OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 19024292
K. ELDAR,	CDTFA Case ID: 246-077
dba The Gold Store	

OPINION

Representing the Parties:

For Appellant:	Arthur Hersh, Enrolled Agent
For Respondent:	Nalan Samarawickrema, Hearing Rep. Jason Parker, Chief of Headquarters Ops. Chad Bacchus, Attorney
For Office of Tax Appeals:	Lisa Burke, Business Taxes Specialist III

A. KWEE, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, K. Eldar, dba The Gold Store, (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 November 16, 2015. The NOD is for tax of $67,316, plus applicable interest, for the period April 1, 2012, through June 30, 2014 (liability period).[2] CDTFA's decision ordered a second reaudit, and otherwise denied the petition. The second reaudit adjusted the tax to $41,940.

During the appeal to the Office of Tax Appeals (OTA), CDTFA conducted a third and fourth reaudit, and pursuant to those reaudits CDTFA now concedes to further reduce appellant's tax liability, from $41,940 to $19,725.

[1] Sales 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 acts or events that occurred before July 1, 2017, "CDTFA" shall refer to the board.

[2] The NOD is timely because appellant signed a waiver of limitations for the expiring periods, which allowed CDTFA until January 31, 2016, to issue the NOD for the liability period. (R&TC, §§ 6487, 6488.)

OTA Administrative Law Judges Andrew J. Kwee, Teresa A. Stanley, and Suzanne B. Brown held an oral hearing for this matter in Cerritos, California, on July 12, 2023. At the conclusion of the oral hearing, the record was closed and this matter was submitted on the oral hearing record pursuant to California Code of Regulations, title 18, (Regulation) section 30209(b).

ISSUE

Whether adjustments are warranted to the measure of unreported taxable jewelry store sales.

FACTUAL FINDINGS

1. Appellant operates a jewelry store in Palm Springs, California. The start date of appellant's seller's permit is April 1, 2011. Appellant buys and sells collectible coins, including monetized bullion. Appellant also fabricates jewelry and offers jewelry repair services.
2. CDTFA audited appellant for the liability period. This was her first audit. For audit, appellant provided federal income tax returns for 2012, 2013, and 2014; incomplete sales invoices showing sales paid by credit card or debit card (credit card sales) for the period May 1, 2012, through December 31, 2013; and merchant credit card sales information for the first six months of 2014. Appellant did not provide bank statements, sales journals, purchase journals, merchandise purchase invoices, sales invoices showing sales paid by cash or check, or worksheets prepared for sales and use tax reporting purposes.
3. For the liability period, appellant reported total sales of $362,302, and claimed deductions of $356,380, which resulted in reported taxable sales of $5,922. CDTFA obtained appellant's Form 1099-K information, which it used to compile credit card sales of $607,861 for the liability period.[3]
4. CDTFA subtracted appellant's reported taxable sales of $5,922 from credit card sales of $607,861 to compute unreported taxable sales of $601,939. Based on its estimate that cash sales were approximately 25 percent of appellant's unreported credit card sales,

[3] Form 1099-K is an IRS form that reports amounts paid to a merchant by a bank, credit card company, or third-party network when the customer pays for goods or services using electronic or online payments (payments by credit card, debit card, PayPal, etc.).

CDTFA added cash sales of $150,485 to unreported credit card sales of $601,939 to establish unreported taxable sales of $752,424 (representing tax of $67,316).

5. On November 16, 2015, CDTFA issued the NOD to appellant for the liability disclosed by audit.

6. Appellant timely petitioned the NOD. Appellant provided CDTFA sales invoices supporting exempt sales of coins and bullion and non-taxable sales of repair labor.

7. In its first reaudit, dated May 27, 2016, CDTFA accepted additional exempt and nontaxable sales and reduced the amount of unreported taxable sales, from $752,424 to $428,781 (representing tax of $38,423).[4]

8. CDTFA issued a decision dated April 5, 2018, directing a second reaudit to correct a computational error and to allow for additional nontaxable sales of repair labor and exempt sales of monetized bullion.

9. On October 22, 2018, CDTFA completed the second reaudit.[5] Because correction of the computational error resulted in an increase to audited total sales, the taxable measure established in the second reaudit increased from $428,781 to $467,844 (representing tax of $41,940).

10. On December 28, 2018, CDTFA informed appellant of the right to appeal the decision to OTA. By letter dated January 24, 2019, appellant timely appealed to OTA.

11. On September 23, 2021, while the appeal was pending before OTA, CDTFA completed a third reaudit to reduce the estimated cash sales ratio of 25 percent to an estimated taxable cash sales ratio to 10 percent of audited taxable credit card sales (based on a ratio determined in a subsequent audit of appellant for the period July 1, 2014, through June 30, 2018). The third reaudit reduced the taxable measure to $344,431, representing tax of $30,976.

12. On December 1, 2021, CDTFA completed a fourth reaudit, which allowed additional exempt sales of coins and bullion, resulting in unreported taxable sales of $219,899 in the fourth reaudit (representing tax of $19,725).

[4] The audit report (amount asserted by CDTFA) listed tax of $38,423; however, the supporting Schedule 12 lists "tax due" of $38,528. This nominal discrepancy is moot because there were later reaudits.

[5] In subsequent correspondence, CDTFA states it was completed on December 11, 2018. The date of completion is immaterial; however, the letter that CDTFA mailed to appellant was dated October 22, 2018.

13. Following the fourth reaudit, the following 19 credit card transactions of $1,500 or more remain in dispute:[6]

Disallowed sales for the period April 1, 2012, through December 31, 2012

a. Reference #20. A sale on November 24, 2012, of the following items: "24k coin, 18k coin, 22k" for $5,000.
b. Reference #21. A sale on November 24, 2012, of the following items: "24k coin, 18k coin" for $4,000.
c. Reference #25. A sale on December 18, 2012, of the following item: "18k coin bullion" for $1,500.

Disallowed sales for calendar year 2013

d. Reference #13. A sale on April 2, 2013, of the following items: "Liberty Gold, 14k gold" for $4,180.
e. Reference #14. A sale on April 2, 2012, of the following items: "Roman Coin Drachma 14K bezel" for $3,300.
f. Reference #20. A sale on April 27, 2013, of the following items: "18k bullion, No description for the other item" for $1,800.
g. Reference #23. A sale on June 8, 2013, of a "14k ring with a .25ctw diamond put in setting" for $2,200.
h. Reference #28. A sale on September 14, 2013, of a gold "American Eagle Coin" for $1,980.
i. Reference #30. A sale on October 19, 2013, of the following items: "Buffalo Gold Coin, Omega Gold Watch 1950" for $1,760.
j. Reference #35. A sale on November 15, 2013, of the following item: "Peridot Diamond Ring 14K" for $2,200.
k. Reference #39. A sale on November 30, 2013, of the following items: "Platinum Diamond Ring 2.50ctw, Plat Diamond E[a]rrings 1.5cts" for $6,750.
l. Reference #45. A sale on December 16, 2013, of the following items: "Eagle coin, Panda, Liberty Coin, Watch Crown/Install" for $9,471.

[6] All reference numbers are to CDTFA Audit Schedules R14-12C-1, 2 & 3. All descriptions are from Column B of the referenced schedules.

m. Reference #49. A sale on December 28, 2013, of the following item: "Mend Diamond Ring .80ctw" for $2,500.

Disallowed sales for the period January 1, 2014, through June 30, 2014

n. Reference #2. A sale on January 9, 2014, of the following items: "Canadian Mint Gold, American Eagle Gold, 9 batteries/remove watch link" for $2,000.
o. Reference #7. A sale on January 30, 2014, of the following items: "Sapphire Diamond Earrings, 2Ct Sapphires, 1.5Ctw Diamonds" for $3,500.
p. Reference #8. A sale on February 3, 2014, of the following item: "Handmade Jade Pendant, Chain" for $1,650.
q. Reference #14. A sale on February 23, 2014, of the following item: ".80ctw Diamond Stud earrings" for $2,250.
r. Reference #19. A sale on March 20, 2014, of the following item: "18K Amethyst Ring W Diamonds" for $2,500.
s. Reference #20. A sale on March 21, 2014, of the following item: "18K Gold Choker Necklace 28.5g" for $1,870.

14. For the disputed items, CDTFA's audit schedules indicate that CDTFA examined the disallowed invoices during the audit. Neither party provided the source invoices or receipts for the disallowed invoices, and they are not included in the evidentiary record before OTA.

15. The parties do not dispute that gold with a purity level of 22 karats or greater will meet a 90 percent purity threshold.

16. On appeal to OTA, appellant submitted 23 additional handwritten sales invoices totaling $83,375 in claimed exempt sales for the liability period, including $24,400 for the second quarter of 2012 (2Q12).[7] This additional claimed amount exceeds the $4,823 in taxable measure asserted by CDTFA for that quarter by $19,577.

[7] This Opinion uses the term "claimed exempt" because the line for "sales tax" was left blank on the sales invoices. The invoices included a customer name with no contact information, but do not indicate the form or date of payment, and do not include a purchase order or transaction number.

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 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).)

When 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*.)

On and after January 1, 1986, sales in bulk of monetized bullion, nonmonetized gold or silver bullion, and numismatic coins (collectively, "coins and bullion") that are substantially equivalent to transactions in securities or commodities through a national securities or commodities exchange are exempt from sales and use tax. (R&TC, § 6355(a).) For sales occurring within the liability period, a bulk sale is deemed to occur when the total market value of coins and bullion sold in a single transaction is $1,500 or more.[8] (Cal. Code Regs., tit. 18, § 1599(a)(3)(A).)

In summary, the exemption applies to qualifying sales of three types of coins and bullion: (1) monetized bullion; (2) nonmonetized gold or silver bullion; and (3) numismatic coins. In addition, any qualifying sale of coin(s) and/or bullion must be a bulk transaction substantially equivalent to a transaction in securities or commodities exchange.

[8] The threshold sale amount required to qualify as a bulk sale depends on the date of the sale. (Cal. Code Regs., tit. 18, § 1599(a)(3)(A).)

First, "monetized bullion" means coins or other forms of money manufactured of gold, silver, or other metal and heretofore, now, or hereafter used as a medium of exchange under the laws of this state, the United States, or any foreign nation. (Cal. Code Regs., tit. 18, § 1599(a)(3).) The medium of exchange must have had a legal status equivalent to legal tender. (Cal. Code Regs., tit. 18, § 1599(a)(3).)

Second, nonmonetized bullion means gold or silver bullion which has been smelted or refined and has a value dependent primarily upon its gold or silver content and not upon its form. (Cal. Code Regs., tit. 18, § 1599(a)(3).)

Third, while the regulation and statute do not define "numismatic," this is a commonly used term meaning of or relating to currency.[9] Federal law applicable to the United States Treasury provides that certain coins minted by the Secretary of the Treasury, including gold and silver American Eagle coins, are numismatic, and OTA will follow any statutory inclusions to the definition of a coin that is numismatic which are also followed by the United States Treasury. (See, e.g., 31 U.S.C. §§ 5112(f)(3), (g), (i)(3); 5132(a)(1)(C)(i).) Furthermore, R&TC section 6355 imposes a requirement that a qualifying sale must be "substantially equivalent to transactions in securities or commodities through a national securities or commodities exchange." (R&TC, § 6355(a).) Interpreting the above, including the requirement to be substantially equivalent to transactions through a securities or commodities exchange, OTA finds that the term "numismatic coins," for purposes of California's sales and use tax exemption, means and includes coins of any metal content or purity level, which are or have in the past been used as a medium of exchange (i.e., recognized as legal tender) under the laws of this state, the United States, or any foreign nation recognized by the United States. This would include a coin sold at a premium over its metal content due to its rarity or value as a collectible, such as numismatic gold and silver American Eagle coins.

Although the statute and regulation do not impose any purity level requirements for metal to qualify as monetized bullion, or gold or silver to qualify as nonmonetized bullion, CDTFA Sales and Use Tax Annotation (Annotation) 168.0260 (2/8/56; 5/20/87), imposes a 90 percent purity requirement for bullion to qualify for the exemption:

> Under the Gold Regulations, "fabricated gold" is excluded from the definition of "gold bullion." Fabricated Gold is defined as any processed or manufactured gold

[9] See, e.g., "Numismatic." *Merriam-Webster.com Dictionary* <www.merriam-webster.com/dictionary/numismatic> (as of July 24, 2023).

> having a gold content not exceeding 90% of the total domestic value of the processed or manufactured article.

CDTFA's Annotations are not law and OTA is not required to follow them. (*Appeal of Praxair, Inc.*, 2019-OTA-301P, citing *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 15.) However, OTA may look to them as examples of how CDTFA interprets the applicable law, and OTA will independently determine the weight, if any, to afford the Annotations. (*Appeal of Martinez Steel Corporation*, 2020-OTA-074P.)

Here, CDTFA's position regarding the definition of bullion is a longstanding interpretation which dates to 1956. At the time CDTFA published this Annotation, the United States Treasury imposed a 90 percent purity threshold for bullion. However, beginning with the FAST Act of 2015, the United States Treasury began moving to a 99.99 percent purity threshold.[10] (Pub.L. No. 114-94 (Dec. 4, 2015) 129 Stat. 1312.) The FAST Act replaced the requirement that silver coins be minted with 90 percent purity and transferred the discretion to the United States Treasury so long as the purity is "not less than 90 percent silver." Thereafter, the law was revised to clarify a 99.9 percent or greater[11] purity requirement for specified silver bullion, and gold and palladium coins and bullion. (See, e.g., 31 U.S.C. 5112(a)(11) & (12), (u)(1)(B).) As such, silver is now minted with 99.9 percent purity. In summary, the United States Treasury has slowly moved away from the 90 percent purity requirement mentioned in CDTFA Annotation 168.0260, in favor of a higher and more restrictive threshold. There are no applicable and directly relevant caselaw, regulations, or statutes which provide further guidance on applying the sales and use tax exemption at issue here. Nevertheless, the exemption was adopted at a time when federal law applied a 90 percent purity threshold, and it is reasonable to conclude that this lower threshold would apply in lieu of the more restrictive 99.9 percent or greater threshold applied today.

OTA will also briefly consider, by way of example, how other states approach this issue. Although not binding on OTA, it is worth noting that CDTFA's interpretation is consistent with how other states exempt sales of bullion. For example, under Michigan's Sales Tax Act, which exempts bulk sales of bullion from sales and use tax, the term "bullion" means gold, silver, or

[10] The "Gold regulations" specifically cited in CDTFA's annotation have since been repealed. However, OTA considers the Annotation for the proposition that OTA should apply a 90 percent purity threshold.

[11] The applicable percentages range from 99.9 to 99.99 percent.

platinum in a bulk sale, where its value depends on its content rather than its form, with a purity of not less than 900 parts per 1,000. (Michigan Compiled Laws, § 205.54s, subd. (2)(a).) Michigan separately exempts the sale of "investment coins," or numismatic coins, with a fair market value greater than the face value of the coins, regardless of purity level. (See Michigan Compiled Laws, § 205.54s(2)(b).) Similarly, under Virginia's Retail Sales and Use Tax Act, bullion must contain at least 90 percent gold, silver, or platinum bullion, to qualify for the sales and use tax exemption. (See Code of Virginia, § 58.1-609.1(19); Tax Bulletin 15-6 (6/26/15).) Virginia similarly exempts the sale of "legal tender coins," which it defines as coins of any metal content issued by a government as a medium of exchange or payment of debts. (*Ibid*.) These definitions are also consistent with valuing bullion based on its metal content (as distinguished from numismatic coins, where value is derived based on their rarity; that is, their value as a collectible item). Based on the above, OTA will defer to CDTFA's longstanding interpretation and application of R&TC section 6355, by adopting the purity requirement of 90 percent for bullion. Thus, OTA finds that monetized and nonmonetized bullion must have a purity content of at least 90 percent to qualify for the tax exemption.

In summary, one primary difference between qualifying "numismatic coins" and qualifying monetized or nonmonetized "bullion," is that numismatic coins do not need to meet a required purity level to qualify for the exemption.[12] Similarly, a primary difference between monetized and nonmonetized bullion is that while nonmonetized bullion is limited to gold or silver with a value dependent primarily on its metal content, monetized bullion may consist of any metal which meets the 90 percent purity requirement, so long as it is used as a form of money (i.e., currency). (R&TC, § 6355(c).)

CDTFA's description of the disputed invoices

Although the audit workpapers indicate that CDTFA examined the invoices, the invoices are not in OTA's evidentiary record because neither party submitted them to OTA. Based on our review of the 23 additional invoices that appellant provided on appeal to OTA (described in OTA Factual Finding 16), the descriptions provided by CDTFA in its audit schedule for the 19 disallowed claimed exempt sales are consistent with and representative of the extent to which appellant described sales transactions on handwritten invoices. As such, and in the absence of

[12] In other words, the value of a "numismatic coin" may be due to its rarity or value as a collectible, as opposed to the intrinsic value (i.e., purity) of its metal content.

any other evidence to the contrary, OTA accepts CDTFA's descriptions of the disputed transactions as if they were transcriptions of the "description" section of the actual invoice.

Fabricated jewelry sales (items g, j, k, m, o, p, q, r, and s)[13]

Nine of the disallowed transactions involve the sale of jewelry, such as necklaces, watches, and earrings. These items are not monetized and thus cannot qualify as numismatic coins or monetized bullion. Nonmonetized bullion must have a "value dependent primarily upon its gold or silver content and not upon its form." (Cal. Code Regs., tit. 18, § 1599(a)(3).) Here, jewelry is metal which has been fabricated to form (i.e., necklaces, watches, and earrings). The value is dependent, in primary part, on the form to which it has been fabricated. As such, jewelry cannot qualify as bullion. These items were properly disallowed.

Sales lacking sufficient documentation (items a, b, c, d, e, f, i, l)

In eight additional disallowed transactions, further described below, appellant failed to provide sufficient documentation to support that the items described were qualifying bulk sales of coins and bullion. These transactions are described in CDTFA's audit schedule as "24k coin, 18k coin, 22k" (item a), "24k coin, 18k coin" (item b), "18k coin bullion" (item c), "Liberty Gold, 14k gold" (item d), "Roman Coin Drachma 14K bezel" (item e), "18k bullion, No description for the other item" (item f), "Buffalo Gold Coin, Omega Gold Watch 1950" (item i), and "Eagle coin, Panda, Liberty Coin, Watch Crown/Install" (item l).

Items a, b, and c

First, there is insufficient documentation to conclude that an item described only as a "coin" (see items a, b, and c) is monetized bullion or a numismatic coin. As explained above, to qualify for the exemption as monetized bullion or numismatic coins, the item in question must have been used as a medium of exchange (i.e., recognized as legal tender) under the laws of this state, the United States, or a recognized foreign nation. A description of an item as a "coin" is insufficient to establish that the coin is or was recognized as legal tender. For example, the item

[13] CDTFA used overlapping reference numbers to identify the transactions, resulting in multiple transactions being identified by the same reference number. For ease of analysis, all reference letters used herein are to the letters used in OTA Factual Finding 13 to describe the disputed items.

in question could be a privately minted coin, or otherwise be a commemorative item with no face value.

Next, to qualify as nonmonetized bullion, the item in question must be gold or silver and at least 90 percent pure (which, for gold, is met if it is 22 karats). Here, an item only described as an "18k coin" (see items a, b, and c) cannot qualify because it fails the 90 percent purity requirement. Further, the item described as "22k" (see item a) does not establish that the item in question was bullion instead of jewelry, which is not exempt. While the "24k coin" (see items a and b) may qualify as non-monetized bullion, there is no breakdown in price to establish that this item was sold in bulk for over $1,500. There is also no documentation to show the value of the "24k coin" was based on the value of its gold or silver content and not upon its form. (Cal. Code Regs., tit. 18, § 1599(a)(3).) For example, it is not clear whether the price was based on its rarity as a collector's item (not exempt) or whether the price paid was consistent with the value of gold content as required to qualify as nonmonetized bullion. If there is a substantial premium paid over the value of the gold content, then it would not qualify as nonmonetized bullion because that would mean the value is based on its form as opposed to its gold content.[14]

Item d

For the transaction described as "Liberty Gold, 14k gold" (item d), it appears that appellant sold two items: a Liberty Gold coin, and an item made of 14 karat gold. Appellant did not separately state the charges for the two items. Here, 14 karat gold fails to meet the 90 percent purity threshold to qualify as bullion (whether monetized or nonmonetized). With respect to numismatic coins, which do not require a purity threshold, there is no evidence to support that an item described only as "14 karat gold" was in the form of a coin and legal tender. While the item described as "Liberty Gold coin" may qualify as a numismatic coin, the evidentiary record contains no breakdown in price between the coin and the undocumented 14 karat gold item. As such, OTA is unable to conclude that the sale qualified as a bulk sale of $1,500 or more (after excluding the insufficiently documented item).

[14] While such an item whose value is based on its rarity and form may qualify for exemption as a numismatic coin; here, there was insufficient documentation to show the "24k coin" was legal tender.

Item e

Item e involves the sale of "Roman Coin Drachma 14K bezel." This item did not include a price breakdown for the two items (coin and watch bezel). For the coin, there is no detail on the purity level or whether it is gold or silver and, as such, there is insufficient evidence to conclude that the Roman Drachma qualifies as monetized or nonmonetized bullion. Thus, these coins do not meet the 90 percent purity requirement to be considered bullion.

Nevertheless, although the "Roman Coin Drachma" is not bullion, OTA concluded above that transactions involving numismatic coins may qualify for the exemption without meeting the 90 percent purity requirement. While the statute does not define the term "numismatic coin," it does require that numismatic coin transactions must be substantially equivalent to transactions in securities or commodities through a national securities or commodities exchange. (R&TC, § 6355(a).) Interpreting this statutory requirement, OTA concludes that coins of any metal content or purity level, which have at any point in time been recognized as legal tender under the laws of this state, the United States, or any foreign nation,[15] may qualify as numismatic coins. While obsolete currency of any foreign nation may qualify for exemption, there is nothing in the law which would allow OTA to categorically recognize all monetary artifacts from ancient civilizations as legal tender. To the contrary, the statute requires that the transaction be substantially equivalent to transactions in securities or commodities through a national securities or commodities exchange. (R&TC, § 6355(a).) Here, OTA finds no evidence in the record to establish that the coins were minted and used in such a manner by a foreign nation nor that the coins are substantially equivalent to transactions in securities or commodities through either the United States or a foreign nation's securities or commodities exchange. (R&TC, § 6355(a).) In addition, the 14k watch bezel is jewelry, which, as discussed above, does not qualify for the exemption. Thus, appellant failed to substantiate that item e qualifies for the exemption.

Item f

For the next item, described as "18k bullion, No description for the other item" (item f), it appears that appellant sold two items but only provided a description of one item on its invoice. For the item it did describe, 18 karat gold fails to meet the 90 percent purity threshold to qualify

[15] Foreign nation for this context would generally mean and include any country that the United States recognizes as a sovereign state.

as bullion. As with item d, there is again no evidence to support that it was in the form of a coin and legal tender.

Items i and l

The two remaining items (items i and l) included the sale of items not qualifying for the coins and bullion exemption. The sale of a gold omega watch (item i) and the sale and installation of a crown for a watch are both jewelry items which do not qualify as coins and bullion. In addition, the item described only as "Panda" is insufficient to establish an exemption. For example, this description, absent supporting documentation, is insufficient to establish that the item in question was a numismatic coin (e.g., Chinese Panda Gold Coin) versus jewelry (e.g., a gold panda necklace). As such, OTA cannot conclude that the "Panda" was an exempt coin or bullion. While the items described as "Buffalo Gold Coin," "Liberty Coin," and "Eagle coin" may qualify as numismatic coins, the evidentiary record contains no breakdown in price between the coins and the jewelry items. As such, OTA is unable to conclude that the sale of any numismatic coins qualified as a bulk sale of $1,500 or more (after excluding the taxable jewelry and insufficiently documented items).

Miscellaneous sale items (items h and n)

Item h includes the sale on September 14, 2013, of an "American Eagle Coin" for $1,980.[16] CDTFA disallowed this item on the basis that the American Eagle coin is "not considered bullion." As explained above, under federal law, American Eagle coins are considered numismatic. (See, e.g., 31 U.S.C. §§ 5112(f)(3), (g), (i)(3); 5132(a)(1)(C)(i).) Furthermore, American Eagle Coins are accepted as legal tender under the laws of the United States, are minted by the United States Treasury, and include a face value for use as legal tender. (See *Ibid*.) As such, OTA finds that American Eagle coins are numismatic coins for purposes of the exemption for coins and bullion. The transaction exceeded the threshold of $1,500 to be considered bulk and, as such, this transaction is exempt. Therefore, OTA finds that an adjustment of $1,980 to Schedule R4-12C-2 is warranted for the sale of exempt numismatic coins.

[16] The transaction was for $2,500 but it included a separately stated charge for watch repair for $520, which CDTFA accepted as exempt labor and is not at issue in this appeal.

Item n includes a sale on January 9, 2014, of the following items: "Canadian Mint Gold, American Eagle Gold, 9 batteries/remove watch link" for $2,000. Here CDTFA concedes that the Canadian Mint gold is 99 percent pure. CDTFA disallowed this transaction because the charge for the American Eagle coin and watch repair were not separately stated. First, the Canadian mint gold is accepted as currency in Canada, is minted by Canada, and includes a face value for use as legal tender. As such, the Canadian Mint gold qualifies as a numismatic coin. Second, OTA concluded above that American Eagle coins qualify as numismatic coins. That leaves only the batteries and watch adjustment. The sale of the batteries is taxable, and application of tax to the watch adjustment depends on whether the watch is new or used and, in absence of documentation, is presumed taxable due to lack of substantiation. (R&TC, §§ 6012(b)(1), 6006(b), 6091.)

Due to the lack of substantiating documentation, OTA has no way to ascertain the amount of the transaction which qualifies for the coin and bullion exemption. Nevertheless, OTA does not believe that the sale of watch batteries and removal of a watch link would exceed $500.[17] In different invoices, appellant charged as follows for comparable items: $66 for watch batteries and cleaning; $50 for an unspecified number of batteries; $30 for three batteries; and $5 for removing a watch link.[18] Based on these invoices, it seems reasonable to conclude that appellant charged $10 per battery, and $5 for removing a watch link. Therefore, OTA finds that an adjustment of $1,905 ($2000 - $95) to Schedule R4-12C-3 is warranted for the sale of exempt numismatic coins.

In summary, OTA finds that an adjustment of $1,970 is warranted for item h (Schedule R4-12C-2, ref. 28), and an adjustment of $1,905 is warranted for item n (Schedule R4-12C-3, ref. 2). CDTFA shall recompute and redetermine the liability after allowing these two adjustments to audited taxable credit card sales.

In addition to the above, because CDTFA estimated taxable cash sales to be 10 percent of credit card sales in the fourth reaudit (Schedule R4-12C, column F), an additional adjustment will be required to reduce taxable cash sales by $387.50 ($1,970.00 x .1 + $1,905.00 x .1).

[17] Since the transaction amount is $2,000, and the threshold to qualify as a bulk sale is $1,500, up to $500 may be allocated to the batteries and watch removal and the transaction will still qualify as a bulk sale.

[18] See CDTFA Audit Schedules R4-12C-1, ref. 17; R4-12C-2, ref. 32 and 34; R4-12C-3, ref. 10.

Additional Invoices

CDTFA determined the liability based on subtracting documented exempt credit card sales from the Form 1099-K statements. Considering that gross receipts are presumed by statute to be taxable until the contrary is established (R&TC, § 6091), OTA finds this a reasonable and rational approach. (*Appeal of Talavera, supra*.) As such, appellant has the burden to show error. (*Ibid*.)

On appeal to OTA, appellant submitted 23 handwritten sales invoices totaling $83,375 in claimed exempt sales for the liability period to meet its burden. Appellant asks that these additional transactions be subtracted from recorded credit card sales for the liability period. However, upon review, it appears that the new "invoices" create illogical inconsistencies. For example, the additional claimed exempt invoices include $24,400 in claimed exempt sales for 2Q12. This additional claimed exempt amount exceeds the $4,823 in taxable measure asserted by CDTFA for that quarter by $19,577 and, as such, is not reasonable. In addition, the newly furnished invoices are unreliable because they do not include supporting documentation and do not include any customer contact information aside from a name. In addition, they are in a different format than other invoices submitted because they do not include an invoice number or cash register receipt, and appellant's address is printed on a different location of the invoice. Consequently, OTA finds no adjustment is warranted based on the additional "invoices" submitted.

Cash sales ratio

Appellant contends that the additional taxable cash sales ratio should be reduced from 25 to 10 percent, and that the additional taxable cash sales be further reduced to account for exempt sales. At a prior point in the appeals process, CDTFA determined additional taxable cash sales based on "estimate[ing] that 25 percent of credit card receipts reported on the 1099-K's *including* recorded exempt sales . . . paid for with credit cards were paid for with cash." (Italics in original.) On appeal to OTA, CDTFA acknowledged that it is erroneous to include exempt credit card sales when estimating additional taxable cash sales. As such, pursuant to its third reaudit dated September 23, 2021, CDTFA now concedes that the additional taxable cash sales ratio is reduced to 10 percent to account for exempt sales. CDTFA used the 10 percent ratio determined in a subsequent audit of appellant's business.

Appellant provided no documentation to support a greater allowance, and the estimation was required due to appellant's own lack of documentation. In absence of documentation, it was reasonable and rational for CDTFA to use the taxable ratio from a later audit period. Thus, the burden shifts to appellant. (*Appeal of Talavera, supra*.) Given the lack of supporting documentation, appellant failed to provide documentation that a greater adjustment is warranted.

HOLDING

An adjustment of $1,970 is warranted for item h (Schedule R4-12C-2, ref. 28), and an adjustment of $1,905 is warranted for item n (Schedule R4-12C-3, ref. 2).

In addition to the above, because CDTFA estimated taxable sales paid by cash to be 10 percent of taxable sales paid by credit card in the fourth reaudit (Schedule R4-12C, column F), an additional adjustment is warranted to reduce taxable cash sales by $387.50 ($1,970.00 x .1 + $1905.00 x .1).

CDTFA shall recompute and redetermine appellant's liability after allowing these three adjustments.

DISPOSITION

CDTFA shall reduce the liability as conceded by CDTFA in its fourth reaudit. In addition, CDTFA shall reduce the audited taxable measure of $219,899.00 established in the fourth reaudit by $4,262.50 ($3,875.00 + $387.50). CDTFA's action in denying the petition is otherwise sustained.

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Andrew J. Kwee
Administrative Law Judge

We concur:

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Teresa A. Stanley
Administrative Law Judge

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

Date Issued: 9/14/2023