

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 21027271
O&B EQUIPMENT, INC.)	CDTFA Case ID: 128066
dba Frazier Park Sand & Gravel)	
)	
)	

OPINION

Representing the Parties:

For Appellant: David Glaubiger, Attorney

For Respondent: Courtney Daniels, Attorney
Jarrett Noble, Attorney
Nalan Samarawickrema,
Hearing Representative

For Office of Tax Appeals: Corin Saxton, Attorney

L. KATAGIHARA, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, O&B Equipment, Inc. dba Frazier Park Sand & Gravel (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration¹ (CDTFA) partially denying appellant’s petition for redetermination (petition) of the Notice of Determination (NOD) dated July 15, 2010. The NOD is for tax of \$78,298.63 and applicable interest, for the period January 1, 2007, through December 31, 2009 (liability period). Over the course of two reaudits, CDTFA reduced the taxable measure from \$936,556 to \$255,079, which reduced appellant’s tax liability to \$23,582.

Office of Tax Appeals (OTA) Administrative Law Judges Suzanne B. Brown, Keith T. Long, and Lauren Katagihara held an oral hearing for this matter in Cerritos, California, on August 10, 2023. At the conclusion of the hearing, OTA held the record open for additional

¹ Sales and use taxes were formerly administered by the State Board of Equalization (BOE). In 2017, functions of BOE 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 BOE.

briefing. After the additional briefing period ended, OTA closed the record and this matter was submitted for an Opinion.

ISSUE

Whether interest relief is warranted for the period January 2010 through June 2017.²

FACTUAL FINDINGS

1. Appellant, a California corporation, operates a business in Sylmar, California. CDTFA asserts that appellant is both a retailer and hauler of sand, gravel, and rock. Appellant, on the other hand, asserts that it makes sales of sand, gravel, and dirt for resale only, and/or that it transports materials using independent contractors, and on occasion, its own trucks.³
2. On December 22, 2009, CDTFA and appellant had their first meeting regarding this audit.
3. On April 7, 2010, CDTFA provided a copy of its audit report (dated April 6, 2010) to appellant. The audit report identified an aggregate deficiency measure of \$936,556, consisting of unreported taxable sales of \$350,161, and disallowed claimed nontaxable labor of \$586,395.
4. CDTFA discussed its audit with appellant on May 28, 2010. On June 23, 2010, CDTFA revised its Form BOE-836-A, Report of Discussion of Audit Findings, provided a copy to appellant, and transmitted the audit to CDTFA's Headquarters.
5. On July 15, 2010, CDTFA issued the NOD based on the audit, which appellant timely petitioned on August 10, 2010.
6. Appellant's petition was assigned to CDTFA's Petitions Section on August 23, 2010. The Petitions Section gave appellant until January 21, 2011, to submit additional documentation.

² Appellant listed on its BOE-735 Form, Request for Relief from Penalty, Collection Recovery Fee, and/or Interest (BOE-735), that it was requesting relief for the period "First Quarter 2007 through June 2017," which coincides with the beginning of the liability period through the month in which appellant paid the assessed liability. However, appellant's stated basis for relief in the BOE-735 specifies, and appellant's arguments on appeal confirm, that appellant is requesting relief of interest starting with the year 2010 (the year the NOD was issued), not 2007.

³ In its petition dated August 10, 2010, appellant states that it "arranges delivery of building materials via independent contractor truckers that own their own trucks. On occasion, [appellant] transports using its own trucks." In its opening brief, appellant further states that "[o]n some occasions, [appellant] merely hauls materials and there is no sale."

7. CDTFA received additional documentation from appellant on both January 21, 2011, and February 16, 2011. CDTFA then reviewed appellant's documentation, requested information from third parties, and conducted its own inquiries to confirm the veracity of the documents provided.
8. As a result of its review and inquiries, CDTFA prepared a draft reaudit and provided a copy to appellant on July 6, 2011. In turn, appellant provided additional documentation to CDTFA on August 1, 2011. CDTFA completed the reaudit on August 8, 2011, and after additional review, made additional adjustments on September 16, 2011. CDTFA finalized the reaudit on September 20, 2011. In the reaudit, CDTFA recommended that the aggregate deficiency measure be reduced to \$911,233 (comprised of unreported taxable sales of \$49,871 and disallowed claimed exempt sales of \$861,362).
9. On September 23, 2011, CDTFA transmitted the reaudit to its headquarters for further review and to have the matter prepared for transfer to CDTFA's Appeals Bureau.
10. Appellant's petition was forwarded to CDTFA's Appeals Bureau on December 23, 2011. CDTFA scheduled appellant's appeals conference on three different occasions (specifically, for July 9, 2013, July 17, 2013, and April 30, 2014), but each time, appellant requested the appeals conference be postponed.
11. CDTFA held the appeals conference in this matter on November 4, 2014, but nobody appeared on appellant's behalf. After the appeals conference, CDTFA provided appellant a deadline of December 1, 2015, to submit additional evidence. There is no indication in the evidentiary record that appellant responded to CDTFA's communication by the deadline.
12. On February 23, 2015, appellant contacted CDTFA inquiring into the status of its appeal. CDTFA provided appellant until March 12, 2015, to submit additional documentation. Appellant did not provide additional documentation, but on March 10, 2015, requested another appeals conference. CDTFA denied appellant's request.
13. On July 22, 2015, CDTFA issued its decision recommending reductions in accordance with the reaudit, but otherwise denying appellant's petition.
14. In its petition, appellant requested a board hearing before the Board of Equalization. On September 23, 2015, CDTFA acknowledged appellant's prior request and notified appellant that its board hearing was scheduled for February 23, 2016. Appellant

- requested a postponement of the scheduled board hearing. CDTFA granted appellant's request and rescheduled appellant's board hearing for April 27, 2016.
15. On March 2, 2016, appellant submitted an opening brief with additional information, including aerial photos of its vendors' locations. CDTFA submitted a reply brief on March 21, 2016.
 16. On April 15, 2016, appellant requested another postponement of the board hearing, which CDTFA granted. CDTFA rescheduled the board hearing for September 28, 2016. Appellant then requested the board hearing be rescheduled for November 30, 2016. CDTFA granted appellant's request.
 17. On October 19, 2016, CDTFA deferred the board hearing in order to evaluate the information appellant submitted with its opening brief. Thereafter, CDTFA reviewed appellant's documentation and made additional inquiries, including contacting appellant's customers. Through this inquiry and further analysis, CDTFA was able to confirm, for certain transactions, that the landfill material appellant transported originated from an excavation site and was delivered to landfill sites.⁴
 18. Consequently, on June 5, 2017, CDTFA issued a second reaudit report reducing the aggregate deficiency measure to \$255,079 (comprised of unreported taxable sales of \$49,871, a credit measure of \$20,232 for tax-paid purchases resold,⁵ and disallowed claimed nontaxable labor to \$225,440).
 19. Appellant disputes CDTFA's enforcement of California Code of Regulations, title 18, (Regulation) section 1628(c) on the grounds that it imposes restrictions that appellant argues are inconsistent with the corresponding statute (R&TC, § 6012(c)(8)). Nevertheless, on June 19, 2017, appellant paid the tax liability, sans interest.

⁴ CDTFA provided direction to its audit staff regarding the term "landfill sites" as used in California Code of Regulations, title 18, (Regulation) section 1628(c). Specifically, CDTFA determined "landfill sites" included areas where the material was applied to the land in its raw form (e.g., parks, backyards, drainage ditches, and large construction sites) and was not used as a raw ingredient for further processing (e.g., to create asphalt or other products).

⁵ The documents appellant submitted with its opening brief revealed both a tax-paid purchases resold credit of \$63,335, as well as additional unreported taxable sales of \$43,102. Therefore, CDTFA offset the credit by the additional unreported taxable sales, resulting in a net credit measure of \$20,232. (Mathematical discrepancies are due to rounding within the audit working papers.)

20. On December 3, 2017, appellant requested relief of the interest that accrued between January 2010 through June 2017. On April 5, 2018, CDTFA denied appellant's request for relief of interest, and this timely appeal followed.⁶
21. After OTA held a hearing for this matter, CDTFA conceded interest relief for the period June 11, 2015, through July 22, 2015.

DISCUSSION

The imposition of interest is mandatory. (R&TC, § 6482.) The law allows CDTFA, in its discretion, to grant relief of all or any part of the interest imposed on a person under the Sales and Use Tax Law where the failure to pay the tax is due in whole or in part to an unreasonable error or delay by an employee of CDTFA acting in his or her official capacity. (R&TC, § 6593.5(a)(1).) Such a delay means, for example, an unreasonable failure to work on an appeal. (*Appeal of Micelle Laboratories, Inc.*, 2020-OTA-290P.) The mere passage of time does not establish error or delay. (See *Appeal of Eichler*, 2022-OTA-029P.) In addition, an unreasonable error or delay shall be deemed to have occurred only if no significant aspect of the error or delay is attributable to an act of, or failure to act by, appellant. (R&TC, § 6593.5(b).) Any person requesting interest relief must provide CDTFA a statement under penalty of perjury setting forth the facts on which the request is based. (R&TC, § 6593.5(c).)

OTA reviews CDTFA's decisions to deny interest relief on an abuse of discretion standard. (*Appeal of Micelle Laboratories, Inc.*, *supra*; *Appeal of Eichler*, *supra*.) To show an abuse of discretion, appellant must establish that, in refusing to relieve interest, CDTFA exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law. (*Appeal of Eichler*, *supra*.)

⁶ As of January 1, 2018, BOE's duties, powers, and responsibilities for conducting business tax appeals hearings were transferred to OTA. (Gov't. Code, §§ 15672, 15674; former Cal. Code Regs., tit. 18, § 30832 [superseded by Cal. Code Regs., tit. 18, § 30106].)

Appellant filed the requisite statement setting forth the facts upon which its request for interest relief is based. In appellant's statement and on appeal, appellant contends it is entitled to interest relief because CDTFA took seven years to concede that \$635,922 of appellant's \$861,362 claimed nontaxable labor charges constituted nontaxable transportation charges, which resulted in an unwarranted accrual of interest.⁷ Specifically, appellant asserts that CDTFA's delayed concession was due to CDTFA's failure to both make basic inquiries regarding appellant's business and reject an allegedly unconstitutional restriction in Regulation section 1628.⁸ Appellant's position is that if CDTFA had not delayed in making its concession, appellant would have paid its liability sooner and less interest would have accrued.

Here, the audit process spanned a significant amount of time, but the mere passage of time does not establish error or delay. (See *Appeal of Eichler, supra.*) The record does not indicate that there was any unreasonable error or delay by an employee of CDTFA acting in his or her official capacity that contributed to appellant's failure to pay the tax. In fact, the record shows that CDTFA continually worked on the appeal for the entire time period in dispute.

Appellant argues that the reaudit was not performed satisfactorily because CDTFA failed, at the outset, to make basic inquiries (e.g., not accessing public records, requesting specific information or documentation from appellant, or placing inquiries with appellant's vendors) that would have revealed that appellant's transportation charges were nontaxable. However, it was appellant's responsibility to provide the relevant evidence and documentation to CDTFA for the audit because appellant, not CDTFA, is in the best position to know and document the facts upon which a correct determination of tax can be based. (See R&TC, § 7053; Cal. Code Regs., tit. 18, §§ 1698, 35003.)

⁷ As a result of CDTFA's adjustment in the second reaudit, any interest charged in association with the allowed claimed nontaxable labor charges was removed prior to appellant's payment of the liability. As such, the interest amount at issue in this appeal is attributable only to the disallowed claimed nontaxable labor sales and unreported taxable sales.

⁸ Appellant argues that Regulation section 1628 is unenforceable because it requires that landfill material be transported from an excavation site to a "landfill site," and therefore, is allegedly more restrictive than its corresponding statute, R&TC section 6012, which requires the landfill material to be transported "to a site specified by the purchaser." CDTFA's decision to apply Regulation section 1628 as written, or to adopt a specific interpretation of it, is not a proper basis for interest relief. (See *Appeal of Micelle Laboratories, Inc., supra* ["interest relief does not extend to an allegedly 'unreasonable' position taken on appeal, that is otherwise being actively maintained"].) Therefore, OTA need not determine whether CDTFA's position regarding Regulation section 1628 was unreasonable as it does not constitute an "error" as contemplated by R&TC section 6593.5.

Moreover, CDTFA informed appellant of its position throughout the audit and reaudits. For example, in the first reaudit, CDTFA explained that it was not confident that the materials appellant transported were from an excavation site and/or delivered to a landfill site. Appellant argues that CDTFA should have known, based on the quantity of the materials, that the materials originated from an excavation site. Telling, however, is that appellant, at any time during the audit, could have provided documents to CDTFA evidencing the location from which the materials originated and where they were delivered. However, appellant did not provide such evidence (specifically, the aerial photographs) until March 2, 2016, despite having given CDTFA information related to the taxability of its transportation charges on prior occasions.

After CDTFA received the aerial photographs, it determined that at least some of appellant's transactions met the requirement that the landfill materials originated from an excavation site. This prompted CDTFA to conduct further inquiries to determine specifically which of appellant's transportation charges were for landfill material originating from an excavation site and delivered to a landfill site, and to provide further direction to audit staff regarding what constitutes a landfill site.⁹ The catalyst of this inquiry was appellant's submission of the aerial photographs, which ultimately led to CDTFA's concession that \$635,922 of appellant's transportation charges were nontaxable. Therefore, appellant's delay in providing the aerial photographs, in addition to its piecemeal submission of evidence, and repeated requests for postponements during CDTFA's appeals process (specifically, three for the appeals conference and three for the board hearing), significantly contributed to the delay in the parties' resolution of the appeal. Pursuant to R&TC section 6593.5(b), an unreasonable error or delay cannot be deemed to have occurred here because significant aspects of the delay are attributable to appellant's actions or failures to act. Further, appellant has not otherwise established that CDTFA exercised its discretion to relieve interest arbitrarily, capriciously, or without sound basis in fact or law. Accordingly, OTA finds that appellant is not entitled to additional interest relief.

⁹ See footnote 4.

HOLDING

Other than the conceded period of June 11, 2015, through July 22, 2015, interest relief is not warranted for the period January 2010 through June 2017.

DISPOSITION

CDTFA’s denial of interest relief, as modified to relieve interest for the period June 11, 2015, through July 22, 2015, is sustained.

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Lauren Katagihara
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Lauren Katagihara
Administrative Law Judge

We concur:

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Suzanne B. Brown
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Suzanne B. Brown
Administrative Law Judge

DocuSigned by:
Keith T. Long
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Keith T. Long
Administrative Law Judge

Date Issued: 1/17/2024