OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 19054810
	) CDTFA Case ID 272-217
ACHAMAK TRADING, INC.	)
	)
	)
	)

OPINION

Representing the Parties:

For Appellant:	Marc Brandeis, CPA
For Respondent:	Nalan Samarawickrema, Hearing Representative Cary Huxsoll, Tax Counsel IV Jason Parker, Chief of Headquarters Ops.
For Office of Tax Appeals:	Richard A. Zellmer, Business Taxes Specialist III

A. WONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6901, Achamak Trading, Inc. (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)[1] denying appellant's claim for refund of approximately $40,100.46, which appellant paid towards a Notice of Determination (NOD) dated February 4, 2011.[2] Originally, the NOD was for tax of $229,897.18, plus accrued interest, and a negligence penalty of $22,989.72 for the period of January 1, 2005, through December 31, 2007. The tax liability was primarily based on unreported taxable gasoline sales and unreported taxable mini-mart sales.[3] Upon reaudit, CDTFA subsequently reduced both of

[1] The State Board of Equalization (Board) formerly administered the sales and use taxes. On July 1, 2017, the Board's administrative (and audit) functions relevant to this case 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, all references to "CDTFA" refer to the Board.

[2] CDTFA timely issued the February 4, 2011 NOD because appellant waived the applicable three-year statute of limitations and consented to an extended deadline per R&TC section 6488.

[3] A relatively minor portion of the tax liability was also based on disallowed claimed credits for sales tax prepaid to gasoline vendors, which appellant does not dispute and are thus not at issue in this appeal.

those amounts, which in turn reduced the tax liability from $229,897.18 to $218,835.46, and the negligence penalty from $22,989.72 to $21,883.58.[4]

Office of Tax Appeals (OTA) Administrative Law Judges Andrew Wong, Richard Tay, and Teresa A. Stanley held an oral hearing for this matter in Cerritos, California, on July 12, 2022. At the conclusion of the hearing, OTA closed the record, and this matter was submitted for a decision.

ISSUE

Whether a refund based on a further reduction to the amount of unreported taxable gasoline sales is warranted.

FACTUAL FINDINGS

1. Appellant operated an independent gasoline station with a mini mart in San Bernardino, California. Appellant commenced business on April 1, 2003, and held a seller's permit through August 30, 2017.
2. As relevant here, CDTFA audited appellant twice: (1) for the period January 1, 2005, through December 31, 2007 (first audit period); and (2) for the period October 1, 2008, through December 31, 2011 (second audit period).[5]

First Audit

3. For the first audit period, appellant reported total sales of $9,825,332, claimed total deductions of $477,139, and reported taxable sales of $9,348,193.
4. CDTFA found the books and records appellant provided upon audit to be incomplete and thus performed additional testing to verify reported gasoline and mini-mart sales.
5. Regarding appellant's gasoline sales specifically, CDTFA used information about gasoline selling prices in the Los Angeles region from the United States Energy Information Administration (EIA) to estimate appellant's weekly selling prices for gasoline during the first audit period. CDTFA then multiplied these adjusted weekly selling prices by the number of gallons of gasoline appellant sold during each quarterly

[4] Appellant does not dispute the amount of unreported taxable mini-mart sales or the negligence penalty, so they are not at issue in this appeal.

[5] CDTFA audited appellant a third time, for the period September 30, 2012, through June 30, 2015, but that third audit is not at issue here.

period being audited (based on appellant's records) to compute audited gasoline sales, including sales tax reimbursement, for the first audit period. CDTFA removed sales tax reimbursement from the resulting amount to compute audited taxable gasoline sales for the first audit period.

6. CDTFA then added audited gasoline sales to audited taxable mini-mart sales (which were based on the markup method) to compute audited taxable sales and compared that amount to reported taxable sales to compute unreported taxable sales of $2,850,170 for the first audit period.

7. Based on this first audit, CDTFA timely issued the February 4, 2011 NOD to appellant. That same day, appellant timely filed a petition for redetermination.

Second Audit

8. For the second audit, CDTFA initially computed appellant's audited gasoline sales and taxable mini-mart sales in the same manner as the first audit, using estimates based on EIA data and the markup method, respectively. This yielded unreported taxable sales of $2,995,318 for the second audit period.

9. Subsequently, appellant produced its point-of-sale (POS) reports for the period of July 1, 2010, through December 31, 2011 (i.e., the latter part of the second audit period), which CDTFA used to recompute unreported taxable sales of $2,630,304 for the entire second audit period.

10. Pursuant to this second audit, CDTFA issued two NODs: (1) a January 20, 2012 NOD for the period of October 1, 2008, through June 30, 2009, based on EIA data and the markup method; and (2) a November 20, 2012 NOD for the period of July 1, 2009, through December 31, 2011, based on the POS reports.[6]

11. Notably, when using the POS reports for the period July 1, 2010, through December 31, 2011, CDTFA calculated audited taxable gasoline sales that were 5.05 percent lower than when using EIA data for the same period.

12. On February 16, 2012, appellant timely filed a petition for redetermination of the January 30, 2012 NOD, but not for the November 20, 2012 NOD.

[6] CDTFA issued two NODs because, partway through the audit, appellant declined to waive/extend the statute of limitations for issuing an NOD with respect to the earlier part of the second audit period. Accordingly, CDTFA first issued the January 20, 2012 NOD. Appellant subsequently produced the POS reports, and CDTFA completed the second audit in September 2012 and issued the November 20, 2012 NOD.

CDTFA's Appeals Bureau Decisions

13. On June 19, 2014, CDTFA's Appeals Bureau held a consolidated appeals conference with appellant regarding both of its petitions.

14. In its Decision and Recommendation (D&R) dated November 4, 2014, which addressed the February 4, 2011 NOD and the first audit period, CDTFA's Appeals Bureau recommended a reaudit to make various adjustments, mostly to the amount of taxable mini-mart sales. But CDTFA's Appeals Bureau also recommended reducing the audited number of gallons of gasoline appellant sold (basing them on appellant's vendors' records instead of appellant's own records) and otherwise denying appellant's petition for redetermination. CDTFA prepared a reaudit, which reduced the total amount of audited unreported taxable sales from $2,850,170 to $2,705,743. Appellant subsequently requested a hearing before OTA's predecessor, the State Board of Equalization (Board).[7]

15. In its D&R dated October 31, 2014, which addressed the January 20, 2012 NOD and the period of October 1, 2008, through June 30, 2009 (i.e., the earlier part of the second reaudit period), CDTFA's Appeals Bureau recommended basing the audit determination on the POS reports rather than EIA data and the markup method, which reduced the aggregate deficiency measure from $712,543 to $602,332. Appellant did not request a Board hearing with respect to this D&R-recommended audit result.

Board Hearing

16. The Board sent appellant a hearing notice dated December 4, 2015, informing appellant that its requested hearing was scheduled for February 24, 2016.

17. Appellant did not respond to the hearing notice.

18. The Board removed appellant's appeal from the February 24, 2016 hearing calendar, placed it on the nonappearance calendar for the March 29, 2016 Board meeting, and informed appellant that the Board would base its decision on the written record and without an oral hearing.

19. At the March 29, 2016 Board meeting, the Board voted to adopt and to approve CDTFA's Appeals Bureau's D&R regarding the February 4, 2011 NOD and the first

[7] OTA is the successor to the Board with respect to all the duties, power, and responsibilities of the Board necessary or appropriate to conduct appeals hearings. (Gov. Code, § 15672(a).)

audit period, as well as the subsequent D&R-recommended reaudit results. According to a Notice of Board Action and CDTFA's Appeals Bureau's final action summary, among the issues resolved was whether additional adjustments to the amount of unreported taxable sales (including unreported taxable gasoline sales) for the first audit period were warranted. In its briefs, appellant had contended that both the number of gallons of gasoline purchased and the audited gasoline selling prices were overstated, but the Board concluded that appellant failed to substantiate a further reduction to either amount with any evidence. The Board also found no computation errors by CDTFA and concluded that the audit method CDTFA used to determine unreported taxable gasoline sales for the first audit period (i.e., using EIA data) was reasonable.

Claim for Refund

20. On September 7, 2017, appellant timely filed a claim for refund for recovery of payments it had made towards the February 4, 2011 NOD (first audit period).
21. CDTFA's Appeals Bureau held another appeals conference on January 9, 2019, to address the claim for refund. In its decision dated April 22, 2019, CDTFA's Appeals Bureau recommended no further reductions to the reaudit results of the first audit because appellant was precluded from pursuing the matter further based on the doctrine of res judicata. In the alternative, CDTFA denied appellant's claim for refund on the merits.
22. Appellant filed the instant appeal with OTA.

DISCUSSION

On appeal, appellant argues that res judicata does not preclude its claim for refund for two reasons. First, appellant contends that res judicata only applies in a court setting, which OTA is not. Second, appellant surmises that the Board made its March 29, 2016 decision regarding the first audit period before CDTFA had completed its second audit, so it did not have all the information that is available now. Accordingly, appellant argues that, with respect to the first audit, it is presenting new information, a new argument on the merits, and a new issue for consideration, so res judicata does not apply. Appellant's new argument is that audited gasoline sales computed using EIA data in the first audit should be reduced by 5.05 percent (or $513,747) because the second audit showed that similarly computed audited gasoline sales for the second

audit period were overstated by 5.05 percent when compared to audited gasoline sales computed using POS reports for the same period.

Traditionally, the doctrine of res judicata prevents parties or their privies from relitigating a cause of action after a final judgment on the merits has been entered by a court of competent jurisdiction. (*Commissioner v. Sunnen* (1948) 333 U.S. 591, 597; *Bernhard v. Bank of America Nat. Trust & Savings Assn.* (1942) 19 Cal.2d 807, 810 (hereafter *Bernhard*).) A "privy" is one who, after rendition of a judgment, has acquired an interest in the subject matter affected by the judgment through one of the parties via inheritance, purchase, or succession. (*Bernhard*, at p. 811.) "'Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.'" (*State Bd. of Equalization v. Super. Ct.* (1985) 39 Cal.3d 633, 641 [quoting *Brown v. Felsen* (1979) 442 U.S. 127, 131].) Res judicata "is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy." (*Bernhard*, at p. 811.)

Although res judicata traditionally applied in the context of courts and their decisions, it also applies to adjudicatory administrative decisions, contrary to appellant's first argument on appeal. Both OTA and its predecessor, the Board, have applied res judicata to reject administrative appeals in the franchise and income tax context. For example, in *Appeal of Millennium Dental Technologies, Inc.* (2019-OTA-178P), OTA concluded that the doctrine of res judicata barred a taxpayer's claim for refund because the Board had already rendered a final decision on the merits regarding the same tax year, issue, and liability in taxpayer's prior appeal of a Notice of Action. And in *Appeals of Williams, et al.* (84-SBE-050 [1984 WL 16129]), the Board applied the basic premise of res judicata to reject a taxpayer's appeal of a refund claim after the Board ruled against the taxpayer in a prior deficiency appeal with the same tax year, liability, issue, facts, and arguments.

Res judicata can also apply to sales and use taxes cases. (See R&TC, § 7176 [discussing the applicability of res judicata to cases arising under the Sales and Use Tax Law].) The application of res judicata depends upon the satisfaction of four elements: (1) the parties in each action must be identical (or at least in privity); (2) a court of competent jurisdiction (which includes administrative agencies such as OTA's predecessor, the Board) must have rendered the first judgment; (3) the prior action must have resulted in a final judgment on the merits; and

(4) the same cause of action or claim (i.e., year, issue, and liability) must be involved in both suits. (*Appeal of Millennium Dental Technologies, Inc.*, *supra*.) For cases arising under the Sales and Use Tax Law, R&TC section 7176 clarifies that the liability involved must be for the same quarterly period (or periods) as was involved in another previously determined case.

Here, the first element is met because the appellant in the prior case before the Board and in the current appeal before OTA is identical. Also, the Board's audit staff was involved in the prior case, while CDTFA is a party to the current appeal, and they are in privity because CDTFA is the successor to the Board with respect to the administration of the Sales and Use Tax Law (see Gov. Code, § 15570.22). The second element is met because, under R&TC sections 6561 and 6562, the Board had jurisdiction to hear appellant's timely appeal of the February 4, 2011 NOD, and rendered the first judgment in that case. The third element is met because the Board issued a final judgment on the merits in that case as evidenced by its March 29, 2016 Notice of Board Action and the final action summary by CDTFA's Appeals Bureau. Finally, the fourth element is met because appellant's claim for refund at issue involves the same cause of action that the Board decided and rejected on the merits in that prior case: same quarterly periods (the first audit period); same issue (whether additional adjustments to the amount of unreported taxable sales [including gasoline sales] are warranted); and same tax liability ($218,835.46). Thus, all four elements of res judicata have been met.

As for appellant's supposition that the Board made its March 29, 2016 decision regarding the first audit period before CDTFA had completed the second audit, it is belied by the facts: CDTFA completed the second audit in September 2012, and issued the associated NOD on November 20, 2012, over three years before the March 29, 2016 Board meeting.[8] Thus, information from the second audit was available to the Board well before that meeting.

As for appellant's contention that it is presenting a new argument for consideration on the merits, OTA notes that appellant already had the opportunity to offer arguments to the Board at a hearing appellant requested and the Board scheduled for February 24, 2016. But appellant failed to respond to the hearing notice, so the Board moved the matter to the nonappearance calendar of a subsequent Board meeting. Res judicata prevents litigation of all grounds for recovery that were previously available to the parties regardless of whether those grounds were asserted or determined in the prior proceeding. (See *State Bd. of Equalization v. Super. Ct.*, *supra*.)

[8] See footnote 6, *ante*, page 3.

Because appellant did not avail itself of the opportunity to offer its allegedly new argument to the Board, OTA concludes that res judicata prevents appellant from doing so here.

Finally, regarding appellant's argument that it is presenting a new issue, OTA has already found, as part of the fourth element of res judicata, that the issue before the Board in 2016 is the same as the one before OTA now (i.e., whether additional adjustments to the amount of unreported taxable gasoline sales are warranted).

For all these reasons, OTA finds appellant's arguments against the applicability of the doctrine of res judicata to this case unpersuasive and concludes that res judicata applies to bar appellant from bringing its refund claim. Accordingly, OTA does not need to further consider appellant's argument on the merits.

HOLDING

Due to res judicata, a refund based on a further reduction to the amount of unreported taxable gasoline sales is not warranted.

DISPOSITION

CDTFA's action denying appellant's claim for refund is sustained.

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Andrew Wong
Administrative Law Judge

We concur:

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Richard Tay
Administrative Law Judge

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Teresa A. Stanley
Administrative Law Judge

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