OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 20096678) CDTFA Case No. 280-033
D. JENKINS **dba Pro Comp Scooters**	))))

OPINION

Representing the Parties:

For Appellant:	D. Jenkins, Owner
For Respondent:	Jason Parker, Chief of Headquarters Operations
For Office of Tax Appeals:	Richard Zellmer, Business Taxes Specialist III

J. ALDRICH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, D. Jenkins dba Pro Comp Scooters (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA),[1] in response to appellant's petition for redetermination of the Notice of Determination (NOD) dated March 23, 2016. The NOD is for tax of $170,233.27, and applicable interest, for the period July 1, 2012, through August 13, 2015 (audit period).

Subsequently, CDTFA reduced the understated measure of tax from $2,092,543 to $2,091,331 and reduced the understated measure of district taxes from $2,550,696 to $2,549,484,[2] which will result in a reduction to the tax and applicable interest; CDTFA denied the remainder of the petitioned amount.

[1] Sales 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.

[2] The Transactions and Use Tax Law (R&TC, § 7251 et seq.), pursuant to various enabling statutes, allows local jurisdictions to impose a "district" tax at rates ranging from 0.01 percent to 2 percent of the gross receipts from the retail sales of tangible personal property within the jurisdiction. These district taxes are in addition to the statewide sales and use taxes imposed upon all retailers in California.

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

ISSUE

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

FACTUAL FINDINGS

1. Appellant operated as a retailer of kick scooters, shirts, hats, and scooter-related parts. Appellant also manufactured and distributed scooters and scooter-related parts. A separate business owned by appellant's husband, "The Scooter Zone" or "ScooterZone" (ScooterZone) also operated at some of appellant's locations. ScooterZone operated indoor scooter parks and service centers and made some retail sales.
2. Appellant held a seller's permit from February 1, 2010, through August 13, 2015, at which time appellant sold her business (Pro Comp Scooters) to her husband who operated it as ScooterZone.
3. During the audit period, appellant operated four locations: a main location in Riverside from July 1, 2012, through August 13, 2015; a location in Santa Clarita from October 1, 2012, through August 13, 2015; a location in Laguna Hills from July 12, 2012, through January 1, 2015; and a location in Huntington Beach from July 21, 2012, through December 31, 2012.[3]
4. For the audit period, appellant reported on her sales and use tax returns total sales of $542,293, claiming deductions of $35,835 for sales for resale, $2,470 for exempt food products, $30,760 for nontaxable labor, $2,500 for exempt sales in interstate commerce, $2,175 for returned merchandise, and $10,400 for shipping costs, resulting in reported taxable sales of $458,153.
5. Upon audit, appellant provided no books and records for CDTFA to examine. As such, CDTFA concluded that an indirect audit method was warranted to verify the accuracy of

[3] The Riverside location consisted of a scooter park, warehouse, and service center that engaged in retail sales, including sales at a snack bar. The Laguna Hills location consisted of a scooter park, distribution center, and service center, making retail sales. The Santa Clarita location was both a distribution center and retail location. Appellant alleges that the Huntington Beach location was a service center only, but its address was the Huntington Beach Pier, and it operated as part of a street fair on Tuesday evenings, and thus, CDTFA expected that location to make some retail sales.

appellant's returns. CDTFA utilized the credit-card-sales-ratio method to compute appellant's sales.

6. CDTFA obtained information from the Franchise Tax Board regarding appellant's credit card receipts as reported on Forms 1099-K for the period July 1, 2012, through December 31, 2014.[4] Using the 1099-K information, CDTFA compiled credit card receipts of $1,987,551 for the period July 1, 2012, through December 31, 2014. For this period, total reported sales were $461,963. Based on its experience in auditing similar businesses, CDTFA estimated that 85 percent of the sales made at appellant's business were paid for by credit card (credit-card-sales-ratio). CDTFA divided credit card receipts of $1,987,551 by the 85 percent credit-card-sales-ratio to compute audited total sales of $2,338,296 for the period July 1, 2012, through December 31, 2014. CDTFA reduced this amount by an estimated five (5) percent for non-taxable labor, to compute audited taxable sales of $2,221,382 for the period July 1, 2012, through December 31, 2014. Upon comparison to reported taxable sales of $398,308 for the same period, CDTFA computed unreported taxable sales of $1,823,074 for the period July 1, 2012, through December 31, 2014 (audit item 1). CDTFA computed an error ratio of 457.7 percent.[5]

7. CDTFA did not have 1099-K information for the remainder of the audit period. Thus, for the period January 1, 2015, through June 30, 2015, CDTFA multiplied reported taxable sales by the error ratio to compute unreported taxable sales of $240,041 for that period (audit item 2). The $240,041 included $76,184 for the second quarter of 2015 (2Q15). CDTFA divided this amount by 91 days to compute audited taxable sales of $837 per day for 2Q15.[6] CDTFA multiplied this amount by 44 days to compute audited taxable sales of $36,828 for the period July 1, 2015, through August 13, 2015. This amount was reduced by $7,400 of reported taxable sales to compute unreported taxable sales of

[4] Form 1099-K is an Internal Revenue Service form titled, "Payment Card and Third Party Network Transactions," issued to merchants, which shows the monthly and annual amount paid to the merchant by a credit card company or third party network during a given time period.

[5] Unreported taxable sales of $1,823,074 ÷ reported taxable sales of $398,308 = 457.7 percent.

[6] CDTFA later found this calculation to be incorrect because reported taxable sales for 2Q15 should have been added to the unreported taxable sales for 2Q15 to compute audited taxable sales for 2Q15, and then audited taxable sales for 2Q15 should have been divided by 91 days to compute audited taxable sales per day. After correcting this error, CDTFA calculates taxable sales of $1,016 per day for 2Q15. This error is in appellant's favor and CDTFA is not pursuing an increase for the difference.

$29,428 for the period July 1, 2015, through August 13, 2015 (audit item 3). In total, CDTFA computed unreported taxable sales of $2,092,543.[7]

8. CDTFA noted that appellant's locations were in counties that impose district taxes, but appellant had not reported any district taxes on her sales and use tax returns. Thus, CDTFA established a separate measure of tax of $2,550,696 for unreported district taxes, which consist of $458,153 applicable to reported taxable sales for which district taxes were not reported, and $2,092,543 applicable to unreported taxable sales.
9. CDTFA issued the NOD to appellant on March 23, 2016.
10. Appellant filed a timely petition for redetermination of the NOD.
11. On or about May 15, 2019, CDTFA held an appeals conference. Post-conference, appellant submitted fifty-six (56) invoices in support of her position.
12. In its Decision issued on February 24, 2020, CDTFA recommended a reaudit. In the reaudit, the measure of tax for audit item 1 was reduced from $1,823,074 to $1,815,040, the measure of tax for audit item 2 was reduced from $240,041 to $238,987, and the measure of tax for audit item 3 was increased from $29,428 to $37,304. These three adjustments reduced the measure of tax from $2,092,543 to $2,091,331. The measure of tax for district taxes was reduced from $2,550,696 to $2,549,484.[8]
13. Appellant filed the instant appeal with the Office of Tax Appeals.
14. On April 9, 2021, CDTFA responded to our March 17, 2021 additional briefing request with: (1) a complete copy of the 56 invoices that appellant provided during CDTFA's appeals process; (2) "a copy of printout from the Department's computer records showing 'ScooterZone' and 'The Scooter Zone' registered with start date of July 12, 2012, July 21, 2012, and July 1, 2012, respectively and operated under permit # 101-436478 until the closed out date of September 30, 2015"; and (3) CDTFA records memorializing a phone call on April 18, 2014, wherein appellant indicated that the start date for ScooterZone, Laguna Hills, was October 1, 2010. Appellant did not respond.[9]

[7] $1,823,074 + $240,041 + $29,428 = $2,092,543.

[8] Since appellant has not specifically protested the imposition of district taxes (except to the extent that district taxes should not be imposed on any sale found to be nontaxable or exempt), we do not discuss district taxes.

[9] In our March 17, 2021 additional briefing request we asked appellant to clarify and support her positions regarding adjustments for nontaxable labor, adjustments for exempt sales in interstate commerce, and sales attributable to ScooterZone.

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.) "Gross receipts" means the total amount of the sales price of the retailer's retail sales of tangible personal property. (R&TC, § 6012(a)(2).) Gross receipts do not include the price received for labor or services used in installing or allying the property sold. (R&TC, § 6012(c)(3).)

If CDTFA is not satisfied with the accuracy of the sales and use tax returns filed, it 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.) It is the retailer's responsibility to maintain and make available for examination complete and accurate records necessary to determine the correct tax liability, including bills, receipts, invoices, or other documents supporting the entries in the books of account (i.e., books and records). (R&TC §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).)

When a taxpayer challenges an NOD, CDTFA has a minimal, initial burden of showing that its determination is 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*.) The applicable burden of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c); *Appeal of Estate of Gillespie*, 2018-OTA-052P.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Talavera*, *supra*.) To satisfy her burden of proof, a taxpayer must prove both (1) that the tax assessment is incorrect and (2) the proper amount of the tax. (*Appeal of AMG Care Collective*, 2020-OTA-173P.)

Here, appellant initially provided no books or records for CDTFA to examine. CDTFA, therefore, determined that the use of an indirect audit method was warranted to compute appellant's audited sales. CDTFA used the credit-card-sales-ratio method as the basis for its computations. The credit-card-sales-ratio method is a standard audit procedure that is effective in establishing taxable sales because it relies on readily verifiable information: the amount of

credit card sales.[10] CDTFA found a disparity between the Forms 1099-K and the reported total sales for the period July 1, 2012, through December 31, 2014. During that period, the credit card receipts totaled $1,987,551 compared to reported total sales of $461,963 for that same period. Based on the disparity and the lack of records, CDTFA questioned the reliability of reported sales. Also, since Form 1099-K information was not available for the remainder of the audit period (i.e., January 1, 2015, through August 13, 2015), CDTFA calculated taxable sales for the remaining portion using an error ratio and average daily sales amounts. Based on the foregoing, we find that CDTFA has met its initial burden to show that its determination was reasonable and rational. Therefore, the burden of proof shifts to appellant to show errors in the audit.

Appellant contends that audited sales erroneously include sales made by a business (i.e., ScooterZone) that was not owned by appellant. Appellant further contends that she and ScooterZone operated under different seller's permits. In this case, audited total sales were based on appellant's credit card receipts as reported on the Forms 1099-K. The 1099-K information obtained by CDTFA was for appellant's business only, not for any other business. CDTFA attributed all of the credit card receipts reported on the relevant Forms 1099-K to appellant's business. Likewise, CDTFA attributed all of the sales resulting from the application of the credit-card-sales-ratio to the credit card receipts reported on the relevant Forms 1099-K to appellant's business. Appellant has provided no documentation to show what portion, if any, of the credit card receipts reported on the Forms 1099-K belonged to a different business.[11] Appellant has not shown that she accepted payments on behalf of ScooterZone. Appellant has not provided documentation to show that she transferred credit card payments that were allegedly from ScooterZone's sales to ScooterZone. Appellant has not provided an accounting record of the receipts from ScooterZone that were allegedly processed under appellant's account. In response to our March 17, 2021 additional briefing request, CDTFA provided records that demonstrate that both appellant and the ScooterZone operated under the same seller's permit.[12]

[10] Generally, sales paid by credit card are deposited directly into the retailer's bank account, net of payment processing fees.

[11] On March 17, 2021, we requested additional briefing from both parties: we asked appellant to describe the nature of the relationship between appellant and ScooterZone. More specifically, to describe how the money, as reported on the Forms 1099-K, was divided between appellant's business and ScooterZone. For CDTFA, we asked for supporting documentation regarding CDTFA's claim that ScooterZone operated under appellant's seller's permit. We did not receive a response from appellant.

[12] See Factual Finding no. 14.

Therefore, we find that appellant has not met her burden to prove that the audit liability includes sales made by another business.

Appellant contends that a larger adjustment is warranted for nontaxable sales for resale. Appellant asserts that all of the sales made by her business, Pro Comp Scooters, were sales for resale. As part of her appeal with CDTFA, appellant provided CDTFA with copies of 56 sales invoices to various purchasers but did not provide any resale certificates.[13] CDTFA examined the 56 sales invoices, and found that, based on its search of CDTFA computer records, 11 of the sales invoices totaling $5,456 involved sales to persons who held seller's permits at the time of the respective sales, and were engaged in businesses that likely resold the merchandise purchased from appellant. Thus, CDTFA considered those 11 sales to be sales for resale, and in the reaudit, CDTFA made an adjustment to account for those 11 sales. Appellant has provided no other documentation to support her contention regarding sales for resale.

The burden of proving that a sale of tangible personal property is not at retail is upon the seller unless the seller timely takes in good faith a certificate from the purchaser that the property is purchased for resale. (R&TC, § 6091; *Appeal of V.A. Auto Sales, Inc.*, 2019-OTA-299P.) If the seller does not timely obtain a valid and complete resale certificate, the seller will be relieved of liability for the tax only where the seller shows that the property: (1) was in fact resold by the purchaser and was not used by the purchaser for any purpose other than retention, demonstration, or display while holding it for sale in the regular course of business; (2) is being held for resale by the purchaser and has not been used for any purpose other than retention, demonstration, or display, while being held for sale in the regular course of business; or (3) was consumed by the purchaser and tax was reported by the purchaser directly to CDTFA on the purchaser's returns or in an audit of the purchaser. (Cal. Code Regs., tit. 18, § 1668(e).)

In this case, we note that appellant reported taxable sales of $458,153 for the audit period, which contradicts her assertion that all of her sales were for resale. We also note that appellant has not provided any resale certificates, and thus, appellant has the burden to provide other evidence to support sales for resale (e.g., XYZ Letters).[14] Except for the above-mentioned 11 sales invoices, appellant has not provided evidence sufficient to support sales for resale.

[13] Appellant also provided other documentation regarding other issues not relevant here.

[14] For more information regarding XYZ letters see California Code of Regulations, title 18, section 1668(f).

Therefore, we find that appellant has not met her burden of proof to support nontaxable sales, and thus, no further adjustment for sales for resale is warranted.

HOLDING

Appellant has not shown that further reductions to the measure of tax are warranted.

DISPOSITION

CDTFA's action in reducing the measure of tax to $2,091,331, reducing the measure of district taxes to $2,549,484, and otherwise denying the petition, is sustained.

DocuSigned by:
Josh Aldrich
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Josh Aldrich
Administrative Law Judge

We concur:

DocuSigned by:
Josh Lambert
CB1F7DA37831416...
Josh Lambert
Administrative Law Judge

DocuSigned by:
Andrea Lt Long
272945E7B372445...
Andrea L.H. Long
Administrative Law Judge

Date Issued: 9/2/2021