OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:

SILVERSPUR SERVICES, INC.,
dba Silver Spur Services

OTA Case No. 220911465
CDTFA Case ID: 190-115

OPINION

Representing the Parties:

For Appellant: Steve Farzanfar, Representative

For Respondent: Jason Parker, Chief of Headquarters Ops.

For the Office of Tax Appeals: Craig Okihara, Business Taxes Specialist III

A. WONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Silverspur Services, Inc. (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (respondent) denying appellant's petition for redetermination of a Notice of Determination (NOD) issued on July 16, 2015.[1] The NOD is for a tax liability of $153,844.92, plus applicable interest, and a negligence penalty of $15,384.58 for the period April 1, 2011, through March 31, 2014 (audit period).[2]

Appellant waived the right to an oral hearing, so the Office of Tax Appeals (OTA) decides this matter on the written record.

ISSUES

1. Whether the amount of unreported taxable gasoline sales should be reduced.
2. Whether appellant was negligent.
3. Whether relief of interest is warranted.

[1] The State Board of Equalization (BOE) formerly administered sales and use taxes. On July 1, 2017, BOE functions relevant to this case transferred to respondent. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to events that occurred before July 1, 2017, "respondent" refers to BOE.

[2] Respondent timely issued the NOD because appellant waived the otherwise applicable three-year statute of limitations and extended respondent's issuance deadline to July 31, 2015. (See R&TC, §§ 6487(a), 6488.)

FACTUAL FINDINGS

1. Appellant, a corporation doing business as Silver Spur Services, operated an ARCO-branded gasoline station with a minimart and carwash in Rolling Hills Estates, California. Appellant sold gasoline, but not diesel fuel, and provided automotive repair and smog-check services.
2. Appellant's seller's permit had an effective start date of February 1, 1980.
3. Respondent previously audited appellant for the period January 1, 2005, through December 31, 2007, but the evidentiary record is silent as to the results of this audit.
4. In early 2011, respondent assigned a second audit of appellant—for the period January 1, 2008, through December 31, 2010—to one of its district offices. In August 2011, respondent transferred this audit assignment to a different district office. On August 24, 2011, respondent contacted appellant, who indicated that it would bring its records to the district office, but the records were not yet ready.
5. The second audit began in May 2014 (after respondent's district office transferred the audit assignment to a different audit crew) but focused on the audit period at issue rather than the period January 1, 2008, through December 31, 2010.
6. Appellant used its point-of-sale system sales reports to report sales on its sales and use tax returns (SUTRs). On its SUTRs for the audit period, appellant reported total sales of $33,733,857 and claimed the following deductions: nontaxable food product sales of $636,328 and nontaxable carwash and automotive repair labor of $218,236. Appellant also claimed a partial deduction with respect to reported gasoline sales of $31,570,885, which were subject to a decrease in the statewide sales and use tax rate due to the "fuel tax swap."[3] Appellant ultimately reported total taxable sales of $1,308,408.[4] In addition, appellant claimed credits of $645,864 for prepaid sales tax on gasoline purchases.

---

[3] Effective July 1, 2010, legislation increased the state excise tax rate on sales of motor vehicle fuels (i.e., gasoline, not diesel fuel) while correspondingly decreasing the sales and use tax rate on the same. (See R&TC, §§ 6357.7, 7326 & 7360.) As relevant here, during the audit period, the increase in the state excise tax rate ranged from $0.353 per gallon to $0.36 per gallon, and the statewide sales and use tax rate on gasoline sales decreased from 8.25 percent to 2.25 percent, plus applicable district taxes. This legislation is referred to as the "fuel tax swap."

[4] During the audit, respondent concluded that this amount consisted entirely of taxable minimart sales and was reasonable.

7. For the audit, appellant did not provide its books and records. Without appellant's books and records, respondent could not use a direct audit method (i.e., compiling audited sales directly from appellant's books and records) to verify appellant's reported sales. Instead, respondent used an indirect audit method to verify, as relevant here, appellant's reported taxable gasoline sales.
8. Respondent used ad hoc reconciliation reports for the period April 1, 2011, through March 31, 2013, to compile prepaid sales taxes of $442,588, which is the amount appellant's fuel vendor had reported collecting on its gasoline sales to appellant.[5] But this amount differed from the credits of $645,864 that appellant claimed on its SUTRs for prepaid sales taxes on its gasoline purchases. Respondent attributed the difference to reporting errors by appellant's vendor. Accordingly, respondent concluded that appellant's claimed prepaid sales taxes of $645,864 was the best evidence of the amount of gasoline appellant purchased during the audit period.
9. To calculate the amount of gasoline purchased by appellant during the audit period, respondent first divided appellant's claimed prepaid sales taxes for each quarterly reporting period (quarter) in the audit period by the corresponding quarterly prepaid sales tax rate, which resulted in the number of gallons of gasoline appellant sold for each quarter. Respondent then added the results together, computing that appellant had purchased a total of 9,834,666 gallons of gasoline during the audit period.
10. Respondent visited appellant's business on three Mondays in 2014 (May 26, 2014; June 2, 2014; and June 9, 2014) and noted that appellant sold three grades of gasoline: regular, mid-grade, and premium. During each of these three visits, respondent also observed and recorded appellant's posted per-gallon gasoline selling prices for each grade of gasoline.
11. Using a combination of the most recently available gasoline sales data at the time of the audit and contemporaneous average weekly gasoline selling prices reported by the U.S. Department of Energy Information Administration (EIA) for the Los Angeles area—described in more detail below—respondent computed an overall volume-weighted

[5] Respondent generates ad hoc reconciliation reports to identify differences or errors in the amount of prepaid sales tax claimed by a taxpayer. For each reporting period, these reports compare the prepaid sales tax that fuel vendors are reported to have collected from a given taxpayer with the amounts of prepaid sales tax claimed as a credit by that same taxpayer.

average "price differential" of negative $0.25 per gallon. In other words, respondent determined that appellant's gasoline selling prices for the three Mondays at issue were generally $0.25 per gallon lower than gasoline selling prices prevailing in the Los Angeles area per EIA.

12. For the audit, appellant did not provide any sales documentation to respondent, so respondent could not determine how appellant's total gasoline sales broke down between regular, mid-, and premium grades. Instead, for each grade, respondent obtained from EIA the total number of gallons sold in California per day for 2010, 2011, and 2012 (the most recent available data at the time of the audit), compared each of these to the total number of gallons of regular, mid-grade, and premium gasoline sold in California per day for those same years, and computed the sales ratio for each grade of gasoline sold in California for 2010, 2011, and 2012.[6]

13. Respondent also obtained from EIA the average weekly per-gallon selling prices for each of these three grades of gasoline in the Los Angeles area during the period January 2010 through January 2015.[7] Using the 2010 sales ratios from EIA, respondent computed volume-weighted average per-gallon selling prices for the three grades of gasoline combined for each week—and then for each quarter—in the audit period.

14. For each quarter in the audit period, respondent reduced the volume-weighted average per-gallon selling prices by the volume-weighted average price differential of negative $0.25 per gallon to compute audited selling prices of gasoline per gallon.

15. Respondent multiplied the audited number of gallons of gasoline purchased by appellant in each quarter of the audit period by the corresponding audited selling prices of gasoline per gallon to compute expected total gasoline sales (including sales tax reimbursement) of $37,050,520 for the audit period.

16. Respondent divided the expected gasoline sales (including sales tax reimbursement) for each quarter in the audit period by one plus the applicable partial quarterly sales tax rate

[6] For 2010, respondent computed sales ratios of 75.60 percent, 9.81 percent, and 14.59 percent for regular, mid-grade, and premium grade, respectively. For 2011, respondent computed sales ratios of 76.20 percent, 9.30 percent, and 14.50 percent for regular, mid-grade, and premium grade, respectively. For 2012, respondent computed sales ratios of 75.31 percent, 9.75 percent, and 14.94 percent for regular, mid-grade, and premium grade, respectively.

[7] EIA surveys gasoline stations in various areas one day each week (typically a Monday) and computes an average per-gallon selling price for that day, which OTA refers to here as average weekly per-gallon selling prices.

(i.e., 3.75 percent for the period second quarter 2011 [2Q11] through 4Q12, and 4.00 percent for the period 1Q13 through 1Q14) to compute audited expected gasoline sales (excluding sales tax reimbursement) of $35,673,413 for the audit period. Upon comparison to reported gasoline sales of $31,570,885 for the audit period, respondent computed unreported taxable gasoline sales of $4,102,528 for the same period.

17. Because appellant did not provide any books and records for the audit, respondent imposed a penalty for negligence in recordkeeping.
18. On July 16, 2015, respondent issued the NOD to appellant.
19. On July 22, 2015, appellant timely filed a petition for redetermination with respondent but did not specify any grounds for its petition. Later, on August 11, 2021, appellant emailed respondent, specifying that it disagreed with the audit procedure.
20. On February 23, 2022, the parties held an appeals conference.
21. On August 23, 2022, respondent denied appellant's petition. Respondent's decision addressed the tax liability and the negligence penalty.
22. Appellant timely appealed to OTA.

DISCUSSION

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

California imposes on all retailers a sales tax measured by the retailer's gross receipts from the retail sale of all tangible personal property in this state, 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 evasion of the sales tax, it is presumed that all gross receipts are subject to tax until the contrary is established. (R&TC, § 6091.)

A taxpayer shall maintain and make available for examination by respondent 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).) If respondent is not satisfied with the amount of tax reported by the taxpayer, respondent may compute and determine the amount required to be paid upon the basis of any information within its possession or that may come into its possession. (R&TC, § 6481.)

In the case of an appeal, respondent has a minimal, initial burden of showing that its determination was reasonable and rational. (*Appeal of Talavera*, 2020-OTA-022P.) If respondent carries its initial burden, the burden of proof shifts to the taxpayer to establish that a result differing from respondent's determination is warranted. (*Ibid.*)

The 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).) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of AMG Care Collective*, 2020-OTA-173P.) To satisfy its burden of proof, a taxpayer must prove both (1) that the tax assessment is incorrect, and (2) the proper amount of the tax. (*Ibid.*)

Here, for the audit, appellant did not provide its books and records to respondent. Accordingly, respondent did not have sufficient information to verify appellant's reported gasoline sales via a direct audit method (i.e., compiling audited sales directly from appellant's records). Thus, OTA concludes that it was appropriate for respondent to utilize an alternative, indirect audit method to establish audited taxable sales.

Respondent performed an analysis of gasoline sales based on EIA sales data and selling prices, as well as the number of gallons of gasoline appellant purchased. The EIA information respondent used is gathered and published by a federal government agency, which OTA finds is a reasonable third-party information source from which to formulate appellant's audited selling prices for gasoline. Respondent then applied the audited selling prices to the number of gallons of gasoline appellant purchased during the audit period—information that came from appellant's own reporting of the amount of sales taxes it prepaid on its gasoline purchases during the audit period. On these facts, OTA concludes that respondent has carried its minimal, initial burden and established that its determination is reasonable and rational. The burden of proof now shifts to appellant to establish that a result differing from respondent's determination is warranted.

On appeal, appellant contends that unreported taxable sales are incorrect. Appellant alleges that respondent improperly increased the liability by $30,000, from an approximate amount of $90,000, which respondent had previously presented to appellant during the audit. Appellant also asserts that it provided to respondent documentation showing that the liability was wrong, but respondent did not consider the documentation. Further, appellant maintains that respondent's decision is not fair.

The July 16, 2015 NOD is for a tax liability of $153,844.92. The evidentiary record before OTA does not support appellant's allegation that respondent improperly increased the liability by $30,000, from $90,000 to $120,000. The evidentiary record also does not contain the documentation appellant claims that it provided to respondent. During the pendency of this appeal, OTA requested additional briefing to allow appellant the opportunity to provide its specific contentions and any supporting evidence it wanted OTA to consider. But appellant failed to respond to OTA's request. Because appellant has not provided any evidence to support a reduction to unreported taxable gasoline sales, OTA finds no basis to recommend a reduction.

In summary, OTA finds that respondent's audit method, computations, and determination were reasonable and rational. For its part, appellant has not identified any errors in respondent's audit method and computations, nor has it provided any evidence showing that audited taxable gasoline sales are incorrect. Accordingly, OTA concludes that a reduction in the amount of unreported taxable gasoline sales is not warranted.

Issue 2: Whether appellant was negligent.

Respondent added a 10 percent negligence penalty of $15,384.58 to the determination because appellant failed to provide its books and records for the audit.

If any part of a 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 Cal.2d 310, 317; see also *People v. Superior Court* (*Sokolich*) (2016) 248 Cal. App. 4th 434, 447.)

A taxpayer shall maintain and make available for examination on request by respondent (or its authorized representative) 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: (1) normal books of account ordinarily maintained by the average prudent businessperson engaged in the activity in question; (2) bills, receipts, invoices, cash register tapes, or other documents of original entry supporting the entries in the books of account; and (3) schedules or working papers used in connection with the preparation of 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. (Cal. Code Regs., tit. 18, § 1698(k).) A taxpayer's failure to report numerous transactions is also evidence of negligence if the failure had nothing to do with the taxpayer's accounting system. (*Independent Iron Works, Inc. v. State Bd. of Equalization* (1959) 167 Cal.App.2d 318, 323.)

On appeal, appellant requests the dismissal of the "interest penalty" of $15,384.58. Appellant contends that it took respondent seven years to hold a conference for its internal appeals process and the "auditor made a mistake and never told…[appellant] the penalty would be increasing during [the] wait time for appeals." Appellant also states that the wife of its president passed away in 2014 and that should be considered.

OTA requested additional briefing to confirm if appellant was disputing the imposition of the negligence penalty and, if so, to provide its specific arguments along with any supporting evidence that appellant wished to be considered. Appellant did not respond to OTA's request.

Appellant appears to have confused aspects of the negligence penalty with interest accruing on the unpaid tax liability. The amount that appellant disputes, $15,384.58, is for the negligence penalty. The negligence penalty amount is statutorily fixed at 10 percent of the tax liability and does not increase unless the tax liability increases. (See R&TC, § 6484.) In contrast, accrued interest on the unpaid tax liability increases over time if the tax remains unpaid. (See R&TC, § 6482.) Appellant's claim that respondent's auditor never told it that the "penalty" would be increasing while it waited for its appeal suggests that this "penalty" is actually interest accruing on the unpaid tax liability. OTA discusses the negligence penalty here and relief of interest below in Issue 3.

Here, appellant was previously audited for the period January 1, 2005, through December 31, 2007. Subsequently, on August 24, 2011, respondent telephoned appellant regarding a second audit, which is the audit at issue. On this call, appellant indicated that it would bring its records to respondent's district office but that its records were not yet ready. OTA finds that these facts show that appellant was aware of the requirement to maintain and make available for examination on request by respondent all records necessary to verify the accuracy of any return filed. However, appellant ultimately failed to provide any records, including point-of-sale system sales reports, ARCO franchise sales reports, sales tax worksheets, purchase journals, or source documentation for the audit period. Thus, respondent was unable to

verify sales reported on appellant's SUTRs for the audit period using a direct audit method (i.e., compiling audited sales directly from appellant's records). OTA finds that appellant knew or should have known of the need for complete and adequate records, and its failure to present them for the audit at issue suggests that it failed to maintain them, which in turn is evidence of negligence.

Additionally, respondent reasonably determined that appellant failed to report taxable gasoline sales totaling $4,102,528 for the audit period. This equates to an error ratio of 12.99 percent when compared to reported taxable gasoline sales of $31,570,885. Nothing in the record suggests that this amount of underreporting, which is significant, is related to appellant's accounting system. Accordingly, OTA finds that appellant's failure to report taxable transactions of over $4 million is also evidence of negligence.

Regarding appellant's contentions on appeal, respondent's alleged failure to notify appellant that interest continued to accrue on its outstanding tax liability each month is not relevant to the negligence penalty and not a basis for deleting it. Further, the passing of the spouse of appellant's president in 2014 is an insufficient basis alone for deleting the negligence penalty. The evidentiary record is silent as to why another of appellant's officers, employees, or representatives could not have compiled, requested (from appellant's ARCO franchisor), and/or produced appellant's books and records to respondent, especially in August 2011 when respondent first contacted appellant about providing its records for the audit at issue. Thus, OTA is not persuaded by appellant's contentions on appeal.

For the above-mentioned reasons, OTA finds that appellant was negligent, and respondent properly imposed the negligence penalty.

Issue 3: Whether relief of interest is warranted.

The imposition of interest on an unpaid tax liability is mandatory. (R&TC, § 6482.) There is no statutory right to interest relief. (*Appeal of Eichler*, 2022-OTA-029P.) The law authorizes respondent, in its discretion, to relieve all or any part of the interest imposed on a person under the Sales and Use Tax Law where the failure to pay tax is due in whole or in part to an unreasonable error or delay by an employee of respondent acting in his or her official capacity. (R&TC, § 6593.5(a)(1).) OTA will defer to respondent's decisions regarding interest relief unless respondent exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law. (*Appeal of Adventures by the Sea, Inc.*, 2023-OTA-284P.) Any person requesting

interest relief must include a statement under penalty of perjury setting forth the facts on which the request is based. (R&TC, § 6593.5(c); Cal. Code Regs., tit. 18, § 1703(b)(1)(E).)

On appeal, appellant requests that the "interest penalty" of $15,384.58 be dismissed.[8] Appellant contends that it took respondent seven years to hold a conference for its internal appeals process and the "auditor made a mistake and never told…[appellant] the penalty would be increasing during [the] wait time for appeals." Appellant submitted a signed CDTFA-735 (*Request for Relief from Penalty, Collection Cost Recovery Fee, and/or Interest*) form dated September 21, 2022, but did not request interest relief on the form or include any statement signed under penalty of perjury justifying interest relief.

Based on the evidentiary record, appellant did not request relief of interest during respondent's internal appeals process, so respondent's August 23, 2022 decision does not address the interest issue. During the pendency of appellant's appeal before OTA, OTA requested additional briefing from appellant to verify whether it was in fact requesting interest relief. If so, OTA requested that appellant also provide a statement signed under penalty of perjury specifying and describing the period(s) of alleged error or delay by respondent, as well as any supporting evidence. Appellant failed to respond. Without the requisite interest relief statement signed under penalty of perjury, as well as any decision by respondent regarding interest relief, OTA has no authority to consider interest relief on its own accord. On these facts, OTA concludes that relief of interest is not warranted here.

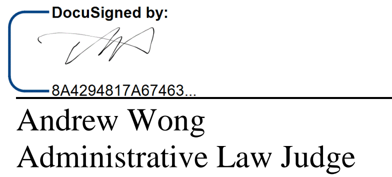
[8] $15,384.58 is the amount of the negligence penalty, which OTA discussed above in Issue 2.

HOLDINGS

1. Reducing the amount of unreported taxable gasoline sales is not warranted.
2. Appellant was negligent, so respondent properly imposed the negligence penalty.
3. Relief of interest is not warranted.

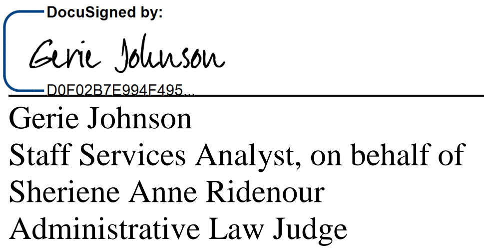
DISPOSITION

Respondent's action denying appellant's petition for redetermination is sustained.

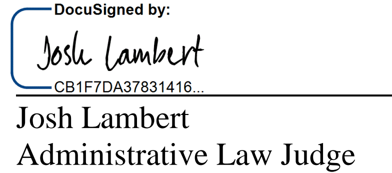


Andrew Wong
Administrative Law Judge

We concur:



Gerie Johnson
Staff Services Analyst, on behalf of
Sheriene Anne Ridenour
Administrative Law Judge



Josh Lambert
Administrative Law Judge

Date Issued: 3/4/2024