

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 19105370
F. BOUTROS)	CDTFA Case ID 169-017
dba Discount Cigarettes Market)	
)	
)	

OPINION

Representing the Parties:

For Appellant: Paul Azir, Representative

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

For Office of Tax Appeals: Richard Zellmer, Business Taxes Specialist III

A. WONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, F. Boutros (appellant), dba Discount Cigarettes Market, appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA) on March 1, 2019.¹ In its decision, CDTFA partially denied appellant’s petition for redetermination of a timely Notice of Determination (NOD) dated October 11, 2016, for the period of January 1, 2013, through February 5, 2016 (liability period).² The NOD was for sales tax of \$93,187.73, applicable interest, and a failure-to-file penalty of \$416.09.³ CDTFA ultimately reduced the aggregate deficiency measure by \$7,872, from \$1,164,846 to \$1,156,974, but otherwise denied appellant’s petition.

¹ 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 BOE.

² CDTFA timely issued the NOD because appellant waived the otherwise applicable three-year statute of limitations for the period of January 1, 2013, through June 30, 2013, and extended the deadline to issue an NOD to October 31, 2016. (See R&TC, §§ 6487(a), 6488.)

³ During CDTFA’s internal appeals process, appellant conceded the failure-to-file penalty, so this Opinion will not address this penalty further.

Office of Tax Appeals (OTA) Administrative Law Judges Andrew Wong, Andrew J. Kwee, and Daniel K. Cho held an oral hearing for this matter in Cerritos, California, on May 17, 2022. At the conclusion of the hearing, the record remained open for additional submissions by the parties. Following the parties' submissions, the record closed on June 9, 2022, and this matter was submitted for a decision.

ISSUE

Whether any further reduction to the determined amount of unreported taxable sales is warranted.

FACTUAL FINDINGS

1. From July 1, 2011, until February 5, 2016, appellant, a sole proprietor, owned a store known as "Discount Cigarettes Market" in Rancho Cucamonga, California. Appellant sold beer, wine, soda, cigarettes, and sundry taxable items, as well as exempt food products and nontaxable lottery tickets and money orders. Appellant also provided check cashing services. Appellant sold the store on February 5, 2016.
2. For the liability period, appellant reported total sales of \$1,335,338, and claimed deductions of \$24,738 for sales tax included in total sales, \$478,129 for lottery ticket sales, \$191,153 for money order sales, \$315,257 for check cashing fees, and \$16,635 for unspecified "other" deductions, resulting in reported taxable sales of \$309,226.
3. Upon audit, appellant provided federal income tax returns (FITRs) for 2013 and 2014, profit and loss statements for 2013 and 2014, and bank statements for 2015. Appellant did not provide general ledgers, sales journals, cash register tapes, purchase journals, merchandise purchase invoices, or worksheets showing how he prepared his sales and use tax returns (SUTRs). CDTFA considered the provided books and records incomplete and could not determine appellant's method of reporting.
4. CDTFA found that gross receipts reported on the 2013 FITR reconciled to the total sales reported on the quarterly SUTRs for that year with minor differences, but gross receipts reported on the 2014 FITR exceeded total sales reported on the quarterly SUTRs for that year by \$8,103. Appellant could not explain this difference.

5. CDTFA also found that bank deposits for 2015 exceeded total sales reported on the quarterly SUTRs for that year by \$64,195. Appellant also could not explain this difference.
6. CDTFA compared cost of goods sold (COGS) reported on the FITRs for 2013 and 2014 to total sales reported on the SUTRs for those same years. Using this information, CDTFA computed book markups of 11.14 percent for 2013 and 9.08 percent for 2014.⁴ CDTFA found these book markups too low because it expected a markup of 33 percent based on its experience auditing similar businesses.
7. Due to appellant's incomplete books and records, the difference between gross receipts reported on the 2014 FITR and total sales reported on the quarterly SUTRs for that year, the difference between bank deposits for 2015 and total sales reported on the quarterly SUTRs for that year, and appellant's low book markups, CDTFA questioned the reliability of appellant's books and records and reported amounts. Accordingly, CDTFA decided to use an indirect audit method, the markup method, to determine appellant's taxable sales for the liability period.
8. COGS reported on appellant's FITRs for 2013 and 2014 combined was \$930,845. CDTFA found that the books and records provided by appellant did not segregate his purchases into categories of taxable and nontaxable merchandise. And due to the lack of purchase invoices and other merchandise purchase records, CDTFA could not perform a purchase segregation test or otherwise determine the amount of taxable merchandise purchases.⁵ Instead, CDTFA visually observed the store's shelves and estimated that

⁴ "Markup" is the amount by which the cost of merchandise is increased to set the retail price. For example, if the retailer's cost is \$.70 and it charges customers \$1.00, the markup is \$0.30. The formula for determining the markup percentage is $\text{markup amount} \div \text{cost}$. In this example, the markup percentage is 42.86 percent ($.30 \div .70 = 0.42857$). A "book markup" (sometimes referred to as an "achieved markup") is one that is calculated from the retailer's records. Markup and "gross profit margin" are different. The gross profit is the sales price minus the cost. The formula for determining the gross profit margin is $\text{profit amount} \div \text{sales price}$. In the above example, the gross profit margin is 30 percent ($.30 \div 1.00 = 0.3$).

⁵ A purchase segregation test segregates merchandise purchases into various product categories.

- 80 percent of the merchandise was taxable and 20 percent was nontaxable.⁶ CDTFA then computed taxable merchandise purchases of \$744,676 ($\$930,845 \times .80$) for 2013 and 2014 combined.⁷ CDTFA reduced this amount by 1 percent for pilferage, computing adjusted cost of taxable merchandise sold of \$737,229 for 2013 and 2014 combined.⁸
9. CDTFA could not compute a markup using a shelf test because appellant did not provide any purchase invoices to verify costs, nor any cash register tapes to verify selling prices. Instead, CDTFA estimated a 33 percent markup for taxable merchandise based on its experience auditing four other businesses in the same region for a similar period.⁹ CDTFA added the estimated 33 percent markup to the adjusted cost of taxable merchandise sold of \$737,229 for 2013 and 2014 combined to compute audited taxable sales of \$980,515 for that same period.
10. CDTFA's comparison of audited taxable sales of \$980,515 for 2013 and 2014 combined to reported taxable sales of \$214,399 for those same years resulted in a difference of

⁶ CDTFA's audit working papers (AWPs) do not specify how CDTFA's visual observation took place. Appellant's business closed on February 5, 2016, and CDTFA conducted its audit between March 7, 2016, and October 12, 2016, when a successor owned and operated the store. The AWP's do not record any on-site visit by CDTFA, but do contain six photographs, which CDTFA apparently downloaded from an online business review website (Yelp). The photographs depict racks and shelves with cigarettes and tobacco products, as well as refrigerators filled with beer, soda, energy drinks, and water, but do not appear comprehensive (a section with candy and nuts is only partly visible). The photographs are undated, so OTA cannot verify when each photograph was taken or who owned the store during those times. One of the photographs includes a promotional banner indicating that the store made a substantial lottery payout on August 11, 2009, which predates appellant's ownership of the store. And the earliest Yelp review included in the AWP's is dated May 31, 2011, which also predates appellant's ownership. CDTFA's March 1, 2019 decision implies that the visual observation was of appellant's successor's business, noting in a footnote that appellant had stated that his successor operated the business in substantially the same manner as he did (suggesting that the ratio of shelf space devoted to taxable and nontaxable items remained consistent between appellant's and his successor's ownership of the store).

⁷ CDTFA apparently assumed a direct correlation between the amount of shelf space tangible items occupied and their cost (i.e., if taxable items occupy 80 percent of a store's shelf space, then 80 percent of reported COGS is taxable).

⁸ Appellant stated that there was no self-consumption of taxable merchandise at his business, so CDTFA did not provide an allowance for self-consumption.

⁹ The four other businesses (and their respective markup percentages) were: (1) a market that sold soda, paper products, over-the-counter medicines, and sundry items, but did not sell alcohol, tobacco products, lottery tickets, or money orders, and did not provide check cashing services (45.31 percent markup); (2) a liquor store that sold soda, beer, wine, liquor, tobacco products, sundry items, and lottery tickets, but did not provide check cashing services (35 percent markup); (3) a mini mart that sold soda, beer, tobacco products, periodicals, sundry items, and lottery tickets, but did not sell money orders or provide check cashing services (32.74 percent markup); and (4) a liquor store that sold soda, beer, wine, liquor, tobacco products, periodicals, sundry items, lottery tickets, and money orders, and provided check cashing services (28.28 percent markup). The average markup for these four businesses was 35.33 percent. CDTFA also had enough information for three of these four businesses to compute an average taxable merchandise ratio of 80.35 percent.

\$766,116, which represented an error ratio of 357.33 percent. CDTFA applied the 357.33 percent error ratio to reported taxable sales of \$309,226 for the period of January 1, 2013, through December 31, 2015, to compute unreported taxable sales of \$1,104,963 for that same period.

11. CDTFA could not apply the error ratio of 357.33 percent to the period of January 1, 2016, through February 5, 2016, because appellant did not file a SUTR for that period. Instead, CDTFA first divided audited taxable sales of \$980,515 for 2013 and 2014 combined by 730 days (365 days x 2 years) to compute average audited taxable sales of \$1,343.17 per day. CDTFA then multiplied the \$1,343.17 amount by 35 days to compute unreported taxable sales of \$47,011 (rounded) for the period of January 1, 2016, through February 4, 2016.¹⁰
12. In total, CDTFA computed unreported taxable sales of \$1,151,974 for the liability period.¹¹
13. In connection with appellant's sale of the store on February 5, 2016, the escrow papers listed the sale of fixtures and equipment for \$5,000. CDTFA concluded that the sale of fixtures and equipment at close-out was taxable, and thus, the audit included a separate taxable measure of \$5,000 for the unreported taxable sale of fixtures and equipment.¹²
14. The audit also included a separate taxable measure of \$7,872 for unreported cigarette rebates.
15. On October 11, 2016, CDTFA issued the NOD to appellant, who timely petitioned.
16. On July 10, 2018, CDTFA's Appeals Bureau held an appeals conference with appellant. Afterwards, appellant provided CDTFA with the following additional books and records: monthly reports labeled "general ledger for cost of goods sold" that listed automated teller machine check deposits, bank cards deposits, and checks paid in 2015; total monthly merchandise purchases from Anheuser Busch and Gate City Beverage for 2015; a report of itemized merchandise purchases from Costco with no yearly total for 2015;

¹⁰ According to CDTFA, it was unclear whether appellant was open on the close-out date of February 5, 2016, so CDTFA did not compute sales for that day.

¹¹ \$1,151,974 is the total of \$1,104,963 for the period of January 1, 2013, through December 31, 2015, plus \$47,011 for the period of January 1, 2016, through February 4, 2016.

¹² During the June 9, 2022 oral hearing before OTA, appellant confirmed that the unreported taxable sale of fixtures and equipment was not at issue in this appeal, so OTA will not address it further.

and a report of checks paid in 2015. Appellant did not provide any information regarding reported COGS for 2013 and 2014.

17. In its March 1, 2019 decision, CDTFA's Appeals Bureau deleted the \$7,872 measure of tax for unreported cigarette rebates because it was already included in the \$1,151,974 measure of tax for unreported taxable sales. Otherwise, CDTFA's Appeals Bureau denied appellant's petition.
18. Appellant's appeal to OTA followed.

DISCUSSION

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.*)

Here, CDTFA decided to use the markup method to determine appellant's taxable sales due to the following: appellant's incomplete books and records; discrepancies between gross receipts reported on appellant's 2014 FITR and total sales reported on his SUTRs for that year,

and between bank deposits for 2015 and total sales reported on his SUTRs for that year; and appellant's low book markups. The markup method is a recognized and accepted accounting procedure. (*Appeal of Amaya, supra.*) Accordingly, OTA finds that CDTFA's use of the markup audit method was appropriate.

However, the markup method is only effective and reliable if CDTFA has sufficient information to establish the cost of taxable merchandise sold and a reasonable markup. (*Appeal of Amaya, supra.*) Before OTA can conclude that CDTFA has carried its minimal, initial burden of proof, OTA must evaluate the sufficiency of the information CDTFA used to establish both the cost of taxable merchandise sold and the 33 percent markup.

Here, there were two main components to the cost of taxable merchandise sold of \$744,676 for 2013 and 2014: (1) COGS of \$930,845 reported on appellant's FITRs for 2013 and 2014 combined, and (2) the estimated 80 percent taxable merchandise ratio applied to it. As relevant here, COGS is "expenditures necessary to acquire ... a physical product which is to be sold." (*Reading v. Commissioner* (1978) 70 T.C. 730, 733.) Phrased differently, COGS is the costs of purchasing inventory. (*Patients Mutual Assistance Collective Corp. v. Commissioner* (2018) 151 T.C. 176, 205.) Based on these definitions, OTA finds that, generally, COGS as reported on FITRs is a sufficient source of information for the cost of merchandise sold.

As for the estimated taxable merchandise ratio of 80 percent, here, CDTFA had limited sources of information to formulate it. At the time of the audit, appellant had already sold the store and failed to provide purchase invoices or other merchandise purchase records from which CDTFA could determine a taxable merchandise ratio. Instead, CDTFA apparently estimated the 80 percent taxable merchandise ratio based on a visual observation of the store's shelves as depicted in six photographs posted on, and downloaded from, a third-party business review website (Yelp).¹³ It is not clear when the photographs were taken, if they were all taken at the same time, who owned the store at that time (or those times), or whether they comprehensively depicted the store's interior or all merchandise available for sale. Given these unknowns, OTA questions whether these photographs alone would constitute sufficient information to estimate a reliable taxable merchandise ratio.

However, following the June 9, 2022 oral hearing, CDTFA provided documentation regarding four other businesses it had compared appellant to during the audit (primarily for the

¹³ See footnote 6, *ante*, page 4.

purpose of estimating the 33 percent markup, which OTA will address next).¹⁴ These four businesses sold similar merchandise and/or services, were in the same general area, and were audited for roughly the same periods as appellant. CDTFA had enough taxable merchandise information from three of these four businesses to calculate an average taxable merchandise ratio of 80.39 percent, which corroborates CDTFA's estimated 80 percent taxable merchandise ratio established by visual observation. CDTFA may determine the amount of tax required to be paid by a person based on any information that may come into CDTFA's possession (if it is not satisfied with the amount of tax reported). (R&TC, § 6481.) OTA finds that CDTFA's visual observation of undated online photographs of parts of the store at issue, when corroborated by documentation establishing the average taxable merchandise purchase ratios of three other similar businesses located in a similar area and audited for a similar period, constitutes sufficient information on which to estimate the 80 percent taxable merchandise ratio for appellant's business. In so finding, OTA further finds that CDTFA had sufficient information to reliably compute the \$744,676 cost of the taxable merchandise sold in 2013 and 2014 combined.¹⁵

OTA now examines whether CDTFA had sufficient information to estimate the 33 percent markup. Again, at the time of CDTFA's audit, appellant had sold the store and failed to provide purchase invoices to verify costs, cash register tapes to verify sales prices, or other book and records that would allow CDTFA to compute appellant's markup. Instead, CDTFA estimated a 33 percent markup for appellant by comparing appellant to the above-referenced four businesses, which had an average markup of 35.33 percent. Following the oral hearing, CDTFA provided to OTA a redacted copy of the spreadsheet the auditor used to compute the average 35.33 percent markup of the four comparable businesses, and supplied information regarding these businesses' salient characteristics (e.g., items sold, services provided, etc.). OTA has reviewed this documentation and finds that CDTFA has substantiated that it had sufficient information to estimate the 33 percent markup used in the markup method, and concludes that the markup is reasonable.

Based on the analysis above, OTA finds that CDTFA has met its minimal, initial burden of showing that its determination was reasonable and rational. Thus, the burden of proof shifts to

¹⁴ See footnote 9, *ante*, page 4.

¹⁵ Appellant does not dispute the 1 percent allowance for pilferage that CDTFA subsequently applied, which reduced the cost of taxable merchandise sold for 2013 and 2014 combined from \$744,676 to \$737,229.

appellant to show by a preponderance of the evidence that CDTFA's determination is incorrect and to establish the proper amount of tax.

On appeal, appellant argues that the amount of unreported taxable sales is overstated for four reasons. First, appellant contends that a significant amount of the COGS reported on appellant's FITRs included costs associated with appellant's nontaxable check cashing services.¹⁶ Second, appellant contends that COGS reported on appellant's FITRs also included sales of exempt food costs. Third, appellant argues that the amount of unreported taxable sales also includes sales of items that are exempt under a state food stamp program. Appellant argues that removing these three nontaxable items from COGS will reduce the amount of unreported taxable sales per the markup method. Fourth, appellant argues that his business is dissimilar to the four other businesses CDTFA used for comparison to estimate the 80 percent taxable merchandise ratio and 33 percent markup used in the audit. OTA will examine each of these arguments in turn.

Costs Associated with Check Cashing Service

As part of appellant's first argument that COGS reported on his FITRs included costs associated with appellant's nontaxable check cashing service, appellant contends that the Internal Revenue Code (IRC) does not prohibit such reporting. Accordingly, appellant argues that he properly included the cost of his check cashing services in reported COGS because he first bought checks (i.e., the merchandise) from his customers and then sold the checks to the banks. In support of this argument, appellant provided the following documentation: a check cashing permit; copies of checks cashed in 2012; copies of a few checks cashed in February and March 2013; copies of checks cashed in 2015; and spreadsheets regarding checks cashed, deposited, and paid in 2015. Appellant alleges that CDTFA ignored all these books and records for the "sampling year of 2015."

In response, CDTFA asserts that COGS reported on FITRs generally do not include costs associated with check cashing services. CDTFA contends that, typically, a taxpayer would only report the check cashing fees as income on FITRs. Further, CDTFA argues that appellant has

¹⁶ In his briefs, appellant originally argued that COGS reported on appellant's FITRs also included costs associated with nontaxable lottery ticket sales income, which led to overstating the amount of unreported taxable sales. However, during the oral hearing, appellant acknowledged that COGS did not include costs associated with lottery ticket sales. Accordingly, OTA will not address this argument further.

not substantiated that COGS reported on FITRs for 2013 and 2014 combined included expenses related to his business's check cashing service.

The IRS has addressed the issue of whether the amount of cash paid out for checks by a check cashing business represents the cost of goods sold. In a Field Service Advisory (FSA) dated March 8, 1994, the IRS concluded that the gross receipts from a check cashing business are the fees received for cashing the checks and not the face amount of the checks. (IRS FSA (March 8, 1994) 1994 WL 1725443.) In so concluding, the IRS considered then disfavored an alternative accounting/reporting method, one which appellant allegedly employed, because it could potentially distort the check cashing business's income accounting/reporting:

If the taxpayer's gross receipts were the total amount of the checks he cashed, then the cash paid out in currency and silver would represent the cost of goods sold. This could create a distortion of income if the taxpayer cashed a check but was unable to collect on the check from the original payer. [T]he taxpayer would take the total amount of checks into income and take a cost of goods sold deduction for the amount of his payments to his customers. By accounting for income in this manner, his bad debt deductions would, in effect, be up front rather than when the debt became worthless, as required by [IRC section] 166.

(*Ibid.*) Furthermore, as noted above, COGS is defined as costs of purchasing physical product or inventory to be sold (*Reading v. Commissioner, supra.*; *Patients Mutual Assistance Collective Corp. v. Commissioner, supra.*). Checks to be cashed are not goods, merchandise, or inventory to be sold; they are a type of negotiable instrument representing a promise to pay. (See generally Cal. U. Com. Code, § 3104.) Check cashing is a service, which should have no merchandise or inventory costs. Accordingly, in theory, OTA would not expect COGS reported on FITRs to include costs associated with check cashing.

However, regardless of how a taxpayer "should" report COGS on a FITR, OTA must examine whether appellant *in fact* included the total amount paid for checks in COGS reported on his FITRs for 2013 and 2014 combined (the starting point of the markup method used by CDTFA). Here, appellant has provided copies of checks cashed, primarily from 2012 and 2015. However, 2012 predates the liability period at issue, and 2015 was not the "sampling year" that CDTFA used in its markup method—those were 2013 and 2014. Appellant has not provided sufficient documentation to show the details of the transactions that are included in the COGS reported on appellant's 2013 and 2014 FITRs, or otherwise shown that COGS reported on those FITRs includes costs associated with his check cashing services. Accordingly, OTA finds that,

with this first argument and supporting documentation, appellant has not carried his burden of showing by a preponderance of the evidence that CDTFA's determination is incorrect.

Costs of Exempt Food

In support of appellant's second argument that COGS reported on FITRs included sales of exempt food costs, appellant provided the following books and records: monthly reports labeled general ledger for COGS for 2015; total monthly merchandise purchases from Anheuser Busch and Gate City Beverage for 2015; and a report of itemized merchandise purchases from Costco with no yearly total for 2015.

Here, appellant again has not provided any documentation for 2013, 2014, or the COGS for those years. Appellant also has not provided any purchase invoices for 2015. Accordingly, the amounts listed in the monthly reports are not supported. Further, OTA cannot verify whether these reports account for all of appellant's merchandise vendors, or account for all the purchases made from any given vendor. Additionally, the general ledger for cost of goods sold does not include detailed information regarding purchases that OTA would normally expect to find in such a report, such as purchase invoice number or purchase invoice date. Accordingly, OTA finds that this documentation for 2015 to be incomplete and cannot be used to determine the amount of taxable merchandise purchases. For the above stated reasons, OTA concludes that, with his second argument and supporting documentation, appellant has not carried his burden of showing that CDTFA's determination is incorrect.

Items from the Supplemental Nutrition Assistance Program (SNAP/CalFresh)

In support of appellant's third argument that the amount of unreported taxable sales includes benefits that are exempt from sales tax under the SNAP/CalFresh program (formerly called food stamps) (see R&TC, § 6373(a)), appellant provided a copy of a permit issued to the prior owners of the business to accept SNAP/CalFresh benefits. However, appellant has not provided any evidence that *he* was authorized to accept SNAP/CalFresh benefits. Furthermore, appellant has not provided a detailed record of any SNAP/CalFresh benefits that he received in connection with his sales. Thus, appellant failed to establish that he redeemed any nontaxable CalFresh benefits within the meaning of R&TC section 6373.

Other Comparable Businesses

Finally, appellant asserts that the four other businesses to which CDTFA compared appellant's business when estimating the 80 percent taxable merchandise ratio and 33 percent markup used in the audit are, in fact, dissimilar. Specifically, appellant notes that three of the four businesses did not offer check cashing services, and, for the one that did, argues that CDTFA "did NOT specify that the Cost of Purchase of Checks [was] included in the Total Purchases."

Here, OTA has reviewed the salient characteristics of the four other geographically proximate businesses (consisting of liquor stores or markets) that CDTFA audited for a contemporaneous period and found them to be reasonably similar to appellant as far as category of items sold and/or services offered.¹⁷ These other comparable businesses need not be identical to appellant in all respects in order to supply CDTFA with sufficient information to estimate a taxable merchandise ratio and a reasonable markup when appellant failed to provide complete books and records. Accordingly, OTA is not persuaded by appellant's fourth argument that these other businesses are too dissimilar to appellant for comparison and conclude that, ultimately, he has not established that a result differing from CDTFA's determination is warranted.

Summary

Based on our finding that appellant has failed to provide sufficient documentation or other evidence from which a more accurate determination could be made, OTA concludes that appellant has failed to meet his burden of establishing that a further reduction to the measure of unreported taxable sales is warranted.

¹⁷ See footnote 9, *ante*, page 4.

HOLDING

Appellant has not shown that any further reduction to the determined amount of unreported taxable sales is warranted.

DISPOSITION

CDTFA’s action in deleting the \$7,872 measure of tax for unreported cigarette rebates (which reduces the aggregate deficiency measure from \$1,164,846 to \$1,156,974), and otherwise denying appellant’s petition, is sustained.

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Andrew Wong
Administrative Law Judge

We concur:

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Andrew J. Kwee
Administrative Law Judge

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Daniel K. Cho
Administrative Law Judge

Date Issued: 8/23/2022