OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **BODY WISE INTERNATIONAL, LLC**	OTA Case No. 19125567 CDTFA Case IDs: 552589, 847439, 841167

OPINION

Representing the Parties:

For Appellant:	Jesse McClellan, Attorney Lucian Khan, Attorney
For Respondent:	Joseph Boniwell, Tax Counsel III Scott Claremon, Tax Counsel IV Jason Parker, Chief of Headquarters Ops.
For Office of Tax Appeals:	Steven Kim, Tax Counsel

A. Kwee, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) sections 6561 and 6901, Body Wise International, LLC (appellant) appeals decisions issued by respondent California Department of Tax and Fee Administration (CDTFA)[1] in response to a timely petition, an untimely petition accepted as an administrative (late) protest,[2] and a claim for refund related to the late protest, filed by appellant.

In the first case, CDTFA Case ID 552589, appellant timely filed a petition for redetermination of a Notice of Determination (NOD) dated October 7, 2010 (first NOD). The first NOD is for tax or excess tax reimbursement (collectively excess tax reimbursement)[3] of

[1] Sales 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. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to acts or events that occurred before July 1, 2017, "CDTFA" shall refer to the board.

[2] Under regulations promulgated by CDTFA and applicable at the time the second petition was filed, if a taxpayer files a petition for redetermination after the 30-day time period specified in R&TC section 6561, CDTFA may accept it as an administrative (late) protest. (Cal. Code Regs, tit. 18, § 5220.)

[3] During a prehearing conference, appellant confirmed that it concedes the California sales tax liability and only disputes the excess tax reimbursement liability.

$2,362,207.01, applicable interest, and a negligence penalty of $236,220.74, for the period April 1, 2005, through December 31, 2009. CDTFA's decision, as amended by a supplemental decision, deleted the negligence penalty, reduced the excess tax reimbursement, and otherwise denied the appeal. By letter dated November 30, 2021, CDTFA clarified that the remaining amount asserted by CDTFA for the first case is $100,672 in excess tax reimbursement, plus applicable interest.[4]

In the second case, CDTFA case ID 841167, appellant filed an untimely petition for redetermination of a second NOD dated July 7, 2014 (second NOD). The second NOD is for excess tax reimbursement of $141,733.73, plus applicable interest, for the period April 1, 2010, through June 30, 2013. CDTFA accepted appellant's appeal as a late protest.

In connection with the third case, CDTFA case ID 847439, appellant remitted $104,759.83 towards the second NOD over a period of eight months. Appellant filed timely protective claims for refund totaling $104,759.83. CDTFA consolidated the second and third case. CDTFA issued a decision on the consolidated matters for the second and third case which reduced the excess tax reimbursement liability to $104,759.83, the amount paid by appellant, and otherwise denied the appeal and refund claim.[5]

Office of Tax Appeals Administrative Law Judges Andrew J. Kwee, Josh Lambert, and Keith T. Long held an oral hearing for this matter in Sacramento, California, on June 22, 2022. At the conclusion of the hearing the record was closed, and this matter was submitted for decision.

ISSUES[6]

1. Whether the "Tax Amount" that appellant collected from out-of-state customers on California exempt or nontaxable transactions must be remitted to CDTFA.

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[4] During the oral hearing, CDTFA asserted that appellant conceded to CDTFA that it is liable for $40,917 in sales tax, representing sales tax on California intrastate sales. Appellant agrees that it is only disputing amounts allocable to non-intrastate sales; however, appellant did not provide a specific concession amount. As such, wenote that sales tax on intrastate sales is not at issue, but we do not list a concession amount.

[5] CDTFA had initially asserted a finality penalty pursuant to R&TC section 6565, for failure to timely pay the NOD; however, it is no longer asserting this penalty.

[6] This issue statement makes no finding as to the applicability of tax in any other jurisdiction, such as whether tax must be remitted to any other jurisdiction (for products shipped outside California). The application of tax to in-state shipments is not at issue in this appeal.

2. Does OTA have jurisdiction to determine whether CDTFA improperly granted appellant a credit for taxes paid to other states.
3. If it is determined that OTA has jurisdiction, did CDTFA improperly grant appellant a credit for taxes paid to other states.

FACTUAL FINDINGS

1. During the two periods at issue in this appeal; April 1, 2005, through December 31, 2009, and April 1, 2010, through June 30, 2013 (collectively, the liability period), and continuing to this day, appellant operated as a retailer of weight loss and nutritional products.
2. During the liability period, appellant was registered to collect tax in approximately 35 states, including California. Appellant has held a California seller's permit since prior to the start of the liability period.
3. Appellant accepts customer orders through its California call center and on its website. Appellant also uses independent selling agents or representatives based in taxing jurisdictions other than California.
4. Appellant shipped the property at issue to the end-use consumer from a warehouse operated by appellant and located in California.[7] None of the disputed transactions involve a drop shipment.[8] In other words, appellant was the retailer for all these transactions.
5. Appellant utilized Vertex tax software for sales and use tax compliance purposes. Appellant's tax software was mistakenly programed to charge a "Tax Amount" on all sales including, as relevant here, sales to customers located in states where appellant was not registered to charge or collect a sales or use tax.

[7] The parties do not agree on whether appellant maintains an out-of-state warehouse. Appellant did not provide evidence of an out-of-state warehouse. This Opinion declines to make a finding on the matter because all the transactions examined were shipped from appellant's California warehouse.

[8] We use the term drop shipment to refer to a transaction where a seller accepts an order from a consumer, and then purchases the property from a third party (e.g., the manufacturer) for resale to the consumer, and who directs the third party to ship the tangible personal property directly to the consumer. (See, e.g., Cal. Code. Regs., tit. 18, § 1706(a)(1), (b).)

6. Appellant's Vertex tax software provided a detailed price breakdown to appellant, which lists the jurisdiction for which sales or use tax is collected, a tax rate, and the amount of sales or use tax collected.
7. Appellant provided a sales invoice to each customer. Appellant's invoice listed a ship "from" address, which was the location of appellant's California warehouse. The "ship to" address is the customer's address. The invoice also includes a line for the "Tax Amount," followed by a dollar amount. Appellant did not provide any further breakdown of the price, or the "Tax Amount," on the invoices to its customers.
8. Neither the invoice, nor any other document provided to the customer, included a provision which specifically addressed the time when title to the goods passed from appellant to the customer. Appellant shipped the property via common carrier from its California warehouse directly to the consumer. Appellant did not maintain or provide to CDTFA a resale certificate, or any other documentation to suggest the sale was other than at retail, for any of the transactions at issue.
9. Upon audit, CDTFA determined that all amounts which appellant charged and collected as a "Tax Amount" must be remitted to this state or refunded to the customer. As an exception, CDTFA provided appellant a credit for any "Tax Amount" which appellant remitted to a taxing jurisdiction other than California.[9] As such, CDTFA is not asserting a liability against appellant for charging a "Tax Amount" on shipments to customers located in taxing jurisdictions where appellant is registered to collect tax and remitted that collected "Tax Amount" to the other taxing jurisdiction.
10. CDTFA provided appellant an opportunity to refund the excess unremitted "Tax Amount" collected to the customers who paid the amounts. Appellant contacted its customers and refunded a portion of the "Tax Amount" to its customers.
11. The remaining liability involves amounts appellant collected as a "Tax Amount" from consumers located in states where appellant was not registered to collect sales or use tax,

[9] We use the term "taxing jurisdiction" here instead of "state" because appellant was registered in Canada and collected a Canadian good and services (GST) tax. CDTFA is no longer asserting a liability for the $9,660,156 in sales shipped to Canada, a large portion of the liability in the first NOD, because appellant established that it remitted the GST to Canada. CDTFA did not assert a liability for any sales to Canada in the second NOD, based on our review of CDTFA's Audit Schedules 12D and 12D-1, which include a detailed breakdown of the asserted excess tax collected by jurisdiction. Appellant is disputing the credit on the Canada sales (see issues 2 and 3).

which appellant did not refund to the customer who paid the charge, and which appellant did not report as a sales or use tax or otherwise remit to any other taxing jurisdiction.

12. CDTFA determined that any "Tax Amount" collected from a customer, and not remitted to a taxing jurisdiction or refunded to the customer, constitutes excess sales tax reimbursement within the meaning of California Code of Regulations, title 18, section (Regulation) 1700 and R&TC section 6901.5, and must be remitted to this state.
13. CDTFA issued the first NOD to appellant on October 7, 2010, and the second NOD on July 7, 2014. Appellant timely appealed the first NOD, untimely appealed the second NOD, and thereafter paid the tax on the second NOD. Appellant filed a timely claim for refund with respect to payments made on the second NOD.
14. CDTFA denied, in pertinent part, appellant's timely petition and late protest, and denied the claim for refund in its entirety.
15. This timely appeal to OTA followed.
16. OTA held three prehearing conferences with the parties.
17. During the first two conferences, and as memorialized in Minutes and Orders sent to the parties following each of the conferences, the parties stipulated that the following facts are agreed and not disputed:
    a. The disputed transactions involve sales of property shipped from a point within this state to a point outside this state, and which are exempt or excluded from California sales tax. To the extent there are intrastate sales, or taxable California sales, the treatment of those transactions is not at issue.
    b. A portion of the disputed amount might involve intrastate California sales, for which appellant does not dispute California sales tax applies. As such, if appellant prevails on this appeal, the exact amount to be refunded or redetermined is not currently known (see footnote 4).
    c. Any tax collected was itemized as a "Tax Amount" on the invoice to the customer.
    d. The customers paid the "Tax Amount" to appellant.
    e. CDTFA's audit examined and allowed a credit to appellant for taxes paid to other states.

18. During the third conference, appellant asserted that OTA must consider five items, and appellant insisted that the Opinion separately list and address each argument, because appellant contends its five arguments are essential to resolving the appeal:[10]

> 1. [ ] OTA must consider the entire statute and all the relevant facts, arguments and evidence in this appeal[.[11]]
> 2. [ ] CDTFA's Regulation 1700 must be consistent with [R&TC] section 6901.5[.]
> 3. [T]ax applies in the destination jurisdictions and [ ] the tax charged by Appellant is for the destination jurisdictions[.]
> 4. [ ]CDTFA is [not] authorized to alter the nature of the tax charged following the sale, if Appellant fails to pay the tax to the appropriate jurisdiction[.]
> 5. [ ] OTA [lacks] jurisdiction to consider CDTFA's challenge of its own Decision which forms the basis of Appellant's appeal[.]

19. During the prehearing conference, the parties were unable to agree on whether appellant maintains an out-of-state warehouse, whether the sales are taxable in the destination state, or whether appellant collected tax at the appropriate rate for the destination state. Except as summarized above, this Opinion does not specially make any findings on these items.

DISCUSSION

California imposes 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).)

When 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

[10] Appellant phrased each contention as an issue statement and started it with the word "Whether" and ended with a question mark. During the third prehearing conference, OTA explained that we would consider each item raised by appellant as an argument and address the pertinent items relevant to this appeal. As such, we rephrased the items from questions into the contentions asserted by appellant.

[11] During the third prehearing conference, OTA explained to the parties that, as with any appeal, OTA would consider the entirety of all relevant statutes and applicable laws and regulations, and all relevant facts, argument, and evidence.

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.*)

Issue 1: Whether the "Tax Amount" that appellant collected from out-of-state customers on California exempt or nontaxable transactions must be remitted to California.

A sale of tangible personal property that is required to be shipped and is shipped from a point within this state to a point outside this state by the retailer by means of common carrier is generally exempt from sales tax. (R&TC, § 6396; Cal. Code Regs., tit. 18, § 1620(a)(3)(B).) If such a sale occurs outside this state, such as when the property is shipped from within this state to a point outside this state by common carrier under terms "F.O.B. place of destination," or when it is delivered by facilities of the retailer and there is no agreement to pass title prior to delivery, the sales tax is inapplicable because sales tax only applies to sales occurring in this state. (R&TC, §§ 6006, 6051; Cal. Code. Regs., tit. 18, § 1628(b)(3)(D).) Unless explicitly agreed that title is to pass at a prior time, the sale occurs when the retailer completes its performance with respect to the physical delivery of the property. (Cal. Code. Regs., tit. 18, § 1628(b)(3)(D).)

A retailer may collect sales tax reimbursement from its customers on the sales price of tangible personal property sold at retail. (Civ. Code, § 1656.1(a).) This amount is not a sales tax imposed on the customer; instead, it is merely "reimbursement" for the sales tax imposed on the retailer. (*Ibid*.) There is no statutory requirement for the retailer to collect sales tax reimbursement from its customer, and a retailer is liable for any applicable California sales tax regardless of whether it elects to do so. (Civ. Code, § 1656.1(a); R&TC, § 6051.)

The Civil Code creates certain rebuttable presumptions regarding the collection of sales tax reimbursement and provides, in pertinent part, as follows:

> It shall be presumed that the parties agreed to the addition of sales tax reimbursement to the sales price of tangible personal property sold at retail to a purchaser if: . . . (2) Sales tax reimbursement is shown on the sales check or other proof of sale.

(Civ. Code, § 1656.1(a), (d).) The R&TC sets forth what a retailer must do when it collects sales tax reimbursement in excess of the amount, if any, of sales tax liability imposed on the retailer for the sale:

> When an amount represented by a person to a customer as constituting reimbursement for taxes due under this part[[12]] is computed upon an amount that is not taxable or is in excess of the taxable amount and is actually paid by the customer to the person, the amount so paid shall be returned by the person to the customer upon notification by [CDTFA] or by the customer that such excess has been ascertained. In the event of his or her failure or refusal to do so, the amount so paid, if knowingly or mistakenly computed by the person upon an amount that is not taxable or is in excess of the taxable amount, shall be remitted by that person to this state.

(R&TC, § 6901.5.)[13]

Regulation 1700 interprets and implements R&TC section 6901.5, and Civil Code section 1656.1, and provides as follows:

> [(a)(2)] Presumptions. Certain presumptions concerning the addition of sales tax reimbursements are created by Civil Code Section 1656.1. It shall be presumed that the parties agreed to the addition of sales tax reimbursement to the sales price of tangible personal property sold at retail to a purchaser if: . . . (B) Sales tax reimbursement is shown on the sales check or other proof of sale[.]. . . ¶
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> [(b)](1) Definition. When an amount represented by a person to a customer as constituting reimbursement for sales tax is computed upon an amount that is not taxable or is in excess of the taxable amount and is actually paid by the customer to the person, the amount so paid is excess tax reimbursement. Excess tax reimbursement is charged when reimbursement is computed on a transaction which is not subject to tax, when reimbursement is computed on an amount in excess of the amount subject to tax, when reimbursement is computed using a tax rate higher than the rate imposed by law, and when mathematical or clerical errors result in an overstatement of the reimbursement on a billing.
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> [(b)](2) Procedure Upon Ascertainment of Excess Tax Reimbursement. Whenever the board ascertains that a person has collected excess tax reimbursement, the person will be afforded an opportunity to refund the excess collections to the customers from whom they were collected. In the event of failure or refusal of the person to make such refunds, the board will make a

[12] This is a reference to part 1 of division 2 of the R&TC; part 1 is titled "Sales and Use Taxes."

[13] R&TC section 6901.5 goes on to address offsets against amounts due and payable on the same transaction. We do not discuss this language because no California sales tax liability has been asserted against appellant for the disputed out-of-state shipments and it is undisputed that California sales and use tax is inapplicable to those transactions.

> 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.

(Cal. Code. Regs., tit. 18, § 1700(a)(2), (b)(1)-(2).) In addition to promulgating Regulation section 1700, CDTFA publishes sales and use tax annotations in its Business Taxes Law Guides (BTLG). For example, BTLG annotation 460.0242 demonstrates how CDTFA interprets the provisions summarized above:

> Internet Order Form. An Internet order form invites purchasers to buy merchandise for an amount plus 'tax and shipping.' The shipping cost is set at a fixed price for sales in California, to which an additional amount is added for sales outside the state, depending on the destination ZIP code. The purchaser is given a lump-sum statement of the total amount due via e-mail or telephone call. In all cases the purchaser pays a final charge that is greater than the printed prices on the order form.
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> In the absence of a sales invoice or other documentation containing a separately stated charge for tax and shipping, the Internet order form acts as the agreement of sale. The information contained on the order form states that the purchaser will be charged tax and the purchaser is actually charged some additional amount that appears to be sales tax reimbursement. Therefore, it is presumed that both parties agreed to the addition of sales tax reimbursement. Where tax reimbursement was charged, collected and reported on exempt sales to out-of-state customers, this is excess tax reimbursement that can be refunded to the customers from whom it was collected. 1/23/02.

(BTLG annotation 460.0242 (1/23/02).)[14]

As pertinent background, the California sales tax is a privilege tax imposed on the gross receipts of California retailers for in-state sales of tangible personal property. (See R&TC, § 6051.) On the other hand, the California use tax is an excise tax imposed on the consumption of tangible personal property in this state. (See R&TC, § 6201.) A retailer with sufficient nexus to California under the commerce clause of the United States Constitution, which for purposes of California's sales and use tax law generally means the retailer is engaged in business within this state within the meaning of R&TC code section 6203, must collect the use tax from the California purchaser.[15] (See R&TC, § 6201.)

[14] Annotations do not have the force or effect of law but are entitled to some consideration and may be afforded greater weight in an appeal before OTA when they represent a longstanding interpretation by CDTFA of a statute that CDTFA is charged with interpreting. (*Appeal of Martinez Steel*, 2020-OTA-074P.)

[15] Under certain circumstances not relevant here, a marketplace facilitator is regarded as the retailer instead of a marketplace seller. (R&TC, § 6043.)

In the instant appeal, the liability being asserted is nominally titled excess *sales tax* reimbursement. Nevertheless, under the sales and use tax law, it is not necessary for a sale, purchase, or any other type of transfer for consideration to be subject to California's *sales tax* in order for the excess tax reimbursement provisions of R&TC section 6901.5 to apply. (R&TC, § 6901.5; Cal. Code. Regs., tit. 18, § 1700.) For example, the requirement to remit or refund excess sales tax reimbursement collected from a customer applies whether the person collecting the amount is registered with CDTFA to collect tax; or is an unlicensed in-state or out-of-state seller or other "person" collecting excess tax. Also, the requirements of R&TC section 6901.5 apply whether the underlying transaction is nontaxable, taxable, or exempt. (*Ibid*.)

The nature of the underlying transaction is not entirely irrelevant. The Civil Code creates a statutory presumption that the parties agreed to the addition of sales tax reimbursement to the sales price of tangible personal property sold at retail to a purchaser if sales tax reimbursement is shown on the sales check or other proof of sale. (Civ. Code, § 1656.1(a)(2); Cal. Code. Regs., tit. 18, § 1700(a)(2)(B).) In other words, if CDTFA establishes that appellant: (1) sold tangible personal property (2) at retail to the purchaser and (3) charged an amount for sales tax reimbursement on a document of sale, then this will trigger the presumption that appellant collected excess tax reimbursement.[16] (*Ibid*.) With respect to the first two elements, it is undisputed that the nutritional products are tangible personal property, and the sales were at retail.

The parties dispute whether an amount listed as "Tax Amount" on the customer's invoice is sufficient to constitute a charge for sales tax reimbursement (the third element). Appellant's primary argument on appeal is that appellant did not represent to its customers that the "Tax Amount" constitutes reimbursement for California sales tax and, as such, it does not constitute California excess tax reimbursement. Instead, appellant asserts the "Tax Amount" is a collection for another state's sales or use tax. We do not believe that the invoice, sales check, or bill of sale needs to use the exact phrase "California sales tax reimbursement" in order to trigger the presumption that the retailer collected sales tax reimbursement. For example, in *Loeffler v. Target Corp*. (2014) 58 Cal.4th 1081, 1093, a charge simply for "sales tax" on an exempt food

[16] Although not explicitly stated, we believe it is implied that the retailer or transactions must meet some threshold connection (nexus) with California. In the instant case, appellant has a California seller's permit, shipped the items from California, and conducted its business operations from in California. Under these facts, we consider nexus to be more than sufficient.

sale constituted excess sales tax reimbursement, even though the law imposes no sales tax liability on the customer. Here, appellant concedes that the "Tax Amount" billed on the invoice was in fact intended to represent collection of a state's sales or use tax from the customer, just not *California's* sales or use tax. Furthermore, appellant does not contend, nor does the evidentiary record support, that the "Tax Amount" could or would potentially be interpreted as anything other than reimbursement for a retail sales or use tax.[17] Based on the above, we find that it is statutorily presumed that appellant and its customers agreed to the addition of sales tax reimbursement on the disputed sales at issue in this appeal. In other words, appellant is presumed to have collected reimbursement for the sales tax (that is, taxes due under California's Sales and Use Tax Law) from its customers because the three elements listed in the California Civil Code were met. Furthermore, because it is undisputed that these are exempt or nontaxable sales in California, it is presumed that appellant collected *excess* tax reimbursement. As such, appellant has the burden to establish that it did not collect excess sales tax reimbursement from its customers.

Next, R&TC section 6901.5 requires that when an amount represented as constituting reimbursement for taxes due under the California Sales and Use Tax Law is computed upon an amount that is not taxable or is in excess of the taxable amount and is actually paid by the customer, the amount so paid shall be refunded or remitted to CDTFA. As previously discussed, appellant is presumed to have collected such excess amounts from its customers because the three elements were met. Appellant raises five arguments to rebut this presumption and establish that it did not collect excess sales tax reimbursement from its customers.

Appellant's first argument is that OTA must consider the entire statute and all the relevant facts, arguments, and evidence in this appeal. Appellant cites R&TC section 6901.5 and contends that "OTA must not only consider the *entire* statute, but it must also consider the entire statutory scheme." Appellant asserts that CDTFA's decision to grant credit for taxes remitted to other states is evidence that the "Tax Amount" is not California sales tax reimbursement. We agree with appellant that the entire statutory scheme must be considered. The entire statutory scheme sets forth the two-step approach we applied above. We find that the statutory presumption pertaining to collection of sales tax reimbursement set forth in Civil Code section 1656.1 (i.e., step 1)

[17] We note, however, that appellant used a different invoice format to collect the Canada GST from its customers. CDTFA has conceded this portion of the liability, so we do not make any findings with respect to those invoices.

must be considered as complementary to the excess sales tax reimbursement provisions of R&TC section 6901.5 (i.e., step 2). This two-step analysis is consistent with the regulatory framework set forth in Regulation section 1700, which interprets and implements these statutory provisions as complementary legislation on "reimbursement for sales tax." This approach is also consistent with the analysis set forth in BTLG Annotation 460.0242, wherein CDTFA applied the same two-step analysis set forth in this Opinion and concluded: first, it was presumed that the parties agreed to the addition of sales tax because the requirements of Civil Code section 1656.1 were met; and, second, there was excess tax reimbursement collected on exempt interstate sales which should be refunded to the customer.

We concluded above that, under this framework, appellant bears the burden to establish that it did not collect sales tax reimbursement within the meaning of R&TC section 6901.5. Here, the only evidence appellant raises to rebut the statutory presumption is that CDTFA credited appellant, and reduced its liability, for sales and use taxes appellant remitted to other states. This perspective is incongruous because it simply means that appellant is not being held liable for collecting and remitting the "Tax Amount" to other jurisdictions where it was registered to collect tax. Instead, appellant is only being held liable for the erroneous collection of sales tax reimbursement in jurisdictions in which appellant is *not* registered (i.e., authorized) to collect sales or use tax. Furthermore, appellant conceded that it was not registered to collect taxes in those states. In other words, these excess collections cannot constitute reimbursement for those state's sales or use tax because there is no evidence that appellant was registered or authorized to collect those states' sales or use tax during the liability period. Finally, it is undisputed that appellant did not refund these excess collections to its customers.

Thus, these amounts are clearly excess sales tax reimbursement, and the only potential question is whether California has a valid claim to the excess reimbursement. Here, it is worth mentioning that the sales occurred in this state because appellant shipped the property via common carrier from its California warehouse, and appellant provided no evidence that there was any title passage provision. In other words, appellant completed its performance with respect to delivery of the property in California upon delivery to the common carrier. (See Cal. Code. Regs., tit. 18, § 1628(b)(3)(D).) Furthermore, appellant operates out of California, and holds a California seller's permit. Therefore, the evidence supports finding that the "Tax Amount" is excess sales tax reimbursement, and that there is sufficient connection or nexus for

California to assert liability for the excess tax reimbursement because the sales occurred in this state (see footnote 16).

Appellant's second argument is that Regulation section 1700 must be consistent with R&TC section 6901.5. Specifically, appellant cites Government Code section 11342.2 and appellant contends that "no regulation adopted is valid or effective unless consistent and not in conflict with the statute." Namely, appellant cites R&TC section 6901.5, which requires that an amount must be represented as constituting reimbursement for "taxes due under this part." Next, appellant cites Regulation section 1700, which includes no such requirement. In other words, we understand that appellant contends that Regulation section 1700 would be invalid to the extent it is interpreted by OTA to apply to excess tax reimbursement collected for taxes not due under California's Sales and Use Tax Law and, as such, must be interpreted in a manner consistent with R&TC section 6901.5 to apply only to excess reimbursement for taxes due under California's Sales and Use Tax Law.

As explained above, Civil Code section 1656.1 creates a rebuttable presumption that the parties agreed to the addition of reimbursement for taxes due under the California Sales and Use Tax Law. Those elements were met under the facts of this case. Regulation section 1700 interprets both Civil Code section 1656.1 and R&TC section 6901.5. As such, and considering the statutory presumption, we find no inconsistency with the complete statutory framework as implemented by Regulation section 1700, and we have no basis to conclude that the regulation is invalid. Furthermore, we note that OTA lacks authority to declare Regulation section 1700 invalid or to refuse to enforce it on that basis. (*Appeal of Talavera*, 2020-OTA-022P.)

Appellant's third argument is that tax applies in the destination jurisdictions and the tax charged is for the destination jurisdictions. While the destination states may impose a retail consumption tax (and we offer no finding on the matter), appellant's argument stands in contrast to these undisputed facts: (1) appellant was not registered to collect such a tax in the states at issue during the liability period; (2) appellant did not ever remit the "Tax Amount" to the destination states at issue; and (3) appellant's concession that it "inadvertently set up" its tax compliance software to collect the tax reimbursements for the states at issue in this appeal. Notably, all these amounts were collected during the period April 1, 2005, through

June 30, 2013, which is more than a decade ago and no portion of the disputed amount was ever remitted to any other state. Based on these facts, we find nothing in the record to rebut the presumption that the disputed amounts are excess tax collections.

Appellant's fourth argument is that CDTFA cannot alter the nature of the tax charged following the sale if appellant fails to pay the tax to the appropriate jurisdiction. In its decision, CDTFA found that appellant and its customers agreed that the collections constituted sales tax to be remitted to the destination states; and that such amounts became excess collections when appellant failed to do so. On appeal to OTA, CDTFA no longer contends that the customers agreed to the collection of tax for the destination state, and CDTFA now contends that it was always excess tax reimbursement. Above, we concluded that it is presumed that the parties agreed to the collection of reimbursement for taxes due under the Sales and Use Tax Law and, because the sales at issue were exempt from tax, such amounts are presumed to be excess collections which must be remitted to this state or refunded to the customer. The timing and nature of when a collection for reimbursement for taxes due becomes an excess collection, or whether it always was an excess collection, in the event the sale turns out to be nontaxable or exempt, is not an element considered under the Sales and Use Tax Law. As such, it is not relevant to the determination of this appeal, and we decline to issue a finding on the matter.

Appellant's final argument is that OTA lacks jurisdiction to consider CDTFA's challenge of its own Decision in the appeal. This argument is tied to appellant's fourth argument. Namely, appellant contends that CDTFA cannot change its position on appeal regarding the timing of when a tax collection becomes an excess tax collection. Above, we declined to make a finding with respect to the timing question, on the basis that it was not an element considered under the law in order to impose liability for excess tax collections and, as such, was not relevant. Based on our finding that the parties' respective positions on the question of timing are not legally relevant, we decline to issue a finding on the final contention.

In summary, we find that appellant failed to rebut the presumption that it collected reimbursement for taxes due under the Sales and Use Tax Law and, because the sales at issue were nontaxable or exempt, such amounts constitute excess collections which must be remitted to this state or refunded to the customers.

Issue 2: Does OTA have jurisdiction to determine whether CDTFA improperly granted appellant a credit for taxes paid to other states.

With respect to the second issue, CDTFA's decision, which was appealed to OTA, concluded that appellant is not liable to the extent that any "Tax Amount" was remitted to taxing jurisdictions in which appellant was registered to collect tax, and CDTFA provided a credit therefore to the extent such amounts were included in the audit liability. Appellant appealed CDTFA's decision to allow the credits to OTA. On appeal to OTA, appellant contends that:

> Both audits explicitly and clearly provide a credit for the same taxes CDTFA makes claim to, if the taxes were paid to a different state. CDTFA is not disputing that it provided credits in the audits for taxes paid to other states and Canada. We believe CDTFA lacks the authority to provide such credits for taxes . . . We are disputing CDTFA's treatment in this regard and therefore have a right for this issue to be heard and fully explored.

As a preliminary matter, we must consider the practical implications of accepting appellant's contention. For example, in the first NOD, CDTFA asserted a liability in the amount of $2,362,207.01. CDTFA's decision reduced the liability being asserted to $100,672.00. If appellant were to prevail on this issue, it would potentially increase appellant's liability to this state by over $2 million, just for the first NOD.

As currently drafted, division 4.1 of title 18 of the California Code of Regulations (OTA's Regulations) does not explicitly prohibit the issuance of an advisory legal opinion on a matter that is not currently at issue in an active appeal before OTA (which we refer to herein as an advisory opinion). However, OTA's Regulations do provide that OTA's jurisdiction is set forth in statute. OTA's authorizing legislation, the Taxpayer Transparency and Fairness Act of 2017 (Stats. 2017, Ch. 16) provides that OTA has the duties, powers, and responsibilities necessary or appropriate to conduct appeals of certain tax and fee programs. (Gov. Code, § 15672.) For these purposes, an appeal includes a petition for redetermination, an administrative protest, and a claim for refund. (Gov. Code, § 15671(a)(1)-(3).) A claim for refund is a claim for refund of a tax overpayment. (See R&TC, § 6902). A petition for redetermination and administrative protest are appeals processes for a taxpayer to allege errors in CDTFA's computation of the tax assessment. (See R&TC, § 6561; *People v. West Publishing Co*. (1950) 35 Cal.2d 80, 82; Cal. Code. Regs., tit. 18, § 35019(a).)

With respect to OTA's jurisdiction to resolve an appeal, OTA's Rules for Tax Appeals require, in pertinent part, a timely appeal of an adverse CDTFA decision to establish jurisdiction. (Cal. Code. Regs., tit. 18, § 30103(b).) In summary, although OTA may resolve a petition for redetermination, a taxpayer cannot file such a petition with OTA in the first instance; first, there must be an adverse action by CDTFA denying, in whole or part, the petition and that adverse action may then be appealed to OTA. (*Ibid*.) The same is true for a claim for refund or late protest. (*Ibid*.) We further interpret this to mean that OTA will not issue an advisory opinion over a matter which OTA lacks jurisdiction within the meaning of OTA's Rules for Tax Appeals.

Here, CDTFA's decision *allowed* the credits, and CDTFA's decision to allow the credits is not adverse to appellant because it decreased appellant's liability. Furthermore, such amounts were never asserted by CDTFA in the appeal before OTA. Appellant is asking for a refund, yet if we found in favor of appellant, it would have the opposite effect of substantially increasing appellant's liability beyond the amount asserted in CDTFA's decision, which is to appellant's detriment. OTA is not a tax administrator, the responsibility for administering the Sales and Use Tax Law, including resolving questions of law which are not at issue in an active appeal before OTA, rests with CDTFA. (Gov. Code, § 15570.22.) Here, we must emphasize that this issue does not involve a request to disallow a party concession on an item in an appeal before OTA.[18] In this case, the credits at issue were allowed during the audit process and prior to appellant's filing of the appeal with OTA. Therefore, in this case, the jurisdictional document in the appeal to OTA (i.e., CDTFA's decision) allowed the credits. (Cal. Code. Regs., tit. 18, § 30103(b).) As such, CDTFA's decision, to the extent it allowed the credits, is not adverse to appellant. Under these facts, we find that the decision to allow the credits is not an issue properly before OTA to decide. Based on our finding on this issue, we need not address the third issue.

[18] We would not consider lightly, if ever, a request to overturn a party concession concerning the amount at issue in an appeal, and question whether doing so would be entirely consistent with the framework of OTA's authorizing legislation if, as here, it would require ordering an increase to the liability. (See Stats. 2017, Ch. 16.) Based on our finding that the allowed credits do not represent a party concession in the appeal before OTA we need not, however, resolve this question.

HOLDINGS

1. The "Tax Amount" that appellant collected from out-of-state customers on California exempt or nontaxable transactions must be remitted to California.
2. OTA lacks jurisdiction to determine whether CDTFA improperly granted appellant a credit for taxes paid to other states.

DISPOSITION

CDTFA's actions are sustained.

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

We concur:

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

DocuSigned by:
DC88A60D8C3E442...
Keith T. Long
Administrative Law Judge

Date Issued: 8/11/2022