

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
N S PATEL DENTAL CORPORATION

) OTA Case No. 220710811
) CDTFA Case IDs: 2-959-593; 2-959-594; 2-970-
) 854; 2-972-841
)
)
)

OPINION

Representing the Parties:

For Appellant:	Neilesh S. Patel, President
For Respondent:	Kevin B. Smith, Attorney Jarrett Noble, Attorney Jason Parker, Chief of Headquarters Ops.
For Office of Tax Appeals:	Oliver Pfost, Attorney

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, N S Patel Dental Corporation (appellant) appeals a June 20, 2022 decision (Decision) issued by the California Department of Tax and Fee Administration (respondent) denying appellant’s petitions for redetermination of four Notices of Determination (NODs), which collectively covered the entire period of January 1, 2016, through December 31, 2019 (liability period) and determined a total use tax deficiency measured \$71,857 for the liability period. The NODs are: a July 22, 2021 NOD for tax of \$59, plus applicable interest, for the 2016 calendar year (2016); a July 23, 2021 NOD for tax of \$2,741, plus applicable interest, for 2017; a July 22, 2021 NOD for tax of \$1,564, plus applicable interest, for 2018; and a July 22, 2021 NOD for tax of \$1,988, plus applicable interest, for 2019.

Office of Tax Appeals (OTA) Administrative Law Judges Sheriene Anne Ridenour, Suzanne B. Brown, and Michael F. Geary held a virtual hearing for this matter on June 15, 2023. At the conclusion of the hearing, the parties submitted the matter and OTA closed the record.

ISSUE

Is appellant entitled to adjustments to the measure of unreported purchases subject to use tax.

FACTUAL FINDINGS

1. Appellant is a California corporation that operated a dental office in San Pablo, California.
2. During the liability period, appellant purchased dental products from Pan Am Dental, Inc. (Pan Am), an out-of-state dental lab that did not hold a California seller's permit or Certificate of Registration—Use Tax (Certificate). All of these products were tangible personal property (TPP) used by appellant in its dental practice.
3. Appellant did not file timely use tax returns to report its purchases of TPP used in its dental practice.
4. After being contacted by respondent, appellant obtained a use tax account and filed use tax returns for the liability period, reporting the following purchases subject to use tax: \$2,296 during 2016; \$1,926 during 2017; \$3,330 during 2018; and \$0 during 2019. Most or all of these reported purchases, which totaled \$7,552, were from vendors other than Pan Am.
5. Pan Am provided respondent a summary of all sales to appellant during 2017, 2018, and 2019, which totaled \$73,960.49, as follows: \$31,221.82 during 2017; \$18,132.00 during 2018; and \$24,606.67 during 2019.
6. Available Pan Am sales invoices that were issued to appellant did not show charges for tax or tax reimbursement. The “Standard Terms and Conditions” apparently printed from Pan Am’s website stated that all sales were F.O.B. seller’s facility,¹ that its prices did not include taxes, and that the purchaser was responsible for all taxes.² Based on this information, respondent concluded that Pan Am did not charge tax or tax reimbursement on its sales of TPP to appellant, and appellant owed use tax on its ex-tax purchases of TPP from Pan Am.
7. In a March 22, 2021 Notice of Proposed Liability (NPL), respondent informed appellant that its purchases from Pan Am totaling \$73,960.49 also should have been reported as subject to

¹ In this context, F.O.B seller’s location typically means that title passes to the buyer at seller’s shipping point.

² Appellant provided the screen print as one of its exhibits. The date of the screen print is not clear.

use tax. Appellant asserted that it paid tax in connection with all purchases from Pan Am and that if any taxes were due, Pan Am owed them.

8. In May 2021, respondent held a conference call with appellant and Pan Am. According to the parties, Pan Am agreed during this conference to register with respondent and pay the taxes due on appellant's purchases from Pan Am on the condition appellant pay all amounts appellant reportedly owed to Pan Am (allegedly in excess of \$10,000).
9. In a May 6, 2021 email, Pan Am informed the parties that it had determined that Pan Am was not required to register in California because it did not meet the "nexus threshold." Pan Am also stated that it would not voluntarily register for a California seller's permit or apply for a Certificate, or pay the taxes at issue in this appeal.³
10. Respondent timely issued four NODs (identified above) based on its determination that appellant was liable for use tax in connection with its purchase of TPP from Pan Am.
11. Appellant timely filed petitions for redetermination disputing all four NODs.
12. The parties participated in a May 9, 2022 appeals conference as part of respondent's internal appeals process.
13. Respondent issued its June 20, 2022 Decision denying appellant's petitions for redetermination.
14. This timely appeal followed.

DISCUSSION

When sales tax does not apply, use tax, measured by the sales price, applies to the storage, use, or other consumption of TPP purchased from any retailer for storage, use, or other consumption in this state unless that use is specifically exempted or excluded by statute. (R&TC, §§ 6201, 6401.) It is rebuttably presumed that all TPP sold for delivery in California is for use, storage, or other consumption in the state. (R&TC, § 6241.) The tax is owed by the person using, storing, or otherwise consuming the property. (R&TC, § 6202(a).)

A retailer who is engaged in business in this state has an obligation to collect use tax from the purchaser on sales of property for use, storage, or other consumption in this state. (R&TC, § 6203(a).) A retailer is deemed to be "engaged in business in this state" if it has a substantial nexus with the state for purposes of the commerce clause of the United States

³ The email also proposed to appellant that appellant pay whatever taxes were owed to California and Pan Am would forgive appellant's debt.

Constitution and any retailer upon whom federal law permits this state to impose a use tax collection duty. (R&TC, § 6203(c).) A retailer who is not engaged in business in this state may nevertheless apply for a Certificate. (Cal. Code Regs., tit. 18, § 1684(e).) A Certificate holder is required to collect use tax from purchasers and pay the tax to the state in the same manner as retailers engaged in business in this state. (*Ibid.*) The obligation exists for as long as the Certificate remains in effect, regardless of whether the Certificate holder is engaged in business in this state. (*Appeal of B & D Litho, Inc.*, (SBE Memo.) 2001 WL 1034733.)

Purchasers of property subject to use tax must pay the tax to the person from whom the property is purchased if that person holds a California seller's permit or a Certificate. (R&TC, § 6202(a); Cal. Code Regs., tit. 18, § 1685(a)(1).) If the person from whom the property is purchased does not hold a California seller's permit or a Certificate, the purchaser must pay the tax directly to the state. (R&TC, § 6202(a); Cal. Code Regs., tit. 18, § 1685(a)(2).) Purchasers who pay use tax to a retailer who does not hold a California seller's permit or a Certificate of Registration—Use Tax remain liable to the state for the use tax until it is paid. (R&TC, § 6202(a); Cal. Code Regs., tit. 18, § 1685(a)(2).)

In an appeal before OTA, respondent has a minimal, initial burden of showing that its determination was reasonable and rational. (*Appeal of Talavera*, 2020-OTA-022P.) Once respondent has met its initial burden, the burden of proof shifts to the taxpayer to establish a result differing from respondent's determination is warranted. (*Ibid.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid.*)

Appellant has not made an argument or submitted evidence to dispute the following facts:

- At no time during the liability period did Pan Am hold either a California seller's permit or a Certificate.
- Appellant purchased TPP from Pan Am during 2017, 2018, and 2019 at a total cost of \$73,960.49, ex-tax.⁴
- Appellant purchased TPP from Pan Am for storage, use, or other consumption in California.

⁴ In this context, an "ex-tax" purchase is a purchase that does not include the payment of sales tax reimbursement or use tax.

- Appellant did not include the cost of the TPP purchased from Pan Am in its reported measure of use tax for any of the three years in question.⁵

On the basis of these facts, OTA finds that respondent's reliance on the Pan Am records of appellant's purchases to establish the asserted deficiency was rational and that the determined deficiency constitutes a reasonable estimate of appellant's unpaid use tax for the liability period. It thus becomes appellant's burden to prove a more accurate measure of use tax due.

Appellant argues that it purchased the TPP from Pan Am tax-paid and that any use tax due in connection with its purchases from that vendor are owed by the vendor. In support of this argument, appellant has provided various price lists, emails, and other documents, some of which indicate that Pan Am represented to appellant that prices included tax. Appellant also points to the May 2021 telephone conference, attended by appellant's president, the president and chief executive officer of Pan Am, and a representative of respondent. According to respondent's Decision, Pan Am agreed in that telephone conference to register to pay taxes in California and to pay the use tax due in connection with appellant's purchases from Pan Am during the liability period if appellant paid its past-due account in full.

OTA understands why appellant is frustrated. Appellant believes it already paid the taxes at issue to Pan Am in good faith. However, the law is clear. If the person from whom the property is purchased does not hold a California seller's permit or a Certificate, the purchaser must pay the tax directly to the state. (R&TC, § 6202(a); Cal. Code Regs., tit. 18, § 1685(a)(2).) While R&TC section 6203(a) provides that a retailer who is engaged in business in this state has an obligation to collect use tax from the purchaser on sales of property for use, storage, or other consumption in this state, that provision does not relieve the person using, storing, or otherwise consuming the property of the obligation to pay use tax.⁶

⁵ It is not entirely clear why the measure of tax for 2017 and 2018 shown on the NODs for those years are \$1,332.18 and \$3,066.00 greater than the amounts shown on the NPL, which matches the amounts shown on the Pan Am purchase records. Regardless, the parties agree that the disputed measure is \$2,103.49 less than the total measure shown on the NPL, and because the parties did not argue or provide evidence regarding these differences, OTA need not further address them in this Opinion.

⁶ Appellant argues that Pan Am was engaged in business in California during the liability period, at least in part due to the alleged presence of salespersons in this state. However, because Pan Am is not a party to this appeal, and because OTA has no authority to shift appellant's liability to Pan Am, the matter asserted by appellant is not material to the issue presented.

Even an agreement between a taxpayer and an out-of-state, non-permitted, non-certificated vendor that the vendor will pay California use tax would not relieve the taxpayer until payment was made in full. For purposes of a taxpayer’s tax obligations to respondent, there is no provision in the Sales and Use Tax Law that would allow a taxpayer to shift its tax liability to another party. Any contractual shifting of tax burdens is a matter exclusively between the contracting parties. (Civ. Code, § 1656.1; *Pacific Coast Engineering Company v. State of California* (1952) 111 Cal.App.2d 31, 34.) Consequently, there is no legal basis upon which OTA can order a reduction of the measure of TPP subject to use tax.

HOLDING

Appellant is not entitled to a reduction of its liability for use tax.

DISPOSITION

Respondent’s action denying appellant’s petitions for redetermination is sustained.

DocuSigned by:
Michael F. Geary
1A9B52EF88AC7...
Michael F. Geary
Administrative Law Judge

We concur:

DocuSigned by:
Suzanne B. Brown
47F45ABE89E94D0...
Suzanne B. Brown
Administrative Law Judge

DocuSigned by:
Sheriene Anne Ridenour
67E043D83EF547C...
Sheriene Anne Ridenour
Administrative Law Judge

Date Issued: 9/18/2023