OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 21057794
	CDTFA Case ID: 841139
THREE FOUR R, INC.	

OPINION

Representing the Parties:

For Appellant:	Jafar Rashid, President Omar Sharif, CPA
For Respondent:	Jason Parker, Chief of Headquarters Operations
For the Office of Tax Appeals:	Deborah Cumins, Business Taxes Specialist III

J. ALDRICH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Three Four R, Inc. (appellant) appeals a Decision and Recommendation (decision) issued by respondent California Department of Tax and Fee Administration (CDTFA)[1] in response to appellant's petition for redetermination of the Notice of Determination (NOD) dated July 25, 2014.[2] The NOD is for tax of $162,988.30, applicable interest, and a negligence penalty of $16,298.87, for the period January 1, 2010, through December 31, 2012 (audit period). In its subsequent decision, CDTFA reduced the tax from $162,988.30 to

[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.

[2] The NOD was timely issued because on September 7, 2013, taxpayer signed the most recent in a series of waiver of the otherwise applicable three-year statute of limitations, which allowed CDTFA until October 31, 2014, to timely issue a NOD. (See R&TC, §§ 6487(a), 6488.)

$157,759.00[3] and the penalty from $16,298.87 to $15,775.87, and denied the remainder of the petitioned amount.

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

ISSUES

1. Whether further adjustments to the audited understatement of reported taxable sales are warranted.
2. Whether CDTFA properly imposed the negligence penalty.

FACTUAL FINDINGS

1. Appellant has operated a Valero gasoline station with a mini-mart in Los Angeles since May 2006. During the audit period, appellant sold three grades of gasoline (i.e., regular, midgrade, and premium), but did not sell diesel fuel. In the mini-mart, appellant sold taxable merchandise and exempt food products.
2. Appellant was previously audited for the period January 1, 2007, through December 31, 2009 (prior liability period). CDTFA issued a NOD for the prior liability period on April 23, 2010. The April 23, 2010 NOD was for tax of $244,731.57, applicable interest, and a negligence penalty of $24,473.13. That NOD was based on an audit wherein CDTFA determined unreported taxable sales of $4,319,482, which was subsequently reduced to $3,777,872 with a corresponding reduction to the negligence penalty. CDTFA imposed the negligence penalty because of the large measure of unreported taxable gasoline sales, the error ratio, and incomplete records (i.e., only incomplete cash register tapes, which were provided after the appeals conference).

[3] CDTFA implemented these reductions via reaudit. There is a minor discrepancy between this figure, $157,759.00, and the amount of tax computed in the reaudit, $157,752. OTA notes that, in the December 15, 2020 letter to appellant describing the reaudit results, CDTFA deducted the adjustment of tax, $5,237.00, from $162,996 rather than $162,988.30 (the amount determined in the NOD). OTA could not find an explanation in the record for this minor discrepancy and will not address the matter herein.

3. For the audit period at issue, appellant reported total sales of $8,223,475 and claimed deductions of $107,364 for exempt sales of food products and $7,015,417 for the exempt portion of the sales of motor vehicle fuel.[4] Appellant reported sales of $1,100,694 subject to the state portion of the sales and use tax and taxable sales of $8,116,111 subject to the local tax and transactions and use tax.[5]
4. For audit, appellant provided only federal income tax returns (FITRs) for 2010, 2011 and 2012.
5. CDTFA found that the sales amounts appellant reported on its FITRs reconciled with the amounts it reported on sales and use tax returns. However, in the absence of records, CDTFA concluded that it needed to investigate further. To establish the audited number of gallons of gasoline purchased, CDTFA used the total amount of sales tax appellant prepaid to vendor(s), as reported to CDTFA by the vendor, and the per gallon prepayment rate in effect for each quarter of the audit period.[6]
6. CDTFA found that appellant had claimed $251,421 in prepayments to vendors, while the vendors had reported receiving prepayments from appellant of $252,317. CDTFA used the lower figure to compute the audited number of gallons purchased.

[4] 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.) This legislation is referred to as the "fuel tax swap."

[5] On and after July 1, 2010, sales of gasoline are exempt from the state portion of the sales and use tax. (R&TC, § 6357.7(a).) The exemption does not apply with respect to tax levied in accordance with the Bradley-Burns Uniform Local Sales and Use Tax Law (commencing with R&TC, § 7200) or the Transactions and Use Tax Law (commencing with R&TC, § 7251). The exemption also does not apply with respect to tax levied pursuant to temporary sales tax increases (R&TC, §§ 6051.2, 6051.5), temporary use tax increases (R&TC, §§ 6201.2, 6201.5), or temporary local or transactions tax increases (Section 35 of Article XIII of the California Constitution). On and after July 1, 2011, in addition to the sales and use taxes imposed on retail sales of tangible personal property in general, an additional tax is imposed upon retailers of diesel fuel. The rate of increase was originally 1.75 percent, and the rate of increase has varied in subsequent years. (R&TC, § 6051.8.) R&TC sections 6357.7, 6051.8 add a level of complexity to the computation of the amount of tax. However, it is not necessary to incorporate that complexity into OTA's analysis of appellant's arguments.

[6] CDTFA concluded that appellant's reported taxable mini-mart sales were substantially accurate. Accordingly, OTA will address only the audited understatements of sales of gasoline.

7. To establish audited selling prices for gasoline, CDTFA used the average weekly prices published by the United States Department of Energy (DOE),[7] adjusted for an observed differential between the average weekly prices and the prices charged by appellant.

   a. To establish the differential, CDTFA observed appellant's posted prices for each of the three grades of gasoline it sold on the following five days: one Tuesday (April 2, 2013) and four Mondays (April 8, 15, and 29, 2013, and May 13, 2013).[8] For each day of observation, CDTFA compared the DOE average weekly price and appellant's posted price for each grade of gasoline, computing the difference. CDTFA then used the ratio of the sales of each grade to total gasoline sales, published by DOE, to compute a volume-weighted price difference for all grades of gasoline for that day.[9] For each observation day, appellant's selling prices for gasoline were less than the DOE prices,[10] and CDTFA computed an average differential of 7.5 cents per gallon.

   b. For each week of the audit period, CDTFA scheduled the DOE average weekly prices for regular, mid-grade, and premium gasoline. It used the percentages of sales of each grade of gasoline, published by DOE, to compute the volume-weighted average selling price for each week. CDTFA then computed the average selling price for each quarter of the audit period, using the selling prices for each week in each quarter.

[7] The DOE surveys gasoline stations in various areas one day each week (typically on Monday) and computes an average selling price for that day for each grade of gasoline. OTA refers to the DOE prices herein as the average weekly prices.

[8] The days of CDTFA's observations are relevant because DOE typically conducts its price surveys on Mondays. Thus, prices observed on Monday are most comparable to the DOE average weekly prices.

[9] The DOE publishes ratios of sales of each grade of gasoline (e.g., for 2010, DOE published sales ratios of 75.60 percent regular grade, 9.81 percent mid-grade, and 14.59 percent premium).

[10] Appellant's selling prices for gasoline were less than the DOE prices: by 13.7 cents on April 2, 2013, by 10.7 cents on April 8, 2013, by 3.9 cents on April 15, 2013, by 5.8 cents on April 29, 2013, and by 3.2 cents on May 13, 2013.

c. CDTFA reduced the average selling price per quarter, computed from the DOE data, by $0.075 to compute the audited selling price, including sales tax reimbursement.[11]

8. CDTFA established the audited sales of gasoline for each quarter using the audited number of gallons purchased for the quarter and the audited selling price, including sales tax reimbursement. It then reduced the amount for each quarter by the amount of sales tax reimbursement included, using the sales tax rate in effect for gasoline for each quarter.

9. CDTFA established an understatement of reported taxable gasoline sales of $3,512,836 ($11,528,235 audited - $8,015,399 reported). CDTFA then computed an understatement of tax of $162,988, using a 9.75 percent tax rate for the period January 1, 2010, through June 30, 2010, and a 3.75 percent tax rate for the remainder of the audit period, as a result of the exemption from the state portion of the sales and use tax established by R&TC section 6357.7, mentioned in footnote 5 above.

10. CDTFA concluded that the understatement resulted from negligence because of the following: appellant had previously been audited, and similar reporting errors occurred in the present audit; the high error ratio; and appellant failed to maintain and make its records available.

11. On July 25, 2014, CDTFA issued the NOD.

12. On August 14, 2014, appellant filed a timely petition for redetermination.

13. CDTFA held a conference on March 1, 2016. Based on documentation provided after the appeals conference, CDTFA concluded that an adjustment was warranted for pilferage.

14. On August 25, 2016, CDTFA issued a decision recommending an adjustment of 1 percent, an estimated amount of pilferage.

15. CDTFA prepared a reaudit and notified appellant on December 15, 2020, via letter that it had reduced the tax and negligence penalty to $157,759 and $15,775.87, respectively.[12]

[11] Sales or use tax applies to retail sales of fuel taxed under the Motor Vehicle Fuel License Tax Law. The tax applies to the total selling price of such motor vehicle fuel, inclusive of federal and state excise taxes. (See Cal. Code of Regs., tit. 18, § 1598(c)(1); https://www.cdtfa.ca.gov/lawguides/vol3/mvftl/motor-vehicle-fuel-tax-law.html.) For this reason, CDTFA did not deduct excise taxes from the selling price.

[12] Based on the December 15, 2020 letter, it is unclear whether interest continued to accrue. However, appellant has not raised interest relief as an issue. The letter also indicates that CDTFA applied $5,237 in credit towards the tax liability.

16. This timely appeal followed.

DISCUSSION

Issue 1: Whether further adjustments to the audited understatement of reported taxable sales are warranted.

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).)

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.) If CDTFA carries 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*.)

Here, appellant provided only FITRs. It did not provide profit and loss statements; sales journals, purchase journals, or other summary records; cash register tapes, purchase invoices, or other source documents; bank statements; or any other records. In other words, appellant provided virtually no evidence to show that its reported taxable sales were accurate. Under those circumstances, CDTFA had no option other than to use an alternate audit method. CDTFA conducted a standard audit of a retailer of gasoline that provides inadequate records. In this audit, CDTFA computed the numbers of gallons of gasoline sold each quarter using amounts reported to CDTFA by appellant's vendor(s) of total prepayments of sales and use tax to suppliers and the prepayment rate per gallon in effect in each quarter. Both elements of that computation are objective, documented figures. To establish the audited selling prices, CDTFA

began with average weekly prices published by DOE, which is a reliable source for gasoline prices. CDTFA then reduced those prices by a 7.5 cent differential, and further reduced for sales tax reimbursement included, as described above. OTA finds that CDTFA used a standard audit procedure, based on objective, verifiable figures. In light of the absence of appellant's business records, OTA finds that CDTFA has shown that its determination is reasonable and rational. Therefore, appellant has the burden to establish that further adjustments are warranted.

Appellant disputes both the audited selling prices and the audited number of gallons of gasoline sold, each of which OTA addresses individually below.

Audited selling prices

Appellant disputes the audited selling prices. Appellant first notes that the differential used to establish audited selling prices was based on five days of field observation. Appellant acknowledges that most of the observation days were Mondays, which corresponds to the typical day of the DOE survey. However, appellant asserts that its selling prices change every day to compete with other stations. On that basis, appellant asserts that five days of observation is not a sufficient test of the difference between its selling prices and the average weekly prices published by DOE.

Appellant is correct that CDTFA compared appellant's selling prices to DOE average weekly prices for five days. The purpose of CDTFA's observation of prices on Mondays was to compare "apples to apples" (Monday average weekly prices compared to Monday prices at appellant's gas station). As appellant notes, fuel selling prices do change frequently, perhaps every day. It is for that very reason that it is preferable to compare the station's selling prices on Monday to the average weekly selling prices also established for the same day.

Appellant also observes that, in the prior audit of the period 2007-2009, CDTFA used a price differential of almost 26 cents. Appellant argues that a similar differential should be used in this audit because, according to appellant, nothing has changed in its business operations since 2009.

CDTFA clarifies that the price differentials for sales of gasoline in the prior liability period were 26.40 cents per gallon for 2007, 27.65 cents per gallon for 2008, and 21.75 cents for 2009. Those price differentials were established after CDTFA reviewed cash register tapes appellant presented during the appeals process for the prior liability period.

CDTFA asserts that the sales reported in each audit period are evaluated based on the available books and records for that period. CDTFA also observes that, while appellant provided cash register tapes for the prior liability period that supported higher price differentials than CDTFA had established based on its observation of posted prices, appellant has not provided a single cash register tape or any other reliable evidence for this audit period. Thus, CDTFA argues that no further adjustments are warranted to the audited selling prices.

Here, appellant has provided no records to support its argument that the price differential for gasoline should be increased to 26 cents. OTA notes that appellant had been audited previously, and there is no reason for it to have no evidence whatsoever of its actual selling prices for this audit period. In the absence of records, CDTFA used a logical process to evaluate the relationship of appellant's selling prices to DOE average weekly prices. CDTFA observed appellant's actual, posted selling prices on five separate days over a period of about seven weeks. The price differentials for the test weeks varied broadly (13.7 cents, 10.7 cents, 3.9 cents, 5.8 cents, and 3.2 cents, as noted in footnote 10, above). The highest differential is 13.7 cents, and only two of the five differentials exceed 10 cents. There is no evidence of any price differentials approaching 26 cents in this audit period. If there were other weeks during the audit period for which appellant's price differentials were greater, it was appellant's responsibility to provide records to support those lower selling prices. Since it has not done so, OTA finds no further adjustments to the audited selling prices for gasoline are warranted.

Audited number of gallons of gasoline sold

Appellant has not disputed the audited number of gallons of gasoline purchased. Appellant argues, however, that the audited allowance of 1 percent for pilferage should be increased. Appellant states that its gas station is located in a neighborhood with an unusually high crime rate. Appellant also asserts that gasoline theft is very common, and that its cashiers are afraid to confront thieves, especially at night. Appellant argues that the adjustment for theft should be 10 percent of the number of gallons purchased.

In response to appellant's assertion that the pilferage allowance should be increased to 10 percent, CDTFA states that the allowance of 1 percent represents an adjustment of 33,042 gallons of gasoline, or 31 gallons per day (33,042 ÷ 1095).[13] CDTFA asserts that an

[13] CDTFA states 31 gallons per day, but OTA computes 30; the minimal difference does not impact the present analysis.

allowance of 1 percent for pilferage is reasonable and sufficient, and it refers to Section 0407.10 of its Audit Manual, which provides that an allowance of 1 percent for shrinkage may be allowed without specific documentation.[14] CDTFA notes that appellant has provided no police reports or other evidence to support a pilferage allowance in excess of 1 percent, and it argues that no further adjustment is warranted.

OTA finds that the pilferage allowance represents regular losses of gasoline of about 30 gallons per day, which would be one to three "fill-ups" for which appellant did not receive payment, every single day. In contrast, appellant asserts that the allowance should be 10 times higher, or 300 gallons per day (about 15 to 30 unpaid sales). However, appellant has provided no documentation of the allegedly numerous daily thefts, such as police reports or insurance claims.[15] In the absence of supporting evidence, no further adjustment is warranted for pilferage.

Issue 2: Whether CDTFA properly imposed the negligence penalty.

R&TC section 6484 provides that if any part of the deficiency for which a deficiency determination is made is due to negligence or intentional disregard of the law or authorized rules and regulations, a penalty of 10 percent of the amount of the determination shall be added thereto. Although the term "negligence" in not specifically defined in the Sales and Use Tax Law, it is a common legal concept and is generally defined as a failure to act as a reasonably prudent person would have acted under similar circumstances.[16] (*Acqua Vista Homeowners Assn. v. MWI, Inc.* (2017) 7 Cal. App. 5th 1129, 1157; *Warner v. Santa Catalina Island Co.* (1955) 44 Cal.2d 310, 317.) The pertinent circumstances here are that of a corporate entity

[14] Section 0407.10 of CDTFA's Audit Manual provides that the taxpayer must provide evidence of losses in excess of 1 percent. CDTFA's Audit Manual is an advisory publication providing direction to CDTFA staff administering the Sales and Use Tax Law and Regulations. OTA is not required to follow CDTFA's Audit Manual. (See *Appeal of Micelle Laboratories, Inc.*, 2020-OTA-290P.)

[15] Appellant asserts that it provided a point of sale (POS) report for another gas station (RD 786) which showed a difference of about five percent between purchased gallons and sold gallons. However, an audit of RD 786 Enterprises, Inc. was appealed for a prior audit period, (RD 786 Enterprises Inc. is one of the related appeals listed in CDTFA's April 24, 2012 decision regarding the audit of appellant for the years 2007 through 2009), but there is no current appeal for RD 786 Enterprises, Inc. Moreover, the POS report referred to by appellant is not in the record, and, if it were, it would be applicable to a different business. Thus, OTA will not discuss it further herein.

[16] Similarly, among the definitions for the term provided by Black's Law Dictionary (11th ed. 2019) is: "the doing of what a reasonable and prudent person would not do under the particular circumstances, or the failure to do what such a person would do under the circumstances."

operating as a retailer with a seller's permit. Therefore, the question is whether the underreporting occurred despite appellant's exercise of ordinary business care and prudence.

Taxpayers are required to maintain and make available for examination on request by CDTFA, 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 returns. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).) Such records include but are not limited to: (a) the normal books of account ordinarily maintained by the average prudent businessperson 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, including all bills, receipts, invoices, or other documents of original entry supporting the entries in the books of account, will be considered evidence of negligence and may result in the imposition of penalties. (Cal. Code Regs., tit. 18, § 1698(k).) Imposition of a negligence penalty is warranted where errors are continued from one audit to the next. (*Independent Iron Works, Inc. v. State Board of Equalization* (1959) 167 Cal.App.2d 318, 321-324.)

Appellant argues that CDTFA conducted the audit of the prior liability period and the audit under consideration here concurrently and that following completion of the first audit, there was not enough time for appellant to comply with the requirement to maintain and provide records for the instant audit. However, CDTFA issued the NOD for the prior liability period on April 23, 2010. Thus, by the end of April 2010, appellant had been fully informed that it was required to maintain records and reminded of its obligation to make them available for audit. The audit period under consideration here was from January 1, 2010, through December 31, 2012. Appellant had ample time during those three years to establish procedures to maintain records. Moreover, appellant had been in business since May 2006, and, during this audit period it reported taxable sales of over $8 million (audited sales were over $11.5 million).[17] A businessperson operating with ordinary business care and prudence when making sales of that volume would recognize that records are required, and appellant is presumed to know the law.

[17] Reported taxable sales of $8,116,111 plus an understatement of reported taxable gasoline sales of $3,397,550 total $11,513,661.

(*Diaz v. Grill Concepts Services, Inc.* (2018) Cal.App.5th 859, 869.) Thus, OTA is not persuaded by appellant's argument that it was unaware that records were required and that it simply did not have time to comply with the requirement to maintain and make available records for audit.

Appellant also states that in 2013 and 2014 it updated its gas pumps and installed a POS system. According to appellant, an audit of the period 2015 through 2017 resulted in no understatement. Appellant asserts that it complied with CDTFA's "request" (to maintain records) within a reasonable time. The requirement to keep records is not a request by CDTFA; the requirement is established by law. (See R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).) Subsequent remedial improvements in recordkeeping for subsequent periods are not relevant to the analysis of negligence for the period under consideration here.

The only records appellant provided for this audit were its FITRs for 2010, 2011 and 2012. It provided no summary records, source documents or bank statements. Appellant had been audited previously and was notified of the requirement to provide complete records for audit. OTA finds that appellant's failures to maintain and make records available are evidence of negligence in recordkeeping.

The understatement of reported taxable sales after the reaudit was $3,397,550, and appellant reported taxable sales of $8,116,111.[18] Thus, the understatement represents 42 percent of reported amounts. Both the amount of understatement and the percentage of error are substantial and represent clear evidence of negligence in reporting. Moreover, the errors CDTFA identified in this audit are the same types of errors found in the audit of the prior period (severely inadequate records, along with substantial understatements of reported taxable sales of fuel). For the prior liability period, the audited understatement was $3,777,872. The understatement for this audit period was $3,397,550. While OTA would expect a taxpayer's recordkeeping and reporting to improve after an audit, appellant's did not. As noted above, imposition of a negligence penalty is warranted where errors are continued from one audit to the next. (*Independent Iron Works, Inc. v. State Board of Equalization, supra,* 167 Cal.App.2d at pp. 321-324.)

[18] Both the understatement and the reported taxable sales are the total amounts, without any adjustment for the sales that were not subject to the state portion of the sales and use tax pursuant to R&TC section 6357.7.

In sum, there is ample evidence that the understatement resulted from negligence. OTA finds that appellant was negligent, and that CDTFA properly imposed the negligence penalty.

HOLDINGS

1. No further adjustments to the audited understatement of reported taxable sales are warranted.
2. CDTFA properly imposed the negligence penalty.

DISPOSITION

Sustain CDTFA's decision to reduce the tax liability and negligence penalty to $157,759 and $15,775.87, respectively, and to otherwise deny the petition.

DocuSigned by:
Josh Aldrich
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Josh Aldrich
Administrative Law Judge

We concur:

DocuSigned by:
Michael F. Geary
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Michael F. Geary
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DocuSigned by:
8A4294817A67463...
Andrew Wong
Administrative Law Judge

Date Issued: 3/26/2024