OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No.: 18113964
	CDTFA Case ID: 782985
TRUEBALLOT, INC.	

OPINION

Representing the Parties:

For Appellant:	Betty J. Williams, Attorney Michael Pearson, Attorney John Seibel, President
For Respondent:	Joseph Boniwell, Tax Counsel III Scott Claremon, Tax Counsel IV Jason Parker, Chief of Headquarters Ops.
For Office of Tax Appeals:	Corin Saxton, Tax Counsel IV

A. KWEE, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, TrueBallot, Inc. (appellant) appeals a decision[1] issued by respondent California Department of Tax and Fee Administration (CDTFA) denying, in part, appellant's petition for redetermination of a Notice of Determination (NOD) dated October 31, 2013. The NOD is for $39,300.40 in tax, accrued interest, and a 10 percent failure to file penalty of $3,930.11, for the period January 1, 2009, through June 30, 2013 (liability period).

Office of Tax Appeals (OTA) Administrative Law Judges Andrew J. Kwee, Josh Lambert, and Josh Aldrich, held an electronic oral hearing for this matter on October 21, 2022. At the conclusion of the hearing, the record was closed, and this matter was submitted for decision.

[1] CDTFA issued a Decision and Recommendation (D&R) dated January 19, 2016, which was amended by a Supplemental D&R dated December May 30, 2017. We use the term decision to refer collectively to the D&R and Supplemental D&R.

ISSUES

1. Whether appellant made taxable sales of tangible personal property.
2. Whether the service charges are includible in appellant's gross receipts as a part of the sale of tangible personal property.

FACTUAL FINDINGS

1. Appellant is engaged in the business of providing election services and/or products, including ballot administration. Appellant's customers contract with appellant to administer elections and certify the election results. During the liability period, appellant administered elections by mail, on-site (i.e., in person), via the internet, and by telephone.
2. Appellant's principals hold two U.S. patents for the design of election systems. Appellant does not license its election systems to its customers. Instead, appellant uses its election systems as a part of the process of administering the election and voting process for its customers.
3. The transactions at issue in this appeal only pertain to elections that appellant administered via mail, and for which appellant printed election ballots in-house.[2]
4. Appellant created the election ballots using its own ballot building software. When an election is held using mail-in ballots, appellant will generate digital ballots in portable document format (PDF). These ballots are then printed and mailed to voters.
5. Appellant's president testified that prior to 2015, and during the liability period, appellant printed these ballots in-house.[3]
6. Appellant provided a sample Balloting Agreement with a customer, dated December 15, 2012, which was admitted as Exhibit 1. Appellant's president testified that this was a representative sample for a Balloting Agreement for an election administered via mail.
7. Appellant was responsible under the Balloting Agreement to provide the ballots in tangible (printed) format for its customers. The Balloting Agreement also specified that:

[2] This Opinion does not discuss the application of tax, or the facts or circumstances, pertinent to any other type of election administered by appellant.

[3] Appellant's president further testified that appellant ordered the ballots in bulk from a third party (e.g., Gowans Printing Company), with pre-printed instructions on one side. Afterwards, appellant used its own printing equipment to add printed text to the other side of the ballot.

"[Appellant] shall generate a ballot for each member . . . and shall deliver the same to a mailing house for insertion into envelopes, metering, and mailing."

8. With respect to using appellant's election administration services without obtaining printed matter, customers were not required to purchase the printed ballots from appellant. Appellant allowed customers to hire a third-party printer, or alternatively to print the ballots themselves using the customer's own printer. These transactions are not at issue.

9. With respect to obtaining printed matter without using appellant's election administration services, appellant's president testified during the hearing that appellant has never sold, and would never sell, printed ballot materials without also providing its ballot administration services. Appellant's president also testified that appellant was a recognizable name in the industry and customers selected appellant due to appellant's well-known reputation in the industry of providing election administration services.

10. The Balloting Agreement goes on to provide that: "[Appellant] shall conduct the ballot count at a facility provided by the [customer]. Such facility will accommodate a required number of observers." In other words, appellant is responsible to collect, validate, and count all the ballots returned by mail. In addition, appellant is responsible to announce and certify the results of the election. Appellant also retains digital images of the printed ballots.

11. When a recount is required, appellant reviews a digital picture of the paper ballot and the data that was electronically read from that printed ballot.

12. CDTFA audited appellant for the liability period. Appellant did not hold a seller's permit or use tax collection certificate. Appellant also did not collect or remit any tax to CDTFA during the liability period.

13. Appellant provided invoice #297, dated September 21, 2009. This invoice was admitted as Exhibit 10. Appellant's president testified that this invoice was a representative example of charges to a customer who hired appellant to administer an election involving the use of printed mail ballots. The invoice included the following charges, totaling $8,460.36:

    A. "TrueBallot Fee" (charge for administering the election), $5,000.00;

    B. "Laser Printing Ballots," $344.88;

C. "Undeliverable item[s]" (charge for returned mail), $44.60;

D. "Duplicative Ballots," $6.92;

E. "Envelope Stock," $240.00;

F. Miscellaneous charges for "printing" election materials, $1,614.84; and

G. Miscellaneous nontaxable reimbursements for hotel charges, meals, labor, miles driven totaling $1,209.12.[4]

14. CDTFA determined that appellant was the retailer of tangible personal property for transactions in which appellant charged its customers for printed mail ballots.[5] CDTFA picked up 43 customer invoices during the audit period where appellant included a charge for the printed materials.

15. For the 43 customer invoices involving a charge for printed election materials, CDTFA determined that certain itemized charges were taxable (totaling $526,616) but allowed a $74,898 deduction for tax paid purchases resold, resulting in a deficiency measure of $451,718, disclosed by audit.

16. On October 31, 2013, CDTFA issued an NOD for the liability disclosed by audit.

17. Subsequently, CDTFA issued a decision deleting separately stated charges for certain items from the deficiency measure. The remaining items at issue in this appeal are the election administration fees (TrueBallot Fee) of $233,885, and fees for items B through F, above, which CDTFA determined specifically involve the sale of tangible personal property totaling $240,509 (Issue 1).

18. Specifically, the charges that CDTFA determined to be taxable as a part of the sale of the ballots are as follows: (1) laser printing ballots, (2) envelope stock, (3) printing, (4) supplies, (5) other client, (6) miscellaneous tangible personal property charges, (7) duplicate ballots, and (8) taxable shipping charges.[6]

19. With respect to the TrueBallot Fee, CDTFA determined that a portion of this fee was taxable. CDTFA calculated a taxable percentage based on dividing the sum of the

[4] CDTFA separately itemized the nontaxable reimbursements on Exhibit E, Schedule R2-12B-2. CDTFA treated these items as nontaxable charges. The treatment of these charges is not at issue in this appeal.

[5] For many transactions, such as elections held electronically, a physical ballot was not used.

[6] Only some transactions involved shipping charges. Invoice #297 did not include any shipping charges. The charges conceded by CDTFA and deleted pursuant to its decision are not at issue in this appeal and, as such, are not otherwise identified or discussed.

taxable charges (described in factual finding 18, above), by the sum of the total billed charges excluding the TrueBallot Fee. The TrueBallot Fees for the liability period totaled $450,406.00. Of this amount, CDTFA determined that 48.91 percent, or $233,885.00, were taxable service charges (Issue 2).

20. CDTFA determined that appellant paid sales tax reimbursement to its supplier at the time of purchasing the above items and increased the tax paid purchases resold deduction to $74,918, and deleted the failure to file penalty. This reduces the deficiency measure at issue on appeal to OTA to $399,476 (i.e., $240,509 + $233,885 - $74,918).

21. This appeal to OTA followed.

DISCUSSION

Issue 1: Whether appellant made taxable sales of tangible personal property.

California imposes 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, §§ 6012, 6051.) A sale includes any transfer of title or possession of tangible personal property for a consideration. (R&TC, § 6006(a).) A sale also includes the printing of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the printing process. (R&TC, § 6006(b).) The production of printed matter for a consumer is a sale of tangible personal property whether the materials incorporated into the printed matter are furnished by the consumer or the printer. (Cal. Code Regs., tit. 18, § 1541(b)(1).)

Persons engaged in the business of rendering service are consumers, not retailers, of the tangible personal property which they use incidentally in rendering the service. (Cal. Code Regs., tit. 18, § 1501.) If in addition to rendering service they regularly sell tangible personal property to consumers, they are retailers with respect to such sales. (Cal. Code Regs., tit. 18, § 1501.)

Here, it is undisputed that for the 43 disputed transactions at issue in this appeal, appellant separately invoiced its customers at cost for the tangible personal property used in the course of producing and mailing ballots. These separately stated charges for tangible personal property include charges for laser printing ballots in-house, charges for envelopes, additional charges for printing, charges for tangible supplies, client charges (printing, insertion, and change

fees for wrongly approved forms), miscellaneous tangible personal property charges, charges for duplicate ballots, and charges for shipping ballots to a mailing house.[7] As such, we find that appellant's $240,509 in separately stated charges for printed materials are taxable.

Appellant contends that, under Regulation section 1501, it is a provider of election services and, as such, it is a consumer of tangible personal property which it uses incidentally in the rendering of the service. Appellant further contends that the true object of the contract between appellant and its customers is the election services, as opposed to the ballots.[8] Appellant also cites to a number Business Taxes Law Guide Annotations to support its interpretation of the true object test.[9]

We decline to address the parties' arguments regarding the proper interpretation of the true object of the contract test. The true object of the contract test is not relevant in cases where, as here, the taxpayer included a separately stated charge for tangible personal property. Under such circumstances, Regulation section 1501 provides that service providers are retailers with respect to sales of tangible personal property. Furthermore, the printing of tangible personal property, and the production of printed matter, for consideration is a sale. (R&TC, § 6006(b), (f); Cal. Code Regs., tit. 18, § 1541(b)(1).) Here, it is undisputed that appellant printed the ballots in-house during the liability period. More importantly, appellant's Balloting Agreement listed charges for tangible personal property (including the printed ballots), appellant's invoices charged the customers the agreed fees for this tangible personal property, and the ballots were mailed as directed by appellant's customers in exchange for the consideration paid ($240,509). As such, we find that the separately stated charges for tangible personal property in the 43 transactions at issue constitute retail sales of printed matter.

[7] Gross receipts generally include shipping charges. (R&TC, § 6012(a)(3). As an exception, they do not include certain separately stated charges for shipping tangible personal property directly to the purchaser. (R&TC, § 6012(c)(7); Cal. Code Regs., tit. 18, § 1628(a). There is no argument or contention that the charges for shipping the ballots to a mailing house fall within this exception.

[8] In connection with the true object test, appellant also contends that CDTFA is applying in incorrect standard of "merely incidental" instead of "incidental."

[9] Annotations are digests of materials written by CDTFA; they do not have the force or effect of law but may be entitled to some consideration by OTA. (*Appeal of Praxair, Inc*., 2019-OTA-301P; *Appeal of Martinez Steel Corporation* (PFR) 2020-OTA-074P.)

Issue 2: Whether the service charges are includible in appellant's gross receipts as a part of the sale of tangible personal property.

The term "gross receipts" means the total amount of the sale or lease or rental price of tangible personal property and includes any services that are a part of that sale. (R&TC, § 6012(b)(1).) On the other hand, tax does not apply to the sale of intangible personal property or to the provision of services. (R&TC, §§ 6006, 6007, 6051.) Tangible personal property is 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.) The R&TC does not define what is meant by intangible personal property or services; however, these concepts are defined in caselaw. (*Dell, Inc. v. Superior Court* (2008) 159 Cal.App.4th 911, 923 (*Dell, Inc*.).) Services means the performance of labor for the benefit of another. (*Ibid*.)

A bundled transaction occurs when the provision of services and transfer of tangible personal property are inextricably intertwined in a single transaction. (R&TC, §§ 6006, 6012; *Dell, Inc. v. Superior Court*, supra, at p. 924.) Such a bundled transaction is either a taxable sale or a nontaxable service transaction in its entirety. (*Ibid*.) California Code of Regulations, title 18, section (Regulation) 1501 interprets and implements the R&TC. Regulation section 1501 establishes the true object test to determine whether a bundled transaction involves a taxable sale of tangible personal property or the transfer of tangible personal property incidental to the performance of a nontaxable service.[10] (Cal. Code Regs., tit. 18, § 1501.) Under the true object test, it must be determined whether the real object sought by the buyer is the service per se or property produced by the service. (Cal. Code Regs., tit. 18, § 1501.) If the true object of the contract is the service, the transaction is nontaxable even if some tangible personal property is transferred. (*Ibid*.) If the transaction is regarded as a sale of tangible personal property, tax applies to the gross receipts from the furnishing thereof, without deduction for any work, labor, skill, thought, time spent, or any other expense. (*Ibid*.)

California courts also addressed mixed transactions in *Dell, Inc.* and concluded that optional computer service contracts were readily separable from the sale of computers because: the service contracts were optional; Dell sold the service contracts independently of the

[10] R&TC section 7051 grants CDTFA the authority to prescribe, adopt, and enforce rules and regulations relating to the administration and enforcement of the Sales and Use Tax Law. The courts have concluded that the legislative delegation in R&TC section 7051 is proper even though it confers some degree of discretion on CDTFA. (*Henry's Restaurants of Pomona, Inc. v. State Bd. of Equalization* (1973) 30 Cal.App.3d 1009, 1020.)

computers; and the charge for the computer was reduced by a specified sum if the customer declined the service contract. (*Dell, Inc. v. Superior Court*, supra, at p. 929.) As such, the court concluded that *optional* service contracts were not bundled with the sale of Dell's computers and treated these as two separate transactions: the provision of an optional service contract and a retail sale of a computer.

Mixed versus Bundled Transactions

The first question then, is whether the transaction involves a mixed transaction of election administrative services and printed election materials. If the provision of services and the transfer of tangible personal property are distinct and readily separable, tax will only apply to the tangible personal property. (R&TC, §§ 6006, 6012; *Dell, Inc. v. Superior Court*, supra, at p. 924.) On the other hand, if the provision of the services is inextricably intertwined with the provision of the printed election materials, tax applies to the entire charge. (*Ibid*.) The question here is not whether there are separately stated charges for tangible personal property and for services. Instead, the question is whether it is possible to obtain the tangible personal property without the services. If the buyer has the option to choose not to purchase the services, tax will not apply to amounts properly allocable to the provision of optional services even if there is only a single lump sum charge for the services and for the tangible personal property. (See Cal. Code Regs., tit. 18, §§ 1546(b)(3)(C) [tax does not apply to the sale of optional maintenance contracts]; 1655(c)(3) [tax does not apply to the sale of optional warranties].) On the other hand, if the buyer must purchase the services in order to obtain the tangible personal property, tax will apply to the entire charge. (See Cal. Code Regs., tit. 18, §§ 1546(b)(3)(B) [tax applies to the sale of mandatory maintenance contracts]; 1655(c)(2) [tax applies to the sale of mandatory warranties].)

In the instant case, however, we need not opine on whether this involves a mixed or a bundled transaction. CDTFA implicitly conceded that appellant provides nontaxable election administration services in a mixed transaction because CDTFA deleted the administration fees from the audit liability and conceded they are nontaxable. Specifically, appellant charges fees such as labor, travel, hotel, gas, and milage for traveling to a location selected by the customer to count the ballots. CDTFA conceded that these charges are nontaxable and listed them as non-taxable in its second reaudit work papers. As such, CDTFA has treated this as a mixed transaction involving both: (1) non-taxable administration services and (2) the taxable sale of

printed matter. After CDTFA's second reaudit concessions, 48.91 percent of appellant's charges (excluding the TrueBallot Fee) were determined to be taxable, and the balance of the charges CDTFA has conceded are nontaxable.[11] Based on these facts, the only item for OTA to resolve is the treatment of the TrueBallot Fee.

Here, appellant uses its own software to design and create the election materials. In other words, it is not possible to get the election ballots without also obtaining appellant's professional services in designing custom ballots as required for use in an election. Thus, at least a portion of the design services are included as a part of the transfer of the printed election materials. According to appellant, the services include importing the voter list, assigning each voter a unique voter ID code and ballot type, ensuring only eligible voters receive a printed ballot, designing the ballot and voting materials, and properly using appellant's patented system for voter authentication, ballot delivery, and tabulation. The Balloting Agreement indicates that appellant is required to provide an election result certification report including reports and compatible data and ballot images delivered on CD-ROM (i.e., tangible personal property). Based on the above, we conclude that the services that went into designing and creating the printed election materials are included as a part of the transfer of those printed materials. A retailer's gross receipts include any services that are a part of the sale of property, such as printed materials. (R&TC, §§ 6006(b) & (f), 6012(b)(1); Cal. Code Regs., tit. 18, § 1541(b)(1).) As such, based on our conclusion that appellant made retail sales of printed materials, and accepting CDTFA's concession that appellant also provides nontaxable administration services, we find it was reasonable for CDTFA to allocate a portion of the TrueBallot Fee to the taxable sale of the printed materials. Considering all the above, the ratio applied by CDTFA (of separately stated charges for tangible personal property as the numerator, and total invoiced charges excluding the TrueBallot Fee as the denominator) was a reasonable ratio to determine the taxable percentage of the TrueBallot Fee. As such, we find that no adjustments are warranted to the measure of taxable services included in the sale of printed materials, as calculated by CDTFA.

[11] Of the billed charges (less TrueBallot Fees) amount of $491,729.25, CDTFA determined that $240,510.80 pertained to the taxable sale of tangible personal property, and the remainder was not subject to tax. This resulted in a taxable percentage of 48.91 percent ($240,510.80 ÷ 491,729.25). CDTFA determined the taxable portion of the TrueBallot Fees using this taxable percentage. CDTFA has not asserted any tax on the balance of the TrueBallot fees, or on the billed charges CDTFA agreed are nontaxable during the audit and two reaudits. Appellant asserts that all charges and fees are nontaxable, not just those conceded by CDTFA.

HOLDINGS

1. Appellant made taxable sales of tangible personal property.
2. The service charges are includible in appellant's gross receipts as a part of the sale of tangible personal property.[12]

DISPOSITION

Sustain respondent's action in full.

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Andrew J. Kwee
Administrative Law Judge

We concur:

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Josh Lambert
Administrative Law Judge

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Josh Aldrich
Administrative Law Judge

Date Issued: 12/20/2022

[12] In reaching this holding we accept CDTFA's concession that appellant provides nontaxable services and, as such, we decline to offer an Opinion on whether CDTFA correctly concluded that these are mixed transactions (i.e., transactions that include both taxable and nontaxable components).