

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 20046142
)	CDTFA Case ID 381-430
)	
S. YAMVONGSA AND)	
K. KHAMTHAKHOUN¹)	

OPINION

Representing the Parties:

For Appellant: S. Yamvongsa and K. Khamthakhoun

For Respondent: Jason Parker,
Chief of Headquarters OperationsFor Office of Tax Appeals: Deborah Cumins,
Business Tax Specialist III

N. RALSTON: Pursuant to Revenue and Taxation Code (R&TC) section 6561, S. Yamvongsa and K. Khamthakhoun, a husband-and-wife partnership doing business as California Thai Restaurant (appellant), appeals a decision issued by California Department of Tax and Fee Administration² (respondent) denying appellant’s petition for redetermination of two³ Notices of Determination (NOD) dated August 15, 2018. The NODs were for \$11,795 in

¹ S. Yamvongsa and K. Khamthakhoun reported the business entity as a husband-and-wife co-ownership, as opposed to a partnership, to CDTFA. 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.)

² Sales taxes were formerly administered by the State Board of Equalization (BOE). In 2017, functions of BOE relevant to this case were transferred to respondent. (Gov. Code, § 15570.22.) For ease of reference, when referring to acts or events that occurred before July 1, 2017, “respondent” shall refer to BOE; and when referring to acts or events that occurred on or after July 1, 2017, “respondent” shall refer to respondent.

³ One NOD was issued to each partner.

tax and applicable interest, for the period October 1, 2014, through September 30, 2017 (liability period).

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

ISSUES

1. Whether appellant has shown that adjustments are warranted to the audited understatement of reported taxable sales.
2. Whether appellant has shown that adjustments are warranted to the audited measure for excess sales tax reimbursement collected.

FACTUAL FINDINGS

1. Appellant operated a restaurant in El Sobrante, selling Thai-style cuisine, since July 2009. The restaurant has dine-in and take-out sales and makes online delivery sales through third-party delivery services such as Eat24.
2. For the audit period, appellant reported total and taxable sales of \$366,992, claiming no deductions.
3. For audit, appellant provided bank statements for the second quarter 2017; federal income tax returns (FITRs) for 2014, 2015 and 2016; incomplete guest checks; and incomplete credit card batch reports. In addition, respondent obtained Form 1099 K⁴ data for the years 2014, 2015 and 2016.
4. Respondent computed book markups⁵ of 209.57 percent for 2014, 133.45 percent for 2015, and 189.14 percent for 2016.
5. Due to the lack of records to support reported taxable sales, and because appellant's book markups were all lower than the book markup respondent expected for the type of restaurant operated

⁴ The Form 1099 K is an IRS form which shows amounts paid to the merchant by customers using some type of payment card (i.e., credit card or debit card) or third-party network (e.g., PayPal).

⁵ "Markup" is the amount by which the cost of merchandise is increased to set the retail price. For example, if the retailer's cost is \$.70 and it charges customers \$1.00, the markup is \$0.30. The formula for determining the markup percentage is $\text{markup amount} \div \text{cost}$. In this example, the markup percentage is 42.86 percent ($.30 \div .70 = 0.42857$). A "book markup" (sometimes referred to as an "achieved markup") is one that is calculated from the retailer's records.

- by appellant,⁶ respondent decided to use the book markup from 2014 to compute an audited understatement for 2015, 2016, and 2017.
6. To compute the audited cost of goods sold (COGS) of \$37,667, for 2014, respondent reduced the COGS reported on the FITR (\$38,824) for estimated amounts of pilferage (2 percent) and spoilage (1 percent). Respondent then used total sales reported on the sales and use tax returns (SUTRs) for 2014⁷ (\$118,894) and the audited COGS to compute the audited markup of 215.88 percent.
 7. To compute audited sales for 2015 and 2016, respondent reduced the amounts of COGS reported on the FITRs by 2 percent for pilferage and 1 percent for spoilage. Respondent then added a markup (computed at 215.88 percent) to the adjusted COGS and compared audited and reported taxable sales to compute error rates of 54.70 percent for 2015, 16.63 percent for 2016, and 23.63 percent for the three years combined (with zero understatement for 2014).
 8. Respondent applied the audited error rates to reported taxable sales on a quarterly basis for 2015, 2016, and 2017 (using 23.63 percent for 2017). Respondent computed an understatement of reported taxable sales of \$108,200.
 9. In its review of the incomplete guest checks provided by appellant, respondent found that appellant had been charging and collecting sales tax reimbursement at a rate of 9 percent during the audit period. However, the applicable sales tax rate in El Sobrante was 8.50 percent for the period April 1, 2014, through December 31, 2016, and 8.25 percent for the period January 1, 2017, through September 30, 2017.
 10. Respondent multiplied audited taxable sales by 9 percent to compute that appellant had collected sales tax reimbursement of \$42,767 for the audit period. It then used the correct sales tax rates to compute the amount of sales tax due of \$40,117. Thus, respondent computed that appellant had collected excess sales tax reimbursement of \$2,651 (rounded), which corresponds to \$55,803 in measure.

⁶ Respondent stated that it expected a markup of well over 240 percent.

⁷ We note that the evidence does not contain information about appellant's reported sales tax for the second through the fourth quarters of 2014. However, given that the 2014 sales amount relied upon by respondent (\$118,894) was approximately 9.6 percent less than gross receipts appellant reported on the 2014 FITR (\$130,299), and considering the fact that appellant has not challenged respondent's reliance on that sales amount, we accept it.

11. On August 15, 2018, respondent issued an NOD for tax of \$11,795 based on a measure of \$164,003.⁸
12. On August 28, 2018, appellant filed a timely petition for redetermination.
13. On March 23, 2020, respondent issued a Decision, denying the petition for redetermination.
14. This timely appeal followed.

DISCUSSION

California imposes sales tax on a retailer's gross receipts from the retail sale of tangible personal property in this state unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, §§ 6012, 6051.) For the purpose of the proper administration of the Sales and Use Tax Law and to prevent the evasion of the sales tax, the law presumes that all gross receipts are subject to tax until the contrary is established. (R&TC, § 6091.) It is the retailer's responsibility to maintain complete and accurate records to support reported amounts and to make them available for examination. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).)

When respondent is not satisfied with the amount of tax reported by the taxpayer, respondent 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.) In the case of an appeal, respondent has a minimal, initial burden of showing that its determination was reasonable and rational. (*Appeal of Talavera*, 2020-OTA-022P.) Once respondent has met its initial burden, the burden of proof shifts to the taxpayer to establish that a result differing from respondent's determination is warranted. (*Ibid.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid.*)

Issue 1: Whether appellant has shown that adjustments are warranted to the audited understatement of reported taxable sales.

Appellant provided incomplete and conflicting records for audit; therefore, we find it was reasonable for respondent to utilize an indirect audit approach. In this matter, the audited markup has been computed using appellant's records for 2014, and we find the audited markup

⁸ This amount reflects \$108,200 for underreported taxable sales plus \$55,803 for the excess sales tax.

reliable. Thus, we find that respondent has shown that its determination is reasonable and rational, and appellant has the burden of establishing that adjustments are warranted.

Appellant has not made any specific argument or provided any evidence in opposition to respondent's determination.⁹

Appellant has offered no substantive basis for its disagreement with the audit findings. Similarly, in its petition for redetermination filed with respondent, appellant stated only that the amount seemed too high. At the appeals conference with respondent on October 16, 2019, appellant stated that their new representative would need additional time to review the audit and present appellant's contentions and evidence. However, appellant had provided no additional information by the date of respondent's Decision, dated March 23, 2020. Neither has appellant submitted additional information with this appeal. Accordingly, there is nothing in the record that explains appellant's reasons for arguing that the audit findings are incorrect.

As noted above, respondent used the book markup for 2014 as the audited markup, although that markup (215.88 percent, after adjustments to COGS for pilferage and spoilage) was lower than the markup of at least 240 percent that respondent expected for this type of restaurant. To establish audited COGS for 2015 and 2016, respondent used the amounts appellant had reported on their FITRs, adjusted for pilferage and spoilage. It then used appellant's book markup for 2014 to compute the audited taxable sales for those two years. In other words, all the elements of the audit computations were derived from appellant's records. Appellant has provided no evidence, or even argument, that its reported COGS or the book markup for 2014 were overstated, or that there were any errors in the audit computations. We find that appellant has not shown that adjustments are warranted to the audited understatement of reported taxable sales.

Issue 2: Whether appellant has shown that adjustments are warranted to the measure of excess sales tax reimbursement collected.

When a retailer represents an amount to the customer as sales tax reimbursement, and that amount exceeds the amount of sales tax due on the transaction, the retailer is collecting excess tax reimbursement. (R&TC, § 6901.5; Cal. Code Regs., tit.18, § 1700(b)(1).) When

⁹ In its opening brief, appellant states, "We do not agree with your decision on the amount we owe \$55,803." Appellant does not owe \$55,803. That figure is the measure of the excess tax reimbursement, which we discuss under Issue 2.

respondent finds that a person has collected excess tax reimbursement, that person will be afforded the opportunity to refund the excess collections to the customers from whom they were collected. (Cal. Code Regs., tit. 18, § 1700(b)(2).) In the event the seller fails to refund the excess tax reimbursement to the customer, respondent will make a determination against the person for the amount of the excess tax reimbursement collected and not previously paid to the state, plus applicable interest and penalty. (*Ibid.*)

In its review of the incomplete guest checks provided by appellant, respondent found that appellant was collecting sales tax reimbursement computed at 9 percent, which was higher than the applicable sales tax rate in El Sobrante.¹⁰ Accordingly, respondent found that appellant had collected excess sales tax reimbursement.¹¹ Respondent computed excess tax reimbursement of \$2,651, using audited sales.¹² Respondent computed a measure of excess tax reimbursement of \$55,803.

We find that respondent has shown that appellant collected excess tax reimbursement. Further, we have reviewed respondent's computation of the amount of excess tax reimbursement and have found no errors. Accordingly, appellant has the burden to show that adjustments are warranted.

Appellant has made no argument, except to state that it does not agree that it owes \$55,803.¹³

Appellant has not shown, with respect to the available guest checks reviewed by respondent, that it did not collect excess tax reimbursement. Moreover, appellant has not provided additional guest checks or other evidence to show that the errors found on the available guest checks did not occur during the remainder of the audit period. Accordingly, we find that appellant has not shown that adjustments are warranted to the audited measure of excess sales tax reimbursement.

¹⁰ The sales tax rates during the audit period were 8.50 percent (October 1, 2014, through December 31, 2016) and 8.25 percent (January 1, 2017, through September 30, 2017).

¹¹ Further, respondent found that appellant reported \$237 of excess sales tax as taxable sales.

¹² Respondent compared the amounts of sales tax reimbursement collected (at 9 percent) to the amounts of sales tax due (computed using the rate in effect for each quarter) to compute the excess tax reimbursement.

¹³ As noted above, appellant does not owe \$55,803. That figure is the measure of the excess tax reimbursement, which we discuss under Issue 2.

HOLDINGS

1. Appellant has not shown that adjustments are warranted to the audited understatement of reported taxable sales.
2. Appellant has not shown that adjustments are warranted to the audited measure for excess sales tax reimbursement collected.

DISPOSITION

Respondent’s decision to deny the petition for redetermination is sustained.

DocuSigned by:


DF5800E706FD40F
 Natasha Ralston
 Administrative Law Judge

We concur:

DocuSigned by:


1A9B52FF88AC1C7
 Michael F. Geary
 Administrative Law Judge

DocuSigned by:


0CC6C6ACCC8A44D1
 Teresa A. Stanley
 Administrative Law Judge

Date Issued: 2/23/2022