

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 230112370  
L. TOOKER ) CDTFA Case ID: 3-733-802  
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**OPINION**

Representing the Parties:

For Appellant: L. Tooker  
Susan Lea, Attorney

For Respondent: Kevin B. Smith, Attorney

For Office of Tax Appeals: Steven Kim, Attorney III

L. KATAGIHARA, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, L. Tooker (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA) denying appellant’s petition for redetermination (petition) of a Notice of Determination (NOD) dated April 4, 2022. The NOD is for a tax of \$843.41, plus applicable interest, and a failure-to-file penalty of \$84.34, for the period January 1, 2020, through December 31, 2020.

Appellant waived the right to an oral hearing; therefore, the matter was submitted to the Office of Tax Appeals (OTA) on the written record pursuant to California Code of Regulations, title 18, section 30209(a).

**ISSUES**

1. Whether appellant is liable for California use tax in connection with his purchase of trading cards.
2. Whether appellant has established that relief of the failure-to-file penalty is warranted.<sup>1</sup>

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<sup>1</sup> Appellant does not specifically dispute the failure-to-file penalty. However, CDTFA addressed the penalty in its decision, so in an abundance of caution, OTA chooses to do the same.

### FACTUAL FINDINGS

1. CDTFA was notified by the United States Customs and Border Protection (CBP), and appellant does not dispute, that in January 2020, appellant made two purchases of trading cards, totaling \$8,878, from a retailer in Germany and had the trading cards shipped to him in California.<sup>2</sup>
2. It is undisputed that appellant took delivery of the trading cards in California and that the trading cards are still in appellant's possession in California.
3. On September 1, 2021, CDTFA mailed a Statement of Proposed Liability to appellant proposing to assess use tax in the amount of \$843.41, plus applicable interest, and a penalty in the amount of \$84.34, for items appellant imported into California in 2020.<sup>3</sup>
4. Appellant disputed the Statement of Proposed Liability. In response, CDTFA, for the first time, provided details regarding the items it believed appellant imported into California in 2020 (e.g., identifying the items as trading cards, the declared value, the shipper, etc.). Based on this newly presented information, appellant was able to confirm that he purchased the trading cards but claimed that the transaction was not subject to use tax.
5. On March 18, 2022, CDTFA issued a letter to appellant disagreeing with his claim that the transaction was not subject to use tax. In that letter, CDTFA also informed appellant that if he did not file a return and submit payment of the use tax within 15 days, CDTFA would issue an NOD. CDTFA did not receive appellant's return or payment by the deadline, so it issued the NOD on April 4, 2022.
6. Appellant timely filed a petition with CDTFA disputing the NOD. On January 9, 2023, CDTFA issued a decision denying the petition.

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<sup>2</sup> The first shipment of trading cards arrived in the United States on January 23, 2020. The invoice associated with this shipment is dated January 20, 2020, and reflects a selling price of €5,744.92. A translated version of that invoice shows a selling price of \$6,385.48. However, CBP's documents reflect the trading cards were valued at \$6,375.00 (to appellant's benefit). The second shipment of trading cards arrived in the United States on January 27, 2020. The invoice associated with this shipment is dated January 23, 2020, and reflects a selling price of €2,270.34. A translated version of that invoice was not provided, but CBP's documents reflect the trading cards were valued at \$2,503.

<sup>3</sup> CDTFA claims that prior to mailing the Statement of Proposed Liability, it mailed a letter to appellant informing him that he may be required to pay use tax for items he imported into California (March 15, 2021 letter). Appellant asserts that he never received the March 15, 2021 letter. The March 15, 2021 letter has no bearing on the adequacy of CDTFA's NOD or the issues on appeal, and thus, will not be addressed further.

7. This timely appeal followed.

### DISCUSSION

#### Issue 1: Whether appellant is liable for California use tax in connection with his purchase of trading cards.

California imposes a use tax on the purchaser's use, storage, or other consumption in California of tangible personal property purchased from a retailer for use in this state, unless the use is specifically exempt or excluded from tax by statute. (R&TC, §§ 6201, 6202, 6401.) It is presumed that tangible personal property shipped or brought to California by the purchaser was purchased from a retailer for storage, use, or other consumption in California. (R&TC, § 6246.)

“Use” includes the exercise of any right or power over tangible personal property incident to the ownership of that property. (R&TC, § 6009.) “Storage” includes any keeping or retention in California, for any purpose except sale in the regular course of business or subsequent use solely outside of California, of tangible personal property purchased from a retailer. (R&TC, § 6008.) However, if a purchaser who purchases property for the purpose of reselling it makes any storage or use of the property other than retention, demonstration, or display while holding it for sale in the regular course of business, the storage or use is taxable as of the time the property is first so stored or used. (R&TC, § 6244.)

If 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.*) For example, a taxpayer bears the burden of proving entitlement to an exemption or exclusion and must provide some credible evidence of that entitlement. (*Appeal of Owens-Brockway Glass Container, Inc.*, 2019-OTA-158P.) The applicable burden of proof is by a preponderance of the evidence; that is, the taxpayer must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (Cal. Code Regs., tit. 18, § 30219(a), (b); *Appeal of Owens-*

*Brockway Glass Container, Inc., supra.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Talavera, supra.*)

Here, there is no dispute that appellant purchased trading cards from a retailer in Germany for \$8,878, did not pay tax or tax reimbursement to CDTFA or the retailer, and had the trading cards shipped to him in California. Pursuant to R&TC section 6246, it is presumed that tangible personal property shipped to California by a purchaser was purchased for storage, use, or other consumption in California. Therefore, based on the information CDTFA received from CBP, in conjunction with the lack of any indication that appellant paid or reported California use tax in relation to the purchase, CDTFA's determination of tax was reasonable and rational. As such, appellant has the burden to establish that no use tax is due.

Appellant has confirmed that the trading cards have been, and continue to be, stored in California, but asserts that he purchased the trading cards for resale in the regular course of business, and consequently, his storage of the trading cards is excluded from use tax.<sup>4</sup> In support of appellant's assertion, appellant provided the following documents to CDTFA and/or OTA: (1) spreadsheets documenting sales appellant made in 2021 and 2022; (2) screenshots of advertisements for various trading cards appellant posted online;<sup>5</sup> (3) affidavits from two individuals attesting that appellant was establishing an inventory of trading cards and attempting to secure a retail store outside of California between late 2021 and early 2022; (4) a chronology of events (signed by appellant under penalty of perjury) which, among other things, states that the trading cards "have remained available for sale in the regular course of [appellant's] business to persons outside of California since said acquisition" but have not yet been sold; and (5) a statement that appellant signed under penalty of perjury declaring that the trading cards "were immediately added to [his] inventory for res[ale] in the regular course of his business," that appellant intended to transport the trading cards to an out-of-state retail location he had yet to acquire, and that he was "holding [the trading cards] to be added to other value added decks."

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<sup>4</sup> Appellant does not have a seller's permit. Appellant claims that all of his sales are exclusively made in interstate commerce, and thus, is not required to hold a seller's permit. (See R&TC, § 1699(b).)

<sup>5</sup> Appellant asserts that all of his sales were made to customers outside of California (see footnote 4). OTA notes that appellant's advertisements include a restriction for "Shipping in the U[.][S][.]" or "U.S. shipping only," but do not mention that sales would only be made to non-California residents or that items would not be shipped within California.

First, appellant's declaration and chronology of events, despite both being signed under penalty of perjury, provide conflicting narratives regarding appellant's storage and/or use of the trading cards. According to appellant, upon receipt of the trading cards, he simultaneously held them out for resale, retained them for transport out of state, and retained them for sale at a later date. Given these inconsistencies, OTA finds appellant's statement and chronology of events unreliable.

Second, appellant has not provided any evidence that the trading cards were held for resale. The spreadsheets, screenshots, and affidavits do not specifically address the trading cards at issue and thus, do not prove that appellant has been holding them out for resale. For example, because appellant has not sold the trading cards, they are not reflected on appellant's spreadsheet. Similarly, the affidavits are silent as to the trading cards appellant purchased in January 2020. Nor do the screenshots, on their face, establish that the trading cards at issue in this appeal are included in the advertisement. The screenshots provide photos of various trading cards, and a seemingly partial link to a google document that purportedly lists all of appellant's trading cards for sale, but appellant did not provide that list to OTA. Nor did appellant submit an inventory list identifying the specific trading cards he purchased in January 2020 from which OTA could ascertain whether appellant was indeed holding them out for resale. Even if the trading cards were included in the advertisement, however, the screenshots do not prove that appellant continuously held the trading cards for resale from the time he acquired them. Appellant has therefore failed to prove with credible evidence that his purchase was made for the purpose of resale. As such, appellant is liable for California use tax in connection with his purchase of the trading cards.

Appellant's contentions on appeal also include various accusations of unfair treatment and the denial of due process by CDTFA. However, OTA lacks jurisdiction to determine whether appellant is entitled to a remedy for CDTFA's actual or alleged violation of any substantive or procedural right to due process under the law unless the violation affects the adequacy of a notice, the validity of an action from which a timely appeal was made, or the amount at issue in the appeal, none of which are present here. (See Cal. Code Regs., tit. 18, § 30104(e).)

Issue 2: Whether appellant has established that relief from the failure-to-file penalty is warranted.

Every person purchasing tangible personal property, the storage, use, or other consumption of which is subject to the use tax, who has not paid the use tax due to a retailer required to collect the tax, is required to file a return. (R&TC, §§ 6452, 6452.1 [qualified use tax may be reported on an acceptable tax return, as defined by R&TC section 6452.1(d)].) If a person fails to make a return, CDTFA will estimate the tax the person is required to pay and add a 10 percent penalty, commonly known as a failure-to-file penalty. (R&TC, § 6511.) The failure-to-file penalty may be relieved if the person's failure to make a timely return or payment is due to reasonable cause and circumstances beyond the person's control and occurred notwithstanding the exercise of ordinary care and the absence of willful neglect. (R&TC, § 6592(a).) A person seeking relief of the failure-to-file penalty must file a statement under penalty of perjury setting forth the facts upon which the person bases the claim for relief. (R&TC, § 6592(b).)

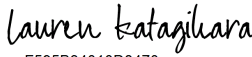
Here, appellant submitted a statement signed under penalty of perjury to OTA but appellant does not address the failure-to-file penalty or provide a basis for relief therein, other than to say that the purchase is not subject to use tax. As OTA has found that the purchase is indeed subject to use tax, appellant has not established that relief of the failure-to-file penalty is warranted.

HOLDINGS

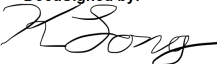
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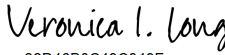
DISPOSITION

CDTFA’s actions in denying appellant’s petition for redetermination is sustained.

DocuSigned by:  
  
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 Lauren Katagihara  
 Administrative Law Judge

We concur:

DocuSigned by:  
  
DC88A60D8C3E442  
 Keith T. Long  
 Administrative Law Judge

DocuSigned by:  
  
32D46B0C49C949E  
 Veronica I. Long  
 Administrative Law Judge

Date Issued: 9/18/2023