

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 18083612
FIVE FIVE ASSOCIATES, LLC)	CDTFA Case ID 170-020
dba Coco Laurent)	
)	
)	

OPINION

Representing the Parties:

For Appellant:	Warren Nemiroff, Attorney
For Respondent:	Randy Suazo, Hearing Representative Kevin Smith, Tax Counsel III Jason Parker, Chief of Headquarters Ops.

For Office of Tax Appeals: Steven Kim, Tax Counsel

S. BROWN, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Five Five Associates, LLC dba Coco Laurent (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) dated February 3, 2016, for tax of \$63,098.90, plus applicable interest, for the period November 27, 2012, through April 30, 2014 (liability period).

Office of Tax Appeals (OTA) Administrative Law Judges Andrew Wong, Sheriene Anne Ridenour, and Suzanne B. Brown held a virtual hearing for this matter on September 29, 2021. At the conclusion of the hearing, the record was closed and this matter was submitted for decision.

¹ Sales taxes were formerly administered by the State Board of Equalization (BOE). In 2017, functions of 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 BOE; and when referring to acts or events that occurred on or after July 1, 2017, “CDTFA” shall refer to CDTFA.

ISSUE

Whether any adjustments to the liability are warranted for the liability period.

FACTUAL FINDINGS

1. Appellant, a California limited liability company, held a seller's permit and operated a restaurant in Los Angeles, California, during the liability period.
2. In February 2015, appellant filed amended sales and use tax returns (SUTRs) for the first quarter of 2013 (1Q13), 3Q13, 4Q13, 1Q14, 2Q14, 1Q15, and the period April 1, 2015, through May 30, 2015. Appellant's amended SUTRs reported amended gross sales that were approximately 21 percent less than the original reported amounts for the periods 1Q13, 3Q13, 4Q13, and 1Q14, and 18 percent less for 2Q13. Appellant had filed the original SUTRs with either partial remittance or no remittance of tax.
3. On or about July 16, 2015, an escrow company notified CDTFA that appellant had opened escrow for the sale of its business for \$500,000 and the sale of fixtures and equipment for \$50,000.
4. In October 2015, CDTFA began an audit of appellant for the liability period. According to an audit report dated November 3, 2015, the audit determined a deficiency measure totaling \$702,578, consisting of two audit items: (1) unreported taxable sales of \$652,578; and (2) unreported sales of fixtures and equipment of \$50,000. Based on the audit, CDTFA issued the February 3, 2016 NOD for \$63,098.90 in tax, plus applicable interest.
5. Pursuant to R&TC section 6812(b), on February 5, 2016, CDTFA issued a Notice of Amounts Due and Conditional Release, notifying the parties to the sale that \$181,018.30 from the proceeds of the sale of appellant's business must be paid to CDTFA as a condition for issuing a tax clearance certificate.²
6. On February 10, 2016, appellant filed a timely petition for redetermination of the NOD.
7. On February 25, 2016, the escrow company remitted a check for \$181,018.30 to CDTFA. CDTFA applied \$71,803.82 to pay the NOD liability, and the remaining \$109,214.48 to

² The total amount due was valid through February 29, 2016, and consisted of \$139,949.60 in tax, \$18,997.28 in interest, \$18,841.42 in penalties, and \$3,230.00 in collection cost recovery fees.

appellant's then-outstanding liabilities.³ The \$109,214.48 in liabilities were self-assessed, based on SUTRs appellant filed for 1Q13, 3Q13, 4Q13, 1Q14, 2Q14, 1Q15, and April 1, 2015, through May 30, 2015, plus applicable interest, penalties, and collection cost recovery fees.

8. On March 29, 2016, CDTFA issued a Certificate of Payment stating that appellant had no outstanding liabilities remaining for the period November 27, 2012, through May 30, 2015.
9. On July 10, 2018, CDTFA issued a decision indicating that there were no longer any disputed items in the appeal and denying appellant's petition for redetermination.
10. Appellant filed this timely appeal with OTA.
11. During the oral hearing in this matter, CDTFA stated that it had determined that the audit's determination of unreported sales of fixtures and equipment of \$50,000 was improperly billed because the sale actually occurred in January 2015, not 2Q14. Therefore, CDTFA recommended that the audit's deficiency measure be reduced by \$50,000.

DISCUSSION

California imposes on a retailer sales tax measured by the retailer's gross receipts from its retail sales of tangible personal property in this state unless a 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.)

If CDTFA is not satisfied with the amount of tax reported by the taxpayer, or if a person fails 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.) If CDTFA carries that 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.) That is, a party must

³ On September 16, 2019, CDTFA issued a refund of \$2,839.19 for overbilled interest of \$2,383.93 for 2Q14 and \$455.26 for the liability period.

establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Appeal of AMG Care Collective*, 2020-OTA-173P.) Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Talavera*, *supra*.)

Here, appellant does not dispute the audit liability. Instead, appellant argues that the liability period overlaps with the self-assessed periods between 1Q13 and 2Q15. Appellant asserts that the audit liability was the total liability for the entire liability period. Thus, appellant contends that it was only liable for the \$71,803.82 used to pay the NOD liability in full, and that it overpaid the \$109,214.48 used to pay appellant’s liabilities for the self-assessed periods. Furthermore, appellant argues that CDTFA failed to credit appellant for “tips, spoilage, returns and contributions” that comprise more than 21 percent of appellant’s reported income.

The evidence establishes that appellant’s liabilities arising from the self-assessed periods are separate and distinct from the NOD liability arising from the audit. Those self-assessed liabilities are based on appellant’s SUTRs and amended SUTRs for 1Q13, 3Q13, 4Q13, 1Q14, 2Q14, 1Q15, and the period April 1, 2015, through May 30, 2015, plus applicable interest, penalties, and collection cost recovery fees. The NOD liability is based on the audit for the liability period, which was conducted using the amounts appellant reported on its amended SUTRs. The audit revealed unreported taxable sales, which were in addition to the sales appellant reported on the amended SUTRs. Appellant’s self-assessed liabilities totaling \$109,214.48 are unrelated to the NOD, and the audit liability does not supersede or replace, but rather supplements, these self-assessed liabilities.

Additionally, appellant has failed to provide any explanation or documentation to support its allegation that CDTFA failed to credit appellant for “tips, spoilage, returns and contributions.” Moreover, CDTFA relied on the amended SUTRs in calculating the audit liability. Appellant’s amended SUTRs reported amended gross sales that were approximately 21 percent less than the original SUTRs for the periods 1Q13, 3Q13, 4Q13, and 1Q14, and 18 percent less for 2Q13, and which indicates that the audit already accounted for the amounts that appellant references. In light of all of the above, we find that appellant has failed to prove that any further adjustments are warranted for tips, spoilage, returns or contributions.

During the oral hearing in this matter, CDTFA stated that it had determined that the audit’s determination of unreported sales of fixtures and equipment of \$50,000 was improperly

billed because the sale actually occurred in January 2015, not 2Q14.⁴ Consequently, CDTFA recommended that the measure be reduced by \$50,000. Accordingly, we accept CDTFA’s concession to reduce the audit’s deficiency measure by \$50,000. To the extent that this reduction may result in an overpayment by appellant, we note that there is no timely claim for refund before us, and therefore we lack jurisdiction to consider whether a refund is warranted. Appellant would need to file a timely refund claim with CDTFA in order for any refund to be considered. (R&TC, § 6902(a).)

HOLDINGS

1. Pursuant to CDTFA’s concession, the audit’s deficiency measure shall be reduced by \$50,000.
2. No additional adjustments to the liability are warranted, beyond the amount conceded by CDTFA.

DISPOSITION

CDTFA’s action to deny the petition for redetermination is sustained, subject to CDTFA’s concession to reduce the audit’s deficiency measure by \$50,000.⁵

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 Suzanne B. Brown
 Administrative Law Judge

We concur:

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 Sheriene Anne Ridenour
 Administrative Law Judge

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 Andrew Wong
 Administrative Law Judge

Date Issued: 12/8/2021

⁴ Because the audit period ended on April 30, 2014, a sale during 2015 would have occurred outside of the audit period.

⁵ CDTFA shall compute how much this reduction in measure adjusts the amount of the liability. Because there is no refund claim currently before OTA, we do not address whether a refund should be granted.