OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 22019463
	) CDTFA Case ID: 952-530
SWISSPORT LOUNGE, LLC	)
	)
	)
	)

OPINION

Representing the Parties:

For Appellant:	Paul William Raymond, Attorney
For Respondent:	Amanda Jacobs, Tax Counsel III Jarrett Noble, Tax Counsel IV Ravinder Sharma, Hearing Representative
For Office of Tax Appeals:	Deborah Cumins, Business Taxes Specialist III

A. KWEE, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Swissport Lounge, LLC (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)[1] denying appellant's petition for redetermination of a Notice of Determination (NOD) dated April 5, 2019, as revised by a Notice of Increase (NOI) dated June 1, 2020. The NOD is for tax of $132,030, plus applicable interest, for the period July 1, 2014, through June 30, 2017 (audit period).[2] After the NOD was issued, CDTFA performed a reaudit which increased the tax liability from $132,030 to $211,183. On June 1, 2020, CDTFA issued the NOI for the additional liability disclosed by the reaudit.

[1] Sales and use taxes were formerly administered by the State Board of Equalization (board). In 2017, functions of the board relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to events that occurred before July 1, 2017, "CDTFA" shall refer to the board.

[2] The NOD was timely issued because appellant signed a waiver of the otherwise applicable three-year statute of limitations period to issue a NOD. (See R&TC, §§ 6487(a) and 6488.)

On March 7, 2023, CDTFA conceded to reduce the tax liability by $1,410, from $211,183 to $209,773,[3] plus applicable interest, to account for bar mixing supplies which were incorrectly included in the audited cost of goods sold. This reduced the measure of unreported taxable alcohol sales from $116,926 to $99,230.

Office of Tax Appeals (OTA) Administrative Law Judges Andrew J. Kwee, Keith T. Long, and Josh Aldrich held an electronic oral hearing for this matter on March 23, 2023. At the conclusion of the hearing, the record was closed, and this matter was submitted for an opinion.

ISSUES

1. Whether adjustments are warranted to the measure of unreported taxable alcohol sales of $99,230.[4]
2. Whether adjustments are warranted to the measure of unreported taxable sales of $2,488,997 based on a percentage of the entrance fees paid by merchants.

FACTUAL FINDINGS

1. Appellant holds a California seller's permit and operates an establishment doing business as "Airspace Lounge" and co-branded as "Admirals Club" in the San Diego airport (lounge). The lounge offers food and beverages (both alcoholic and nonalcoholic), as well as various amenities such as restrooms, shower facilities, and internet access, to patrons.[5]
2. Appellant entered contracts with American Express, American Airlines on behalf of oneworld® Alliance member carriers operating out of the San Diego airport,[6] and Condor

[3] CDTFA's summary of the change lists a tax total of $209,781; however, the amount actually being asserted by CDTFA, based on the "Amount Due" listed on the first page of the notice, reflects a lesser tax amount due of $211,183 - $1,410 (i.e., $209,773). The reason for the difference is unclear.

[4] During a prehearing conference, this was discussed with the parties as $116,926; however, CDTFA has since conceded to reducing this amount to $99,230.

[5] Appellant operates in additional airports outside this state; however, only the gross receipts generated by the San Diego airport location are at issue in this appeal.

[6] This included, for example, British Airways and Japan Airlines. Oneworld® Alliance members separately reimbursed American Airlines for the entrance fees paid to appellant.

Airlines (merchants) to allow entrance to qualifying patrons associated with those merchants without charge to the patrons.[7]

3. The merchants' respective contracts with appellant require the merchants to pay an entrance fee to appellant for each merchant's qualifying patron who enters appellant's lounge. The merchants typically extend these benefits to specified patrons, such as elite status flyers, first-class ticket holders, and annual holders of certain paid membership programs.
4. During the audit period, American Express paid appellant $16.50 per patron, and this fee included non-premium[8] food and beverages and a $6.00 voucher for the purchase of premium food or beverages. Condor Airlines paid appellant $27.00 per patron, which included non-premium food and beverages, and a $10.00 voucher. American Airlines paid appellant $14.75 per oneworld® Alliance patron, and this fee included non-premium food and beverages, but no voucher.
5. Access to appellant's lounge is not restricted to qualifying patrons associated with a merchant. Appellant's lounge is also open to any person who pays an entrance fee directly to appellant. The entrance fee during the audit period was $35; however, appellant offered a $5 military discount. The entrance fee included non-premium food and beverages, and a $10 voucher.
6. Although appellant includes non-premium food and beverages with its entrance fee (whether paid by the patron or by a merchant), all patrons have the option to purchase premium food and beverages, including alcoholic beverages, which were not included in the entrance fee. The vouchers could be used to pay, in full or part, for these purchases.
7. Appellant's revenue included (1) entrance fees paid by merchants; (2) entrance fees paid by patrons, and (3) income from the sale of premium food and beverages.
8. For the audit period, appellant reported taxable and total sales of $1,417,382, claiming no deductions.

[7] The contract with American Airlines prohibited appellant from extending benefits to patrons associated with Delta SkyClub, United Club, Alaska Airline Boardroom, and US Airways Club.

[8] For ease of analysis, this Opinion uses the term "non-premium" to refer to food and beverage items which were included with the entrance fee, and "premium" to refer to those items which were not included with the entrance fee. This Opinion makes no finding on the quality of any food or drink item furnished by appellant.

9. Appellant's reported taxable sales included income from the sale of premium food and beverages and entrance fees paid directly by patrons. Appellant did not report the value of redeemed voucher credits in taxable sales. Appellant considered itself the consumer of non-premium food and beverages, and reported tax based on its purchase price allocable to such items, as calculated by appellant.

10. For audit, appellant provided double entry records, which CDTFA found to be adequate for sales and use tax purposes. Those records included profit and loss statements (P&Ls) for the audit period, daily point of sale (POS) data for the audit period; copies of contracts with each merchant; and purchase invoices for June 2017.

11. Using the sales and cost of goods sold information on the P&Ls, CDTFA computed book markups[9] of 358 percent[10] for sales of premium alcohol and 66 percent for sales of premium food and non-alcoholic beverages (rounded).

12. CDTFA expected the markup for food sales in an airport restaurant to be at least 400 percent and the markup for alcohol sales to be even higher. CDTFA decided to establish audited taxable sales of alcoholic beverages to patrons on a markup basis.

13. To establish the audited markup for premium alcohol, CDTFA used appellant's purchase invoices for June 2017 to conduct a purchase segregation test. It then used costs from those invoices, along with selling prices on the Bar Fact Sheet, to compute markups for each category of alcoholic beverage sold.[11] CDTFA used the percentages of purchases in each category of beverage, computed in the purchase segregation test, to compute a weighted average markup of 606.43 percent.

14. To compute the unreported taxable sales of premium alcohol, CDTFA reduced the audited costs of liquor, beer, and wine by the amounts of "comps" reported by appellant.

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[9] "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 markup amount ÷ cost. In this example, the markup percentage is 42.86 percent (.30 ÷ .70 = 0.42857). A "book markup" (sometimes referred to as an "achieved markup") is one that is calculated from the retailer's records.

[10] This markup is computed on CDTFA Audit Schedule 12B, columns E and L, line 66.

[11] The markups (rounded) were: 636 percent for wine, 233 percent for draft beer, 262 percent for regular bottled beer, 215 percent for premium bottled beer, 1,258 percent for well drinks, 707 percent for call drinks, and 621 percent for premium drinks. CDTFA incorporated the following allowances into the computation of the markups: 6 percent overpouring and spillage for wine, 10 percent overpouring and spillage for draft beer, 1 percent breakage for bottled beer, and 12 percent overpouring and spillage for liquor.

Reported "comps" represented the cost of alcohol associated with the vouchers provided by visitors. CDTFA then added the bar mixing supplies (CDTFA has since conceded this was done in error) and reduced the total by 1.00 percent for food, 2.00 percent for self-consumption and 2.00 percent for pilferage. CDTFA then added the audited markup of 606.43 percent to compute audited sales of premium alcohol of $330,518, which exceeded appellant's reported sales of premium alcohol of $213,593 by $116,926.

15. Although the book markup of 66 percent for premium food and non-alcoholic beverage sales was lower than the markup of 400 percent that CDTFA expected, CDTFA did not compute an understatement for reported taxable sales of premium food and non-alcoholic beverages and sales of those items are not at issue in this appeal.

16. To establish the amount of taxable entrance fees paid by merchants, CDTFA computed the difference between recorded and reported voucher credits for non-premium food, liquor, beer, and wine. CDTFA initially computed an understatement of $1,492,027.[12]

17. On April 5, 2019, CDTFA issued an NOD for tax of $132,030 and applicable interest, for the liability disclosed by audit, which appellant timely petitioned.[13]

18. CDTFA conducted a reaudit and determined that appellant was the retailer, as opposed to the consumer, of non-premium food and beverage items. As such, CDTFA determined that the measure of tax must be increased from appellant's cost to appellant's gross receipts from the sale of non-premium food and beverages.[14]

19. To compute the retail value of non-premium food and beverages, CDTFA added markups to recorded costs. For food and non-alcoholic beverages, CDTFA used the book markup of about 66 percent;[15] for alcoholic beverages, it used the audited markup of about 606 percent.

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[12] CDTFA used an entirely different audit method in the reaudit (discussed below), which is the basis of the liability in dispute.

[13] The audit also included an audited cost of consumable supplies, measured by $30,579, purchased from out-of-state that were subject to tax, and an understatement that represented the difference of $21,125 between recorded and reported taxable sales, which are conceded and not at issue in this appeal.

[14] The reaudit only impacted entrance fees paid by merchants because appellant already reported tax on the entire entrance fee paid by patrons directly to appellant.

[15] As noted previously, CDTFA considered the book markup of about 66 percent to be significantly lower than expected for sales of food in an airport.

20. CDTFA used the retail values to compute that the non-premium food and drinks, and the non-premium alcoholic beverages, represented 17.48 percent and 29.99 percent, respectively of appellant's taxable gross receipts from the entrance fees paid by merchants.

21. Using those percentages and the amounts paid per patron, CDTFA computed the average retail value of non-premium food, drinks, and alcoholic beverages provided to each patron.

22. CDTFA added the amount of any vouchers included with the entrance fee to the average retail value of non-premium food, drinks, and alcoholic beverages per patron to compute the total taxable value of each entrance fee paid per patron. CDTFA divided the taxable value by the total amount of the entrance fee paid by the merchant to compute a taxable percentage of the entrance fee paid by each merchant. CDTFA applied the respective taxable percentage[16] to the entrance fees paid by each merchant to calculate the audited taxable entrance fees.

23. For example, Condor Airlines paid appellant an entrance fee of $27.00 per patron. Of this account, CDTFA computed an average retail value of non-premium food and drink of $4.72, non-premium alcoholic beverages of $8.10, and the entrance fee included a voucher of $10.00. Thus, CDTFA computed that $22.82 of the $27.00 total entrance fee was taxable, which represents a taxable percentage of 84.51. CDTFA multiplied the taxable percentage of 84.51 by the amount of entrance fees paid by Condor Airlines to determine the audited taxable entrance fees. CDTFA treated the remaining percentage (15.49) as nontaxable. CDTFA did this computation for each merchant.

24. CDTFA applied the percentages to the total amounts of entrance fees paid by each merchant to compute retail sales of non-premium food and beverages of $3,437,954. CDTFA compared that amount to the cost of food and beverages reported by appellant of $948,957 to compute an understatement of reported taxable sales included in reimbursements from merchants of $2,488,997.[17]

[16] The percentages were 83.84 percent for American Express, 47.48 percent for American Airlines, and 84.51 percent for Condor Airlines.

[17] There were no changes to any other audit item in the reaudit.

25. For entrance fees that were not paid by a merchant, CDTFA computed that the total taxable value of an entrance fee was $26.62 per patron (out of the $35.00 entrance fee paid); however, the taxable value was reduced to $15.25 per patron (out of the $30.00 entrance fee paid) for patrons who received the $5.00 military discount. In total, CDTFA computed that 76.05 percent of the non-discounted entrance fees paid to appellant were taxable, and 50.82 percent of the discounted entrance fees paid to appellant were taxable.
26. Appellant collected sales tax reimbursement from its customers on 100 percent of its entrance fees, including the nontaxable portion. Therefore, CDTFA did not include an audit allowance for nontaxable entrance fees paid directly to appellant by a patron.
27. On June 1, 2020, CDTFA issued the NOI, asserting the increase disclosed in the reaudit. This increased the underreported tax from $132,030 to $211,183.
28. On December 7, 2021, CDTFA issued a decision denying the petition.
29. This timely appeal to OTA followed.
30. On March 7, 2023, CDTFA conceded that there was an error in its markup audit calculations and agreed to reduce the measure of unreported premium alcohol sales from $116,926 to $99,230.

DISCUSSION

Issue 1: Whether adjustments are warranted to the measure of unreported taxable alcohol sales of $99,230.

California imposes sales tax on a retailer's retail sales of tangible personal property sold in this state measured by the retailer's gross receipts, unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, §§ 6012, 6051.) For the purpose of the proper administration of the Sales and Use Tax Law and to prevent the evasion of the sales tax, the law presumes that all gross receipts are subject to tax until the contrary is established. (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 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*.)

When a retailer represents an amount to the customer as sales tax reimbursement, and that amount exceeds the amount of sales tax due on the transaction, the retailer then is collecting excess tax reimbursement. (R&TC, § 6901.5; Cal. Code Regs., tit.18, § 1700(b)(1).) Excess sales tax reimbursement must be returned to the customer or paid to the state. (R&TC, § 6901.5.)

This audit item pertains to the sale of premium alcoholic beverages (alcohol), for transactions where the patron paid appellant directly.[18] It is undisputed that appellant was the retailer, the transactions are taxable, and that the measure of tax is the amount paid by the patron. The issue in dispute is whether appellant correctly reported its taxable premium alcohol sales to CDTFA. Appellant contends it reported all such sales correctly. CDTFA determined, based on a markup audit, that appellant did not.

Appellant argues that the audited understatement of reported alcohol sales, established on a markup basis, should be reduced to zero. Appellant states that it reported its premium alcohol sales based on its P&Ls and contends that these sales were correctly reported at a 356 percent markup, which is below the 606 percent markup calculated by CDTFA.

To establish audited taxable alcohol sales, CDTFA utilized the markup audit approach, which is a well-established audit method that has been shown effective and reliable, as long as there is sufficient information to establish an accurate cost of taxable merchandise sold and an accurate markup. (*Appeal of Amaya,* 2021-OTA-328P.) Here, the detailed cost and selling price information contained in CDTFA's audit file was obtained from appellant's double entry set of books and records and it is undisputed that appellant's records were sufficient for sales and use tax recordkeeping purposes. Therefore, CDTFA has shown that its determination, based on appellant's own records, was reasonable and rational. Thus, appellant has the burden of establishing that adjustments are warranted.

[18] CDTFA accepted appellant's reported premium food and non-alcoholic beverage sales; therefore, those sales are not at issue.

OTA finds that the evidence does not support appellant's assertion that it reported all its alcohol sales. CDTFA's thorough, detailed shelf test offers evidence to the contrary. CDTFA used purchase invoices from appellant's records for an entire month to segregate the alcohol into various categories of drinks. CDTFA then used known costs, from those purchase invoices, and known selling prices, provided by appellant, to compute markups for each category of drinks. Further, CDTFA made all the allowances for over-pouring, spillage and breakage[19] that are established in CDTFA's Audit Manual.[20] Using this detailed procedure, CDTFA computed a markup of about 606 percent. OTA reviewed the audit computations and found no errors in the computations of the markup. Thus, CDTFA has provided clear evidence to support the audited markup, which it used in its computation of the audited taxable alcohol sales.

Appellant also argues that the audited understatement of alcohol sales, established on a markup basis, is a duplication of other understatements in the audit. Appellant contends that there is a duplication because the other audit item (issue 2, below) includes the stated value of the vouchers in the taxable percentage of entrance fees.

Upon review of the record, OTA finds that this does not result in double taxation of the voucher amount. First, appellant did not include voucher credits in reported taxable sales to CDTFA. Second, CDTFA did not include the value of the vouchers in the markup audit. In its computation of audited taxable alcohol sales, CDTFA applied the audited markup to the cost of alcohol sold, net of the voucher credits. Thus, the voucher credits are excluded from the marked-up costs.

Appellant further contends that the audit is overstated because appellant already reported its premium alcohol sales. However, there still is no double taxation because the understatement represents the difference between audited taxable sales and reported taxable sales.

Appellant also argues that it is entitled to an adjustment because it reported sales tax on the full amount charged to walk-in patrons, and CDTFA conceded that a portion of the entrance fee is nontaxable. CDTFA computed taxable percentages for walk-in patrons of 76.05 percent

[19] The overpouring and spillage allowances are 12 percent for liquor, 10 percent for draft beer, and 6 percent for wine. The breakage allowance for bottled beer is 1 percent.

[20] CDTFA's Audit Manual summarizes CDTFA's audit policies and procedures. It is a useful resource that OTA may look to for guidance in interpreting the law; however, the Audit Manual is not binding legal authority, and should not be cited as such. As such, OTA must exercise its own independent judgement in determining the weight, if any, to afford CDTFA's construction of the law, as set forth in the Audit Manual. (*Appeal of Micelle Laboratories, Inc.*, 2020-OTA-290P.)

(non-military) and 50.82 percent (military), respectively. Since appellant collected sales tax reimbursement and remitted sales tax with respect to the full amounts collected from patrons, OTA agrees that appellant overpaid tax on these transactions. However, the overpayments represent excess tax reimbursement, and the amounts of excess tax reimbursement have not been refunded to appellant's customers. Therefore, these amounts must be paid to the state and there is no basis for refund to appellant. Furthermore, entrance fees paid by walk-in and military patrons did not involve the same transactions as entrance fees paid by merchants; therefore, the excess tax reimbursement that appellant collected from the walk-in and military patrons cannot be used to reduce appellant's unreported sales tax liability incurred in connection with entrance fees paid by merchants. (R&TC, § 6901.5; Cal. Code Regs., tit. 18, § 1700(b).) In other words, appellant cannot use excess "sales tax" collected from a military or walk-in patron to offset its unreported liability for sales to an elite status oneworld® patron.

In summary, appellant failed to establish error with CDTFA's markup audit. As such, no adjustments are warranted for the unreported taxable alcohol sales.

Issue 2: Whether adjustments are warranted to the measure of unreported taxable sales of $2,488,997, based on a percentage of entrance fees paid by merchants.

As a preliminary matter, entrance fees paid by patrons are not at issue in this appeal, because appellant collected and reported sales tax on the entire entrance fee. This issue only addresses the entrance fees paid by merchants.

Sales tax applies measured by a retailer's gross receipts from the sale of tangible personal property at retail in this state. (R&TC, § 6051.) A sale includes any transfer of title or possession of tangible personal property for a consideration. (R&TC, § 6006(a).) The term "gross receipts" means the total amount of the sale price of the retail sales of a retailer, valued in money, whether received in money or otherwise. (R&TC, § 6012(a).) The gross receipts include all receipts, cash, credits, and property of any kind. (R&TC, § 6012(a), (b)(2).) It also includes any amount for which credit is allowed by the seller to the purchaser. (R&TC, § 6012(b)(3).) There is no requirement under the Sales and Use Tax Law that the consideration for a sale must be paid by the purchaser. Thus, for example, a retailer's gross receipts include the value of vouchers paid or reimbursed to the retailer by a third party. (See Cal. Code Regs., tit. 18, § 1671.1(b)(5).)

Here, appellant served non-premium food, drinks, and alcoholic beverages to qualified patrons associated with a merchant, for consumption on appellant's premises in exchange for an entrance fee.[21] This is the definition of a sale, and the entrance fee is the consideration. (R&TC, § 6006.) The amount of appellant's gross receipts is the amount of the entrance fee received for the non-premium food and beverages. Under the law, it does not matter whether the entrance fee was paid by the patron, the merchant, or some other third party.

CDTFA compiled detailed audit schedules that calculated the average retail value of non-premium food, drinks, and alcoholic beverages, and vouchers redeemable for food and beverages, and computed a taxable percentage of entrance fees based on dividing this amount by the total entrance fee. Although appellant did not separately charge anyone specifically for the non-premium food and beverage items, there is insufficient evidence to conclude that such items were incidental to any other item potentially furnished by appellant, such as amenity services. (See Cal. Code Regs., tit. 18, § 1501.) To the contrary, appellant was required under its contracts with the merchants to provide the non-premium food and beverages, as part of the entrance fee paid by the merchants.[22] Furthermore, the taxable value of the tangible personal property was 83.84 percent for American Express, 47.48 percent for American Airlines, and 84.51 percent for Condor Airlines. OTA finds this to be a reasonable and rational method to establish appellant's gross receipts. As such, appellant has the burden of establishing that an adjustment is warranted.

Appellant raises six additional contentions to support its position on appeal that an adjustment is warranted.

First, appellant asserts that it received only modest reimbursement from the third parties for the cost of "complimentary" food and beverages. That assertion is not supported by the evidentiary record. The food was not complimentary because the contracts with the merchants detailed precisely the dollar amount of consideration appellant received from the merchant for each patron who visited appellant's establishment and received non-premium food and beverages

[21] There is no argument or contention that appellant's sales of food are exempt from tax. As relevant here, sales of food are subject to tax if the food is sold for consumption at facilities provided by the retailer; if the food is sold as hot prepared food products; or if the food is sold within, and for consumption within, a place the entrance to which is subject to an admission charge. (R&TC, § 6359(d)(2), (d)(7), and (d)(4).)

[22] Food and beverages, and for that matter the specific type of food and beverages provided, were specifically negotiated between the parties. As an example, American Airlines wanted sliced vegetables made available to patrons. In exchange, the amount paid by American Airlines for each patron was increased by $0.17.

from appellant. OTA finds that CDTFA used the best available information to establish the audited taxable measure of entrance fees.

Second, appellant contends that it is not a retailer of food and beverages. The term "retailer" includes every seller who makes any retail sale of tangible personal property. (R&TC, § 6015.) A retail sale is a sale of tangible personal property for a purpose other than resale in the regular course of business. (R&TC, § 6007.) Tangible personal property means personal property which may be seen, weighed, measured, felt, or touched, or which is in any other manner perceptible to the senses. (R&TC, § 6016.) A seller includes every person engaged in the business of selling tangible personal property. Here, this is a retail sale because it is undisputed that the food is for consumption by the patron while on appellant's premises. Moreover, food is tangible personal property because it can be seen, weighed, and touched. In addition, as discussed above, appellant is a seller because it is making taxable retail sales of non-premium food and beverages in exchange for the entrance fee. Based on the foregoing, the facts demonstrate that appellant is a retailer of the non-premium food and beverages.

Third, appellant contends that its lounge is identical to airport lounges that the third parties historically operated on their own (identified by appellant as "branded" lounges). Appellant asserts that the branded lounges were not regarded as retailers of food and alcohol. On that basis, appellant asserts that it, also, should not be regarded as a retailer of food and alcohol. The application of tax to amounts received by branded lounges is not in the evidentiary record. OTA can only consider the evidentiary record on appeal and has no way to ascertain how those businesses operate, the source of their gross receipts, or the application of tax to their transactions. Moreover, the application of tax to transactions by a different business is not germane to OTA's analysis of the application of tax to appellant's transactions. Even if appellant were able to establish that some other business similar to appellant's business incorrectly reported its sales tax, that would not change the application of tax to appellant's business. OTA's role is to determine the correct amount of tax. Therefore, OTA is unable to make an adjustment on this basis.

Fourth, appellant argues that the "true object" of the merchant payments to appellant are for the services and amenities that appellant offers. As explained above, the contracts themselves are the evidence of the transactions between appellant and the third parties. The contracts specifically detail the nature of the food and beverages that will be provided in

exchange for the entrance fee. The contracts also state the amount of any vouchers to be provided to the patrons. Thus, the contracts are evidence that the merchants negotiated with appellant (or with its predecessor) to provide specific items of tangible personal property to the patrons. The contracts offer evidence that each merchant pays a specified amount of money to appellant for each patron who visits appellant's lounge, which represents both compensation for a transfer of tangible personal property, as well as payment for various amenities. Moreover, as discussed above, the evidence does not support a finding that the transfer of the food and beverages was incidental to the amenities or other services provided because the transfer of specific types of food and beverages was an element required by the contract, which was negotiated by the parties.

Fifth, appellant asserts that other jurisdictions, outside California, have concluded that there are no taxable sales associated with the transfer of non-premium food and beverages to patrons. Appellant argues that California should apply the same tax treatment to similar transactions. Some states do not impose a sales tax, while other states impose sales tax on services, such as the provision of amenities. California does not generally impose sales tax on services, such as the provision of amenities, but it does impose a sales tax. The application of sales tax to sales that occur in California is governed solely by the R&TC and is not impacted by the statutes or regulations of any other state. Thus, the application of sales tax to similar transactions in other states is not relevant to OTA's analysis.

Finally, appellant states that it did not collect sales tax reimbursement from the merchants. OTA understands appellant to be asserting that it should not be held liable for the sales tax because it did not collect sales tax reimbursement from the merchants. The sales tax is imposed upon retailers for the privilege of selling tangible personal property at retail in this state (R&TC, § 6051), although the retailer may collect sales tax reimbursement from the purchaser if the contract of sale so provides (Civ. Code, § 1656.1(a)). In other words, while a taxpayer may collect tax reimbursement from its customers, there is no requirement that it must do so, and failure to collect reimbursement is not a basis for relief from the tax. (See *Pacific Coast Eng. v. State of California* (1952) 111 Cal.App.2d 31, 34.). Thus, in this case, the fact that appellant did not collect sales tax reimbursement from the merchants is not relevant to OTA's analysis of whether appellant is liable for sales tax.

HOLDINGS

1. Appellant failed to establish a basis for adjustment to the measure of unreported taxable alcohol sales.
2. Appellant failed to establish a basis for adjustments to the measure of unreported taxable sales based on a percentage of the entrance fees paid by the merchants.

DISPOSITION

Reduce the taxable measure of unreported taxable alcohol sales (issue 1) from $116,926 to $99,230, as conceded by CDTFA.[23] Otherwise, sustain CDTFA's action on the petition.

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Andrew J. Kwee
Administrative Law Judge

We concur:

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Keith T. Long
Administrative Law Judge

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Josh Aldrich
Administrative Law Judge

Date Issued: 5/15/2023

[23] According to CDTFA, this reduces the tax by $1,410.