OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **C. LEE,** **dba Sushi Kinta**	OTA Case No.: 21017097 CDTFA Case IDs: 147-063; 147-061

OPINION

Representing the Parties:

For Appellant:	C. Lee, Appellant Wai Ling Si, Representative
For Respondent:	Randy Suazo, Hearing Representative Christopher Brooks, Tax Counsel IV Jason Parker, Chief of Headquarters Ops.
Interpreter:	I-Ching
For Office of Tax Appeals:	Deborah Cumins, Business Taxes Specialist III

J. ALDRICH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, C. Lee (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)[1] in response to appellant's timely petition for redetermination of the Notice of Determination (NOD) dated March 26, 2018. The NOD is for tax of $12,991.89 and applicable interest, for the period April 1, 2012, through March 31, 2015 (audit period). In its subsequent decision, CDTFA increased the tax to $14,446.00.

Pursuant to R&TC section 6901, appellant also appeals CDTFA's decision denying appellant's claim for refund of one dollar, or other such amounts as may be established, for payments made against the NOD.

[1] Sales and use taxes were formerly administered by the State Board of Equalization (board). In 2017, functions of the board relevant to this case were transferred to CDTFA. For ease of reference, when this Opinion refers to acts or events that occurred before July 1, 2017, "CDTFA" shall refer to the board.

Office of Tax Appeals Administrative Law Judges Andrew J. Kwee, Michael F. Geary, and Josh Aldrich held an electronic hearing for this matter on March 22, 2022. At the conclusion of the hearing, the record was closed, and this matter was submitted for a decision.

ISSUE

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

FACTUAL FINDINGS

1. Appellant operates a Japanese restaurant in the Financial District of San Francisco, California, selling sushi, miso soup, and other hot and cold foods, as well as beverages, including beer. The restaurant has limited inside seating,[2] and there is seating outside that is shared with neighboring businesses. The restaurant is open Monday through Friday, from 10:30 a.m. to 4:00 p.m., and is open Saturdays "as needed." Appellant also made sales for resale of cold sushi to neighboring hotels.
2. Appellant was previously audited for the period of April 1, 2009, through March 31, 2012 (prior audit period). The audit workpapers (AWPs) for the prior audit indicate that the restaurant has inside seating of six chairs, six tables, and a food bar. Outside seating is available in a common area shared with other restaurants. According to comments in the prior AWPs, appellant was not correctly taxing for-here or dine-in sales. The auditor instructed appellant to reprogram the register to include sales of food consumed at the restaurant as taxable. Appellant reprogramed the register correctly starting on January 29, 2013, and the prior auditor did not accept any cash register Z-tapes (Z-tapes)[3] prior to that date.
    a. According to the AWPs for the prior audit, the auditor did not accept Z-tapes with less than 50 percent taxable sales pursuant to a discussion with the auditor's supervisor. Based on the accepted Z-tapes provided by appellant and the site test, the taxable sales percentage for the audit period was calculated by averaging the following taxable sales percentages: 69.86 percent for January 23, 2013;

[2] There is conflicting information in the record regarding the number of inside seats. In the prior audit, the auditor recorded six seats, six tables, and a food bar. In this audit, the auditor reported 16 inside seats.

[3] Z-tapes are the part of the cash register tapes that summarize sales by category for a given period of time.

54 percent for January 29, 2013; 60 percent for January 30, 2013; 50 percent January 31, 2013; 71 percent for February 5, 2013; and 50 percent for February 6, 2013. The auditor recommended expanding the site test by two additional days and incorporating that data into the audited taxable percentage.

b. In the revised AWPs for the prior audit, CDTFA expanded the site tests pursuant to the auditor's recommendation. On June 28, 2013, CDTFA conducted a site test which resulted in a 70.46 taxable sales percentage. On July 1, 2013, CDTFA conducted a site test that resulted in a 66.14 taxable sales percentage. The revised prior audit included the taxable sales percentage from the site tests. The revised prior audit also excluded the taxable sales percentage derived from the data that appellant provided except for February 5, 2013. The comments provide:

> in the original audit Z-tapes showing a lower taxable sales percentage were accepted to account for any sales for resale. However, since valid sales for resale were subtracted from audited total sales prior to application of taxable sales percentage[s]; all Z-tapes that were not inline with the site tests results were removed.

c. The prior audited taxable sales percentage was initially 59 percent; and the revised prior audited taxable sales percentage was 69 percent. Appellant disputed the results.

d. Aside from the taxable sales percentage, it is undisputed that appellant was not provided a copy of the schedules or other data for the June 28, 2013, or the July 1, 2013, site tests. CDTFA confirmed that it no longer possesses the schedules or data for both site tests. Other than the percentage of taxable sales, a copy of the schedules or other data is not in the record.

3. During the audit period, appellant reported total sales of $1,035,172; claimed deductions of $533,560 for nontaxable sales for resale; $279,215 for nontaxable sales of food products; $17,813 for sales tax included; and reported taxable sales of $204,584.

4. For audit, appellant provided federal income tax returns (FITRs) for the years 2012 through 2014; Z-tapes for the third quarter 2014 (3Q14) and the period March 31, 2016, through April 15, 2016; sales for resale worksheets for the audit period; a monthly sales

log for the audit period; bank statements for the period 3Q12 through 3Q13; and sales invoices for sales for resale.

a. In the original AWPs, the auditor indicated that appellant maintains a single entry set of books and records. The auditor also wrote: "Books and records inadequate for the purpose of sales and use tax audit."

b. In the revised AWPs, the auditor comments:

> While this is [appellant's] second audit, the [appellant] has improved their reporting, and they provided the books and records necessary to conduct the audit. In the prior audit taxable sales were understated by 133 [percent], [whereas] in this audit taxable sales were understated by 73 [percent]. While the current understatement is substantial, it is clear that the taxpayer has worked to correct [his] reporting errors. In this audit, reported total sales were accepted as reported, [whereas] in the prior audit reported total sales were not accepted.

5. No material differences were noted between appellant's FITRs and his sales and use tax returns (SUTRs). CDTFA concluded that the overall book mark-up of 236 percent was reasonable. Bank deposits from July 2012, through September 2013 were compared to reported total sales, which showed there were sales in excess of deposits. CDTFA concluded that the excess was attributable to appellant not depositing all of the cash proceeds from sales made at his business. Based on the results of these various audit tests, CDTFA concluded that the amounts of total sales reported on SUTRs were substantially accurate.

6. CDTFA initially computed that appellant had reported approximately 24 percent of his sales as taxable.

7. To evaluate the accuracy of reported taxable sales, CDTFA conducted an observation test on Wednesday, March 30, 2016. During the observation test, the auditor observed and notated each sale rung on appellant's cash register. CDTFA reviewed the Z-tape for that day and found that it reconciled with the results of the observation test. CDTFA computed a percentage of taxable to total sales (taxable percentage) of 49.25 percent.

8. Appellant provided Z-tapes for the period April 1, 2016, through April 15, 2016 (test period). According to comments in the audit work papers, "All Z-tapes that were not in line with the site test were removed because days [with] low taxable percentage included sales for resale. This resulted in accepting three days of data provided by the

[appellant]." CDTFA concluded that the taxable percentages reflected on the Z-tapes were reasonable for: Saturday, April 2, 2016; Friday, April 8, 2016; and Saturday, April 9, 2016. Accordingly, CDTFA used the percentages for those three days (50.76 percent, 43.76 percent, and 48.30 percent, respectively), along with the percentage of 49.25 percent computed on the day of observation to compute the audited taxable percentage of 47.20 percent.[4]

9. CDTFA's AWPs do not include the Z-tapes or the schedules regarding the taxable percentages for any of the remaining days in the test period. However, appellant provided a schedule, which includes the taxable percentage for each of the remaining days of operation in the test period: 31 percent for April 1, 2016; 37 percent for April 4, 2016; 29 percent for April 5, 2016; 29 percent for April 7, 2016; 33 percent April 11, 2016; 38 percent for April 12, 2016; 37 percent for April 13, 2016; 38 percent for April 14, 2016; and 36 percent for April 15, 2016.

10. Based on its conclusions above, CDTFA applied 47.20 percent to the audited amount of sales in the restaurant, net of tax, of $518,138, to compute audited taxable sales of $244,578,[5] which exceeded reported taxable sales of $204,584 by $49,802.

11. In the revised audit, CDTFA noted that, on several SUTRs, appellant had combined his deductions for sales for resale and exempt sales of food through the restaurant. CDTFA used appellant's records to compile nontaxable sales for resale of $424,843. It then computed total sales through the restaurant of $592,515 ($1,035,172 reported total sales less claimed sales tax included of $17,814 and less recorded sales for resale of $424,843). CDTFA then computed that appellant had reported about 35 percent of his restaurant sales as taxable ($204,584 reported taxable ÷ $592,515).

12. Also, in the revised audit CDTFA made a $25,301 adjustment for claimed sales for resale in excess of the recorded amount of, which increased the audited understatement of reported taxable sales to $75,103.

[4] There is no evidence in the record regarding sales for resale during the test period.

[5] We compute $244,561; the minimal difference is the result of rounding.

13. The revised audit included a separate understatement for disallowed claimed sales for resale of $75,104, for a total understatement of reported taxable sales of $150,207.[6]
14. On September 7, 2017, and March 6, 2018, appellant made payments of $10,375.09 and $5,812.32, respectively.
15. On December 20, 2017, appellant filed a protective claim for refund in the amount of one dollar or other such amounts as may be established.
16. On March 26, 2018, CDTFA issued the NOD for tax of $12,991.89.
17. On April 5, 2018, appellant filed a petition for redetermination.
18. On October 29, 2019, CDTFA issued a decision deleting the audited amount of disallowed claimed nontaxable sales for resale and ordering a reaudit to:

> expand its observation test to three full days in accordance with Audit Manual section 0810.30 to determine the taxable sales rate and to adjust the taxable measure accordingly. However, if [appellant] fails to allow [CDTFA] to expand its observation test, then we conclude that no adjustments to the measure of unreported taxable sales (audit item 1) are warranted.

19. CDTFA conducted a reaudit. Instead of conducting additional observation tests, as ordered, CDTFA noted that it had conducted observation tests for three days during this audit period when it conducted the prior audit. CDTFA decided to utilize the results of those three observation days, along with the observation test for March 30, 2016, to compute a taxable percentage of 62.64 percent. CDTFA computed an understatement of reported taxable sales of $166,566.
20. On January 23, 2020, CDTFA issued a timely Notice of Increase in tax,[7] from $12,991.89 to $14,446.00.
21. On June 22, 2020, appellant submitted a request for reconsideration.
22. On November 20, 2020, CDTFA issued a supplemental decision (SD), ordering that the liability be redetermined in accordance with the reaudit and denying the petition for redetermination as well as the claim for refund.
23. Appellant filed this timely appeal.

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[6] The separate understatement for disallowed claimed nontaxable sales for resale was deleted in the reaudit, pursuant to CDTFA's decision, and that issue will not be addressed further.

[7] The Notice of Increase was timely because the letter was issued before the NOD became final and within three years of the date that the NOD was issued. (See R&TC, § 6563(a).)

DISCUSSION

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

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.) 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. (*Ibid*.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid*.)

In general, sales of food are exempt from tax. (R&TC, § 6359.) However, certain sales of food are excluded from the exemption (and are thus subject to tax). As relevant here, sales of food are subject to tax if the food is sold for consumption at facilities provided by the retailer (R&TC, § 6359(d)(2)) or if the food is sold as hot prepared food products (R&TC, § 6359(d)(7)). When a single price has been established for a combination of hot and cold food items, tax applies to the entire established price regardless of itemization on the sales check. (R&TC, § 6359(e).) The inclusion of any hot food product in an otherwise cold combination of food products sold for a single established price, results in the tax applying to the entire established price, e.g., hot coffee served with a meal consisting of cold food products, when the coffee is included in the established price of the meal. (Cal. Code Regs, tit. 18, § 1603(e)(1).) If a single price for the combination of hot and cold food items is listed on a menu, wall sign or is otherwise advertised, a single price has been established. (*Ibid*.)

During this audit period, appellant was instructed to reprogram his register to properly tax and record dine-in sales during the prior audit. Although the record keeping improved, when

compared to the prior audit period, the records provided to support his reported taxable sales were incomplete. In its preliminary examination, CDTFA computed that appellant's reported taxable sales represented about 24 percent of its total sales. In contrast, the taxable sales percentage that CDTFA had computed, during the prior audit, was 59 percent and then 69 percent, in the prior revised audit. Under those circumstances, we find that CDTFA's use of an indirect audit method was warranted. We also find that CDTFA's use of an observation test to establish an audited taxable percentage was appropriate. Thus, we find that CDTFA has shown that its determination was reasonable and rational. Therefore, appellant has the burden to establish that adjustments are warranted.

Appellant disputes the audited taxable percentage of 62.64 percent established in the reaudit.[8] He also disputes the audited taxable percentage of 47.2 percent that was established in the original audit. Appellant argues that his recorded taxable sales are accurate. He also asserts that it is inappropriate to utilize the results of observation tests for a few days to establish the audited taxable percentage.

Appellant raises specific issues regarding the observation tests, which are addressed below. Regarding appellant's general argument that it is inappropriate to utilize observation tests to establish an audited taxable percentage, we note that it is not feasible to evaluate Z-tapes based solely on the amounts recorded on them. Without verifying data, it would be difficult to determine whether each sale on the Z-tapes was recorded correctly. For that reason, it was not unreasonable for CDTFA to decline to accept cash register data without substantiation, such as an observation test.[9] An observation test may allow CDTFA to identify recording errors. For instance, in the prior audit, CDTFA found that appellant had been regarding some taxable sales as nontaxable and instructed appellant to reprogram his cash register.

Since CDTFA identified significant recording errors in the prior audit, it was appropriate for CDTFA to conduct an observation test to establish the audited taxable percentage in this

[8] Appellant also disputes CDTFA's description of his records as incomplete. As evidence, appellant has provided photos of numerous documents and records. We note, however, that CDTFA has found that appellant's reported total sales were substantially accurate. The only issue in question is the percentage of taxable to total sales, which would be computed from appellant's Z-tapes. Appellant has not provided Z-tapes for every day in the audit period. Moreover, even if a complete set of Z-tapes were available, an observation test would be needed to verify the accuracy of the recording on those tapes. Thus, we do not address in detail appellant's argument that his records were complete.

[9] See CDTFA's Audit Manual, Chapter 8, Bars and Restaurants, for more information regarding observation tests. (CDTFA's Audit Manual, § 0810.30)

audit. Therefore, we reject appellant's argument that he provided complete records and that the taxable sales recorded on the Z-tapes should be accepted without adjustment. However, appellant raises specific concerns that should be addressed.

Appellant disputes CDTFA's rejection of the taxable sales recorded in the test period. As noted previously, CDTFA has not provided copies of those Z-tapes or even a schedule of the tapes, with an explanation of why each rejected Z-tape was found deficient. Instead, CDTFA stated that the taxable percentages shown on most of the tapes during the test period were not in line with the site test. CDTFA concluded that, for those days with a lower taxable percentage, the amounts rung on the cash register included sales for resale in the total sales.[10] CDTFA has provided no evidence to support that conclusion.

We note that the taxable percentage that CDTFA computed for the March 30, 2016 site test, or observation test, was identical to the taxable percentage computed from the Z-tape for that day. As described in CDTFA's Audit Manual, section 0810.30, "A site test is the physical observation and recording of the activity of the business for a specified period of time." Here, the evidence shows that CDTFA observed the sales for that day and reviewed the Z-tapes for the same day. CDTFA's Audit Manual, section 0810.30 also provides that a one-day observation may be used "to verify the reliability of records provided by the taxpayer during the audit."[11] Thus, we find the results of the March 30, 2016 observation test are persuasive evidence that appellant was correctly and accurately recording taxable and nontaxable sales. Yet, CDTFA concluded otherwise without an adequate explanation. CDTFA has not provided evidence to show that, for the immediately following test period, the accuracy of appellant's cash register Z-tapes diminished or that the data on the cash register Z-tapes should otherwise be disregarded. Also, the variances in the taxable percentage recorded on the Z-tapes during the test period are consistent with appellant's business (i.e., a restaurant that sells sushi to-go or for dine-in, but with few seats, and operates during the lunch period in San Francisco's Financial District; and a restaurant with taxable sales of hot soup during the colder months).

[10] Generally, sales-for-resale would be a non-taxable transaction for appellant. Thus, if sales for resale were included it would lower the taxable percentage for that day.

[11] CDTFA's Audit Manual "is an advisory publication providing direction to [CDTFA] staff administering the Sales and Use Tax Law and Regulations." (CDTFA Audit Manual, p. 1.) OTA is not required to follow CDTFA's Audit Manual; however, OTA may look to it for guidance, such as when evaluating the reasonableness of CDTFA's determination. (*Appeal of Micelle Laboratories, Inc*., 2020-OTA-290P.)

> Furthermore, CDTFA's decision ordered audit staff to:
>
> expand its observation test to three full days in accordance with Audit Manual section 0810.30 to determine the taxable sales rate and to adjust the taxable measure accordingly. However, if [appellant] fails to allow [CDTFA] to expand its observation test, then we conclude that no adjustments to the measure of unreported taxable sales (audit item 1) are warranted.

While the previous observation tests from the prior audit were performed within the current audit period, it appears from that language that CDTFA's decision intended CDTFA audit staff to conduct another observation test, prospectively. Instead, CDTFA elected to utilize the observation tests from the prior revised AWPs that supported its present position. CDTFA also noted that appellant was doing a better job recording sales, the cash register was reprogramed, and CDTFA accepted appellant's total sales based on the improved record keeping, whereas it had not accepted appellant's total sales in the prior audit. Nonetheless, CDTFA elected not to perform another observation test and has not provided other reliable evidence to reject the Z-tapes for the test period. Accordingly, we find that appellant met his burden in establishing that an adjustment is warranted to the taxable sales ratio. Therefore, the taxable sales percentages derived from the cash register Z-tapes during the test period shall be utilized in the computation of the audited taxable percentage.

However, for the early portion of the audit period, CDTFA has provided evidence that the taxable percentage for sales at the restaurant was higher.[12] Before discussing that higher percentage further, we address an assertion by appellant. Appellant stated that, during the observation test on January 24, 2013, the auditor observed customers who ordered food to go and then ate at the tables outside the restaurant. Appellant asserts that the auditor told him those sales would be regarded as taxable.

In response, CDTFA provided a copy of the prior AWPs and prior revised AWPs. The comments in the workpapers specifically state, "the audited taxable percentage included only customers dining inside the restaurant and sales of hot food to go." We find that the AWPs are evidence that CDTFA did not regard sales as taxable when the customer stated the purchase was "to go" and then ate at tables outside the restaurant. This evidence supports the conclusion that the January 24, 2013 site test was conducted within the parameters of CDTFA's Audit Manual. (Audit Manual, § 0810.30) We, therefore, find based on the available evidence, that the

[12] For example, see Factual Finding 2.

percentages calculated in the observation test on January 24, 2013, are entitled to some weight regarding the appellant's sales in the early portion of this audit period.

In the reaudit, however, CDTFA used the taxable percentages from the revised prior AWPs which were purportedly established from site tests on June 28, 2013, and July 1, 2013. While R&TC section 6481 permits CDTFA to determine the amount of tax required to be paid on the basis of any information which is in its possession or may come into its possession, that does not mean all of the evidence that CDTFA submits is entitled to the same weight. The panel may use the California rules of evidence when evaluating the weight to give evidence presented in a proceeding before OTA. (Cal. Code. Regs., tit. 18, § 30214(f)(4).) Here, it is undisputed that the appellant was never provided a copy of the Z-tapes or schedules for those dates. Also, CDTFA confirmed that it no longer possesses the Z-tapes or schedules for those dates. Other than the taxable percentages, the Z-tapes or schedules for those dates are not in the record; therefore, we cannot review the details. Also, the taxable percentages discussed in the prior audit have a wide variance and there was limited analysis provided for rejecting the Z-tapes appellant provided in the prior audit (e.g., all Z-tapes that were not in line with the site tests results, or which showed taxable sales percentages below 50 percent, were removed or were disregarded based on a discussion with the prior audit supervisor).[13] This might have had the effect of inflating the taxable sales percentage in the prior audit. For these reasons, we question the reliability of the two unsupported percentages from the site tests on June 28, 2013, and July 1, 2013, as incorporated in this audit. Based on the foregoing, we find that the taxable sales percentages that were purportedly established from the site tests on June 28, 2013, and July 1, 2013, are unsupported by documentary or other evidence. Accordingly, we find that the taxable percentages for June 28, 2013, and July 1, 2013, are entitled to little weight. Furthermore, we previously determined appellant's records for the test period were reliable. As such, we decline to incorporate the June 28, 2013, and July 1, 2013, percentages in this audit.

For some reason not readily apparent in the record, the available evidence indicates that the taxable percentage decreased. The percentages computed during the site tests in 2013 were between 66-70 percent. The prior AWPs concluded that the percentage was 59 percent; and the revised prior AWPs concluded that the percentage

[13] See Factual Finding 2(a) and 2(b).

computed for the March 30, 2016 observation test was 49 percent. Under these circumstances, it is necessary to establish a taxable percentage that recognizes the higher percentage for the early portion of the audit period. Based on the record, it is nearly impossible to determine when the percentage changed and to bifurcate the audit period into portions where the percentages were higher or lower.

In the absence of a readily identifiable date when the taxable sales percentage for the business decreased, or an event such as a remodel or menu change, we find that the audited taxable percentage should be computed using the observed percentage of 69.86 from January 24, 2013, and the percentages shown on appellant's schedule, which includes the March 30, 2016 observation test, and the Z-tapes for the period April 1, 2016, through April 15, 2016. On its schedule, appellant shows a total of 540 percent for the 14 days of operation; we calculate 538.02 percent.[14] We calculate a taxable percentage of 40.52 percent.[15] We note that this taxable percentage is consistent with the 40 percent taxable sales rate that appellant asserted according to CDTFA's decision. We, therefore, find that audited taxable sales should be computed by applying 40.52 percent to the audited amount of sales in the restaurant (total sales, net of sales for resale and sales tax).

Since appellant has paid $16,187.41 against the NOD, our finding will result in a refund.[16]

[14] [(49.25 percent + 31 percent + 50.76 percent + 37 percent + 29 percent + 29 percent + 38 percent + 43.76 percent + 48.30 percent + 33 percent + 38 percent + 37 percent + 38 percent + 36 percent) = 538.02]

[15] (69.86 + 538.02) = 607.68; 607.68 ÷ 15 = 40.52.

[16] The claim for refund is not in the record. However, CDTFA's October 29, 2019 decision states that appellant made payments of $10,375.09 on September 7, 2017, and $5,812.32 on March 6, 2018. Those amounts paid the original NOD (tax and interest) in full. The decision states that appellant filed a claim for refund in the amount of one dollar or other such amounts as may be established on December 20, 2017. The claim for refund is deemed timely as to all subsequent payments applied to the determination. (R&TC, § 6092.6) Neither CDTFA's October 29, 2019 decision nor its November 20, 2020 supplemental decision (SD) specifically states, "the claim for refund is denied." However, the SD heading refers to the case IDs for both the petition and the claim for refund, and the SD states that the "appeals" are denied.

If we find that adjustments are warranted to the liability, such that appellant has overpaid, the claim for refund must be addressed. Therefore, we find that both matters are before us.

HOLDINGS

Appellant has shown that adjustments are warranted to the audited understatement of reported taxable sales. As such, audited taxable sales shall be computed by applying 40.52 percent to the audited amount of restaurant sales (total sales, net of sales for resale and sales tax). After the liability has been adjusted, any resulting overpayment of tax shall be refunded to appellant.

DISPOSITION

Reduce the audited amount of underpayment, computing taxable sales using a taxable percentage of 40.52 percent. Refund any overpayment of tax. Otherwise, deny the petition and claim for refund.

DocuSigned by:
Josh Aldrich
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Josh Aldrich
Administrative Law Judge

We concur:

DocuSigned by:
3CADA62FB4864CB...
Andrew J. Kwee
Administrative Law Judge

DocuSigned by:
Michael F. Geary
1A9B52EF88AC4C7...
Michael F. Geary
Administrative Law Judge

Date Issued: 6/28/2022