

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

I. HANOUNEH,
dba The Royale Group

) OTA Case No. 230513408
) CDTFA Case ID: 03-042-212
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)
)

OPINION

Representing the Parties:

For Appellant:

I. Hanouneh

For Respondent:

Courtney Daniels, Attorney

For Office of Tax Appeals:

Steven Kim, Attorney

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 30261, I. Hanouneh, dba The Royale Group (appellant), appeals an April 19, 2023 Decision (Decision) issued by the California Department of Tax and Fee Administration (respondent) denying appellant’s timely petition for redetermination of an August 3, 2021 Notice of Determination (NOD). The NOD is for tax of \$347,008, plus applicable interest, for the period January 1, 2018, through December 31, 2018 (liability period).

This matter is being decided on the basis of the written record pursuant to California Code of Regulations, title 18, section 30209(a) because appellant waived its right to an oral hearing.

ISSUE

Are adjustments warranted to the measure of disallowed claimed exempt distributions of tobacco products in interstate commerce?¹

¹ Although appellant claimed exemptions on several bases, appellant indicated that this was an error and that all claimed exempt distributions were distributions in interstate commerce.

FACTUAL FINDINGS

1. At all relevant times, appellant was a tobacco products distributor in Pleasanton, California. Appellant held a valid tobacco products distributor's license from April 4, 2017, through December 31, 2018.
2. Appellant filed returns for the liability period, claiming, as relevant here, "credits" on returned products (\$1,426)² and exemptions for distributions in interstate commerce (\$126,023), distributions to interstate or foreign passenger common carriers (\$159,876), and other unspecified distributions (\$252,014) (collectively, deductions).
3. Respondent conducted an audit of appellant, during which appellant failed to provide any books and records for review. Thus, respondent disallowed all claimed deductions, totaling \$539,339 (rounded).
4. On August 3, 2021, respondent issued the NOD.
5. On August 13, 2021, appellant timely filed a petition for redetermination disputing the NOD. During respondent's internal appeals process, appellant asserted that the claimed deductions totaling \$539,339 were all exempt distributions in interstate commerce, and provided bank statements, credit card statements, purchase invoices, some shipping invoices, and spreadsheets with sales and tracking information.
6. On April 19, 2023, respondent issued the Decision denying the petition for redetermination.
7. This timely appeal followed.

DISCUSSION

California imposes a tax upon every distributor for the distribution of tobacco products based on the wholesale cost of the products. (R&TC, §§ 30123(b), 30131.2(b).) A "distributor" includes every person who distributes tobacco products within the meaning of the term "distribution" as defined in R&TC section 30008. (R&TC, § 30011.) "Distribution" includes: (1) the sale of untaxed cigarettes or tobacco products in this state, (2) the use or consumption of untaxed cigarettes tobacco products in this state, and (3) the placing in this state of untaxed cigarettes or tobacco products in a vending machine or in retail stock for the purpose of selling

² This is erroneously listed in respondent's Decision as a claimed "credit" of \$1,426. However, \$1,426 is the measure of taxable distributions. The claimed credit is limited to the amount of tax imposed on \$1,426 in distributions. (See R&TC, § 30176.2.)

the cigarettes or tobacco products to consumers. (R&TC, § 30008(a)-(c).) It is presumed that all cigarettes or tobacco products acquired by a distributor are untaxed cigarettes or tobacco products, and that all cigarettes or tobacco products manufactured in this state or transported to this state, and no longer in the possession of the distributor have been distributed, unless the contrary is established. (R&TC, § 30109.) Respondent shall credit or refund to a distributor tax paid on the distribution of tobacco products that were returned by a customer. (R&TC, § 30176.2.)

Every distributor must keep records, receipts, invoices, and other pertinent papers that pertain to dealing in, transporting, or storing cigarettes or tobacco products in this state, and the distributor must provide those records to respondent for examination upon request. (R&TC, §§ 30453, 30454; Cal. Code Regs., tit. 18, § 4026.) A taxpayer must maintain and make available all records necessary to determine the correct tax liability and for the proper completion of the required tax return or report, including but not limited to, bills, receipts, invoices, cash register tapes, or other documents of original entry supporting the entries in the books of account. (Cal. Code Regs., tit. 18, § 4901(b)(1)(B).)

Tax does not apply to the sale of tobacco products which are delivered to a point outside this state pursuant to a contract of sale, if the delivery is made by the seller to: (1) facilities operated by the seller, (2) a carrier for shipment to a consignee at a point outside the state, or (3) a customs broker or forwarding agent for shipment outside this state. (Cal. Code Regs., tit. 18, § 4080(a).) A distributor must retain bills of lading or other documentary evidence of the delivery of the tobacco products to a carrier, customs broker, or forwarding agent for shipments outside the state, and provide such evidence to respondent for inspection. (Cal. Code Regs., tit. 18, § 4080.)

If respondent is not satisfied with the amount of tax reported by the taxpayer, respondent may determine the amount required to be paid on the basis of any information available to it. (R&TC, § 30201.) The taxpayer bears the burden of proving entitlement to an exemption and must provide credible evidence of that entitlement. (*Appeal of Owens-Brockway Glass Container, Inc.*, 2019-OTA-158P.)³ The applicable burden of proof is by a preponderance of evidence, meaning that the taxpayer must prove that the circumstances it asserts are, more likely

³ Although this case does not involve the Cigarette and Tobacco Products Tax Law (R&TC, §§ 30001 et seq.), the burden of proving entitlement to an exemption or exclusion is the same.

than not, correct. (*Ibid.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Talavera*, 2020-OTA-022P.)

Here, appellant claimed various deductions for the liability period. Upon audit by respondent, appellant did not provide any evidence to support the claimed deductions. During respondent's internal appeals process, appellant submitted documentation, including some purchase invoices and summaries of sales and tracking information. However, appellant did not provide any sales invoices for its claimed exempt sales to support the information contained in the sales summary spreadsheet. Moreover, appellant provided only a small number of shipping documents. Of the shipping documents appellant did submit, six were shipped on dates that did not correspond to any of the orders in the sales summary.⁴ One shipping invoice shows a shipment to L. Zarour in Canada on June 29, 2018, but the corresponding order information on the sales summary indicates that the order did not include any tobacco products.⁵ Another shipping invoice shows a shipment to L. Zarour in Canada on October 5, 2018, and the sales summary shows an order dated October 6, 2018, with the same tracking/waybill number, but the summary does not include an itemized list of the products in the order. Furthermore, many of the shipping documents show names that do not match any of the customer names on the sales summary spreadsheet, and some do not even include the name or address of the recipient.

On appeal to the Office of Tax Appeals (OTA), appellant submits another spreadsheet showing a summary of shipping information. However, the documentation does not provide sufficient information to determine which items were included in the shipment or to support appellant's claimed exemptions for distributions in interstate commerce. Furthermore, appellant still has not provided any sales invoices to support the sales summary information, or other documentation to support its claimed deductions.

⁴ An air waybill dated January 25, 2018, shows shipment to B. Odering in New Zealand, but the 2018 sales spreadsheet shows orders dated July 24, 25, and 31, 2018, and August 9, 2018. Four shipping invoices show shipments to L. Zarour in Canada with shipment dates of March 7, April 12, June 4, and October 23, 2018, but the sales spreadsheet shows orders dated March 15, April 3, April 27, June 12, August 17, September 14, and October 6, 2018. A waybill dated May 18, 2018, shows shipment to C. Singh in the United Kingdom, but the sales spreadsheet shows orders dated January 30, February 17, February 28, May 25, May 29, June 11, June 20, July 19, and August 24, 2018. The Office of Tax Appeals (OTA) notes that some of the order dates in the sales summary are close in time to the shipment dates on the shipping documents, and that discrepancies in dates may exist due to delays after an order was submitted but before it was shipped. However, appellant has not provided any sales invoices or other information with which OTA can determine whether any given order was included in a shipment close in time to the order date.

⁵ It also indicates that appellant collected tax on the sale.

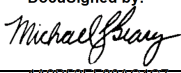
On the basis of the evidence, OTA finds that appellant has not established its entitlement to the claimed exemption.

HOLDING

Adjustments to the measure of disallowed claimed exempt distributions of tobacco products in interstate commerce are not warranted.

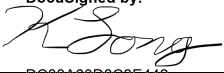
DISPOSITION

Respondent’s action denying the petition for redetermination is sustained.


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Michael F. Geary
Administrative Law Judge

We concur:

DocuSigned by:


DC68A00D8C5E442...
Keith T. Long
Administrative Law Judge

DocuSigned by:


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Sheriene Anne Ridenour
Administrative Law Judge

Date Issued: 5/8/2024