OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 21108836
	) CDTFA Case ID: 1-945-659
W. GUTIERREZ[1]	)
dba Sport Motors Auto Sales	)
	)
	)

OPINION

Representing the Parties:

For Appellant:	W. Gutierrez
For Respondent:	Jason Parker, Chief of Headquarters Ops.
For Office of Tax Appeals:	Deborah Cumins, Business Taxes Specialist III

A. KWEE, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, W. Gutierrez dba Sport Motors Auto Sales (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA).[2] CDTFA's decision denied appellant's petition for redetermination of a Notice of Determination (NOD) dated January 21, 2020. The NOD is for tax of $106,168.00, plus applicable interest, and a negligence penalty of $10,616.78, for the period October 1, 2014, through September 30, 2017[3] (liability period).[4]

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

---

[1] Appellant's surname appears as "Gutierrez Gomez" on the Notice of Determination. However, on the Request for Appeal, appellant indicates his surname is "Gutierrez."

[2] 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.

[3] The NOD was timely issued because appellant signed a series of waivers of the otherwise applicable statute of limitations, which extended the period for issuing an NOD until January 31, 2020. (R&TC, §§ 6487(a), 6488.)

[4] Appellant did not dispute imposition of the negligence penalty in its appeal to OTA or CDTFA.

ISSUES

1. Whether appellant established a basis to reduce the measure of unreported taxable sales.
2. Whether appellant established a basis to reduce the measure of unreported district taxes.

FACTUAL FINDINGS

1. Appellant operates a used car dealership and vehicle repair shop in Pleasant Hill, California. Appellant has been in business since August 2014. During the liability period appellant sold, for the most part, salvage title vehicles. Appellant also performed vehicle repair work.
2. CDTFA audited appellant for the period October 1, 2014, through September 30, 2017. For the liability period, appellant reported total sales of $607,400, claiming deductions of $2,700 for nontaxable labor, $1,251 for sales tax included, and a self-help deduction of $46,051 for non-deductible business expenses, resulting in reported taxable sales of $557,398.[5]
3. Upon audit, appellant provided his federal income tax returns (FITRs) for 2014, 2015 and 2016; sales journals for the audit period; and dealer jackets for some sales made during the audit period.[6] Appellant reported to the auditor that he was unable to provide additional records because: (1) his former landlord discarded his business records;[7] and (2) the California Department of Motor Vehicles (DMV) informed appellant that if he asked DMV to research whether his customers paid use tax to DMV on used cars that he sold, DMV may be required to revoke his dealer's license and impose a penalty.

[5] We refer to this item as a self-help deduction because the expenses are not listed as an allowable deduction on the sales and use tax return. The expenses included items such as internet access, towing fees, permit fees, subscriptions, commissions, cell phones, and storage. On appeal, appellant does not dispute that these items are non-deductible expenses. (See R&TC, § 6012(a)(2).)

[6] Dealer jackets are envelopes utilized by used car dealers to record sales. Dealer jackets usually contain the purchase and sales documents, purchase invoices (e.g., for repair parts or upgrades), an odometer statement, the vehicle identification number, the vehicle stock number, and other records pertaining to the sale.

[7] CDTFA's records quoted appellant as reporting "the property landlord threw away" his records. CDTFA later summarized appellant's position as: "the records were being held by the landlord at the old [business] location." Although the difference is immaterial, we assume the quote to be appellant's position (i.e., they were discarded)

4. Appellant reported $809,880 in gross receipts on his FITRs for 2015 and 2016,[8] and reported $401,840 in total sales to CDTFA on his sales and use tax returns (SUTRs) for the same period.[9] Appellant did not claim any bad debt deductions on his FITRs for 2014, 2015 or 2016.[10]
5. CDTFA independently obtained information regarding sales that appellant reported to DMV on REG 51, Report of Sale – Used Vehicle, forms (DMV ROS data).[11] CDTFA also obtained purchase records directly from appellant's suppliers (auction house data).[12]
6. Based on the above data, CDTFA computed: (1) unreported taxable sales of $963,357 based on sales reported to DMV per the DMV ROS data, and sales recorded in appellant's records but not reported to DMV; (2) $252,500 in unreported taxable sales of vehicles which appellant did not report to DMV, based on the auction house data,[13] and (3) $193,970 in unreported district taxes based on reported taxable sales for the third quarter 2016 (3Q16) through 2Q17.
7. For the first item noted above, unreported sales based on DMV ROS data and appellant's records, CDTFA scheduled the sales listed in the DMV ROS data. CDTFA established the selling price of each vehicle using the Vehicle License Fee (VLF) code listed in the DMV ROS data.[14] Then, CDTFA compared the vehicle identification numbers (VIN numbers) in the DMV ROS data with the VIN numbers recorded in the sales journals and

[8] On his FITRs, appellant reported gross receipts of $505,125 for 2015 and $304,755 for 2016.

[9] Appellant reported to CDTFA total sales of $224,400 for 2015 and $177,440 for 2016.

[10] The start of the audit period was October 1, 2014; however, the 2014 FITR included the period starting August 1, 2014 (when appellant started his business). As such, we do not mention the discrepancy between FITR reported gross receipts and SUTR reported total sales for 2014.

[11] CDTFA did not obtain original copies of the DMV ROS forms submitted to DMV; instead, CDTFA obtained an electronic summary of all the pertinent data for the vehicle sales appellant reported to DMV, which contained pertinent information from the DMV ROS forms.

[12] During the liability period, appellant purchased vehicles from the following auction houses: Copart, IAA, and Manheim.

[13] Absent evidence that the vehicles were still being held in inventory for resale or evidence of an exemption from tax, CDTFA assumed that vehicles appellant purchased from the auction houses were resold at retail.

[14] The sales information obtained from DMV included the vehicle identification number, license plate number, year and make of the vehicle, vehicle registration date, and a two-letter VLF code designating a range of selling prices in $200 increments. CDTFA used the VLF code to assign the lowest estimated selling price; therefore, CDTFA's estimated selling price was usually within $200 of the actual selling price.

dealer jackets, and found that there were many VIN numbers listed in appellant's sales journals and dealer jackets that were not reported to DMV. CDTFA added these vehicles to the schedule of vehicle sales, using the selling prices listed in appellant's records. In total, CDTFA scheduled vehicle sales from the DMV ROS data and appellant's records totaling $1,520,755. CDTFA deducted reported taxable sales to establish an understatement of $963,357.

8. For the second item, unreported sales based on the auction house data, CDTFA compared the VIN numbers listed in the auction house data to the VIN numbers in the DMV ROS data and appellant's sales journals and dealer jackets. CDTFA found additional unreported vehicle sales in the auction house data. CDTFA computed a cost of $252,500 for these additional vehicle sales, which it determined was the measure of tax for the additional unreported vehicle sales.

9. For the third item, unreported district taxes, appellant reported district taxes during the period 3Q14 through 2Q16 and allocated 100 percent of those transactions to Contra Costa County. For the remainder of the audit period, appellant reported taxable sales of $193,970, but did not report any district taxes. CDTFA allocated all the sales to Contra Costa County and computed $193,970 for unreported district taxes.

10. CDTFA issued the NOD to appellant on January 21, 2020, which appellant timely petitioned. On September 13, 2021, CDTFA issued a Decision denying the petition. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellant has shown that any reduction to the unreported taxable sales 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.) It is the retailer's responsibility to maintain complete and accurate records 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, 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.) 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.*)

As a preliminary matter, we note that appellant reported a total of $809,880 in gross receipts on his FITRs for 2015 and 2016, but only reported $401,840 in total sales to CDTFA on his SUTRs for that same period. This unexplained discrepancy is evidence that appellant underreported his total sales to CDTFA. We find that the sales recorded in appellant's sales journals and dealer jackets are evidence of appellant's sales, and thus, we find it was appropriate for CDTFA to use these sources to compile appellant's audited taxable sales. We also find that CDTFA's use of auction house data, and sales reported to DMV per DMV ROS data, are both standard and generally accepted audit procedures for used car dealerships, and thus, we find it was reasonable for CDTFA to use these two sources to compile additional taxable sales. (See *Riley B's, Inc. v. State Bd. of Equalization* (1976) 61 Cal.App.3d 610, 612-613.) For the vehicles listed in the DMV ROS data, we find that it was reasonable for CDTFA to establish the selling prices of those vehicles using the VLF information that was in the DMV data, which used the lowest possible sale price based on the VLF. For the vehicles listed in the auction house data, we find it was reasonable to assume, at a minimum, that the measure of tax is at least what appellant paid for the vehicles. Thus, we find that CDTFA has met its initial burden to show that its determination was reasonable and rational. As such, appellant has the burden of establishing error in the NOD.

Appellant contends that he was not working at the car dealer lot full time and should not be responsible for sales made when he was not the person in charge. This argument is not persuasive. Appellant was a sole proprietor, and the seller's permit was held in appellant's name. There is no requirement in the Sales and Use Tax Law that a sole proprietor must personally supervise every sale to be considered the retailer for tax purposes. (R&TC, §§ 6014, 6015.) Appellant provided no evidence to indicate that sales were made by any other person. To

the contrary, appellant filed FITRs reporting the business income as income from a sole proprietorship. In addition, the unreported sales at issue consist entirely of the following: sales that appellant reported to DMV but not to CDTFA; sales that appellant recorded on its own books and records and failed to report to CDTFA; and the cost of vehicles that appellant purchased from local auto actions. Although appellant might have hired employees to work at and manage his lot, the fact that an employee made the sale instead of appellant has no bearing on appellant's sales tax liability for vehicle sales made at his dealership.

Appellant also contends that some of the vehicles he purchased from auction houses would have been unsaleable and were sent to the junk yard. Appellant has provided no documentation to support his contention. In addition, a review of the FITR data indicates that appellant claimed no bad debts on its 2014, 2015, or 2016 FITRs, which would be a requirement to claim a bad debt deduction for sales taxes. (R&TC, § 6055.) Therefore, there is no basis to grant an adjustment on this basis.

Finally, appellant contends that his customers agreed to pay tax directly to DMV on some of the vehicles in question. Appellant failed to provide evidence that a single customer paid tax directly to DMV; instead, appellant contends that DMV informed him DMV may revoke his license if he asked DMV to research whether his customers paid the tax to DMV. The Sales and Use Tax Law imposes liability for sales tax on the *retailer*, and not the purchaser, of tangible personal property. (R&TC, §§ 6051, 6091.) This is true regardless of whether the retailer collects reimbursement for the sales tax from its customer. (See Civ. Code, § 1656.1(a); Cal. Code Regs., tit. 18, § 1700(a).) Furthermore, taxpayers are charged with knowledge of the law, and ignorance of the law is no defense for failure to comply with statutory requirements. (See, e.g., *Appeal of GEF Operating, Inc.,* 2020-OTA-057P; *MacFarlane v. Dept. of Alcoholic Beverage Control* (1958) 51 Cal.2d 84, 90.) Thus, appellant cannot avoid liability for sales tax by shifting his liability to his customers. While the law recognizes a retailer's ability to shift the financial burden of the sales tax to its customers in the form of sales tax reimbursement properly collected, the retailer cannot, by agreement with its customers, shift his *liability* for such tax to them. (Civ. Code, § 1656.1; *Pacific Coast Engineering Co. v. State of Cal.* (1952) 111 Cal.App.2d 31, 34.) Therefore, we find that appellant is liable for sales tax on his sales of vehicles, regardless of whether any customers agreed to pay the tax directly to DMV. However, appellant would be relieved of his liability for the tax if a customer did pay the tax to DMV. In

the case at hand, appellant has not shown that any of his customers paid tax directly to DMV on any of his sales. Therefore, we reject this contention.

For the reasons stated above, appellant failed to prove facts from which a more accurate determination can be made, and on that basis, no reduction is warranted to the measure of unreported taxable sales.

Issue 2: Whether appellant has shown that a reduction is warranted to the measure of tax for unreported district taxes.

California imposes a statewide combined state, local, and county tax rate, which consists of the Sales and Use Tax (R&TC, §§ 6051 et seq., 6201 et seq.) and the Bradley-Burns Uniform Local Sales and Use Tax (R&TC, §§ 7200-7212). In 1969, the legislature enacted the Transactions and Use Tax Law (R&TC, §§ 7251 et seq.), which, subject to certain requirements, allows local jurisdictions to impose a district tax at rates ranging generally from 0.125 to 2 percent of taxable transactions occurring within the jurisdiction. (R&TC, §§ 7251.1, 7261(a), 7262; Cal. Code. Regs., tit. 18, § 1827(a).) A retailer engaged in business in a jurisdiction imposing the district tax is required to collect the tax. (*Ibid*.) As relevant here, if a vehicle is registered in any district imposing the tax, the retailer is considered as engaged in business in that district and is required to collect and remit the applicable district tax. (Cal. Code Regs., tit. 18, § 1823.5(a).)

Appellant's business was in a county imposing a district tax. Appellant reported district taxes in each quarterly period from October 1, 2014, through June 30, 2016, but did not report any district taxes for the period July 1, 2016, through September 30, 2017. Although vehicles are subject to district tax based on the jurisdiction of registration, in this case appellant also operated a repair shop, and not all of the vehicle sales were reported to DMV. Furthermore, for the vehicles which were registered, CDTFA used the location of registration to determine the applicable district taxes. For vehicle sales determined using the auction house data, CDTFA allocated the place of sale based on the top five districts that appellant reported according to the DMV ROS data. For the remaining measure, $193,970, we find it was reasonable for CDTFA to conclude that appellant owed Contra Costa County district taxes for the period October 1, 2014, through June 30, 2016, because appellant's business was located in that county and appellant allocated 100 percent of its sales to that county in all prior reporting periods.

Appellant disputes imposition of the district tax but provided no specific arguments on appeal of its dispute. In addition, appellant provided no documentation to show that the transactions occurred in any other local jurisdiction. As such, appellant failed to establish a basis for an adjustment to the liability as determined.

HOLDINGS

1. Appellant has not shown that any reduction is warranted to the measure of unreported taxable sales.
2. Appellant has not shown that any reduction is warranted to the measures of tax for unreported district taxes.

DISPOSITION

Sustain CDTFA's decision to deny the petition.

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

We concur:

DocuSigned by:
Josh Aldrich
48745BB806914B4...
Josh Aldrich
Administrative Law Judge

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

Date Issued: 6/27/2022