OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No.: 19024371
	CDTFA Case ID: 984679
UNITED THRIFT STORES, LLC,	
dba Redlands Thrift Store	

OPINION

Representing the Parties:

For Appellant: Jolonda Walsh, CEO/ Owner/ President

For Respondent: Nalan Samarawickrema, Hearing Representative
Chad Bacchus, Tax Counsel IV
Jason Parker, Chief of Headquarters Operations

J. ALDRICH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, United Thrift Stores, LLC (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)[1] denying appellant's timely petition for redetermination of the Notice of Determination (NOD) dated October 21, 2016. The October 21, 2016 NOD is for tax of $90,652.67, plus applicable interest, for the period July 1, 2012, through September 30, 2015 (audit period).

Office of Tax Appeals (OTA) Administrative Law Judges Teresa A. Stanley, Daniel K. Cho, and Josh Aldrich held an oral hearing for this matter electronically, on December 29, 2022. At the conclusion of the hearing, the record was held open for appellant's submission of a request for relief of interest. Following this additional briefing, OTA closed the record on January 13, 2023, and this matter was submitted for an opinion.

[1] Sales taxes were formerly administered by the Board of Equalization (board). Effective July 1, 2017, functions of the board relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) When this Opinion refers to acts or events that occurred before July 1, 2017, "CDTFA" shall refer to its predecessor, the board.

ISSUES

1. Whether CDTFA timely issued the NOD.
2. Whether adjustments are warranted to the disallowed claimed exempt sales in interstate commerce.
3. Whether adjustments are warranted to the disallowed claimed nontaxable sales for resale.
4. Whether an adjustment is warranted on the basis that payment of the liability will be a hardship for the business.
5. Whether interest relief is warranted.

FACTUAL FINDINGS

1. Appellant has operated a thrift store in Redlands, California, selling clothes, furniture, electronics and other home goods, since January 2006.
2. During the audit period, appellant claimed exempt sales in interstate commerce of $416,418 and nontaxable sales for resale of $966,575.
3. Appellant untimely filed its sales and use tax returns (returns) for the third quarter 2012 (3Q12) and 4Q12.
4. CDTFA obtained a waiver of the statute of limitations (waiver) to extend the deadline to issue a determination until October 31, 2016, for the period from 3Q12 through 2Q13. Appellant's president signed the waiver on January 11, 2016. On April 4, 2016, appellant's president signed an extension to the waiver.
5. CDTFA obtained a waiver to extend the deadline to issue a determination until April 30, 2017, for the period from 3Q12 through 4Q13. On October 13, 2016, appellant's president signed the waiver.
6. CDTFA concluded that reported total sales were substantially accurate based on its review of appellant's records. However, CDTFA noted that appellant did not provide any documentation to support its claimed exempt sales in interstate commerce, and CDTFA disallowed the entire claimed amount of $416,418.
7. To evaluate the claimed nontaxable sales for resale, CDTFA conducted a block test, reviewing all claimed nontaxable sales for resale for the first three quarters of 2015.
8. To support claimed nontaxable sales for resale, appellant provided some resale certificates.

9. CDTFA offered appellant the opportunity to send XYZ letters to its customers, and some of the replies to those letters supported claimed nontaxable sales for resale.
10. For some sales, appellant had provided seller's permits, but no resale certificates. For those sales, CDTFA regarded the sales as resales in fact if the customer was engaged in a business that sold items similar to those sold by appellant.
11. CDTFA found nontaxable sales for resale of $50,485 for the first three quarters of 2015 that were adequately supported by documentation, and it computed that $50,485 represented 24.93 percent of claimed nontaxable sales for resale of $202,487 for that period.
12. CDTFA applied 24.93 percent to total claimed nontaxable sales for resale of $764,088 for the period July 1, 2012, through December 31, 2014, to establish $190,487 of allowed resales, and it added $50,485 to establish allowed nontaxable sales for resale for the audit period of $240,972.
13. CDTFA deducted $240,972 from claimed nontaxable sales for resale of $966,575 to establish disallowed claimed nontaxable sales for resale of $725,603.
14. On October 21, 2016, CDTFA issued an NOD for tax of $90,652.67 and applicable interest.
15. On October 23, 2016, appellant filed a petition for redetermination.
16. On January 23, 2019, CDTFA issued a decision denying the petition for redetermination.
17. This timely appealed followed.
18. On January 4, 2023, appellant submitted a *Request for Relief from Penalty, Collection Cost Recovery Fee, and/or Interest* (CDTFA-735).

DISCUSSION

Issue 1: Whether CDTFA timely issued the NOD.

Absent certain exceptions, every NOD must be mailed within three years after the last day of the calendar month following the quarterly period for which the amount is proposed to be determined or within three years after the return is filed, whichever period expires later. (R&TC, § 6487(a).) With an agreement in writing, a taxpayer may waive or extend the deadline prescribed in R&TC section 6487(a). When such a waiver has been obtained, the NOD may be mailed at any time prior to the expiration of the extended period. (R&TC, § 6488; Cal. Code

Regs., tit. 18, § 1698.5(b)(3).) The waiver or extension period may be extended by subsequent agreements in writing. (R&TC, § 6488.)

Here, there is no dispute that the three-year statute of limitations set forth in R&TC section 6487 applies. Since appellant untimely filed its 3Q12 return, the three-year statute of limitations would have expired on February 22, 2016, absent a waiver. However, CDTFA obtained two waivers and an extension for the requisite periods. Appellant does not dispute the validity of the waivers. Instead, appellant argues that it signed them to get through the audit process. This argument fails to establish any basis for invalidating the waivers. Based on the foregoing, OTA concludes that the waivers were valid and CDTFA timely issued the NOD.

Issue 2: Whether adjustments are warranted to the disallowed claimed exempt sales in interstate commerce.

California imposes a 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).)

If 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 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*.)

Sales tax does not apply to a sale of tangible personal property when, pursuant to a contract of sale, the tangible personal property is required to be shipped and is shipped to a point outside this state by the retailer, by means of: (a) facilities by the retailer; or (b) delivery by the retailer to a carrier, customs broker or forwarding agent, whether hired by the customer or not, for shipment to such out-of-state point. (R&TC, § 6396; Cal. Code Regs., tit. 18, § 1620(a)(3)(B).) Bills of lading or other documentary evidence of the delivery of the property

to a carrier, customs broker, or forwarding agent for shipment outside this state must be retained by the retailer to support deductions for exempt sales in interstate commerce. (Cal. Code Regs., tit. 18, § 1620(a)(3)(D).) The retailer bears the burden of establishing entitlement to any claimed exemption. (*Appeal of Owens-Brockway Glass Container, Inc.*, 2019-OTA-158P.)

Here, appellant claimed exempt sales in interstate commerce of $416,418. Appellant provided no evidence to support any of the claimed exempt sales, such as bills of lading or other evidence of shipment to points outside California. Accordingly, CDTFA disallowed the entire amount of claimed exempt sales in interstate commerce. Since appellant did not provide sufficient records to support its claimed exemption, CDTFA's decision to disallow appellant's claimed deduction was reasonable and rational.

Appellant argues that it was not aware of the requirement to retain shipping documents. Appellant explains that, during the audit period, it made sales online, and many of those online sales were to customers outside California. During the appeal with CDTFA, appellant stated that it had explored the possibility of obtaining shipping information from Amazon and eBay, but no information was available from those websites for sales during the audit period. Appellant concedes that it has no documentation to support its claimed exempt sales in interstate commerce but asks that some allowance be made based on the nature of its business.

The law and regulations are clear. Appellant has the burden of proving facts establishing its right to the exemption. (Cal. Code Regs., tit. 18, § 1620(a).) Further, unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Talavera*, *supra*.)

In sum, there is no credible evidence on which OTA can establish an adjustment to the disallowed claimed exempt sales in interstate commerce. Accordingly, OTA finds that no adjustment is warranted to the disallowed exempt sales in interstate commerce.

Issue 3: Whether adjustments are warranted to the disallowed claimed nontaxable sales for resale.

A retail sale is a sale for any purpose other than resale in the regular course of business. (R&TC, § 6007.) A retailer's gross receipts are presumed subject to tax, and the burden of proving that a sale of tangible personal property is not at retail is upon the retailer unless the retailer takes in good faith a resale certificate from the customer that the property is purchased for resale. (R&TC, §§ 6091, 6092; Cal. Code Regs., tit. 18, § 1668(a).) If a seller fails to timely obtain a resale certificate in proper form, the seller will be relieved of liability for the tax only

where it shows that the property at issue: was in fact resold by the purchaser prior to any taxable use; is being held for resale by the purchaser and has not been used for purposes other than retention, demonstration, or display for resale in the regular course of business; or was consumed by the purchaser and tax was paid to CDTFA. (Cal. Code Regs., tit. 18, § 1668(e).)

A seller who does not timely obtain a resale certificate may use any verifiable method of establishing that it should be relieved of liability for the tax, including the use of XYZ letters, which are CDTFA-approved forms and sent to the seller's customers inquiring as to the disposition of the property purchased. (Cal. Code Regs., tit. 18, § 1668(f).) However, a response to an XYZ letter is not equivalent to a timely and valid resale certificate in proper form, and CDTFA is not required to relieve a seller from liability for tax based on a customer's response to an XYZ letter. (Cal. Code Regs., tit. 18, § 1668(f)(3).) When there is no response to an XYZ letter, CDTFA should consider whether it is appropriate to use an alternative method to ascertain whether the seller should be relieved of liability for the tax with respect to the questioned or unsupported transaction.[2] (Cal. Code Regs., tit. 18, § 1668(f)(4).)

Here, CDTFA conducted a test, reviewing appellant's claimed nontaxable sales for resale for the first three quarters of 2015. CDTFA allowed all claimed nontaxable sales for resale that were supported by resale certificates. CDTFA offered appellant the opportunity to send XYZ letters, and CDTFA allowed claimed nontaxable sales for resale for which the customer stated that the merchandise had been sold, was being held in resale inventory, or had been consumed, with tax paid directly to CDTFA on the purchase. In addition, CDTFA noted that, for some sales, appellant had a seller's permit number but no resale certificate. For those transactions, CDTFA researched its data base. If CDTFA found that the sales were to a customer who was in the business of selling the type of merchandise purchased from appellant, CDTFA allowed the sale as a valid nontaxable sale for resale.

In its test of claimed nontaxable sales for resale, CDTFA determined nontaxable sales for resale of $10,735 for 1Q15, $21,709 for 2Q15, and $18,041 for 3Q15, which totaled $50,485. In contrast, for the same three quarters, appellant had claimed nontaxable sales for resale of

[2] CDTFA's Audit Manual section 0409.51 also provides, in relevant part, that non-responses to XYZ letters should not be automatically considered as errors or non-errors and that, instead, CDTFA should make an effort to determine the taxability of the questioned sale by an alternative method. Such method could include determining whether the customer has a seller's permit, reviewing the quantity or type of items sold to determine if the items were sold for resale or consumption, examining other types of items sold to the customer, or accepting or denying the resale based on personal knowledge of the auditor.

$202,487. Based on these amounts, CDTFA computed a percentage of allowable nontaxable sales for resale of 24.93 percent ($50,485 ÷ $202,487). CDTFA applied that percentage to the claimed amounts for the period July 1, 2012, through September 30, 2015, to establish allowable nontaxable sales for resale of $190,487. Thus, CDTFA computed audited nontaxable sales for resale of $240,972 ($50,485 + $190,487). It deducted that amount from total claimed nontaxable sales for resale of $966,575 to establish disallowed claimed nontaxable sales for resale of $725,603.

OTA finds that a test of three quarters, out of a 13-quarter audit period, is a sufficiently long test, and appellant has not argued otherwise. Further, there is no evidence that the quarters tested were not representative of appellant's business. Since appellant did not provide sufficient records to support its claimed nontaxable sales for resale, CDTFA's decision to utilize a test period and apply the percentage derived therefrom to the claimed nontaxable sales for resales was reasonable and rational. As such, appellant bears the burden of establishing that adjustments are warranted.

Appellant asserts that, when nontaxable sales for resale were made at the register, the operator of the register verified each nontaxable sale for resale by checking the resale certificate on file, in a binder kept at each register. However, according to appellant, the detailed documentation for each nontaxable sale for resale was not retained because all sales were coded under a single button on the register. Appellant further states that the XYZ letters were not an effective tool for documenting nontaxable sales for resale in this case because many of the businesses who purchased merchandise for resale had moved or gone out of business.

Appellant also asserts that it was keeping records to the best of its knowledge and "according to the industry standard at the time," asserting that business owners were not fully informed of "current resale documentation requirements of the State." Nonetheless, it is a retailer's responsibility to educate itself regarding the requirements of maintaining adequate records to support claimed deductions. Appellant's assertion that it was maintaining records to the best of its knowledge does not offer a basis for adjustment. Finally, OTA notes that there have been no recent revisions to the requirements for maintaining documentation to support claimed nontaxable sales for resale.[3]

[3] R&TC section 6091 was incorporated in the Sales and Use Tax Law when it was enacted in 1941. R&TC section 6092 has been effective since 1967, and California Code of Regulations, title 18, section 1668 has been in effect since 1939.

Appellant has not provided credible evidence to support adjustments for additional nontaxable sales for resale. Based on the foregoing, OTA finds no adjustment is warranted to the disallowed nontaxable sales for resale.

Issue 4: Whether an adjustment is warranted on the basis that payment of the liability will be a hardship for the business.

Appellant states, "having to pay the [tax of over $90,000 and the accrued interest] would have devastating effects on an already struggling company and seems to be a hefty penalty for not meeting the states [sic] requirement for proper documentation of non-taxable sales…." From this statement, OTA infers that appellant is requesting adjustments based on the hardship that will result from payment of the tax liability.

OTA does not have the authority to relieve appellant's liability based on inability to pay. However, following this appeal, appellant may wish to contact CDTFA to learn about any programs that might provide assistance, such as CDTFA's Offer in Compromise program or installment payment plans.[4]

Issue 5: Whether interest relief is warranted.

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 Micelle Laboratories, Inc.*, 2020-OTA-290P.) 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).) Appellant bears the burden of proof to show interest relief is warranted. (Cal. Code Regs., tit. 18, § 30219.)

[4] For information regarding Offers in Compromise, see https://www.cdtfa.ca.gov/legal/offer-in-compromise.htm or contact (916) 322-7931. For information regarding installment payment plans see https://www.cdtfa.ca.gov/services/#Payment-Plan. For other information, see https://www.cdtfa.ca.gov/services/trouble-paying-taxes.htm

As required by R&TC section 6593.5, appellant's CEO submitted a CDTFA-735 requesting relief from the penalty, the cost collection recovery fee, and interest. With respect to the required statement setting forth the facts on which the request is based, appellant simply stated "Statutes of Limitations." OTA infers from appellant's statement, together with the appellant's other arguments, that appellant is arguing that interest relief should be granted.

During the oral hearing, CDTFA conceded interest relief for the following periods: October 2017 through December 2017 and February 2018 through March 2018. CDTFA denied interest relief for the remaining periods. Appellant, however, has not sufficiently shown what, if any, other delays occurred and how, if at all, those delays are attributable to actions taken by CDTFA. Therefore, appellant has not met its burden of establishing that CDTFA abused its discretion in denying interest relief for the remaining periods. Thus, OTA finds that interest relief is warranted only for the conceded periods, mentioned above.

HOLDINGS

1. The NOD was issued timely.
2. No adjustment is warranted to the disallowed exempt sales in interstate commerce.
3. No adjustment is warranted to the disallowed nontaxable sales for resale.
4. No adjustment is warranted on the basis that payment of the liability will be a hardship for the business.
5. Interest relief is granted for the following periods as conceded by CDTFA during the oral hearing: October 1, 2017, through December 31, 2017, and February 1, 2018, through March 31, 2018.

DISPOSITION

Sustain CDTFA's decision to deny the petition for redetermination except for the relief of interest noted above.

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Josh Aldrich
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Josh Aldrich
Administrative Law Judge

We concur:

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Daniel Cho
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Daniel K. Cho
Administrative Law Judge

DocuSigned by:
Teresa A. Stanley
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Teresa A. Stanley
Administrative Law Judge