DocuSign Envelope ID: C4815BEE-B077-45D4-8206-63E10E122991

2024-OTA-113
Nonprecedential

OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 21067978
J. SAMTANI,	CDTFA Case ID 266-008
dba Ramodi's	

OPINION

Representing the Parties:

For Appellant: J. Samtani
Michelle Sehwani, Representative

For Respondent: Nalan Samarawickrema, Hearing Representative
Christopher Brooks, Attorney
Jason Parker, Chief of Headquarters Ops.

For the Office of Tax Appeals: Deborah Cumins, Business Taxes Specialist III

A. WONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, J. Samtani (appellant) appeals respondent California Department of Tax and Fee Administration's (CDTFA's) decision to partly deny appellant's petition for redetermination of CDTFA's Notice of Determination (NOD) dated July 28, 2014.[1] The NOD was for a tax liability of $26,113.92, plus applicable interest, and a negligence penalty of $2,611.39 for the period January 1, 2009, through December 31, 2011 (audit period).[2] As a result of its decision, CDTFA reduced the determined amount of unreported taxable sales from $277,902 to $203,601 (rounded), the corresponding tax liability from $26,113.92 to $19,131, and the negligence penalty from $2,611.39 to $1,913.10; otherwise, CDTFA denied appellant's petition.

[1] The State Board of Equalization (BOE) formerly administered sales and use taxes along with other business taxes and fees. On July 1, 2017, BOE functions relevant to this case 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 BOE.

[2] CDTFA timely issued the NOD because appellant waived the otherwise applicable three-year statute of limitations and extended CDTFA's issuance deadline. (See R&TC, §§ 6487(b), 6488.)

DocuSign Envelope ID: C4815BEE-B077-45D4-8206-63E10E122991

Office of Tax Appeals (OTA) Administrative Law Judges Andrew Wong, Suzanne B. Brown, and Kenneth Gast held an oral hearing for this matter in Cerritos, California, on October 11, 2023. At the conclusion of the hearing, the record was closed and this matter was submitted for an opinion.

ISSUES

1. Whether the amount of unreported taxable sales should be further reduced.
2. Whether appellant was negligent.

FACTUAL FINDINGS

1. From July 1970 through June 30, 2017, appellant, a sole proprietor, operated a store selling souvenirs, collectibles, and vintage items on Hollywood Boulevard in Hollywood, California. Appellant did business as "Ramodi's."
2. For the audit period, appellant reported/claimed the following on his sales and use tax returns (SUTRs): total sales of $159,235; total deductions of $156,897; and taxable sales of $2,338. Total deductions of $156,897 consisted of the following: nontaxable sales in interstate and foreign commerce (sales in interstate commerce)[3] of $144,722; nontaxable sales for resale of $10,230; returned merchandise of $1,828; and sales tax reimbursement of $117 included in reported total sales.
3. In 2011, as part of CDTFA's Statewide Compliance and Outreach Program (SCOP), a SCOP team reviewed appellant's business operations and recommended an audit, which CDTFA's audit staff subsequently conducted. This was appellant's first audit.
4. For the audit, appellant provided federal income tax returns and bank statements for 2009, 2010, and 2011; a few sales and purchase invoices; some credit card receipts and bills; and a few postage receipts to document sales in interstate commerce. Appellant did not provide complete sales/purchase invoices, any sales/purchase journals, complete shipping documents, or any resale certificates.
5. During the audit, appellant stated that his records for 2009 and 2010 were destroyed by water from a burst pipe from the business above his. CDTFA requested substantiation of

[3] For ease of reference, this Opinion uses the term "sales in interstate commerce" to refer to sales in both interstate *and* foreign commerce.

DocuSign Envelope ID: C4815BEE-B077-45D4-8206-63E10E122991

this event in the form of an insurance claim and/or police report, but the evidentiary record contains no such documentation.

6. CDTFA noted that the amounts deposited in the bank primarily represented credit card receipts with few cash deposits.
7. CDTFA also noted that appellant had claimed that over 90 percent of his sales were nontaxable sales in interstate commerce (sales in interstate commerce of $144,722 ÷ total sales of $159,235 = .9089 or 90.89 percent), but appellant's business sold souvenirs and collectibles from a location in a popular tourist destination.[4]
8. Because appellant did not provide complete purchase or sales records, CDTFA concluded that further investigation was warranted.
9. CDTFA conducted an audit and a revised audit, using the bank statements, credit card receipts, and an estimated ratio of credit card sales to total sales (credit card sales ratio) of 50 percent to compute audited total sales, including tax.[5]
10. In its computations, CDTFA made an adjustment for nontaxable sales in interstate commerce. To establish the audited amount of allowed nontaxable sales in interstate commerce, CDTFA reviewed appellant's records for 2011. For that year, appellant provided 17 postage receipts supporting shipment of goods to locations outside California. Appellant also provided a summary of his nontaxable sales in interstate commerce. Using the number of sales and the total amount of sales on the summary, CDTFA computed an average sale in interstate commerce of $418, and then computed allowable nontaxable sales in interstate commerce of $7,106 ($418 x 17) for 2011. CDTFA compared that figure to claimed sales in interstate commerce of $67,785 for 2011 to compute a percentage of allowed to claimed sales in interstate commerce of 10.48 percent. CDTFA applied that percentage to claimed sales in interstate commerce for 2009 and 2010 to compute allowed nontaxable sales in interstate commerce of $4,894 and $3,171, respectively. After making the adjustment for allowed nontaxable sales in

[4] During the oral hearing, appellant stated that his store was on Hollywood Boulevard, just two blocks away from Grauman's Chinese Theatre.

[5] CDTFA originally used a credit card sales ratio of 20 percent in the audit and 50 percent in the revised audit. According to the reaudit working papers, appellant indicated that 50 percent of his sales were paid by credit card.

DocuSign Envelope ID: C4815BEE-B077-45D4-8206-63E10E122991

interstate commerce in the revised audit, CDTFA established audited unreported taxable sales of $277,902.

11. Because of appellant's lack of books and records, as well as underreporting that it considered substantial, CDTFA added a 10 percent negligence penalty.
12. On July 28, 2014, CDTFA issued the NOD for tax of $26,113.92 and a negligence penalty of $2,611.39.
13. On August 1, 2014, appellant filed a petition for redetermination.
14. On July 29, 2020, CDTFA held an appeals conference with appellant and representatives of CDTFA's audit staff. After the appeals conference, the audit staff recommended reducing the audited amount of unreported taxable sales from $277,902 to $237,303.
15. On November 17, 2020, CDTFA issued a decision ordering a reaudit to make the adjustments recommended by the audit staff, and also to correct certain computational errors. Specifically, CDTFA first reduced the total amount of bank deposits by $40,600 for documented deposits into the bank from appellant's own credit cards (in addition to the documented transfers of funds from appellant's other accounts, deposits of appellant's Social Security payments, and cash deposits that had been deducted in the revised audit) to establish audited credit card sales. CDTFA then divided audited credit card sales by 50 percent (the estimated credit card sales ratio) to establish audited total sales, including sales tax; deducted the allowable amounts of nontaxable sales in interstate commerce (computation explained above) to establish audited amounts of taxable sales, including tax;[6] and finally reduced those amounts by the amounts of sales tax included in reported total sales.
16. As a result of the reaudit, CDTFA ultimately reduced the audited amount of unreported taxable sales from $277,902 to $203,601.

[6] CDTFA did not reduce audited total sales for nontaxable sales for resale or for returned taxable merchandise, although appellant had claimed such deductions on SUTRs of $10,230 and $1,828, respectively. The absence of adjustments in CDTFA's computation of audited taxable sales effectively disallows the deductions for sales for resale and returned merchandise that were claimed on appellant's SUTRs. OTA is unable to find an explanation in the record for CDTFA's decision to not make these adjustments. However, considering the dearth of records, OTA infers that appellant did not provide documentation to support the claimed amounts. Appellant has not specifically asserted that these adjustments should be made. Thus, OTA finds that there is no basis to discuss them further.

DocuSign Envelope ID: C4815BEE-B077-45D4-8206-63E10E122991

17. On March 30, 2021, CDTFA issued a Notice of Proposed Liability to reflect the reaudit results, including a reduced tax liability of $19,131 and a reduced negligence penalty of $1,913.10.
18. This timely appeal followed.

DISCUSSION

Issue 1: Whether the amount of unreported taxable sales should be further reduced.

California imposes upon a retailer a sales tax measured by the retailer's gross receipts from the retail sales of tangible personal property sold in this state, unless a 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, it is presumed 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 any person, or if any person fails to make a return, CDTFA may compute and 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 Amaya*, 2021-OTA-328P.) If CDTFA carries its initial, minimal burden, the burden of proof shifts to the taxpayer to establish that a result differing from CDTFA's determination is warranted. (*Ibid*.)

Appellant bears the burden of proof as to all issues of fact unless the law specifies otherwise. (Cal. Code Regs., tit. 18, § 30219(a).) The standard of proof is by a preponderance of the evidence unless the law also specifies otherwise. (Cal. Code Regs., tit. 18, § 30219(b).) 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. (*Appeal of Amaya*, *supra*.) To satisfy their burden of proof, a taxpayer must prove both (1) that the tax

assessment is incorrect, and (2) the proper amount of tax. (*Appeal of AMG Care Collective*, *supra*.)

Here, appellant provided incomplete records during the audit. Specifically, appellant provided federal income tax returns and bank statements for 2009, 2010, and 2011; a few sales and purchase invoices; some credit card receipts and bills; and a few postage receipts to document sales in interstate commerce. However, appellant did not provide complete sales/purchase invoices, any sales/purchase journals, complete shipping documents, or any resale certificates. Of the limited records provided, appellant's bank statements reflected almost no recorded cash sales even though, during the audit period, appellant's business sold souvenirs and collectibles from a location on Hollywood Boulevard, a popular tourist destination, which suggests that appellant would have made at least some cash sales. Additionally, appellant had claimed that over 90 percent of his sales were nontaxable sales in interstate commerce ($144,722 out of total reported sales of $159,235, or 90.88 percent), which CDTFA found to be an unexpectedly high percentage given that appellant operated a type of business in which sales are generally made in-store and whose specific location on Hollywood Boulevard suggested high foot traffic. Under these circumstances, OTA finds that CDTFA appropriately questioned the adequacy of appellant's reported taxable sales.

Moreover, given the dearth of books and records appellant provided upon audit, OTA finds that it was appropriate for CDTFA to use appellant's credit card receipts and an estimated credit card sales ratio of 50 percent to establish audited total sales, including tax.[7] For the same reason (lack of records), OTA also finds that CDTFA used the best available information to establish the allowable amount of nontaxable sales in interstate commerce. Further, OTA has reviewed the post-audit adjustments made by CDTFA and concludes that CDTFA has established that its determination was reasonable and rational. Accordingly, the burden of proof shifts to appellant to show that the amount of unreported taxable sales should be further reduced.

On appeal, appellant contends that he used to travel to many out-of-state gift shows, take large orders there, and then return to Los Angeles to ship the ordered merchandise out of state, thereby making large amounts of nontaxable sales in interstate commerce. However, appellant states that he does not have complete records of these sales due to water damage. Appellant

[7] During the reaudit, appellant corroborated the estimated credit card sales ratio of 50 percent. See footnote 5, *ante*, page 3.

DocuSign Envelope ID: C4815BEE-B077-45D4-8206-63E10E122991

further states that he has no funds available to pay the determined liability. He states that he is living on Social Security and help from his daughter. In support, appellant provides bank statements from January 2022 through August 2023 for his checking account. Appellant also provides medical records for the period July 2019 through January 2020.[8]

Although appellant's current financial and health situations are regrettable, there is no provision in the Sales and Use Tax Law authorizing OTA to relieve appellant's liabilities (which relate to the period 2009 through 2011) on these bases. Appellant also has not provided any evidence relevant to the tax liability at issue nor substantiated with any documentation his claim that water damaged his records. Accordingly, OTA concludes that appellant has not shown that the amount of unreported taxable sales should be further reduced.

Issue 2: Whether appellant was negligent.

CDTFA applied a 10 percent negligence penalty due to appellant's lack of books and records, as well as underreporting CDTFA considered substantial.

On appeal, appellant contends that his books and records for 2009 and 2010 were destroyed by water damage when a pipe from the business above his burst. In response, CDTFA argues that appellant did not provide any documentation substantiating this claim.

If any part of the deficiency for which a deficiency determination is made is due to negligence or intentional disregard of the Sales and Use Tax Law or authorized rules and regulations, a penalty of 10 percent of the amount of the determination shall be added thereto. (R&TC, § 6484; Cal. Code Regs., tit. 18, § 1703(c)(3)(A).) Negligence is generally defined as a failure to exercise such care that a reasonable and prudent person would exercise under similar circumstances. (*Warner v. Santa Catalina Island Co.* (1955) 44 Ca.2d. 310, 317; see also *People v. Superior Court (Sokolich)* (2016) 248 Cal.App.4th 434, 447.)

Taxpayers are required to maintain and make available for examination on request by CDTFA, all records necessary to determine the correct tax liability under the Sales and Use Tax Law and all records necessary for the proper completion of the sales and use tax return. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).) Such records include but are not limited to: (a) normal books of account ordinarily maintained by the average prudent businessperson

[8] During the oral hearing, appellant also noted that he was robbed in Denver, Colorado, in the 1980s, which affected his business. Because this incident predates the audit period by 20 years or more, OTA finds it irrelevant (though unfortunate) and will not discuss it further.

DocuSign Envelope ID: C4815BEE-B077-45D4-8206-63E10E122991

engaged in the activity in question; (b) bills, receipts, invoices, cash register tapes, or other documents of original entry supporting the entries in the books of account; and (c) schedules or working papers used in connection with the preparation of the tax returns. (Cal. Code Regs., tit. 18, § 1698(b)(1).) Failure to maintain and keep complete and accurate records will be considered evidence of negligence or intent to evade the tax and may result in penalties. (Cal. Code Regs., tit. 18, § 1698(k).)

Generally, a penalty for negligence or intentional disregard should not be added to deficiency determinations associated with the first audit of a taxpayer in the absence of evidence establishing that any bookkeeping and reporting errors cannot be attributed to the taxpayer's good faith and reasonable belief that its bookkeeping and reporting practices were in substantial compliance with the requirements of the Sales and Use Tax Law or authorized regulations. (Cal. Code Regs, tit. 18, § 1703(c)(3)(A).)

Here, appellant did not provide complete sales/purchase invoices, any sales/purchase journals, complete shipping documents, or any resale certificates. This is evidence of negligence in recordkeeping.

Appellant also only reported taxable sales totaling $2,338. The audited amount of unreported taxable sales is $203,601, and the amount of total taxable sales is $205,939 ($2,338 + $203,601). The understatement of $203,601 represents an error ratio of 8,708 percent when compared to reported taxable sales of $2,338 ($203,601 ÷ $2,338). Put another way, appellant reported only 1.14 percent of his total taxable sales ($2,338 ÷ $205,939). That level of underreporting is extreme and is evidence of negligence in reporting.

Additionally, appellant deposited almost no cash from sales into his bank account, and bank statements represented the primary records he provided to support his reported sales. Further, appellant claimed over 90 percent of the total sales reported on SUTRs as nontaxable sales in interstate commerce, but the minimal records he provided supported only about 10 percent of the claimed deductions. Appellant had been in business for almost 40 years before the beginning of the audit period (1970 to 2009). During that extended period, OTA presumes that appellant would have developed a reasonable understanding of recordkeeping and reporting of taxable sales. Moreover, OTA finds that any reasonable and prudent businessperson, regardless of his or her level of experience, would know that cash sales must be recorded and reported, and that deductions must be supported by evidence. Although appellant claimed that

DocuSign Envelope ID: C4815BEE-B077-45D4-8206-63E10E122991

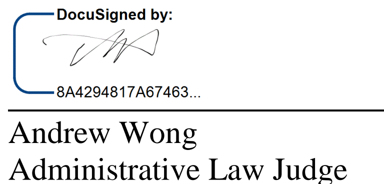
water from a burst pipe damaged his records for 2009 and 2010, he has not substantiated his claim with any documentation, such as an insurance claim, either during the audit or on appeal to OTA. Therefore, OTA finds that appellant's lack of complete records and failure to report almost 99 percent of his total taxable sales cannot be attributed to a bona fide and reasonable belief that his bookkeeping and reporting practices were sufficiently compliant with the requirements of the Sales and Use Tax Law. Accordingly, OTA finds that appellant was negligent, and the penalty was properly applied.

HOLDINGS

1. The amount of unreported taxable sales should not be further reduced.
2. Appellant was negligent, and CDTFA properly applied the negligence penalty.

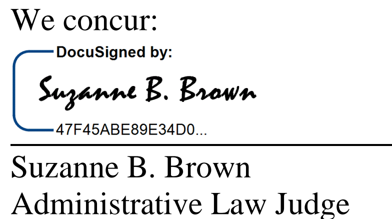
DISPOSITION

CDTFA's decision to reduce the tax and penalty to $19,131 and $1,913.10, respectively, and to otherwise deny the petition, is sustained.



Andrew Wong
Administrative Law Judge

We concur:



Suzanne B. Brown
Administrative Law Judge

Kenneth Gast
Administrative Law Judge

Date Issued: 1/3/2024