection with any action, inaction or omission of you or any affiliate of yours or any of your or their respective employees, agents, contractors or representatives.

4. Appellant did not report the sales that it made through Amazon on its sales and use tax returns.
5. Sales invoices and reports generated from appellant's Amazon seller's account showed sales of \$10,582,905.46 for the liability period. Based on CDTFA's block test of January 2012, CDTFA estimated that 8.04 percent of appellant's Amazon sales were made to California customers and subject to tax. CDTFA applied this percentage to appellant's total Amazon sales to establish unreported taxable sales measuring \$850,866.²

² Appellant does not dispute the audit method. Instead, appellant asserts it is not liable for the related tax liability. Accordingly, the audit will not be discussed further.

6. On February 11, 2013, CDTFA issued the above-described NOD. Appellant filed a timely petition for redetermination. CDTFA issued a Decision on March 9, 2016, denying appellant’s petition. This timely appeal followed.

DISCUSSION

California imposes a sales tax on a retailer’s retail sales in this state of tangible personal property, measured by the retailer’s gross receipts, unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, § 6051.) All of a retailer’s gross receipts are presumed subject to tax, unless the retailer can prove otherwise. (R&TC, § 6091.) “Sale” means and includes any transfer of title or possession of tangible personal property for a consideration. (R&TC, § 6006(a).) Whether a retailer may add sales tax reimbursement to the sales price of tangible personal property sold at retail to a purchaser depends solely upon the terms of the agreement of the sale. (Cal. Code Regs., tit. 18, § 1700(a).)

Here, appellant concedes that it made retail sales of tangible personal property and that it shipped merchandise directly to customers in California. As such, the sales tax is imposed on those sales unless the sale is specifically exempt from taxation by statute. (R&TC, § 6051.) Appellant has not pointed to any statute, nor are we aware of any, that exempts a retailer from paying sales tax on its internet-based sales to customers in this state.

Nevertheless, appellant asserts that it was Amazon’s responsibility to collect and remit the sales tax. Appellant also asserts that it had no choice when entering into an agreement with Amazon, that it did not know Amazon was not collecting the tax, and that there was no option to collect sales tax. Here, we note that appellant chose to enter into a participation agreement with Amazon, which explicitly states that appellant is responsible for the payment of sales tax. Since appellant made the sales at issue, it is responsible for the sales tax regardless of Amazon’s participation in these transactions as an online platform.

Further, the sales tax is imposed upon the retailer (in this case appellant) and any collection of the tax from a customer is merely reimbursement. (See R&TC, § 6051; Cal. Code Regs., tit. 18, § 1700(a).) In other words, whether appellant collected sales tax reimbursement is irrelevant to the question of whether appellant incurred a sales tax liability. (See *Pacific Coast Engineering Co. v. State of California* (1952) 111 Cal.App.2d 31, 34.) Accordingly, appellant is liable for the tax.

HOLDING

Adjustments are not warranted to the measure of underreported taxable sales.

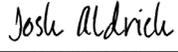
DISPOSITION

CDTFA’s action is sustained.

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Keith T. Long
Administrative Law Judge

We concur:

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Josh Aldrich
Administrative Law Judge

DocuSigned by:

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Daniel K. Cho
Administrative Law Judge

Date Issued: 9/7/2021