OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 19125548
	) CDTFA Case ID 198-004
LAI LUCKY, INC.	)
dba Seafood Cove Chinese Restaurant	)
	)
	)

OPINION

Representing the Parties:

For Appellant:	Marc Brandeis, CPA I. Lai-Boror, Manager
For Respondent:	Nalan Samarawickrema, Hearing Representative Chad Bacchus, Tax Counsel IV Jason Parker, Chief of Headquarters Ops.
For Office of Tax Appeals:	Deborah Cumins, Business Taxes Specialist III

S. BROWN, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Lai Lucky, Inc. dba Seafood Cove Chinese Restaurant (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)[1] in response to appellant's petition for redetermination of a Notice of Determination (NOD) dated April 12, 2016. The NOD was for tax of $122,989.14, plus applicable interest, for the period July 1, 2011, through June 30, 2014 (liability period).[2] On April 13, 2017, CDTFA issued a notice of increase, pursuant to R&TC section 6563, increasing the tax from $122,989.14 to $187,002.23. In its subsequent Decision dated May 8, 2019, CDTFA recommended a reaudit, which reduced the tax from $187,002.23 to $149,290.00, and otherwise denied the remainder of the petition.

[1] Sales and use taxes were formerly administered by the 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" refers to the board.

[2] The NOD was timely issued because appellant signed a series of waivers of the otherwise applicable three-year statute of limitations, which allowed CDTFA until April 30, 2016, to issue a determination for the period July 1, 2011, through December 31, 2012. (R&TC, §§ 6487(a), 6488.) In March 2016, appellant declined to sign an additional waiver, and as a result CDTFA issued the NOD using an estimated understatement.

Office of Tax Appeals (OTA) Administrative Law Judges Suzanne B. Brown, Andrew Wong, and Josh Lambert held an oral hearing for this matter in Cerritos, California, on May 17, 2022. At the conclusion of the hearing, the record was closed and this matter was submitted for a written opinion.

ISSUES

1. Whether further adjustments are warranted to the audited understatement of reported taxable sales for the liability period?
2. What remedy, if any, is warranted for CDTFA's untimely issuance of the May 8, 2019 Appeals Bureau Decision?

FACTUAL FINDINGS

1. Appellant has operated a full-service restaurant specializing in Chinese-style cuisine in Westminster, California, since April 1, 2009. The restaurant serves dim sum for breakfast and lunch, offers a separate menu for dinner, and serves alcoholic beverages.
2. For the liability period, appellant reported total and taxable sales of $10,302,684, claiming no deductions. According to appellant, it used its Point of Sale (POS) data to establish the amounts of reported sales.
3. For audit, appellant provided federal income tax returns (FITRs) for 2012 and 2013; POS data for the liability period; sales and use tax returns (SUTRs), with supporting worksheets; guest checks for February through June 2014; merchandise purchase invoices for December 2012 through November 2013, and for a four-week test period from October 18, 2014, through November 13, 2014; guest checks for the same test period; and monthly bank statements for 2013.[3]
4. In its preliminary examination, CDTFA noted no differences between gross receipts reported on FITRs and total sales reported on SUTRs. It used reported sales amounts and the costs of goods sold reported on FITRs to compute book markups[4] of 129 percent for

[3] Some of the records were provided at the beginning of the audit, while other records were provided later in the audit process.

[4] "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 markup amount ÷ cost. In this example, the markup percentage is 42.86 percent (.30 ÷ .70 = 0.42857). A "book markup" (sometimes referred to as an "achieved markup") is one that is calculated from the retailer's records.

2012 and 120 percent for 2013, for an average of 124 percent for the two-year period, which was lower than the markup of at least 160 percent that CDTFA expected, based on its experience auditing similar businesses.

5. CDTFA found only immaterial differences between the sales tax reimbursement recorded in the POS data and reported tax for the period January 1, 2013, through June 30, 2014. However, it observed that the guest checks recorded in the POS data were not numbered. CDTFA also found that appellant had not provided banquet contracts or dim sum cards (guest checks showing the dim sum plates ordered by customers). In the absence of sequentially numbered guest checks or the dim sum cards, CDTFA concluded that it was unable to verify whether the POS data was complete.

6. Due to its concerns regarding the completeness of the POS data, in conjunction with the book markups that were lower than it expected, CDTFA determined that further investigation was warranted. To establish audited sales using the credit card sales ratio method, CDTFA used the POS data for the period October 18, 2014, through November 14, 2014, which showed credit card sales totaling $168,042 and total sales (by cash, check, and credit card) of $328,376, resulting in a credit card to total sales ratio (credit card ratio) of 51.17 percent.

7. Comments in the audit workpapers state that appellant's then-representative objected to the use of the credit card sales ratio method because the test period was outside the liability period, and that as a result, CDTFA opted for a different audit method. CDTFA decided to conduct the audit using a "controlled-item method" that counted sales of ducks and lobsters, and compared those sales to the number of ducks and lobsters purchased (adjusted for spoilage and self-consumption). CDTFA also concluded, based on its review of guest checks, that appellant charged mandatory tips of 15 percent for bills to large parties (groups of 15 or more).

8. On April 12, 2016, CDTFA issued an NOD for tax of $122,989.14. Because the statute of limitations was about to expire for a portion of the liability period, CDTFA issued the NOD before the audit was complete. Thus, the NOD was based on an estimate. On April 15, 2016, appellant filed a timely petition for redetermination, petitioning the entire NOD.

9. Following issuance of the NOD, CDTFA conducted a revised audit to complete its testing. In the revised audit, CDTFA computed an error rate of 22.72 percent for recorded sales of lobsters and ducks, and then applied that error rate to reported taxable sales to compute an understatement of $2,340,771. CDTFA used the guest checks for March 2014 to compute that mandatory tips represented 0.30 percent of sales, and applied that percentage to reported taxable sales to compute unreported mandatory tips of $30,908.

10. After completion of the revised audit, CDTFA timely issued a Billing and Refund Notice dated April 13, 2017, notifying appellant of an increase in the liability from $122,989.14 to $187,002.23.

11. In 2018, CDTFA completed a subsequent audit of appellant for the period October 1, 2014, through September 30, 2017. For that audit period, appellant reported total and taxable sales of $14,723,580, while appellant's Forms 1099-K[5] showed credit card sales totaling $10,528,039 including tax and tips ($8,482,432 excluding tax and tips). CDTFA calculated an average book markup of 124.81 percent (105.65 percent for 2014, 130.91 percent for 2015, and 138.40 percent for 2016) and a credit card sales ratio averaging 61.11 percent for that audit period. On or about July 9, 2018, CDTFA issued a "No Opinion Warranted" report, wherein CDTFA did not conduct additional testing following preliminary review of appellant's records; this report did not impose any additional tax liability, and did not express an opinion regarding whether all transactions were reported correctly.

12. On November 1, 2018, CDTFA's Appeals Bureau held an appeals conference.

13. On November 6, 2018, CDTFA's Appeals Bureau requested additional information from CDTFA regarding the audit calculations, which CDTFA provided on November 7, 2018. The Appeals Bureau then had 90 days, or until February 7, 2019, to timely issue its Decision pursuant to California Code of Regulations, title 18, (Regulation) section 35065, unless it submitted a written request to the Chief Counsel of CDTFA, or his or her designee, for additional time to issue the Decision. The Appeals Bureau did not request

[5] IRS Form 1099-K is used to report a taxpayer's income received from electronic or online payment services (credit cards, debit cards, PayPal, etc.). It is authorized by the IRS for tax administration purposes.

an extension of this deadline. On May 8, 2019, the Appeals Bureau issued the Decision, which was after the 90-day period.

14. The May 8, 2019 Decision concluded the audit had not established an adequate correlation between sales and purchases of lobsters and ducks and appellant's overall sales. The Decision recommended a reaudit to establish the audited understatement of reported taxable sales using the credit card sales ratio audit method, with the audited credit card ratio of 51.17 percent.

15. In an email from appellant to CDTFA's Appeals Bureau dated June 7, 2019, appellant described its areas of disagreement with the May 8, 2019 Decision and stated that the letter was a request for reconsideration (RFR) of the Decision. In a letter dated June 24, 2019, the Appeals Bureau responded that appellant's RFR was premature, but that once the reaudit report was issued, appellant would receive a letter with information about options to file an RFR or appeal to OTA.

16. Pursuant to the May 8, 2019 Decision, CDTFA prepared a reaudit that utilized the audited credit card ratio of 51.17 percent.[6] The reaudit workpapers reflect that appellant's Forms 1099-K show a total of $7,302,999 in credit card transactions for the liability period. The reaudit also compared audited taxable sales to the costs of goods sold reported on appellant's FITRs and computed markups of 179 percent for 2012 and 162 percent for 2013. As a result of CDTFA's computation using the 51.17 percent credit card ratio, the reaudit reduced the audited understatement of reported taxable sales by $474,117, from $2,340,771 to $1,866,654. The reaudit made no adjustment to the amount of unreported mandatory tips of $30,908.[7]

17. In a letter to appellant dated November 6, 2019, CDTFA's Appeals Bureau noted the results of the reaudit and stated that appellant had the option to accept the reaudit's results, file an RFR with the Appeals Bureau within 30 days, or file an appeal with OTA.

18. On November 30, 2019, appellant filed this timely appeal with OTA.

[6] Schedule 12A-4-R2 in the reaudit workpapers shows POS data that CDTFA used to compute the credit card ratio for the four-week test period. The schedule shows two dates during the test period that had amounts over $10,000 (including tax but excluding tip) paid by cash or check: October 25, 2014, which had sales totaling $20,702 paid by cash; and November 2, 2014, which had sales totaling $10,587 paid by check.

[7] This item is not in dispute in this appeal, and as a result this Opinion does not address it further.

19. In the present appeal, CDTFA states that since the 90-day due date for issuance of the Decision under Regulation section 35065 was February 7, 2019, but the Decision was not issued until May 8, 2019, interest relief is warranted for the period February 8, 2019, through May 8, 2019, if appellant submits a request for interest relief under penalty of perjury pursuant to R&TC section 6593.5. Appellant has not submitted such a request for interest relief.

DISCUSSION

Issue 1: Whether further adjustments are warranted to the audited understatement of reported taxable sales for the liability period?

California imposes on a retailer a sales tax measured by the retailer's gross receipts from the retail sale of all tangible personal property in this state, 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 from the sales tax, sales of hot food and sales of food served for consumption at facilities provided by the retailer are subject to tax. (R&TC, § 6359(d)(2), (d)(7).)

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 that 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.*) 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 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*.)

In this case, CDTFA had concerns about the completeness of the POS data, since the recorded guest checks were not sequentially numbered, and appellant had not provided dim sum cards or banquet contracts. Also, CDTFA had computed book markups that were lower than

CDTFA expected for this business. As a result, CDTFA decided to conduct further testing using an indirect audit method.

Appellant argues that CDTFA had no reasonable basis to impeach appellant's records and to utilize an indirect audit method, and that CDTFA's expected markup of 160 percent is not based on evidence that can be empirically analyzed. In support of its position, appellant points to a different appeal, which was decided at a Board of Equalization hearing, regarding an unrelated dim sum restaurant that reportedly had a lower markup than appellant did.

Appellant's POS data did not include sequentially numbered sales orders, and appellant did not provide dim sum cards or banquet contracts. Without sequentially numbered sales, the POS data did not provide any type of control from which CDTFA could determine that all sales had been recorded. That deficiency in the records and appellant's failure to provide source documents, in conjunction with the book markups that were lower than CDTFA expected, supports CDTFA's position that further investigation was warranted. Accordingly, CDTFA had a valid basis for rejecting appellant's available records. Moreover, CDTFA may determine the amount of tax due based on any available information and is not required to accept a taxpayer's books and records as conclusive evidence of what they purport to represent, even if the books and records are in agreement with each other and with SUTRs. (R&TC, § 6481; see *Riley B's, Inc. v. State Bd. of Equalization* (1976) 61 Cal.App.3d 610, 615; *Appeal of Amaya*, 2021-OTA-328P.) Thus, CDTFA had the responsibility and authority to verify the accuracy of appellant's available records through audit tests. (*Ibid*.) Consequently, OTA finds that it was reasonable and appropriate for CDTFA to utilize an indirect audit method in this case.

Pursuant to the Decision, the reaudit used the credit card sales ratio method to establish audited sales. This method is a recognized and standard audit procedure that is effective in establishing taxable sales because it relies on the amount of credit card receipts, which is readily verifiable information. (See *Appeal of Amaya*, *supra*.) OTA finds that it was reasonable and rational for CDTFA to use the credit card sales ratio method in the reaudit. CDTFA also points to its calculation of average daily sales of approximately $11,300 during the October and November 2014 four-week test period, and argues that multiplying that amount by the number of operating days during the liability period would have increased the measure of audited taxable sales; OTA finds that this offers some additional support that the reaudit results were reasonable. Therefore, appellant has the burden of establishing that adjustments are warranted.

Appellant raises several contentions in support of its position that the liability is excessive and unwarranted. Appellant argues that, contrary to CDTFA's Audit Manual, the reaudit failed to use the results of another audit method as secondary support. Appellant points out that CDTFA's Appeals Bureau concluded that the original audit's controlled-item method was unreliable because the audit had not established an adequate correlation between sales and purchases of lobsters and ducks and appellant's overall sales.

OTA considers that these questions concerning the accuracy of the controlled-item method also render it less reliable as a secondary audit method. However, the reaudit also compared audited taxable sales to the costs of goods sold reported on appellant's FITRs and computed markups of 179 percent for 2012 and 162 percent for 2013, which are consistent with CDTFA's expected markup of at least 160 percent. OTA finds that these calculations provide some secondary support for the reaudit's findings. The limited nature of the secondary audit support is not a basis for rejecting the reaudit, but it does support closer scrutiny of the reaudit's findings.

Appellant argues that the amounts of recorded credit card sales materially reconcile with the amounts shown on appellant's Forms 1099-K, and thus contends that the accuracy of the recorded credit card sales represents evidence that its records are accurate. Preliminarily, OTA notes that appellant's Exhibit 4 reflects POS data showing recorded credit card transactions totaling $6,657,191 for the liability period, which is $645,808 less than the $7,302,999 reflected on appellant's 1099-K reports for the liability period. OTA finds it unlikely that appellant's credit card receipts would be overstated in the 1099-K reports, given that this data was reported to the IRS.

Furthermore, appellant argues that its credit card ratio was in decline during the liability period, and that, as a result, the credit card ratio of 51.17 percent computed for the test period (October 18, 2014, through November 14, 2014) is not representative of the business's operations during the liability period. In support, appellant submitted a graph of the credit card ratios computed from its records for each of the quarters from the third quarter of 2011 (3Q11) through 3Q17. For the liability period, the credit card ratios, computed from appellant's records, vary from quarter to quarter, and they range from about 55 percent (1Q14) to about 65 percent (2Q12).

The credit card ratios recorded on the graph are computed from appellant's records, which have not been verified. The purpose of an audit is to verify the accuracy of appellant's recorded and reported sales; thus, information scheduled from unverified records is of little evidentiary value in substantiating the accuracy of reported amounts. Further, the total sales used in the chart's computation of the credit card ratios total $11,095,483, which exceeds reported total sales of $10,302,684 by almost $800,000; similarly, while the chart shows credit card receipts totaling only $6,657,191, the data on appellant's Forms 1099-K reflected credit card sales totaling $7,302,999. Accordingly, these discrepancies in the total sales and in the credit card receipts render the chart less persuasive. OTA finds that appellant has not shown that the credit card ratio was declining during the liability period.

Appellant also contends that the results of the subsequent audit, which found a credit card ratio of approximately 61 percent and imposed no additional tax liability, show that appellant was reporting accurately during the liability period at issue here. CDTFA responds that appellant improved its reporting in the subsequent audit period in response to its receipt of CDTFA's January 2014 engagement letter notifying appellant that it had been selected for audit. Further, CDTFA argues that if it relies on the 60 percent credit card ratio calculated for year 2017 and applied a compound growth formula to appellant's credit card sales ratio for the years 2011, 2012, and 2013, the results would reflect lower credit card ratios for those years, which would support an even larger audited understatement for the liability period.

The subsequent audit did not involve additional testing and the "No Opinion Warranted" report did not express an opinion regarding whether all transactions were reported correctly; hence, the findings of that audit have only limited relevance to the reaudit results at issue here, and do not establish that the liability here was unwarranted. However, OTA notes that for the subsequent audit period, the Forms 1099-K showed a total of $10,528,039 in credit card sales (including tax and tips) for that period. This was a significant increase over the $7,302,999 in credit card sales for the liability period. This increase in credit card sales is consistent with an increase in sales in the subsequent audit period, rather than merely improved reporting as CDTFA contends, and undercuts CDTFA's position that the subsequent audit results would support calculating even lower credit card ratios for the years in the liability period.

Further, appellant argues that, for two of the days in the four-week test period, the percentage of cash sales to total sales is uncharacteristically high and not representative of its

business during the liability period. Appellant points to the POS data for the test period showing two dates with large amounts paid by cash or check: October 25, 2014, which included $20,702 in sales paid by cash; and November 2, 2014, which included $10,587 in sales paid by check. Appellant states that this frequency would equate to 72 similarly large transactions for the liability period, which appellant argues is excessive and not reflective of its sales.

CDTFA argues that the evidence shows that appellant regularly received large payments by cash or check from banquet customers, and thus that the two large payments during the four-week test period were representative of appellant's sales during the liability period. CDTFA states that appellant's bank statements demonstrated that appellant had large cash and check deposits in April 2013 and October 2013, and appellant's records showed similar large check payments during six quarters within the liability period (3Q11, 4Q11, 3Q12, 4Q12, 1Q13, and 2Q14).

The evidence clearly establishes that during the liability period, appellant sometimes received large cash and check payments, typically for banquets; therefore, removing both the October 25 and November 2, 2014 days from the test period's calculation would not be representative of appellant's sales. However, OTA considers that, as reflected by appellant's records and bank statements, this frequency of large cash and check payments does not appear to equal two large cash or check payments within each four-week period over the twelve quarters of the liability period. In addition, as described in the testimony of appellant's manager, I. Lai-Boror, appellant required the banquet deposits to be paid in cash, but customers could pay the balance by either cash or credit card. Accordingly, not every banquet balance was paid by large cash or check payments. Considering all of the above, OTA finds the evidence suggests that two large payments by cash or check in a four-week period may have been unusual for appellant's business.

In comparison, removing one the two days with large cash/check payments from the test period would more closely reflect the frequency of the large cash/check payments that CDTFA has identified for the liability period. Appellant has not met its burden to prove that a particularly large adjustment to the credit card ratio is warranted, and thus the evidence supports deletion of the day with the lower amount of the two payments. This deletion will increase the credit card ratio, which will result in a reduction to appellant's liability. Based on all of the

above, OTA concludes that the November 2, 2014 sales should be deleted from the test period, and the credit card ratio should be recalculated and the reaudit results adjusted accordingly.

Finally, appellant argues that CDTFA's use of the credit card sales ratio audit method was a new approach, and that appellant received insufficient time to review and refute this method prior to CDTFA's issuance of the Decision. Appellant states that it attempted to file an RFR within 30 days of the issuance of the Decision, but CDTFA rejected the RFR on the basis that it was filed prematurely. Appellant disputes CDTFA's assertion that the RFR was premature, arguing that the RFR could be filed within 30 days after the issuance of the Decision or within 30 days after the issuance of the letter from the Appeals Bureau explaining the results of the reaudit issued in accordance with the Decision.

When a Decision from the Appeals Bureau recommends a reaudit, the Appeals Bureau, upon receipt of a completed reaudit that complies with the Decision, will mail a letter to the parties explaining the results of the reaudit and the available options for appealing the Decision. (Cal. Code Regs., tit. 18, § 35065(e).)[8] OTA does not have jurisdiction to consider whether a taxpayer is entitled to a remedy for CDTFA's actual or alleged violation of any substantive or procedural right, unless the violation affects the adequacy of a notice, the validity of an action from which a timely appeal was made, or the amount at issue in the appeal. (Cal. Code Regs., tit. 18, § 30104(d).)

Here, CDTFA's Appeals Bureau mailed a letter to the parties on November 6, 2019, explaining the results of the reaudit and the available options for appealing the Decision. (See Cal. Code Regs., tit. 18, § 35065(e).) Appellant responded to the November 6, 2019 options letter by filing a timely appeal with OTA. Given these facts, there is no basis for finding that appellant had the right to file an RFR prior to issuance of the November 6, 2019 options letter, or that any alleged violation affected the adequacy of a notice, the validity of an action from which a timely appeal was made, or the amount at issue in the appeal. (See Cal. Code Regs., tit. 18,

[8] Regulation section 35065(e), which became operative March 19, 2018, states in relevant part: "The Appeals Bureau will mail a copy of its decision to each party to the appeal and, except where the decision remands the appeal for reaudit, will include a letter that explains the available options for appealing the decision. Where the Appeals Bureau decision remands the appeal for reaudit, the Appeals Bureau, upon receipt of a completed reaudit that complies with the Appeals Bureau decision, will mail a letter to the parties explaining the results of the reaudit and the available options for appealing the decision." Regulation section 35065(e) does not contain any provision for a party to appeal a Decision prior to completion of the reaudit.

§ 30104(d).) Accordingly, OTA does not have jurisdiction to determine whether an appellant is entitled to a remedy for any alleged violation on the grounds asserted.

In summary, OTA concludes that the November 2, 2014 sales should be deleted from the test period, the credit card ratio should be recalculated, and the audited understatement of reported taxable sales should be adjusted accordingly. In all other respects, appellant has not established that any further adjustments are warranted to the audited understatement of reported taxable sales for the liability period.

Issue 2: What remedy, if any, is warranted for CDTFA's untimely issuance of the May 8, 2019 Appeals Bureau Decision?

CDTFA Regulation section 35065 provides that the Appeals Bureau will issue its written decision no later than 90 days after receipt of the last submission in an appeal, except that the Appeals Bureau may submit a written request to the Chief Counsel of CDTFA, or his or her designee, for additional time to issue its decision. (Cal. Code Regs., tit. 18, § 35065(b), (c).) If such a request is granted, the Appeals Bureau will mail the Chief Counsel's approval to each party to the appeal. (Cal. Code Regs., tit. 18, § 35065(c).) OTA does not have jurisdiction to consider whether a taxpayer is entitled to a remedy for CDTFA's actual or alleged violation of any substantive or procedural right, unless the violation affects the adequacy of a notice, the validity of an action from which a timely appeal was made, or the amount at issue in the appeal. (Cal. Code Regs., tit. 18, § 30104(d).) In other words, "the only power that [OTA] has is to determine the correct amount of appellant's … tax liability for the appeal years." (*Appeals of Dauberger, et al.* (82-SBE-082) 1982 WL 11759.)

Appellant states that because the last submission to the Appeals Bureau occurred on November 7, 2018, and the Decision was not issued until May 8, 2019, the Decision was not issued within the 90-day time limit under the applicable regulations. Appellant argues that the late issuance of the Decision renders it invalid. Appellant acknowledges that this remedy is not specified in the applicable regulations, but contends that such remedy is warranted because that would have been the result if appellant had failed to timely file petition for redetermination of the NOD.

CDTFA acknowledges that the Decision was not timely issued. CDTFA states that because the last submission occurred on November 7, 2018, the 90-day deadline for issuance of the Decision was February 7, 2019. CDTFA states that since the Decision was issued on

May 8, 2019, interest relief is warranted for the period February 8, 2019, through May 8, 2019, if appellant submits the statement required by R&TC section 6593.5.

Here, the date of issuance of the Decision has no bearing on OTA's analysis of whether adjustments to the liability are warranted. The late issuance of the Decision does not affect the adequacy of the NOD, the validity of an action from which a timely appeal was made, or the amount at issue in the appeal. Consequently, OTA does not have jurisdiction regarding whether appellant is entitled to a remedy for CDTFA's actual or alleged violation of any substantive and procedural right to due process under the law, including the late issuance of the Decision. (See Cal. Code Regs., tit. 18, § 30104(d).) The applicable regulations do not provide for the remedy that appellant seeks.

CDTFA may relieve interest when a person's failure to pay tax is due in whole or in part to an unreasonable delay by an employee of CDTFA acting in his or her official capacity. (R&TC, § 6593.5(a)(1).) Any person seeking relief under this section shall file a statement under penalty of perjury setting forth the facts on which the claim for relief is based. (R&TC, § 6593.5(c).) OTA reviews CDTFA's decisions to deny interest relief on an abuse of discretion standard. (*Appeal of Micelle Laboratories, Inc.*, 2020-OTA-290P.) Here, because appellant has not requested relief of interest, and CDTFA has not denied interest relief, there is no interest relief issue for OTA to decide.

HOLDINGS

1. Adjustments are warranted only to the extent that the November 2, 2014 sales should be deleted from the test period, and the credit card ratio should be recalculated and the audited understatement of reported taxable sales should be recalculated accordingly. Otherwise, no further adjustments are warranted.
2. There is no remedy for OTA to order regarding CDTFA's untimely issuance of the May 8, 2019 Appeals Bureau Decision.

DISPOSITION

Delete the November 2, 2014 sales from the test period, recalculate the credit card ratio, and adjust the audited understatement of reported taxable sales accordingly. Otherwise, sustain CDTFA's Decision.

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Suzanne B. Brown
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Suzanne B. Brown
Administrative Law Judge

We concur:

DocuSigned by:
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Andrew Wong
Administrative Law Judge

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Josh Lambert
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Josh Lambert
Administrative Law Judge

Date Issued: 8/18/2022