OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 21098555
	CDTFA Case ID 1-429-996
ZEITGEIST EVENTS, LLC,	
dba Gypset Event Artisans	

OPINION

Representing the Parties:

For Appellant: Ramon E. Ocon, Representative

For Respondent: Joseph Boniwell, Tax Counsel III

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

A. WONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Zeitgeist Events, LLC (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA) denying appellant's petition for redetermination of a Notice of Determination (NOD) dated September 13, 2019. The NOD is for taxes of $186,641, plus applicable interest, for the period January 1, 2015, through December 31, 2017 (liability period).

Following a reaudit during the briefing period for this appeal before the Office of Tax Appeals (OTA), CDTFA reduced the amount of unreported taxable sales from $2,081,475 to $1,851,475, and the corresponding tax liability from $186,641 to $166,514.

Appellant waived the right to an oral hearing, so OTA decides this matter based on the written record.

ISSUE

Whether the amount of unreported taxable sales should be further reduced.

FACTUAL FINDINGS

1. Appellant, a California limited liability company located in Los Angeles, is an event planning and production company that conceptualizes and creates unique themes and also

leases "staging property" (i.e., stage props) for corporate and private events. Stage props include such items as chairs, tables, tents, furniture, canopies, lighting fixtures, and other accessories.

2. Appellant's clients may contract with appellant for design services only (e.g., to design unique themes for stage props), for the rental of stage props only, or for both. In other words, appellant's clients may independently purchase design services or rental of stage props; purchasing design services is not a mandatory condition for renting the stage props, and vice versa.

3. Upon audit, appellant provided sales invoices for the liability period as well as some of its contracts from 2016 and 2017. At issue here are appellant's charges for "Event Planning, Design, & Production" (EPD&P) on three specific invoices—invoices 1600, 1606, and 1611.

Invoice 1600

a. Invoice 1600 lists three separate charges: (i) $13,650 for EPD&P; (ii) $2,000 for lounge seating; and (iii) $180 for administration.

b. Invoice 1600 relates to two contracts: (i) a consulting agreement dated January 4, 2016; and (ii) a rental agreement dated March 30, 2016.

    i. The consulting agreement provided for the following:

        1. Appellant would create and conceptualize the theme and concept for the client's March 30, 2016 event.
        2. Appellant would provide two different concepts or ideas for the event, supported by sketches, drawings, photographs, and samples, and present them to the client by February 1, 2016.[1]
        3. The consulting agreement did not convey any tangible personal property.
        4. Consideration consisted of a flat fee of $10,000 for the two concepts to be presented by appellant, and an hourly fee of $250 for completing the final concept (not to exceed $5,000).
        5. The client was to pay fifty percent of the concept fee up front with the remaining balance to be paid within one week after the

[1] Appellant retained the items used for its presentations, but its clients could take a copy of the sketches.

February 1, 2016 presentation.

ii. Per the rental agreement, appellant's client agreed to pay $2,000 for control and use of the lounge seating until noon on April 1, 2016.

Invoice 1606

c. Invoice 1606 lists a charge of $119,100 for EPD&P and charges totaling $92,060 for stage props.

d. Invoice 1606 relates to two contracts: (i) a consulting agreement dated June 5, 2016; and (ii) a rental agreement dated September 1, 2016.

i. The consulting agreement provided for the following:

1. Appellant would create and conceptualize the theme and concept for the client's September 3, 2016 event.
2. Appellant would provide two different concepts or ideas for the event, supported by sketches, drawings, photographs, and samples, and present them to the client by July 1, 2016.
3. Upon receipt of the concepts, the client would have seven days to select and approve one concept "for final guidance."
4. The consulting agreement did not convey any transfer of tangible personal property.
5. Consideration consisted of a flat fee of $100,000 for the two concepts to be presented by appellant, and an hourly fee of $500 for completing the final concept.
6. The client was to pay ten percent of the concept fee up front with the remaining balance to be paid within one week after the July 1, 2016 presentation.

ii. Per the rental agreement, appellant's client agreed to pay $92,060 for control and use of the stage props until noon on September 7, 2016, plus applicable sales taxes.

Invoice 1611

e. Invoice 1611 lists the following three charges: (i) a charge of $255,000 for EPD&P; (ii) a charge of $125,000 for wedding reception seating and lounging installation; and (iii) a charge of $150,000 for after-party set up.

f. Invoice 1611 relates to a consulting agreement dated February 20, 2016, which provided for the following:
    i. Appellant would create and conceptualize the theme and concept for the client's November 15, 2016 event.
    ii. Appellant would deliver three different concepts or ideas, supported by sketches, drawings, photographs, and samples, and present them to the client by May 1, 2016.
    iii. Upon receipt of the concepts, the client would have seven days to select and approve one concept "for final guidance."
    iv. The consulting agreement did not convey any tangible personal property.
    v. Consideration consisted of a flat fee of $230,000 for the three concepts presented by appellant, and an hourly fee of $500 for completing the final concept.
    vi. The client was to pay 10 percent of the concept fee up front with the remaining balance to be paid within one week after the presentation.
g. Unlike invoices 1600 and 1606, appellant did not provide a rental agreement for invoice 1611.

4. During the audit, CDTFA's Audit and Information Section (AIS) provided appellant and CDTFA's auditor with a memorandum summarizing the taxability of various charges listed on appellant's invoices.
    a. Regarding the consulting agreements, AIS's memorandum stated, "The true object of the contract is the service to develop the concepts, design, and ideas for the event, and not for the property produced by the service. Therefore, such a transaction is not subject to tax, even when the client retains a copy of the sketches produced by the service."
    b. Under the heading of "Design/Creative," AIS's memorandum stated, "When the charge for design is attributable to the initial agreement with the client to develop concepts, designs, and ideas for the event, it is not subject to tax. [S]uch charge is for the agreement to provide a service."

c. Subsequently, AIS addressed the three invoices at issue here (invoices 1600, 1606, and 1611), noting that appellant made lump-sum EPD&P charges on these invoices but did not include detailed line items. For these invoices, AIS recommended that the auditor "allocate the portion of the charge that is subject to tax based on the criteria" described in the memorandum.

5. After segregating the charges listed on appellant's invoices into taxable and nontaxable categories, CDTFA computed audited taxable sales of $2,656,333, which exceeded reported taxable sales of $574,858 by $2,081,475.

6. CDTFA determined that all charges in invoices 1600, 1606, and 1611 were taxable, including those for the rental of tangible personal property, administration, and EPD&P. CDTFA concluded that the EPD&P charges were taxable because they related to the transfer of tangible personal property.

   a. Regarding invoices 1600 and 1606, specifically, CDTFA determined that appellant's EPD&P charges were "definitely taxable" because they "related to rental sales of tangible personal property."

   b. CDTFA determined that all charges in invoices 1600, 1606, 1611, and 1701 were taxable, and that their EPD&P charges there should be taxable "regardless of whether invoices of rental or sale of tangible personal properties [were] provided" by appellant for the following three reasons:

      i. There was a fire at appellant's owner's residence, so it was "very possible" that invoices of related rental or sale of tangible personal property were destroyed.

      ii. Invoices were not in sequential order so there was no way to know how complete the provided sales invoices were. It was "very possible" that related rental or sale of tangible personal properties are missing.[2]

      iii. Most contracted events started with a contract stating sale of concepts and use of only real property "but still went into production of the concepts

[2] On appeal, appellant contends that during the earlier years of the liability period (i.e., 2015-2016) it initially numbered its invoices based on the date of the events for which its clients retained its services rather than on the date its services were retained. Appellant further contends that it began using invoices in sequential, though not complete, order in 2017.

selling rentals of tangible personal property. Taxpayer has shown a pattern of this practice with the provided contracts and sales invoices."

c. In summary, CDTFA concluded that all EPD&P charges at issue were related to rental sales of tangible personal property and should be deemed taxable until appellant provided additional records showing otherwise.

7. In contrast, CDTFA categorized appellant's EPD&P charges in invoices 1703, 1704, 1706, 1707, and 1708 as nontaxable because CDTFA gave appellant "the benefit of the doubt" that these charges did not relate to the rental sales of tangible personal property. CDTFA reasoned that these invoices were in more sequential order, which reduced the likelihood of missing invoices for taxable rental sales of tangible personal property, and the relevant clients were other event planners who could execute appellant's concepts without having to rent tangible personal property from appellant.

a. Invoices 1703, 1704, 1706, 1707, and 1708 were all dated in 2017, and billed for EPD&P charges in the following respective amounts: $100,000; $15,000; $100,000; $50,000; and $100,000.

b. All invoices, except for 1703, related to consulting agreements in the record. Appellant did not provide a consulting agreement for invoice 1703.

c. The terms of these consulting agreements were largely identical to those described above for invoices 1600, 1606, 1611, and 1701, including stating that appellant was to create and conceptualize the theme for an event.

d. However, regarding consideration, there was no provision of an hourly fee for appellant's aid in completing the final concept.

8. On September 13, 2019, CDTFA issued the NOD to appellant. Appellant filed a timely petition for redetermination and, on July 29, 2021, CDTFA issued a Decision denying the petition for redetermination.

9. This timely appeal followed.

10. During this appeal before OTA, CDTFA recommends reducing the deficiency measure by $230,000, from $2,081,475 to $1,851,475, based on CDTFA's determination that invoice 1701 was a duplicate billing.

DISCUSSION

California imposes upon a retailer a sales tax measured by the retailer's gross receipts from the retail sale of all tangible personal property in this state unless a sale is specifically exempt or excluded from taxation by statute. (R&TC, §§ 6012, 6051.) Generally, tax does not apply to the sale of intangible personal property or to the provision of services. (R&TC, §§ 6006, 6007, 6051.)

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).) The term "tangible personal property" means personal property that may be seen, weighed, measured, felt, or touched, or which is in any other manner perceptible to the senses. (R&TC, § 6016.) Services means the performance of labor for the benefit of another. (*Dell, Inc. v. Superior Court* (2008) 159 Cal.App.4th 911, 923 (*Dell, Inc.*).) For the purpose of the proper administration of the Sales and Use Tax Law and to prevent the evasion of the sales tax, it is presumed that all gross receipts are subject to tax until the contrary is established. (R&TC, § 6091.)

A "bundled transaction" occurs when the transfer of tangible personal property and the provision of services are inseparably bundled together or inextricably intertwined in a single transaction. (R&TC, §§ 6006, 6012; *Dell, Inc.*, *supra*, at pp. 923-924.) A bundled transaction is either a taxable sale or a nontaxable service transaction in its entirety. (*Ibid*.) California Code of Regulations, title 18, (Regulation) section 1501 establishes the true object test to determine whether a bundled transaction involves either a taxable sale of tangible personal property or the transfer of tangible personal property incidental to the performance of a nontaxable service. (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. (*Ibid*.) If the true object of the contract is the service per se, the transaction is not taxable even though 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 any deduction for any work, labor, skill, thought, time spent, or other expense of producing the property. (*Ibid*.)

Aside from bundled transactions, California courts have also addressed "mixed transactions." Mixed transactions are transactions in which goods and services are sold together

yet are readily separable, and each is a significant object of the transaction (i.e., not incidental to the other). (*Dell, Inc.*, *supra*, at p. 925.) 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.*, *supra*, at p. 925.)

In sum, there are three categories of transactions involving the transfer of tangible personal property and services: (1) bundled transactions where the real object of the transaction is the purchase of tangible property and services are incidental (all taxable); (2) bundled transactions where the real object is the purchase of services and the property is incidental (all nontaxable); and (3) mixed transactions where the real object is both services and property and the two elements are distinct, identifiable, and readily separable (only tangible personal property taxable). (See *Dell, Inc.*, *supra*, at p. 926.)

It is the retailer's responsibility to maintain complete and accurate records to support reported amounts and to make them available for examination on request by CDTFA. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).)

If CDTFA is not satisfied with the amount of tax or other amount required to be paid by any person, or if any person fails to make a return, CDTFA may compute and determine the amount required to be paid upon the basis of 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 meets 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 burden of proof requires proof 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. (*Ibid*.) To satisfy the burden of proof, a taxpayer must prove that (1) the tax assessment is incorrect, and (2) the proper amount of the tax. (*Ibid*.)

When property and services are purchased together in a mixed transaction, separate invoices or separate itemization on the same invoice are useful in meeting the taxpayer's evidentiary burden of proving that the service item in the transaction is not taxable. (*Dell, Inc.*,

supra, at p. 932.) However, no statute or regulation demands a separate statement of a service contract's value on an invoice as the exclusive means of meeting the taxpayer's evidentiary burden. (*Ibid*.)

On appeal, appellant contends that, in its audit, CDTFA did not follow the guidance set forth in AIS's July 3, 2019 memorandum and improperly determined that the EPD&P charges, in invoices 1600, 1606, and 1611, constituted taxable charges for services. Appellant argues that the EPD&P charges are for the design of event concepts and that these services are optional and were contracted for in a consulting agreement that is separate from appellant's contracts for the provision of tangible personal property. Appellant also appears to argue that, although the word "Production" is used in the charges for EPD&P, these charges do not involve the transfer of tangible personal property, and the word "Production" is "merely used as a vanity name to be in line with the uniqueness of [appellant]'s status." Additionally, appellant argues that the invoices in dispute should be treated as nontaxable because they are similar to invoices 1703, 1704, 1706, 1707, and 1708, which CDTFA found to be nontaxable.

Here, invoices 1600, 1606, and 1611 each list a total charge for EPD&P that exceeds the flat concept fee listed in their corresponding consulting agreements: for invoice 1600, the total EPD&P charge of $13,650 exceeded the contractual flat concept fee of $10,000; for invoice 1606, the total EPD&P charge of $119,100 exceeded the contractual flat concept fee of $100,000; and, for invoice 1611, the total EPD&P charge of $255,000 exceeded the contractual flat concept fee of $230,000. Thus, it appears that each total EPD&P charge at issue aggregated two different types of fees provided for in the corresponding consulting agreements: (1) the flat concept fee for creating and conceptualizing a particular event's theme and concept; and (2) the hourly fee, the total amount of which was for completing the final concept. OTA will separately analyze whether each type of fee is subject to tax.

By the terms of the consulting agreements, the flat concept fee portion of the EPD&P charges were for the service of creating/designing themes and concepts for events. Thus, by themselves, they would not be subject to tax. This conclusion is echoed by the AIS memorandum: "When the charge for design is attributable to the initial [consulting] agreement with the client to develop concepts, designs, and ideas for the event, it is not subject to tax. [S]uch charge is for the agreement to provide a service." Indeed, CDTFA found the exact same type of flat concept fees billed in invoices 1703, 1704, 1706, 1707, and 1708, where appellant

made no related taxable sale or rental of tangible personal property, to be nontaxable. The only difference with the EPD&P charges in invoices 1600, 1606, and 1611 is that CDTFA found that they related to the taxable provision of rental property and thus were themselves entirely taxable. However, OTA does not find CDTFA's inconsistent treatment of the flat concept/consulting fee reasonable or rational.

Although appellant billed for EPD&P charges and taxable rentals on the same invoices here, the rental charges are distinct and readily separable as they are itemized separately. So, too, are the flat concept fee portions of the total EPD&P charges distinct and separable after examining appellant's consulting agreement: the flat concept fees are $10,000, $100,000, and $230,000 for invoices 1600, 1606, and 1611, respectively. Further, it is undisputed that appellant's clients may contract with appellant for design services alone, rental property alone, or services and property together—they are not inseparably bundled together or inextricably intertwined. This is evidenced by the separate and distinct contract types (i.e., consulting agreements for services on the one hand and rental agreements for property on the other). Accordingly, OTA finds that, when the flat fee portion of the EPD&P charges are billed together with the taxable "related" rental sales on invoices 1600, 1606, and 1611, these constitute mixed transactions where the respective flat concept fees of $10,000, $100,000, and $230,000 were for distinct and readily separable services and therefore not subject to taxation.

Regarding the balance of EPD&P charges unrelated to the flat concept fee (i.e., $3,650, $19,100, and $25,000 for invoices 1600, 1606, and 1611, respectively), these appear to be the total hourly fees for completing the final concept. These hourly completion fees are distinct from the nontaxable flat concept fee, which, per the consulting agreements, were due before or shortly after appellant presented the prospective event concepts to its clients. In contrast, these hourly charges appear to be for appellant's services in producing the chosen concept/theme for the client's event and bringing it to fruition, which necessarily involved the provision of tangible personal property. These hourly completion fees only appeared in consulting agreements related to invoices that billed for rental property and which also related to rental agreements for tangible personal property. This indicates that these services for completing the final event concept were actually part of the rental of tangible personal property and, thus, taxable. OTA concludes that it was appropriate for CDTFA to include the total of these hourly charges in its computation of audited taxable sales.

In sum, OTA finds that the amount of unreported taxable sales should be further reduced by a total of $340,000, the aggregate amount of nontaxable flat concept fees billed as part of mixed transactions in invoices 1600, 1606, and 1611.

HOLDING

The amount of unreported taxable sales should be further reduced by $340,000.

DISPOSITION

CDTFA's action in reducing the deficiency measure by $230,000, from $2,081,475 to $1,851,475, but otherwise denying the petition, is reversed in part. The deficiency measure should be further reduced by $340,000, and CDTFA's decision should otherwise be sustained.

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Andrew Wong
Administrative Law Judge

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Date Issued: 6/7/2023