OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18093743) CDTFA Case IDs: 530177, 731045, 731046
S. MARDIROSIAN AND **A. MARDIROSIAN** **dba Creatrice Catering**	)))))

OPINION

Representing the Parties:

For Appellant: S. Mardirosian, Partner
A. Mardirosian, Partner

For Respondent: Jarrett Noble, Tax Counsel IV

For Office of Tax Appeals: Lisa Burke, Business Taxes Specialist III

A. WONG, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 6561, S. Mardirosian and A. Mardirosian, a husband-and-wife partnership (appellant),[1] appeals a Decision and Recommendation (D&R) issued by respondent California Department of Tax and Fee Administration (CDTFA) that partially denied appellant's petition for redetermination of a Notice of Determination (NOD) issued on March 17, 2010, and two claims for refund filed on February 3, 2010, and May 16, 2012, respectively.[2] The NOD is for tax of $22,859.97, plus accrued interest, for the period of April 1, 2006, through

[1] Under certain circumstances, an unincorporated business jointly owned by a married couple (i.e., a joint venture, co-ownership, or partnership by operation of law) may elect to not be taxed as a partnership for income tax purposes. (See Internal Revenue Code, § 761(f).) Instead of filing taxes as a partnership, the qualifying members (husband and wife) may elect to file as sole proprietors for income tax purposes. (*Ibid.*) Irrespective of federal income tax treatment, a husband-and-wife joint venture or co-ownership is recognized as a partnership by operation of law and treated as a separate entity for sales and use tax purposes. (R&TC, §§ 6005, 6015.)

[2] The State Board of Equalization (BOE) formerly administered the sales tax. Effective July 1, 2017, BOE 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, "CDTFA" refers to the BOE.

December 31, 2007 (liability period).[3] A subsequent D&R-recommended reaudit reduced the tax liability by $6,372.76, from $22,859.97 to $16,487.21. Appellant timely filed the first claim for refund for alleged overpayments made for the first quarter of 2007 (1Q07) through 4Q07.[4] Appellant timely filed the second claim for refund of $4,577.48 for funds CDTFA collected by levy on September 27, 2010.[5]

Appellant waived the right to an oral hearing, so the Office of Tax Appeals (OTA) decides this matter based on the written record.

ISSUES

1. Whether further reductions to the amount of unreported taxable sales are warranted.
2. Whether OTA has jurisdiction to decide whether any of appellant's liabilities were discharged in bankruptcy.
3. Whether appellant is entitled to an additional refund or credit for any portion of the amount collected by levy on September 27, 2010.
4. Whether relief from tax is warranted based on appellant's claim that any understatements are the result of its reasonable reliance on CDTFA's erroneous oral advice.
5. Whether appellant has established that additional relief of interest is warranted.

FACTUAL FINDINGS

1. Beginning in April 1990, appellant operated as a caterer and event planner, furnishing and serving food and drinks, coordinating and supervising events, providing tangible personal property (TPP), such as decorations, flowers, and balloons, and leasing other TPP, such as dishes, silverware, glasses, chairs, tables, and props. Appellant also furnished rented facilities for events and provided services such as valet parking, entertainment, and security.

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[3] CDTFA timely issued the NOD on March 17, 2010, because appellant signed a series of waivers of the otherwise applicable three-year statute of limitations, which allowed CDTFA until July 31, 2010, to issue an NOD for the period of April 1, 2006, through March 31, 2007. (See R&TC, §§ 6487(a), 6488.)

[4] Appellant timely filed the first claim for refund on February 3, 2010, because it was filed before July 31, 2010, the agreed-upon extended deadline to issue an NOD for 1Q07 (see R&TC, § 6902(b)), and within three years from the last day of the respective calendar months following 2Q07, 3Q07, and 4Q07 (see R&TC, § 6902(a)(1)).

[5] Appellant timely filed the second claim for refund on May 16, 2012, which was within three years of September 27, 2010, the date CDTFA collected funds via levy. (See R&TC, § 6902.3.)

2. Appellant failed to file sales and use tax returns (SUTRs) for 4Q06, 1Q07, and 2Q07. CDTFA estimated appellant's tax liability for those quarters and, on August 9, 2007, issued an NOD to appellant for tax of $8,756.00, applicable interest, and a failure-to-file penalty of $875.60. Appellant did not file a timely petition for redetermination of this NOD, and the determination became final 30 days after the NOD's issuance.
3. Appellant also failed to file a return for 3Q07. CDTFA estimated unreported taxable sales of $28,428 for that quarter and, on July 16, 2008, issued another NOD to appellant for tax of $2,202.00, applicable interest, and a failure-to-file penalty of $220.20. Appellant did not file a timely petition for redetermination of this NOD, and the determination became final 30 days after the NOD's issuance.
4. CDTFA closed appellant's seller's permit with an effective date of December 31, 2007.
5. On audit, appellant provided records for examination, including copies of its cash receipts journals, sales invoices, and bank statements for 2006 and 2007. CDTFA also obtained copies of appellant's federal income tax returns (FITRs) for 2006 and 2007. On its 2006 FITR, appellant reported gross receipts of $484,600 and cost of goods sold (COGS) of $345,539. On its 2007 FITR, appellant reported gross receipts of $471,701 and COGS of $337,503.
6. CDTFA examined a one-year block sample of appellant's sales invoices for the period July 1, 2006, through June 30, 2007, and noted that appellant added sales tax reimbursement to its separately stated charges for food, drinks, and some TPP (such as decorations, flowers, and balloons) on its sales invoices, but did not add sales tax reimbursement to its separately stated charges for services and rental of other TPP (such as dishes, silverware, glasses, tables, linens, etc.). CDTFA determined that some of the charges that appellant considered to be nontaxable or exempt, such as charges for catering staff services, event planning services, coordination services, photography, rental of TPP, and labor for delivery and setup, were subject to tax when the services were provided as part of appellant's sales of TPP. However, CDTFA determined that appellant's charges for event planning, coordination, or event staff were not subject to tax when the services were unrelated to the sale of TPP. CDTFA also determined that no tax applied to appellant's charges for facility rentals, entertainment services, valet parking, and security because those charges were not a part of appellant's sales of TPP. CDTFA

scheduled taxable sales totaling $350,306 for the one-year test period, which exceeded the reported and CDTFA-assessed taxable sales of $137,340 for the same period by $212,966, representing an error rate of 155.06 percent ($212,966 ÷ $137,340). CDTFA applied the error rate to appellant's reported and CDTFA-assessed taxable sales for the liability period to establish unreported taxable sales of $310,535.

7. Appellant provided a document from the IRS verifying that appellant had sustained bad debt losses of $25,945 in 2007. To establish the portion of the bad debt losses that resulted from taxable sales, CDTFA divided taxable sales of $350,306 from the one-year test period by total sales of $583,257 for the same period and calculated that 60 percent of appellant's sales were taxable sales. CDTFA then multiplied total bad debt losses of $25,945 in 2007 by 60 percent to determine that bad debt losses of $15,567 had resulted from taxable sales in 2007, and allowed credit for bad debts of $3,892 per quarter ($15,567 ÷ 4 quarters) for each quarter in 2007.[6]

8. On March 17, 2010, CDTFA issued an NOD to appellant based on a total deficiency measure of $294,967, consisting of unreported taxable sales of $310,535 and a credit measure of $15,568 ($3,892 x 4 quarters) for unclaimed bad debt losses from taxable sales. Appellant timely filed a petition for redetermination.

9. Prior to this, on February 3, 2010, appellant filed a timely protective claim for refund or credit for $1 or such other amounts as may be established in tax, interest, and penalty for alleged overpayments made for 1Q07 through 4Q07.

10. On April 25, 2012, CDTFA's Appeals Bureau held an appeals conference with appellant. During the appeals conference, and in correspondence after the conference, CDTFA conceded that $50,024 of the charges regarded as taxable in the audit test were in fact not subject to tax. Additionally, CDTFA conceded that sales totaling $3,717.03 were exempt sales to religious organizations for fundraising purposes, but noted that appellant had collected sales tax reimbursement with respect to those sales. CDTFA agreed to reduce the amount regarded as taxable in the audit test by an additional $3,717.03 if appellant provided evidence that it had returned or intended to return the excess collected sales tax reimbursement to its customer. However, appellant did not provide such evidence, so those sales remain as taxable sales in the audit test.

[6] $15,567 ÷ 4 = $3,891.75, which CDTFA rounded up to $3,892.

11. On May 16, 2012, appellant filed a second timely claim for refund of $4,577.48 in funds collected by CDTFA on September 27, 2010, pursuant to a levy placed on appellant's partners' personal savings account.

12. On December 31, 2014, CDTFA's Appeals Bureau issued its D&R with the following recommendations:

    a. Perform a reaudit to reduce the amount regarded as taxable in the audit test by $50,024, which CDTFA had conceded as nontaxable, and by an additional $6,070, which CDTFA's Appeals Bureau also concluded was not subject to tax.

    b. Relieve interest that accrued on the unpaid audit liability for the following four periods:

        i. December 2, 2010, through May 31, 2011;

        ii. September 25, 2012, through March 1, 2013;

        iii. May 2, 2013, through October 3, 2013; and

        iv. November 1, 2013, through February 1, 2014.

    c. Relieve a penalty of $220.20 imposed pursuant to R&TC section 6565 for appellant's failure to pay the NOD issued on July 16, 2008, before it became final.

    d. Grant appellant a refund or credit of $50.00, which CDTFA erroneously collected by levy.

    e. Otherwise, deny the appeals.

13. The D&R-recommended reaudit reduced the deficiency measure for unreported taxable sales by $82,229, from $310,535 to $228,306. The remaining understatement of reported taxable sales for the liability period totals $212,738, which represents unreported taxable sales of $228,306 and a credit measure of $15,568 for unclaimed bad debt losses from taxable sales.[7]

14. Appellant disputed the results of the D&R-recommended reaudit, and this appeal to OTA followed.

[7] The credit measure for unclaimed bad debt losses on taxable sales was not reduced in the post-D&R reaudit even though reductions to the taxable sales in the audit test resulted in a reduction to the taxable sales ratio from 60 percent to 50 percent. Because CDTFA used the taxable sales ratio of 60 percent from the audit test to compute the portion of bad debt losses resulting from taxable sales, CDTFA's failure to use the adjusted taxable sales ratio of 50 percent to reduce the credit measure for taxable bad debts in the post-D&R reaudit resulted in an unintended benefit for appellant.

DISCUSSION

Issue 1: Whether further reductions to the amount of unreported taxable sales are warranted.

California imposes upon a retailer a sales tax measured by the retailer's gross receipts from the retail sales 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.) It is the retailer's responsibility to maintain complete and accurate records to support reported amounts and to make them available for examination. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).)

If CDTFA is not satisfied with the amount of tax reported by any person, or if any person fails to make a return, CDTFA may determine the amount required to be paid based on any information within its possession or that may come into its possession. (R&TC, §§ 6481, 6511.)

In the case of an appeal, CDTFA has a minimal, initial burden of showing that its determination was reasonable and rational. (*Appeal of Amaya*, 2021-OTA-328P.) If CDTFA carries 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).) 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 Amaya*, *supra*.) To satisfy the burden of proof, a taxpayer must prove two things: (1) the tax assessment is incorrect; and (2) the proper amount of tax. (*Appeal of AMG Care Collective*, *supra*.)

A "caterer" is a person engaged in the business of serving meals, food, or drinks on the premises of, or supplied by, the customer (including premises leased by the customer from a person other than the caterer). (Cal. Code Regs., tit. 18, § 1603(i)(1).)

Tax applies to the entire charge made by caterers for serving meals, food, and drinks, inclusive of charges for food, the use of dishes, silverware, glasses, chairs, tables, etc., used in connection with serving meals, and for the labor of serving the meals, whether performed by the

caterer, the caterer's employees or subcontractors. (Cal. Code Regs., tit. 18, § 1603(i)(3)(A).)[8] Tax also applies to charges by a caterer for event planning, design, coordination, and/or supervision if they are made in connection with the furnishing of meals, food, or drinks for the event. (Cal. Code Regs., tit. 18, § 1603(i)(3)(C)(1).) However, tax does not apply to separately stated charges for services unrelated to the furnishing and serving of meals, food, or drinks, such as optional entertainment or any staff who do not directly participate in the preparation, furnishing, or serving of meals, food, or drinks (e.g., coat-check clerks, parking attendants, security guards, etc.). (*Ibid*.)

Although appellant offered optional event planning services to its customers, it is undisputed that most of appellant's services were catering services provided on premises supplied by its customers. Thus, appellant operated as a "caterer" within the meaning of California Code of Regulations, title 18, (Regulation) section 1603(i)(1). Because appellant was a caterer, tax generally applies to the entire amount of appellant's catering charges, including its charges for food and drinks and for the labor of serving them, and for the use of dishes, silverware, glasses, tables, and other property used by appellant to serve meals, food, or drinks. (Cal. Code Regs., tit. 18, § 1603(i)(3)(A).)

It also is undisputed that appellant correctly added sales tax reimbursement to its stated selling prices for food and other TPP (such as balloons and decorations), but erred when it neither added sales tax reimbursement to its separately stated charges for services, such as its charges for serving food, nor reported those charges for services as taxable sales. CDTFA performed a test of appellant's sales for a one-year period and established audited taxable sales based on that test. Subsequently, pursuant to review by CDTFA's Appeals Bureau and additional documentation provided by appellant showing that certain transactions were not a part of the sale of TPP, CDTFA significantly reduced the audited taxable measure in a reaudit.

Appellant does not dispute CDTFA's use of block sampling during the audit, and OTA has previously concluded in a precedential Opinion that CDTFA's use of block sampling to estimate a taxpayer's liability was reasonable and rational. (See *Appeal of Micelle Laboratories, Inc.*, 2020-OTA-290P.) Additionally, appellant does not dispute CDTFA's subsequent adjustments to the audit test, which reduced the amount of unreported taxable sales upon reaudit.

[8] Prior to amendments of California Code of Regulations, title 18, section 1603 on August 5, 2014, effective January 1, 2015, this subdivision was known as (h)(3)(A). The amendments included renumbering subdivision (h) as subdivision (i) and minor grammatical and formatting changes to new subdivision (i)(3)(A).

Accordingly, OTA finds that CDTFA's use of a block sample to determine the amount of unreported taxable sales and CDTFA's subsequent reduction to the audited taxable measure based on additional documentation already provided by appellant were reasonable and rational. The burden now shifts to appellant to demonstrate that further reductions to the amount of unreported taxable sales are warranted. (See *Appeal of Amaya*, *supra*.)

On appeal, appellant makes three contentions, two of which relate to the audit test. First, appellant contends that, in the block sample, charges for "rentals" of items used by appellant for serving food and drinks are not subject to tax, and removing them would further reduce the amount of unreported taxable sales. Second, appellant contends that the block sample contains a nontaxable sale for resale whose removal would also reduce the amount of unreported taxable sales. Third, appellant contends that its business operations terminated on June 30, 2007, not December 31, 2007, so unreported taxable sales for 3Q07 and 4Q07 should be deleted. OTA will examine each contention below.

Charges for "rentals" of items used by appellant for serving food and drinks

Appellant separately stated charges for "rentals" of dishes, silverware, glasses, tables, and other TPP used by appellant to serve meals, food, or drinks, and did not add sales tax reimbursement to such charges.

On appeal, appellant contends that tax does not apply to its rental of TPP because it paid sales tax reimbursement when it purchased the TPP rented to its customers. Appellant also asserts that the rental of TPP is an intangible, which is not subject to taxation.

As relevant here, Regulation section 1603(i)(3)(A) states that tax applies to the entire charge made by caterers for serving meals, food, and drinks, inclusive of charges for the use of dishes, silverware, glasses, chairs, tables, etc., used in connection with serving meals. Tax does not apply to charges made by caterers for the rental of dishes, silverware, glasses, etc., purchased by the caterer with tax paid on the purchase price *if no food is provided or served by the caterers in connection with such rental*. (Cal. Code Regs., tit. 18, § 1603(i)(3)(A).)

Here, all the rental transactions at issue involve appellant's charges for items used by appellant to provide and serve food and drinks.[9] Because appellant rented out the dishes, silverware, glasses, chairs, and tables, in connection with the sale of food and drinks, the

[9] There were no transactions in the one-year block sample where appellant rented dishes, glasses, table linens, and other such items to its customers, but did not also provide and serve food and drinks.

separately stated charges for such items are taxable even though appellant purchased such items tax paid. Accordingly, no further reduction to the amount of unreported taxable sales is warranted for this contention.[10]

Claimed nontaxable sale for resale

Appellant disputes CDTFA's finding that a sales invoice in the block sample showing $1,500 for a buffet sold to March Air Field Museum (MAFM), with no added tax or tax reimbursement and the notation "resale" on the sales invoice, represents a taxable sale. Appellant asserts that it accepted a resale certificate from MAFM at the time of the sale, but is now unable to locate it. Instead of a resale certificate, appellant provided a copy of MAFM's seller's permit, which appellant argues is proof that its sale to MAFM was a nontaxable sale for resale. Appellant contends that it tried to obtain a replacement resale certificate from MAFM but its contact at the museum was no longer there, and MAFM told appellant that it did not pay sales tax reimbursement because it was a non-profit organization.

The burden of proving that a sale of TPP is not at retail is upon the seller unless the seller timely takes in good faith a certificate from the purchaser that the property is purchased for resale. (R&TC, § 6091.) Any document, such as a letter or purchase order, timely provided by the purchaser to the seller qualifies as a valid resale certificate with respect to the sale of the property described therein so long as it contains all of the following essential elements: (1) the signature of the purchaser, purchaser's employee, or authorized representative of the purchaser; (2) the purchaser's name and address; (3) the purchaser's seller's permit number; (4) a statement that the property described in the document is purchased for resale; (5) an itemized list of the particular property to be purchased for resale, or a general description of the kind of TPP to be purchased for resale; and (6) the date of execution of the document. (Cal. Code Regs. tit. 18, § 1668(b)(1)(A) – (E).)

A seller who fails to timely and in good faith take a valid resale certificate from the purchaser will be relieved of liability for the tax only where the seller shows that the purchaser: (1) resold the TPP prior to use of the TPP for any purpose other than retention, demonstration, or display while holding it for resale in the regular course of business; (2) is still holding the TPP

[10] OTA additionally finds that appellant's separately stated charges for the delivery and set-up of items used for serving food and drinks are also taxable because they are related to the furnishing and serving of meals, food, or drink. (Cf. Cal. Code Regs., tit. 18, § 1668(3)(C)(1).)

for resale in the regular course of business without any use of the TPP for any purpose other than retention, demonstration, or display; or (3) has paid tax directly to the state on its storage, use, or other consumption of the TPP. (Cal. Code Regs., tit. 18, § 1668(e).)

Here, appellant has failed to provide a copy of a valid resale certificate to support its claimed nontaxable sale for resale to MAFM. The copy of MAFM's seller's permit provided by appellant is not signed by an employee or authorized representative of MAFM, does not include a description of the property to be purchased for resale, is undated, and does not include a statement that the property being purchased is for resale. Because it lacks most of the essential elements of a valid resale certificate, the copy of MAFM's seller's permit does not support appellant's assertion that its sale to MAFM was a nontaxable sale for resale. Further, appellant has not provided any evidence to show that MAFM resold or paid use tax for the buffet at issue.[11]

In the absence of evidence that appellant timely and in good faith accepted a valid resale certificate from MAFM, or that MAFM purchased the TPP from appellant for resale or has paid use tax on that purchase, appellant is liable for the sales tax on its sale to MAFM. Therefore, CDTFA properly characterized this transaction as a taxable sale in the block test, and OTA finds that a further reduction in the amount of unreported taxable sales is not warranted based on this contention.

Termination of Business Operations: June 30, 2007, or December 31, 2007

Appellant did not file a SUTR for 3Q07. Therefore, CDTFA issued an NOD to appellant on July 16, 2008, based on estimated unreported taxable sales of $28,428 for that quarter.

Appellant timely filed a SUTR for 4Q07, reporting total sales of $13,400, claiming a deduction of $2,988 for nontaxable sales for resale, and resulting in reported taxable sales of $10,142. According to CDTFA, when its staff telephoned partner S. Mardirosian on October 9, 2008, she stated that the business had closed on December 31, 2007.

In the audit for the liability period, CDTFA established additional unreported taxable sales for 3Q07 and 4Q07 by projecting the error rate computed from the test of sales for the

[11] Although appellant bears the burden of establishing that it is not liable for tax on its sale to MAFM, CDTFA asserts that it still searched its records and found that MAFM obtained a seller's permit on the representation that it was in the business of selling t-shirts, hats, toys, and books, not food products or catering services. Additionally, CDTFA asserts that it was unable to find any evidence in its records showing that MAFM reported and paid use tax on the TPP it purchased from appellant.

period July 1, 2006, through June 30, 2007, to the estimated taxable sales for 3Q07 and the reported taxable sales for 4Q07.

On appeal, appellant asserts that it discontinued business operations effective June 30, 2007, and therefore, the audited taxable measure for 3Q07 and 4Q07 should be deleted. According to appellant, it closed its facility and began conducting business from home as a consultant and wedding planner in July 2007. In response to CDTFA's allegations that one of appellant's employees answered its business telephone and took messages to relay to appellant's management in October 2007 and November 2007, appellant asserts that it maintained its business name and telephone number only to collect money that was due to it, and that family members or a babysitter, not employees, might have answered the business telephone. Regarding the timely filing of the SUTR for 4Q07, appellant alleges that it only signed the return under pressure from CDTFA.

Appellant has not explained why it would report total sales of $13,400, claim a deduction of $2,988 for nontaxable sales for resale, and report taxable sales of $10,142 on a SUTR timely filed for 4Q07 if it made no sales during that quarter. Neither has appellant substantiated its allegation that it signed the SUTR for 4Q07 under CDTFA pressure. Accordingly, OTA finds that appellant's reported sales for 4Q07 are persuasive evidence that appellant made sales during that quarter.

Additionally, appellant's reported gross receipts of $471,701 and COGS of $337,503 on its 2007 FITR are consistent with reported gross receipts of $484,600 and COGS of $345,539 on appellant's 2006 FITR. Given that the amounts reported on the 2006 FITR represent appellant's gross receipts and COGS for the entire year 2006, and the gross receipts and COGS reported on appellant's 2007 FITR are consistent with the amounts reported for 2006, OTA finds that the amounts reported on appellant's 2007 FITR also constitute evidence that appellant operated the business for the entire year 2007.

Appellant has provided no evidence (other than its bare assertion) that the business ceased operations on June 30, 2007. Based on the sales reported on appellant's SUTR for 4Q07 and the amounts reported on appellant's 2007 FITR, OTA concludes that appellant continued its business operations through December 31, 2007, and thus, no adjustments to the audited taxable measure for 3Q07 and 4Q07 are warranted on this basis.

Summary

For the reasons state above, OTA finds that further reductions to the amount of unreported taxable sales are not warranted.

Issue 2: Whether OTA has jurisdiction to decide whether any of appellant's liabilities were discharged in bankruptcy.

On October 2, 2008, appellant's partners filed a Chapter 7 (liquidation) bankruptcy petition with the United States Bankruptcy Court. In their bankruptcy filing, appellant's partners listed CDTFA as a creditor, for taxes owed in the amount of $7,937.66. Appellant asserts that its partners' personal savings account was levied on September 10, 2010, for $4,502.48, which left its partners with no funds. Appellant argues that its tax liability should have been discharged in bankruptcy because the levies of the funds from its partners' personal savings account and other efforts to satisfy its tax debt caused it to experience severe financial hardship.

OTA does not have jurisdiction to determine whether a liability has been or should have been discharged in bankruptcy under the United States Bankruptcy Code. (Cal. Code Regs., tit. 18, § 30104(h); see also *Appeal of Savage*, 2020-OTA-328P.) Accordingly, OTA will not address this issue further.

Issue 3: Whether appellant is entitled to an additional refund or credit for any portion of the amount collected by levy on September 27, 2010.

Subject to certain limitations not relevant here, CDTFA may serve a notice of levy, in person or by first-class mail, on a tax debtor or on a third party holding personal property belonging to the tax debtor, including a financial institution such as a bank, to require the tax debtor or third party to turn over to CDTFA any cash, credits, or other personal property belonging to the tax debtor. (R&TC, § 6703(a), (e).) CDTFA may grant a credit or refund on any amount, penalty, or interest that has been paid more than once or has been erroneously or illegally collected or computed. (R&TC, § 6901.) The claimant bears the burden of establishing his or her entitlement to a refund or credit. (*Honeywell, Inc. v. State Bd. Of Equalization* (1982) 128 Cal.App.3d 732, 744-745.) The applicable burden of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c).) That is, the taxpayer must establish by documentation or other evidence that it is more likely than not that it is entitled to the claimed refund or credit. (*Appeal of AMG Care Collective*, *supra*.)

After CDTFA collected $4,577.48 by levy from appellant's partners' personal savings account in September 2010, appellant filed a claim for refund of the funds on May 16, 2012, arguing that the levy was made in error. Here, OTA has jurisdiction to consider whether CDTFA's action in collecting funds by levy was valid and, if not, whether appellant is entitled to a remedy because appellant filed a timely appeal of that action. (See Cal. Code Regs., tit. 18, § 30104(d).)

Appellant contends that CDTFA was not entitled to collect funds by levy because appellant had filed a timely petition for redetermination of the NOD issued on March 17, 2010, and therefore, the liability was not final. According to appellant, prior to the levy, it had entered into an installment payment plan to pay off its outstanding liabilities, but it stopped making payments after filing its petition for redetermination based on advice from a CDTFA collector, who allegedly told appellant that it no longer needed to make payments pending its appeal. Subsequently, appellant received a letter dated July 22, 2010, from another CDTFA staff member, who indicated that appellant was in default of its payment plan and needed to send a payment by August 6, 2010, or CDTFA would pursue collection efforts for payment of the outstanding unpaid liability of $4,642.58. There is no dispute that appellant did not respond to the July 22, 2010 letter before CDTFA served the levy and collected the funds. However, appellant argues that it was not required to make payments because its liability was not yet final, and, therefore, the funds collected by levy should be refunded.

The liability assessed in the March 17, 2010 NOD did not encompass appellant's entire tax liability as of that date. CDTFA had estimated appellant's tax liability for 4Q06, 1Q07, and 2Q07 after appellant failed to file SUTRs for those quarters, and had issued an NOD to appellant on August 9, 2007, for tax of $8,756.00, applicable interest, and a failure-to-file penalty of $875.60. After appellant also failed to file a return for 3Q07, CDTFA issued another NOD to appellant on July 16, 2008, for tax of $2,202.00, applicable interest, and a failure-to-file penalty of $220.20. Appellant did not file timely petitions for redetermination of these NODs, and these two determinations became final 30 days after their NODs' issuance. According to CDTFA, its review of its records showed that all but $125 of the levied funds were applied to the liabilities assessed in the NODs issued on August 9, 2007, and July 16, 2008. Of the $125 that was not applied to the final liabilities, $75 was kept by the bank as a levy administration fee, and $50 has been refunded to appellant because it had been improperly applied to the non-final audit liability.

There is no dispute that appellant had entered into an installment payment agreement, but had defaulted on that agreement when it stopped making payments. Although appellant asserts that it was always in contact with CDTFA regarding its unpaid liabilities, appellant has not explained its failure to respond to the July 22, 2010 letter from CDTFA. This letter provided appellant with adequate notice of CDTFA's intent to enforce collection of the unpaid tax liability after appellant's default. Appellant has not refuted CDTFA's assertion that all but $125 of the funds collected by levy were applied to appellant's final liabilities that resulted from its failure to file SUTRs for the periods 4Q06, 1Q07, 2Q07, and 3Q07. Although CDTFA improperly applied $50 of the funds collected by levy to appellant's non-final liability, OTA finds no error in CDTFA's collection of the remainder of the funds by levy. Thus, OTA concludes that the refund of $50 to appellant was proper, but that no additional refund of the levied amounts is warranted.

Issue 4: Whether relief from tax is warranted based on appellant's claim that any understatements are the result of its reasonable reliance on CDTFA's erroneous oral advice.

A taxpayer may be relieved of tax, interest, and penalties otherwise due if the taxpayer's failure to make a timely return or payment of sales or use tax was due to the taxpayer's reasonable reliance on written advice from CDTFA. (R&TC, § 6596(a).) This relief is available only when, among other requirements, CDTFA staff provided written advice in response to a written request from a taxpayer that fully described the specific facts and circumstances of the activities or transactions for which relief is requested. (R&TC, § 6596(a), (b).) Any person seeking relief based upon reliance on written advice from CDTFA must file a statement signed under penalty of perjury setting forth the facts on which the claim for relief is based, as well as a copy of the person's written request for advice to CDTFA and CDTFA's written advice. (R&TC, § 6596(c)(1)-(2).)

Here, appellant alleges that, prior to the liability period, when it changed its business address, it went into the CDTFA office in Riverside with its bookkeeper and met with a representative. According to appellant, the representative informed appellant that separately stated charges for catering services and other services provided in connection with catering services, such as event planning services, on-site coordinator services, labor for delivery and set-up, as well as pick-up and clean-up services, are not subject to tax. Appellant contends that, because of the representative's advice, it did not charge or collect sales tax reimbursement on those types of charges. Accordingly, appellant argues that it is entitled to relief because its

failure to collect sales tax reimbursement was in direct reliance on the advice of CDTFA staff.

Appellant alleges that it reasonably relied on *oral* advice from CDTFA staff, and has provided neither argument nor evidence that it relied upon *written* advice. R&TC section 6596 clearly provides relief only when a taxpayer reasonably relied on written advice from CDTFA. In the absence of evidence of appellant's written request for advice and CDTFA's written response thereto, OTA finds that R&TC section 6596 provides no basis for relief. Thus, OTA concludes that no relief from tax is warranted based on appellant's claim that any understatements are the result of its reasonable reliance on CDTFA's erroneous oral advice.

Issue 5: Whether appellant established a basis for additional relief of interest.

The imposition of interest is mandatory. (R&TC, § 6482.) There is no statutory right to interest relief. (R&TC, § 6593.5.) The law allows CDTFA, in its discretion, to grant relief of all or any part of the interest imposed on a person under the Sales and Use Tax Law where the failure to pay the tax is due in whole or in part to an unreasonable error or delay by an employee of CDTFA acting in his or her official capacity. (R&TC, § 6593.5(a)(1).) Such a delay means, for example, an unreasonable failure to work on an appeal. (*Appeal of Eichler*, 2022-OTA-029P.) An unreasonable error or delay shall be deemed to have occurred only if no significant aspect of the error or delay is attributable to an act of, or failure to act by, the taxpayer. (R&TC, § 6593.5(b).) Any person requesting interest relief must include a statement under penalty of perjury setting forth the facts on which the request is based. (R&TC, § 6593.5(c).)

OTA's jurisdiction in an interest abatement case, however, is limited. OTA only reviews CDTFA's decisions to deny interest relief on an abuse of discretion standard. (*Appeal of Eichler, supra*.) To show an abuse of discretion, a taxpayer must establish that, in refusing to abate interest, CDTFA exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law. (*Ibid*.)

By requests dated April 25, 2012, and April 18, 2014, appellant requested relief of interest due to unreasonable errors or delays by CDTFA staff during the audit and subsequent appeal process. In its D&R issued on December 31, 2014, CDTFA comprehensively analyzed the various steps it completed during the audit and its internal appeals process from September 8, 2008, through December 31, 2014. Based on its analysis, CDTFA found that there were unreasonable delays and recommended relief of interest for the following four periods: (1) December 2, 2010, through May 31, 2011; (2) September 25, 2012, through March 1, 2013;

(3) May 2, 2013, through October 3, 2013; and (4) November 1, 2013, through February 1, 2014. In recommending relief of interest, CDTFA noted that appellant originally had disputed less than 20 percent of the deficiency established in the block sample for the one-year test period, and explained that its recommendation regarding relief of interest applied only to the interest that accrued on the disputed tax amount.

On appeal to OTA, appellant contends that it should not pay any interest, primarily because it claims that it was treated unfairly during the audit process. According to appellant, the fact that the process lasted more than ten years is a valid reason to relieve interest.

Here, the length of time from the beginning of the audit in this case through the resolution of the appeal is significant. As stated above, CDTFA already has examined its timeframes for completing the various steps in the audit and appeals process, and has recommended interest relief for four periods totaling more than 20 months. All other periods fell within CDTFA's standard working timeframes. The law allows CDTFA to grant interest relief "in its discretion," provided certain elements are met. (R&TC, § 6593.5.) Because CDTFA's analysis shows that appellant's audit and appeal were processed within standard timeframes with no unexplained absence of work during the periods for which CDTFA has not recommended relief of interest, it does not appear from the record that CDTFA has abused its discretion in denying the remaining periods that were eligible for interest relief. With respect to CDTFA's decision that relief applied only to the interest that accrued on the disputed tax amount, OTA agrees that appellant's failure to pay the portion of the tax with which it originally agreed cannot be attributed to any action or unreasonable delay by CDTFA, and, thus, interest relief does not apply to the conceded amounts. (R&TC, § 6593.5(b).) As such, OTA concludes that appellant has failed to establish that any additional relief of interest is warranted.

HOLDINGS

1. Further reductions to the amount of unreported taxable sales are not warranted.
2. OTA does not have jurisdiction to decide whether appellant's liabilities were discharged in bankruptcy.
3. Appellant has been granted a credit or refund of $50 erroneously collected by levy on September 27, 2010. Appellant is not entitled to an additional refund of any other portion of the amount collected by levy.
4. No relief from tax is warranted based on appellant's claim that any understatements are the result of its reasonable reliance on CDTFA's erroneous oral advice.
5. Appellant has been relieved of the interest that accrued during specified periods on unpaid, disputed tax resulting from the audit for the liability period. Appellant has not established that any additional relief of interest is warranted.

DISPOSITION

CDTFA's actions in reducing the deficiency measure for unreported taxable sales by $82,229, from $310,535 to $228,306, relieving interest for specified periods, refunding $50 erroneously collected by levy, and otherwise denying the appeals, are sustained.

DocuSigned by:
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Andrew Wong
Administrative Law Judge

We concur:

DocuSigned by:
Daniel Cho
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Daniel K. Cho
Administrative Law Judge

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

Date Issued: 8/18/2022