

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No.: 18011998
PARTNERSHIP OF M. HOMAMI et al.,)	CDTFA Case ID: 961730
dba Persian Grill)	
)	
)	
)	

OPINION

Representing the Parties:

For Appellant:	M. Homami, Partner
For Respondent:	Courtney Daniels, Tax Counsel III Christopher Brooks, Tax Counsel IV Jason Parker, Chief of Headquarters Ops.
For Office of Tax Appeals:	Lisa Burke, Business Taxes Specialist III

S. RIDENOUR, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, the Partnership of M. Homami et al., doing business as Persian Grill (appellant)¹ appeals a Decision and Recommendation (D&R) issued by respondent California Department of Tax and Fee Administration (CDTFA)² denying appellant’s petition for redetermination of the Notice of Determination (NOD) issued on July 13, 2016.³ The NOD is for tax of \$23,486.79, plus applicable interest, for the period October 1, 2012, through March 31, 2015 (audit period). In preparation for the hearing, CDTFA reduced the amount of unreported taxable sales, which reduced the measure of tax from \$314,190 to \$278,412, resulting in a reduction to the tax liability.

¹ Appellant is a husband and wife partnership consisting of two partners.

² 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 this Opinion refers to acts or events that occurred before July 1, 2017, “CDTFA” shall refer to its predecessor, the board.

³ The NOD was timely because appellant signed a waiver of limitations extending the three-year statute of limitations. (R&TC, §§ 6487(a), 6488.)

Office of Tax Appeals (OTA) Administrative Law Judges Josh Aldrich, Huy “Mike” Le, and Sheriene Anne Ridenour held an oral hearing for this matter in Sacramento, California, on December 15, 2021. At the conclusion of the hearing, the record was closed, and this matter was submitted for an opinion.

ISSUES

1. Whether appellant has established that a reduction to the amount of disallowed claimed exempt sales to the United States government (U.S. government) is warranted.
2. Whether appellant has established that a further reduction to the amount of unreported taxable sales is warranted.

FACTUAL FINDINGS

1. Appellant operated Persian Grill, a restaurant serving Persian cuisine in Monterey, California from October 1, 2006, until the restaurant closed on November 30, 2014. CDTFA closed appellant’s seller’s permit effective March 31, 2015.
2. During the audit period of October 1, 2012, through March 31, 2015,⁴ appellant reported total sales of \$294,648, and claimed exempt sales to the U.S. government of \$232,596, which resulted in reported taxable sales of \$62,052.
3. For audit, appellant provided its federal income tax returns (FITRs) for the 2012, 2013, and 2014 tax years, and bank statements for the period October 1, 2012, through December 31, 2014.⁵ Appellant was initially unable to provide CDTFA with business records other than its income tax returns and bank statements because its records were

⁴ While the audit period is from October 1, 2012, through March 31, 2015, the audit was based on information appellant provided, as discussed below. Appellant’s reported total sales for fourth quarter 2014 (4Q14) was approximately less than half of the reported total sales for each of the previous quarters, which correlates with the restaurant closing its business mid-quarter on November 30, 2014. Additionally, for 1Q15, appellant reported total sales of zero, and the amount CDTFA determined was zero, which correlates with the business previously closing.

⁵ We note that the income tax returns reported the business as a sole proprietorship. Under certain circumstances, an unincorporated business jointly owned by a married couple (i.e., joint venture, co-ownership, or partnership by operation of law) may elect not to be taxed as a partnership for income tax purposes. (See Internal Revenue Code, § 761(f).) Instead of filing taxes as a partnership, the qualifying members (husband and wife) may elect to file as sole proprietors for income tax purposes. (*Ibid.*) Irrespective of federal income tax treatment, a husband-and-wife joint venture is recognized as a partnership by operation of law, and treated as a separate entity, for sales and use tax purposes. (R&TC, §§ 6005, 6015.)

stored on a network of desktop computers that it had left at the business premises together with other assets when it closed the business.

4. When asked for documentation to support its claimed exempt sales to the U.S. government, appellant asserted that its claimed exempt sales to the U.S. government represented sales of meals to military personnel⁶ and that it was told by a naval officer that it did not need to collect sales tax reimbursement. CDTFA found that appellant's sales of meals to military personnel could not properly be regarded as exempt sales to the U.S. government, and therefore disallowed the claimed deductions totaling \$232,596 in their entirety.
5. CDTFA examined the income tax returns appellant provided and found that the gross receipts reported on appellant's FITRs exceeded the total sales reported on its sales and use tax returns (SUTRs) by \$18,935 for 2012, by \$17,877 for 2013, and by \$17,653 for 2014, with a total difference of \$54,465 for the three-year period. CDTFA then compared appellant's bank deposits for the period October 1, 2012, through December 1, 2014, with appellant's reported total sales for the same period, and found that the bank deposits exceeded the reported total sales by \$82,574.
6. After CDTFA completed its bank deposit analysis, appellant provided a copy of its sales summaries for the period October 1, 2012, through September 30, 2014. CDTFA compared sales of \$355,630 recorded in the sales summaries with appellant's reported total sales of \$278,506 for the same period, and computed unreported sales of \$77,124 (\$355,630 recorded - \$278,506 reported), which represented a reporting error rate of 27.692 percent ($\$77,124 \text{ unreported} \div \$278,506 \text{ reported}$). CDTFA applied the reporting error rate to appellant's reported total sales for the remainder of the audit period (October 1, 2014, through March 31, 2015), computed additional sales of \$4,470 for 4Q14, and established unreported taxable sales of \$81,594 ($\$77,124 + \$4,470$) for the audit period. Since the \$81,594 amount of unreported taxable sales based on the sales summaries was nearly the same as unreported taxable sales of \$82,574 computed from the bank deposit analysis, CDTFA determined that the \$81,594 amount was reasonable.

⁶ During the hearing, appellant clarified that its sales of meals to military personnel included customers who were either in military uniform, showed military identification, or paid for their meals with United Services Automobile Association (USAA) credit cards (USAA is a business that offers services to people and family in the military).

7. On July 13, 2016, CDTFA issued appellant an NOD for \$23,486.79 in tax, plus accrued interest, based on disallowed claimed exempt sales to the U.S. government of \$232,596 and unreported taxable sales of \$81,594. Appellant timely filed a petition for redetermination disputing the NOD in its entirety. On August 24, 2017, CDTFA held an appeals conference with appellant and issued a D&R on October 5, 2017, recommending that the petition for redetermination be denied. This timely appeal to OTA followed.
8. On appeal, appellant provided copies of documents that it identified as its Maitre'D⁷ cash register report⁸ with date and time stamps. The provided cash register report lists individual sales receipt numbers and the associated selling price for the meal(s).
9. CDTFA performed a reaudit and compared the sales listed on the cash register report to the sales listed on the previously provided sales summaries and found that the cash register report had sales data for many sales receipt numbers that were not included in the sales summaries. As an example, for the first quarter 2013 (1Q13), the cash register report provided sales data for the sales receipts numbered 127,255 through 127,626, while the numbers from the sales summaries jumped from 127,254 on line 848 to 127,627 on line 849. That was the most significant sequence of missing sales receipts on the sales summaries provided for audit; however, CDTFA identified others. CDTFA increased the audited amount of unreported taxable sales to reflect the sales data that was not included in the sales summary for which the cash register report provided information.
10. In its review of the detail in the sales summaries, CDTFA noted that there were large groups of duplicated sales in the sales summaries provided for audit. As one example, for 1Q13, sales receipt numbers 126,853 through 126,888 are entered twice on the sales summary. For each sales receipt number, the amount of the sale in the original group is identical to the amount of the sale in the duplicate group. This same type of duplication occurs frequently in the sales summaries for 1Q13 and 2Q13. The duplicated sales total

⁷ Maitre'D is a brand of point-of-sale software frequently used by restaurants.

⁸ Appellant describes the sales summaries provided during the audit as a “raw cash register report [from the] Mater'D [sic] 2005 point of sale [records].” Accordingly, appellant has identified each set of records as a cash register report from the point-of-sale system. During the hearing, appellant explained that each month it created QuickBook files with the Maitre'D information, and that it was subsequently able to recover the QuickBook files. To distinguish between the documents, we will refer to the material provided during the audit as sales summaries and to the document provided on appeal as a cash register report.

- \$16,892 and \$37,803, for 1Q13 and 2Q13, respectively. For the remaining quarters of the audit, there are no significant duplications. CDTFA reduced the audited amount of unreported taxable sales for the duplicate sales it identified in the sales summaries.
11. For the period October 1, 2012, through September 30, 2014,⁹ CDTFA computed a revised recorded taxable sales of \$321,666.
 12. CDTFA used the revised data to compute unreported taxable sales of \$43,160 (\$321,666 revised recorded - \$278,506 reported). CDTFA then computed a percentage of error of 15.497 percent ($\$43,160 \text{ revised unreported} \div \$278,506 \text{ reported}$), which it applied to reported taxable sales of \$16,141 for 4Q14 to compute unreported taxable sales of \$2,501. CDTFA also computed estimated sales of \$157 for sales receipt numbers for which the sales data was not provided in either the sales summaries or the cash register report. Thus, CDTFA computed unreported taxable sales of \$45,819 ($\$43,160 + \$2,501 + \157),¹⁰ which represented a reduction of \$35,775 ($\$81,594 - \$45,819$) in audited unreported taxable sales.
 13. Based on the results of the reaudit, on August 19, 2021, CDTFA submitted a written statement conceding to reduce the measure of tax for the audit period by \$35,778, from \$314,190 to \$278,412.¹¹

DISCUSSION

Issue 1: Whether appellant has established that a reduction to the amount of disallowed claimed exempt sales to the U.S. government is warranted.

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.) Although gross receipts from the sale of "food products" are generally exempt, sales of hot food and sales of food served in a restaurant are subject to tax. (R&TC, § 6359(a), (d)(1), (d)(2), and (d)(7).) A

⁹ Appellant provided sales summaries and the cash register report for the period October 1, 2012, through September 30, 2014, only.

¹⁰ We compute \$45,818; we have not reconciled the \$1 de minimis difference.

¹¹ The overall reduction in the measure is \$35,778. We have not reconciled the \$3 de minimis difference between that amount and the \$35,775 difference in unreported taxable sales. Since the overall discrepancy is in appellant's favor, it will not be discussed further.

taxpayer seeking an exemption or exclusion bears the burden of proving by credible evidence that the statutory requirements have been satisfied. (*Appeal of Thomas Conglomerate*, 2021-OTA-030P.) The applicable burden of proof is by a preponderance of the evidence. (*Ibid.*)

Likewise, sales to the United States or its unincorporated agencies and instrumentalities are generally exempt. (R&TC, § 6381; Cal. Code Regs., tit. 18, § 1614(a).) However, “[t]ax applies to *sales to persons* in the armed services of the United States, notwithstanding the circumstance that the merchandise may be billed through any army or air force exchange service, navy exchange, coast guard exchange, or similar organization.” (Cal. Code Regs., tit. 18, § 1614(b), italics added.)

The sales tax is imposed upon retailers for the privilege of selling tangible personal property at retail in this state (R&TC, § 6051), although the retailer may collect sales tax reimbursement from the purchaser if the contract of sale so provides. (Civ. Code, § 1656.1(a).) In other words, while a taxpayer may collect tax reimbursement from its customers, there is no requirement that they do so, and failure to collect reimbursement is not a basis for relief from the tax. (See *Pacific Coast Engineering Co. v. State* (1952) 111 Cal.App.2d 31, 34.)

Here, appellant deducted sales of \$232,596 from its reported total sales of \$294,648, claiming that approximately 79 percent of its reported total sales were exempt sales to the U.S. government. There is no dispute that appellant did not have a contract with the U.S. government to sell food to the government or to any of its agencies or instrumentalities.¹²

Appellant maintains that it opened the restaurant near the Naval Postgraduate Academy with the goal of providing authentic Persian food to residents of Monterey and to active duty military personnel learning the Farsi language. Appellant asserts that it believed that its sales to active duty military personnel represented exempt sales to the U.S. government because: 1) it provided a service to the military by operating a restaurant where service personnel could learn Farsi and learn about the Persian culture; 2) it operated the only ethnic Persian restaurant close to the base; 3) it employed a Chief Master Language Instructor from the Defense Language Institute to work five hours per day, and therefore, it believed that it was monitored by active

¹² During the hearing, appellant stated that it believed the agreement was “just one sided” since the government was not obligated to do anything, which is why appellant “procrastinated and didn’t get the agreement” and the two or three times it tried to get an agreement proved very difficult.

Regardless of its rationale or number of attempts, appellant admits it did not obtain a contract with the U.S. government to sell food to the government or to any of its agencies or instrumentalities.

military personnel on a daily basis; and 4) customers used credit cards with the United Services Automobile Association (USAA) emblem. Appellant contends that its patriotism prompted the offering of language and cultural immersion to, as well as not collecting tax reimbursement from, servicepersons. Appellant also contends that its records prove that it did not collect tax reimbursement from servicepersons.

As stated above, tax applies to sales to persons in the armed services of the United States. Appellant's intention to assist military personnel in their knowledge of Farsi and Persian culture is noble; however, it does not qualify appellant's sales as exempt sales to the U.S. government under R&TC section 6381. While appellant's restaurant was located in close proximity to the Naval Postgraduate Academy, and it employed an active duty serviceperson, those conditions do not change the fact that appellant's customers were individuals. As to the fact that some of the military personnel paid for food using USAA credit cards, we note that USAA is not a government agency but is a business offering services to people in the military and their families. Thus, appellant's customers electing to pay for their meals with a USAA credit card does not change the fact that appellant was selling food to individuals, and not to the U.S. government.

Regarding appellant's assertion that it did not collect tax from servicepersons, we note that each retailer in California is liable for sales tax on its retail sales unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, § 6051.) A retailer has the option to collect sales tax reimbursement from the customer but is not required to do so. However, failure to collect reimbursement is not a basis for relief from the tax. (See *Pacific Coast Engineering Co. v. State*, *supra*, 111 Cal.App.2d at p. 34.) As discussed above, we find that appellant's sales to servicepersons fail to meet the requirements for exemption set forth in statute. (R&TC, §§ 6051, 6381; Cal. Code Regs., tit. 18, § 1614 (a).) Thus, appellant's contention that it did not collect tax reimbursement from servicepersons, regardless of its possible veracity, is not a basis for adjustment.

In the absence of any evidence showing that an exemption applied to appellant's sales, we find that no adjustment is warranted.

Issue 2: Whether appellant has established that further reduction to the amount of unreported taxable sales is warranted.

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; *Appeal of Amaya*, 2021-OTA-328P; see also *Riley B's, Inc. v. State Bd. of Equalization* (1976) 61 Cal.App.3d 610, 614-615.) It is the taxpayer's responsibility to maintain and make available for examination on request all records necessary to determine the correct tax liability, including bills, receipts, invoices, or other documents of original entry supporting the entries in the books of account. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).) 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. (*Riley B's, Inc. v. State Bd. of Equalization*, *supra*, at p. 616.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (See *ibid*; *Appeal of Amaya*, *supra*.)

Here, appellant failed to provide any source documents, such as guest checks, to support the amounts of its reported sales. Using the limited records provided for examination, CDTFA found that both the gross receipts reported on appellant's FITRs and appellant's bank deposits exceeded the amount of total sales reported on its SUTRs. Thus, it was reasonable for CDTFA to question the accuracy of appellant's reported total sales. Subsequently, appellant provided CDTFA with sales summaries for the period October 1, 2012, through September 30, 2014, to support its reported sales amounts during the audit period of October 1, 2012, through March 31, 2015. When CDTFA found that the sales recorded in appellant's sales summaries also exceeded its reported amounts, CDTFA established unreported taxable sales of \$81,594 based on the difference between the recorded and reported total sales. Thereafter, appellant provided a cash register report on appeal, and CDTFA utilized that document to establish the missing sales records in the audit. CDTFA also reduced the audited amount for duplicate sales found in the sales summaries. Thus, to establish audited taxable sales, CDTFA relied solely on appellant's records.

Given that CDTFA relied on the sales amounts shown in appellant's own records, we find that CDTFA has met its burden of showing that its determination was reasonable and rational. Therefore, the burden shifts to appellant to provide evidence from which a more accurate determination may be made.

Regarding the accuracy of the cash register report that appellant provided on appeal, appellant claims that its recorded sales are overstated because there are duplicate entries resulting from servers' errors in creating multiple tickets for each customer at a table to pay separately. During the hearing, appellant explained that its servers did not know how to split a check, so the servers would instead close the original table ticket as cash (without collecting cash on the ticket), attempt to open a new table ticket for each separate ticket at the table without taking the duplicates to the kitchen, give the restaurant owners the tickets, and the owners reconciled the tickets daily in binders which have subsequently been destroyed. Appellant also explained that while a ticket could be closed, it could not be deleted or modified, and that there "is no way [one] can find the duplicate[s]" since the servers "put every individual in another table" and the "timestamp and sequence number is different" since in the interim other customers had put in food orders.

In support of its contentions, appellant states that the cash register report lists receipt number 126,266, which shows an October 27, 2012 transaction with a 21:08:29 timestamp for 5 customers, a total sale of \$0, a "Service" of \$102.91, a payment method of cash, and an "Amount" of \$0. Appellant contends that while receipt number 126,266 closed at \$102.91, the servers later opened a new ticket for one, two, or maybe all five customers, and that the new ticket(s) would be down on the list with another timestamp. However, appellant was unable to indicate where the split checks were listed on the cash register report, and when asked to explain why there were no additional transactions listed after 21:08:29 on October 27, 2012, appellant responded that it depended on when the server closed the ticket. We have reviewed the cash register report and sales summaries and are unable to locate the possible duplicate transactions for receipt number 126,266.

Rather, in our review of the sales summaries and cash register report, we found that there was an entry for the full amount of the sale when a sales ticket had been split. The sales receipt number was entered again, with a "0" under the sale amount and a separate number under "Payment."¹³ We found no entries for which a total amount was entered as a sale and then

¹³ As an example, the sales summaries list sales receipt number 126,875 which shows a January 14, 2013 transaction for "4" customers, and a total sale of \$66 (payment method denoted as Visa). Then, immediately after, the same sales receipt number is entered three more times, with a date of "1/0/00", "0" customers, and "0" as the sale amount. On each of the four lines with that sales receipt number, there are entries under "total, tax, and tip" of \$19, \$20, \$18, and \$17 (each having a Visa payment method), for a total of \$74. Thus, the total paid for the sale of \$66 was \$74, including tax and tip.

separate receipt numbers were used to bill each customer at the table, resulting in a duplicate billing for the same transaction. We find that appellant has not demonstrated that its recorded sales are overstated due to duplicate entries resulting from servers' errors in creating multiple tickets for each customer at a table to pay separately.

In the absence of guest checks, or other source documents, we find that appellant's sales summaries, along with the cash register report provided on appeal, represent the best available evidence of appellant's sales. CDTFA made all adjustments that are supported by the cash register report, and we find that no further adjustment is warranted.

Regarding the discrepancy between the gross receipts reported on appellant's federal FITRs and its reported total sales, appellant claims that it made an error in using its QuickBooks software that resulted in gross receipts for an additional month being included with its gross receipts for 12 months each year, such that the gross receipts reported on its FITRs were overstated. Regarding the discrepancy between its bank deposits and its reported total sales, appellant claims that it deposited personal funds into its business bank account in order to pay its home mortgage from the business bank account. Appellant asserts that all cash deposits shown in its bank statements represent deposits of personal funds because any cash related to sales was used to pay servers' tips at the end of each day, or, alternatively, it was used as petty cash. However, we note that neither appellant's reported sales for income tax purposes nor its bank deposits were utilized in establishing the audited amounts; rather, CDTFA used the information listed on the sales summaries and cash register report appellant provided. Therefore, these arguments do not impact our analysis.

Appellant claims that a car accident in 2012 and cancer treatment in 2017 have resulted in severe financial hardship that leaves it unable to pay the liability. However, there is no legal authority permitting us to consider the personal circumstances and financial hardship of appellant, nor appellant's owners, in deciding this appeal.¹⁴

¹⁴ Appellant may wish to contact CDTFA to discuss an offer-in-compromise or installment payment arrangements.

HOLDINGS

1. Appellant has not established that a reduction to the amount of disallowed claimed exempt sales to the U.S. government is warranted.
2. Appellant has not established that a further reduction to the amount of unreported taxable sales is warranted.

DISPOSITION

Sustain CDTFA’s decision to reduce the measure of tax from \$314,190 to \$278,412, and to otherwise deny the petition for redetermination.

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 Sheriene Anne Ridenour
 Administrative Law Judge

We concur:

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 Josh Aldrich
 Administrative Law Judge

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 Huy “Mike” Le
 Administrative Law Judge

Date Issued: 3/22/2022