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2024-OTA-383
Nonprecedential

OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **SAFAR & SAFAR BROTHERS, INC.**	OTA Case No. 21027307 CDTFA Case ID 521-923; 2-341-823

OPINION

Representing the Parties:

For Appellant: Harpeet Dhaliwal, Owner
Amanda Bui, Owner

For Respondent: Nalan Samarawickrema, Hearing Representative
Damian Armitage, Hearing Representative
Christopher Brooks, Attorney
Jason Parker, Chief of Headquarters Ops.

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Safar & Safar Brothers, Inc. (appellant) appeals a January 20, 2021 Decision issued by the California Department of Tax and Fee Administration (respondent)[1] denying, in part, appellant's petition for redetermination of an October 18, 2018 Notice of Determination (NOD).[2] The NOD was for $198,129 in tax, plus accrued interest, and a $19,753.51 negligence penalty for the period July 1, 2015, through June 30, 2018 (liability period). A November 15, 2019 reaudit reduced the tax to $176,680 and deleted the negligence penalty.

[1] Sales taxes were formerly administered by the State Board of Equalization (the board). In 2017, functions of the board relevant to this case were transferred to respondent. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to acts or events that occurred before July 1, 2017, "respondent" shall refer to the board.

[2] Appellant used an incorrect form in an attempt to file a claim for refund of diesel fuel excise tax (DFT) on November 13, 2019. The denial of appellant's appeal rendered any such potential claim for refund moot. Nevertheless, given that appellant's claim appears to be in the nature of a protective claim for refund (i.e., one that is intended to protect a taxpayer's right to assert an overpayment as an offset against a determined liability), OTA considers the claim in this Opinion. (See Cal. Code Regs., tit 18, § 30103(b)(1)(A).)

Office of Tax Appeals (OTA) Administrative Law Judges Josh Aldrich, Sheriene Anne Ridenour, and Michael F. Geary held an oral hearing for this matter in Cerritos, California, on July 13, 2023. OTA held the record open following the hearing to allow appellant an opportunity to formally request relief of interest and provide additional evidence. OTA closed the record on August 22, 2023, and deemed the matter submitted on that date.

ISSUE

1. Are further adjustments to the determined deficiency warranted?
2. Is appellant entitled to relief of interest?

FACTUAL FINDINGS

1. Appellant is a California corporation that operates an ARCO ampm (gas station and mini mart) in Perris, California. In addition to gasoline and diesel fuel, appellant sells alcohol, food products, and other items. The current owners purchased the corporation from the former owners in June 2012. At the time, the new owners understood that the former owners had mismanaged the company's finances, leaving it heavily in debt, which included a large debt to respondent.
2. For the liability period, appellant reported total sales of $40,180,209 and claimed deductions totaling $31,592,152, resulting in reported taxable sales of $8,588,057.
3. Appellant did not provide business records for the original audit. Respondent determined an estimated deficiency measure totaling $2,420,859, based on a percentage of error analysis. In addition to the estimated deficiency measure, respondent found that appellant overclaimed diesel fuel prepaid tax exemptions totaling $5,417 and prepaid motor vehicle fuel[3] (gasoline) tax exemptions totaling $2,871. On October 18, 2018, respondent issued the NOD based on that audit.
4. Appellant filed a timely petition for redetermination and provided additional business records, including daily sales reports for the period January 1, 2016, through June 30, 2018, and its federal income tax returns for 2015 through 2017. Respondent considered the additional records in the reaudit.

[3] "Motor vehicle fuel" includes aviation gasoline, gasohol, finished gasoline, gasoline, gasoline blendstocks, and blended motor vehicle fuel. (Cal. Code Regs., tit. 18, § 1101(a).) It does not include diesel fuel. (*Ibid*.)

5. The daily sales reports included recorded diesel fuel sales of $2,677,404 for the first quarter of 2016 (1Q16) through 2Q18; but, according to appellant, that amount included diesel fuel excise tax (DFT) of $197,077 and sales tax reimbursement of $242,968.
6. Respondent initially deducted DFT from the audited sales tax amount to determine unreported sales tax of $26,168.[4] As is respondent's custom and practice, respondent provided a copy of the preliminary audit work papers to appellant on June 21, 2019. Appellant was aware that the audit had not yet been reviewed and was subject to change. Respondent determined during the review that there were errors in the audit, including the deduction of DFT from the audited sales tax amount. Respondent concluded that DFT and sales tax reimbursement should have been deducted from recorded diesel sales. Respondent corrected the error and provided a copy of the final audit work papers to appellant. In the final audit calculations, respondent calculated audited taxable diesel fuel sales for that period by deducting DFT and sales tax reimbursement from recorded diesel fuel sales, resulting in audited taxable diesel fuel sales of $2,237,360 ($2,677,404 - $197,077 - $242,967) for the period 1Q16 through 2Q18.
7. To calculate taxable diesel fuel sales for the periods 3Q15 and 4Q15, for which appellant did not provide daily sales reports, respondent compared audited taxable diesel fuel sales of $230,928 for 1Q16, with reported diesel fuel sales of $246,461 for 1Q16, to compute overreported diesel fuel sales of $15,533 ($246,461 - $230,928) for 1Q16, and an overreporting error rate of 6.3024 percent ($15,533 ÷ $246,461). Respondent then applied this error rate to reported diesel fuel sales for 3Q15 and 4Q15 to calculate audited diesel fuel sales of $480,703 for 3Q15 and 4Q15. Comparing total audited diesel fuel sales of $2,718,063 ($2,237,360 + $480,703) to reported diesel fuel sales of $2,934,214, respondent computed overreported diesel fuel sales of $216,151, which constituted a credit item in the reaudit.
8. The November 15, 2019 reaudit, based on a comparison of recorded sales and reported sales, determined a partial deficiency measure for the liability period of $2,911,004, which consisted of additional taxable gasoline sales of $1,047,433, a credit for overreported diesel fuel sales measured by $216,151, and additional taxable mini-mart sales of $2,079,722. These combined measures resulted in $168,388 in additional tax

[4] This calculation is the primary focus of this appeal.

due. The total additional tax due of $176,676 also included disallowed claimed prepaid gasoline tax of $2,871 and disallowed claimed prepaid DFT of $5,417.

9. The reaudit reduced appellant's tax liability from $198,129 (determined in the original audit) to $176,680. In addition, respondent deleted the negligence penalty following the reaudit.

10. Appellant disputed the reaudit, and the parties participated in an appeals conference as part of respondent's internal appeals process.

11. Respondent issued its Decision, which ordered that the liability be redetermined in accordance with the November 15, 2019 reaudit, including deletion of the negligence penalty, and that the appeal otherwise be denied.

12. This timely appeal followed.

DISCUSSION

Issue 1: Are further adjustments to the determined deficiency warranted?

California sales tax is imposed on a retailer's retail sales in this state of tangible personal property, unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, § 6051.) It is the retailer's responsibility to maintain complete and accurate records and to make them available for examination. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).) As relevant here, "gross receipts" do not include the amount of any tax imposed upon diesel fuel. (R&TC, § 6012(c)(11).)

When respondent is not satisfied with the amount of tax reported by the taxpayer, or in the case of a failure to file a return, respondent 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, respondent has a minimal, initial burden of showing that its determination was reasonable and rational. (*Appeal of Talavera*, 2020-OTA-022P.) Once respondent has met its initial burden, the burden of proof shifts to the taxpayer to establish that a result differing from respondent's determination is warranted. (*Ibid.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid.*)

Respondent based its determination on appellant's detailed sales records for a substantial portion of the liability period. It simply compared what appellant recorded in sales to what it reported in sales. On the basis of the evidence, OTA finds that respondent's audit methodology

was reasonable and rational. It also appears from the evidence that respondent correctly compared recorded sales data with the data appellant reported on its sales and use tax returns. Finally, OTA finds that respondent's calculation of taxable sales and overclaimed prepaid tax is accurate for the period of time for which appellant provided sales records; similarly, respondent's calculation was a reasonably accurate estimate for the periods for which sales records were not provided. Therefore, to the extent appellant asserts that respondent erred in its audits and that the resulting determination is wrong, appellant must establish the error and a more accurate measure or amount of tax due. (*Appeal of AMG Care Collective*, 2020-OTA-173P.)

Appellant makes several arguments. First and foremost, appellant argues that respondent erred when it simply deducted the $197,077 DFT from recorded total sales of diesel fuel, and that respondent instead should have allowed appellant to claim that amount as a credit against its tax liabilities. Appellant asserts that respondent allows other diesel fuel retailers to apply DFT payments as a credit against their tax liabilities, and that respondent has singled appellant out for disparate or unequal treatment because it incurred significant tax liabilities in the past while under different ownership. It also contends that in June 2019, respondent calculated appellant's tax liability to be $26,168, and that appellant agreed to pay that amount. Appellant urges OTA to reduce the disputed deficiency to that amount. Finally, appellant alleges that respondent's assertion of liability in excess of $26,168 is motivated by bias or prejudice against at least one of appellant's owners due to their race, national origin, gender, marital status, or other constitutionally suspect classification. OTA will address each of these arguments to the extent of its authority.[5]

Regarding respondent's treatment of the DFT, appellant, in effect, seeks a refund of the DFT and the application of that refund as a credit against its tax liabilities. However, there is no evidence that appellant paid the DFT. DFT is not paid by retailers like appellant; it is paid by diesel suppliers. (R&TC, § 60201; Cal. Code Regs., tit. 18, § 1420.) Only the supplier can claim a refund (R&TC, § 60501), and even the supplier can only claim a refund under limited circumstances, none of which are present here. (See R&TC, § 60501; Cal. Code Regs., tit. 18,

[5] In its closing remarks at the hearing, appellant appeared to argue that respondent erred by relying on average fuel prices published by the Department of Energy (DOE). However, the evidence shows that, while respondent compared appellant's prices to those published by the DOE, it accepted appellant's recorded sales prices as accurate and based its calculations on appellant's recorded prices. Consequently, this Opinion will not further address this particular argument.

§ 1436.) Appellant does not appear to dispute that its supplier(s) paid the DFT, and it has not cited any legal authority in support of its argument that the DFT amount should have been credited to appellant's tax due. Furthermore, OTA is not aware of any legal authority that would allow a credit against appellant's tax liabilities for DFT payments made by appellant's supplier(s). If, in fact, appellant's recorded diesel sales included DFT of $197,077 and sales tax reimbursement of $242,967, respondent correctly deducted those amounts from recorded diesel sales to determine taxable diesel sales, and appellant was not entitled to apply the DFT as a credit against determined taxes due.

Appellant's assertion that respondent usually allows a supplier's DFT payment to be credited against a retailer's tax liability and that it has been singled out for disparate treatment is not borne out by the evidence. In this regard, Harpeet Dhaliwal testified regarding a telephone conference that included representatives of appellant, respondent, and the diesel supplier, and that the supplier stated it did not "take the deduction." This witness also testified that appellant's accountant, who represents about 15 other similar businesses, informed appellant that respondent allows all of those businesses to "take a deduction."

OTA notes, first, that it cannot be determined to what "deduction" the accountant and supplier allegedly referred. Appellant's accountant and the representative of the diesel supplier who participated in the telephone conference did not appear at the hearing or submit a written statement. It is likely that the supplier's DFT payment was measured by gallons removed from the rack. (R&TC, § 60051; but see also §§ 60052, 60058.) The statement attributed to the supplier – that it did not take a deduction – does not support appellant's argument because there would have been no legal basis for a deduction by the supplier under the facts shown by the evidence. To the extent appellant's accountant was referring to the retailer being entitled to apply the DFT amount as a credit against taxes owed, the statement attributed to the accountant is inconsistent with the law, described above; and even if respondent had, on occasion, erroneously allowed the type of credit that appellant seeks here – and to be clear, there is no persuasive evidence that it ever did so – OTA's conclusion in this appeal would be the same. OTA is responsible for the final administrative adjudication of the contested tax liability. While appellant may be able to make an equitable argument to a court, asserting the allegedly disparate treatment of taxpayers as grounds for relief, OTA does not have the equitable jurisdiction granted to courts.

Appellant urges OTA to conclude that appellant owes no more than the tax amount that respondent estimated in its preliminary findings before the audit was reviewed, approved, and finalized. That is not how respondent's audits work. There is nothing in the Sales and Use Tax Law that entitles a taxpayer to stop the audit process and, in effect, lock in an estimate of tax due. Even the amount stated in an NOD is subject to change. (See R&TC, § 6563.) OTA finds that appellant's liability is not limited to amounts stated on preliminary audit work papers.

Lastly, regarding appellant's contention that respondent's NOD was motivated by bias or prejudice against one or both of the owners, OTA generally does not have jurisdiction to decide whether a taxpayer is entitled to a remedy for respondent'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 (Cal. Code Regs., tit. 18, § 30104(e)).[6, 7] Therefore, OTA is unable to consider this argument.

On the basis of the evidence, OTA concludes that no further adjustments to the determined deficiency are warranted.

Issue 2: Is appellant entitled to relief of interest?

The imposition of interest is mandatory. (R&TC, § 6482.) There is no statutory right to interest relief. The law authorizes respondent, 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 respondent acting in their official capacity. (R&TC, § 6593.5(a)(1).) When reviewing a denial of a request for interest relief, OTA generally examines the record to determine whether there was an abuse of discretion by respondent. (*Appeal of Micelle Laboratories, Inc.*, 2020-OTA-290P.) 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, the taxpayer. (R&TC, § 6593.5(b).)

[6] The one statutory exception, not applicable in this proceeding, is OTA's authority to award reasonable fees and expenses related to a hearing if action taken by respondent is found to have been unreasonable and certain other conditions are met. (R&TC, § 7091.)

[7] OTA makes no finding regarding whether there is evidence to support appellant's claim of bias or prejudice.

Any person requesting interest relief must include a statement under penalty of perjury setting forth the facts on which the request is based.[8] (R&TC, § 6593.5(c).)

Where the administrative record is silent regarding the actions taken on a taxpayer's matter and the tax agency does not come forth with evidence to show that the employees assigned to the matter or involved in its review were actively working on it, there may be no apparent basis to support the agency's determination not to relieve interest, and the unsupported determination may constitute an abuse of discretion. (*Appeal of Eichler*, 2022-OTA-029P.) For purposes of interest relief, an unreasonable failure to work on a case is an example of an unreasonable error or delay by an employee of respondent acting in their official capacity. (*Ibid.*; see also *Appeal of Micelle Laboratories, Inc.*, *supra*.)

In its post-hearing brief, appellant included a completed Request for Relief from Penalty, Collection Cost Recovery Fee and/or Interest,[9] requesting relief of interest and a collection cost recovery fee for the period July 2015 through June 2018 on the grounds that appellant agreed in August 2019 to pay the determined tax of $26,188 and on the further grounds that appellant should not be penalized for delays caused by the COVID-19 pandemic (COVID).[10]

Respondent submitted a reply to appellant's request, wherein it argues that the preliminary audit work papers that it provided to appellant in June 2019 were not final and, in fact, they contained errors, most notably a deduction of DFT from the audited sales tax, precisely what appellant argues should have occurred. Respondent states that the errors were corrected and it provided the final and approved version of the audit work papers to appellant without unreasonable delay on or about September 24, 2019. Respondent notes that delays due to COVID did not begin until 2020, more than 18 months after the period for which appellant seeks relief, and that it has already granted automatic relief of interest for the period March through June 2020 for delays attributable to COVID. In addition, respondent reviewed its handling of the petition for redetermination and agrees to grant appellant additional interest relief for the months of April and October 2019 and November 2020. Respondent argues that it has not identified any other period of unreasonable delay.

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[8] California Code of Regulations, title 18, section 1703(b)(1)(E) restates, without adding further clarification to, the requirements for interest relief within the meaning of R&TC section 6593.5.

[9] This is the omnibus form CDTFA-735.

[10] There is no mention of a collection cost recovery fee in the evidence.

Appellant has not pointed to any particular period of unreasonable delay. Appellant's argument that it should not be required to pay interest for periods after respondent provided the preliminary work papers and it "accepted" the erroneously calculated deficiency is unpersuasive for the reasons already discussed above. Appellant's argument that it should be relieved of interest (for periods in addition to those already automatically allowed) because of COVID is also unpersuasive. OTA has reviewed the audit and reaudit work papers and is not able to identify any periods of unreasonable delay (in addition to those already allowed by respondent). Accordingly, OTA concludes that appellant is entitled to relief of interest for April 2019, October 2019, March through June 2020, and November 2020.

HOLDINGS

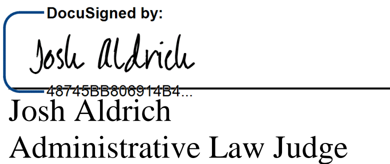
1. No further adjustments to the determined deficiency are warranted.
2. Appellant is entitled to relief of interest for April 2019, October 2019, March through June 2020, and November 2020.

DISPOSITION

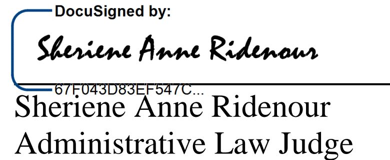
Respondent's action reducing the tax from $198,129 to $176,680 (a reduction of $21,449), deleting the negligence penalty, and relieving interest for April 2019, October 2019, March through June 2020, and November 2020, but otherwise denying appellant's petition for redetermination, protective claim for refund, and request for relief of interest is sustained.

Michael F. Geary
Administrative Law Judge

We concur:



Josh Aldrich
Administrative Law Judge



Sheriene Anne Ridenour
Administrative Law Judge

Date Issued: 11/15/2023