OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 220310017
	) CDTFA Case ID 178-007
VACCO INDUSTRIES	)
	)
	)
	)

OPINION

Representing the Parties:

For Appellant: John P. Lyon, Representative

For Respondent: Kevin Smith, Tax Counsel III

For Office of Tax Appeals: Corin Saxton, Tax Counsel IV

A. WONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6901, Vacco Industries (appellant) appeals a Decision issued by respondent California Department of Tax and Fee Administration (CDTFA)[1] denying in part appellant's claim for refund or credit (claim) for the period January 1, 2015, through December 31, 2017 (claim period).

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

ISSUE

Whether appellant is entitled to a refund for sales tax reimbursement that appellant paid to its vendors in connection with nontaxable sales for resale.

[1] The State Board of Equalization (BOE) formerly administered the sales and use taxes. On 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" shall refer to BOE.

FACTUAL FINDINGS

1. Appellant, a California corporation, operates a facility in South El Monte, California, where appellant designs and manufactures fluid control and filtration products used in aviation, space flight, deep-space exploration, and global communications.
2. On October 30, 2017, appellant filed a timely claim of $1 or more for sales tax reimbursement it paid to its vendors in connection with nontaxable sales for resale it made during the claim period.
3. In response, CDTFA conducted an audit and a reaudit,[2] which identified purchases of $4,535,894 for which appellant paid sales tax reimbursement to its vendors and later resold without intervening use. CDTFA credited appellant with an amount equivalent to some of the sales tax reimbursement paid to its vendors. Specifically, CDTFA allowed a deduction and credit to the extent of appellant's reported taxable measure for the claim period ($1,483,314) and denied a refund measured by the balance of $3,052,580 ($4,535,894 - $1,483,314).
4. Appellant disputed the audit findings, and CDTFA issued a decision upholding the reaudit.
5. This timely appeal followed.

DISCUSSION

A retailer who resells tangible personal property before making any intervening use of it (other than retention, demonstration, or display while holding it for sale in the regular course of business) may take a deduction of the purchase price of the property if, with respect to its purchase, the retailer has reimbursed its vendor for the sales tax. (R&TC, § 6012(a)(1); Cal. Code Regs., tit. 18, § 1701(a).) The retailer should take the so-called "tax-paid purchases resold" deduction when, through error, sales tax reimbursement is paid by the retailer with respect to the purchase price of property purchased for resale in the regular course of business. (Cal. Code Regs., tit. 18, § 1701(b)(4).) If such a deduction is taken by the retailer, no refund or credit will be allowed to its vendor with respect to the sale of the property. (R&TC, § 6012(a)(1); Cal. Code Regs., tit. 18, § 1701(a).) The deduction "must be taken on the retailer's return in which

[2] The reaudit addressed computational errors made in the audit.

[the retailer's] sale of property is included;" "[i]f the deduction is not taken in the proper quarter, a claim for refund of tax must be filed." (Cal. Code Regs., tit. 18, § 1701(a).)

If CDTFA determines that any amount of tax, interest, or penalty was not required to be paid, it will credit the excess amount collected or paid on any amounts then due and payable from the person "from whom the excess amount was collected or by whom it was paid," and the balance will be refunded to that person. (R&TC, § 6901.)

A taxpayer who claims a refund bears the burden of establishing its entitlement thereto. (*Honeywell, Inc. v. State Bd. of Equalization* (1982) 128 Cal.App.3d 739, 744-745.)

On appeal, appellant offers three arguments for why it is entitled to a refund without limitation for the sales tax reimbursement paid to its vendors in connection with nontaxable sales for resale. First, appellant argues that the plain language of California Code of Regulations, title 18, (Regulation) section 1701 does not explicitly limit the claim amount. Second, appellant argues that limiting the claim amount would result in a windfall for the state at appellant's expense because most of appellant's sales are nontaxable sales to the U.S. government, so the state would ultimately retain nearly all the sales taxes paid by appellant's vendors and reimbursed by appellant on nontaxable sales for resale. Third, appellant argues that CDTFA is treating U.S. government contractors seeking refunds (such as appellant) differently from retailers who seek refunds through its vendors pursuant to R&TC section 6901, which generally governs refunds and credits in the sales and use taxes context. Whereas the former's refunds are capped by the limited amount of retail sales they make, appellant asserts that the latter may receive full refunds without limitation. Appellant argues there is no rational reason why other retailers, but not appellant, are free from this restriction.

Here, CDTFA allowed appellant's claim to the extent of appellant's reported taxable measure for the claim period; however, CDTFA denied the claim for any amount above that. This is appropriate because contrary to appellant's first argument on appeal—and by their plain language—R&TC section 6012(a)(1) and Regulation section 1701(a) specifically limit relief to a deduction taken in the quarterly period(s) during which a retailer resold the tax-paid purchases. Accordingly, the tax-paid purchases resold deduction is limited by the retailer's reported tax liability for those quarterly periods; that is, for any given quarter, with respect to tax-paid purchases resold therein, the retailer may only deduct an amount up to the reported taxable measure. If the retailer does not take the tax-paid purchases resold deduction in the proper

quarter, a claim for refund must be filed. (Cal. Code Regs., tit. 18, § 1701(a).) Claims for refund are governed by R&TC section 6901, which specifies that the person filing the claim for refund and entitled to a refund of excess amounts remitted to the state is the person who actually remitted the excess amount to the state. Here, those persons do not include appellant, who paid tax reimbursement to its vendors (not sales tax to the state) with respect to the resold purchases at issue.

With its second, "windfall" argument, appellant essentially seeks an equitable remedy from OTA based on an allegation of unjust enrichment by the state. If appellant believes that it has been charged excess tax reimbursement by its vendors, then appellant may complain to CDTFA, which may in turn initiate an audit of the vendors and/or issue a deficiency determination to them. (See *McClain v. Sav-On Drugs* (2019) 6 Cal.5th 951, 959, citing *Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1103-1104.) If CDTFA ascertains that persons such as appellant's vendors have collected excess tax reimbursement, R&TC section 6091.5 and Regulation section 1700(b) prescribe the procedure to be followed: the vendors will first be afforded an opportunity to refund the excess collections to the customers from whom they were collected (i.e., appellant). (See Cal. Code Regs., tit. 18, § 1700(b)(2).) Under this procedure, a so-called "windfall" for the state is no certainty. However, if the vendors have already remitted to the state the excess tax reimbursement collected from appellant, then, to determine the proper application of tax, appellant's *vendors* must submit claims for refund per R&TC section 6901. (See *McClain v. Sav-On Drugs*, *supra*, at p. 955 ["A customer who has paid excess sales tax reimbursement has no statutory remedy to obtain a refund from [CDTFA] directly."].) If the vendors do not seek a refund for whatever reason, then appellant's recourse is found in a judicial forum, not with OTA: where CDTFA has determined that a refund is appropriate, appellant may sue its vendors (joining CDTFA as a party to the suit) in order to compel them to seek a refund of sales taxes paid in excess of the amount owed. (See *Javor v. State Bd. of Equalization* (1974) 12 Cal.3d 790, 802.) Because OTA is not the proper forum to address appellant's unjust enrichment claim, OTA declines to consider this second argument further.

Regarding appellant's third, "disparate treatment" argument, there is no evidence that CDTFA applied the law differently to appellant. As described above, the Sales and Use Tax Law and relevant case law outline the procedures to be followed when a customer pays excess tax reimbursement to a person and then files a claim with CDTFA. OTA's review of the record

indicates that CDTFA has adhered to these authorities in handling appellant's claim. Accordingly, OTA is not persuaded by appellant's third argument.

For these reasons, OTA concludes that appellant has not established entitlement to a refund for sales tax reimbursement appellant paid to its vendors in connection with nontaxable sales for resale.

HOLDING

Appellant is not entitled to a refund for sales tax reimbursement paid to its vendors in connection with nontaxable sales for resale.

DISPOSITION

OTA sustains CDTFA's action denying appellant's claim in part.

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Andrew Wong
Administrative Law Judge

We concur:

DocuSigned by:
Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

DocuSigned by:
Michael F. Geary
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Michael F. Geary
Administrative Law Judge

Date Issued: 11/28/2022