

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

|                                 |   |                        |
|---------------------------------|---|------------------------|
| In the Matter of the Appeal of: | ) | OTA Case No. 20096679  |
|                                 | ) | CDTFA Case ID: 198-032 |
| <b>RICK’S PATIO, INC.</b>       | ) |                        |
| <b>dba Rick’s Pool and Spa</b>  | ) |                        |
|                                 | ) |                        |

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**OPINION**

Representing the Parties:

|                 |   |
|-----------------|---|
| For Appellant:  | Robert B. Rosenstein, Representative<br>R. Colosimo, Vice President                                       |
| For Respondent: | Jarrett Noble, Tax Counsel IV<br>Chad Bacchus, Tax Counsel IV<br>Jason Parker, Chief of Headquarters Ops. |

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Rick’s Patio, Inc. (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)<sup>1</sup> denying appellant’s petition for redetermination of a Notice of Determination (NOD) dated September 26, 2016. The NOD is for tax of \$79,865.67 and applicable interest for the period January 1, 2013, through December 31, 2015 (liability period).

Office of Tax Appeals (OTA) Administrative Law Judges Teresa A. Stanley, Daniel K. Cho, and Ovsep Akopchikyan held an oral hearing for this matter in Cerritos, California, on October 12, 2022. After the hearing, OTA closed the record on January 9, 2023, and this matter was submitted for an opinion.

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<sup>1</sup> 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.

ISSUE<sup>2</sup>

Are adjustments to the measure of unreported taxable delivery charges warranted?

FACTUAL FINDINGS

1. Appellant, a California corporation, sells new and refurbished above-ground spas and holds a seller's permit effective as of December 11, 2009. Appellant also offers optional warranties and provides repair labor for its products.
2. Appellant uses its own vehicles to deliver the products it sells.
3. Appellant's pro forma sales contract states that "purchaser agrees to pay the balance due shown herein upon delivery. Title to goods will not be given to purchaser until total balance due has been paid[] and cleared through bank for other than cash or cashier's check." The contract also indicates that payment must be made with "cashier's check or certified funds only" and that "no personal checks [are] accepted on day of delivery."
4. Upon audit, CDTFA determined that the unreported delivery charges were taxable in situations where title to the goods transferred after delivery of the tangible personal property.
5. Based on appellant's records, CDTFA established unreported taxable delivery charges totaling \$436,032 (that were not reported on appellant's sales and use tax returns for the liability period for sales where title to the goods transferred after delivery.
6. Appellant timely filed a petition for redetermination disputing the entire NOD.
7. CDTFA issued a Decision denying appellant's petition for redetermination.
8. Appellant filed a timely appeal with OTA.

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<sup>2</sup> At the oral hearing appellant conceded that it was liable for audit item 2, which was unreported taxable sales of \$490,356. (See Oral Hearing Transcript, page 39, at <https://ota.ca.gov/wp-content/uploads/sites/54/2022/10/20096679-Ricks-Patio-Inc.-Transcript-101222.pdf?emrc=ca9e14>.) As such, OTA will not address this issue further.

In addition, at the oral hearing, appellant purported to raise a separate issue with respect to the rate of interest charged to appellant. Appellant alleged that a different rate should apply because the liability was subject to a Chapter 11 reorganization bankruptcy. OTA granted appellant's request to hold the record open to brief this issue; however, appellant failed to provide briefing by the initial 30-day deadline or by the extended date after OTA issued a formal order granting the additional briefing. OTA rejected appellant's request to reopen the record related to the bankruptcy interest based on timeliness and relevance of the documents submitted. CDTFA may, based on bankruptcy documents it received, proof of claim(s) it filed, and applicable interest rates for bankruptcy judgments, adjust the interest rate accordingly. OTA has no authority to direct CDTFA to do so and cannot resolve disputes concerning the impact that filing for bankruptcy may have on the amount of a tax liability in an appeal before OTA. (See Cal. Code Regs., tit. 18, § 30104(h).)

9. On appeal, appellant provided additional documentation for some of the disputed transactions showing that full payment was paid prior to delivery of the goods. CDTFA performed two reaudits and made further reductions to the measure of taxable delivery charges. Specifically, CDTFA examined a sample of the transactions that occurred in August to November of 2015. The total recorded delivery charges in the sample period were \$29,844. Appellant's subsequent documentation established that \$22,896 in the sample period were nontaxable delivery charges. CDTFA determined the remaining \$6,948 in recorded delivery charges were taxable. This resulted in an error rate of 23.28 percent. CDTFA applied the 23.28 percent error rate to appellant's total recorded delivery charges of \$436,032, which resulted in a taxable measure of \$101,507.

### DISCUSSION

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 proper administration of the Sales and Use Tax Law and to prevent 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, CDTFA may determine the amount required to be paid based on any information which is in its possession or may come into its possession. (R&TC, § 6481.) 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.*)

Charges for shipping and transportation are generally taxable when transportation is made using facilities of the retailer. (R&TC, § 6012(a)(3); Cal. Code Regs., tit. 18, § 1628(b)(2).) However, tax does not apply to separately stated transportation charges for transportation from the retailer's location directly to the purchaser, provided the property was sold before the retailer delivered the property. (R&TC, § 6012(c)(7); Cal. Code Regs., tit. 18,

§ 1628(b)(2).) Transportation charges are taxable when delivery of the property is made via facilities of the retailer unless there is an explicit written agreement executed prior to delivery that transfers title at some earlier time. (Cal. Code Regs., tit. 18, § 1628(b)(3)(D).)

Here, there is no dispute that deliveries were made from appellant's facilities and that the delivery charges were separately stated in the sales invoices. The only issue on appeal is whether title transferred to the buyer prior to delivery of the goods, such that sales tax would not apply to the delivery charges. CDTFA performed two reaudits based on appellant's submission of additional documentation on appeal showing that for some of the disputed transactions in the sample period, the balance due was paid in full prior to the date of delivery.<sup>3</sup> CDTFA calculated an error rate of 23.28 percent from the sample period and applied it to the appellant's total recorded delivery charges for the liability period, which resulted in a taxable measure of \$101,507. CDTFA's use of appellant's own records for the sample period, August to November of 2015, was reasonable and rational. Therefore, the burden shifts to appellant to show that adjustments are warranted.

Appellant submitted spreadsheets to show that some of the sales that were made during the sample period were delivered in 2016 and asserts that those should have been excluded, which would have reduced the 23.28 percent error rate applied to the audit period. Supporting documentation was requested but not timely provided within the first 30-day period following the hearing, nor within the extended time for additional briefing. Therefore, there is no evidence in the record warranting an adjustment to the error rate for the sample period.

It is appellant's burden to provide evidence to support an adjustment. (*Appeal of Talavera, supra.*) Absent such evidence, no further adjustments to the measure of taxable delivery charges are warranted. Accordingly, the measure of taxable delivery charges is reduced to \$101,507 based on the second reaudit performed by CDTFA using verifiable documentation submitted by appellant on appeal.

Lastly, at the hearing appellant conceded the issue of unreported taxable sales and agreed to the \$490,354 as determined by CDTFA. Accordingly, no adjustments are warranted to the measure of unreported taxable sales.

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<sup>3</sup> CDTFA did not adjust those transactions that were unsupported by evidence of either full payment and/or date of delivery.

HOLDING

The measure of taxable delivery charges is reduced to \$101,507, as conceded by CDTFA.

DISPOSITION

As conceded on appeal, CDTFA shall make the following adjustments to the determined measure of tax: (1) reduce the measure of taxable delivery charges to \$101,507; (2) reduce the measure of unreported taxable sales to \$490,354<sup>4</sup> and (3) delete the measure of unreported taxable service charges.<sup>5</sup> Otherwise, CDTFA's action denying appellant's petition for redetermination is sustained.

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 Teresa A. Stanley  
 Administrative Law Judge

We concur:

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 Daniel K. Cho  
 Administrative Law Judge

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 Ovsep Akopchikyan  
 Administrative Law Judge

Date Issued: 3/17/2023

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<sup>4</sup> The Opinion does not address this item because at the oral hearing on October 12, 2022, CDTFA agreed to reduce the unreported taxable sales to \$490,354, and as noted above, appellant no longer disputes this audit item. (See Oral Hearing Transcript, pages 30 and 39, <https://ota.ca.gov/wp-content/uploads/sites/54/2022/10/20096679-Ricks-Patio-Inc.-Transcript-101222.pdf?emrc=ca9e14>.)

<sup>5</sup> The Opinion does not address this item because in its exhibit F, CDTFA conceded the entire amount of unreported taxable service charges.