OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 19044592
	CDTFA Case ID: 226-081
FOUR CAFE LLC,	
dba Four Cafe	

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Solis Cooperson, Attorney

For Respondent: Jason Parker, Chief of Headquarters Ops.

K. LONG, Administrative Law Judge: On September 13, 2023, the Office of Tax Appeals (OTA) issued an Opinion modifying a decision issued by respondent California Department of Tax and Fee Administration (CDTFA).[1] CDTFA's decision denied a petition for redetermination filed by Four Cafe LLC (appellant) of a Notice of Determination (NOD) dated October 15, 2015. The NOD is for tax of $124,248.56, plus applicable interest, and a penalty of $12,424.82 for the period October 1, 2010, through December 31, 2013 (liability period).

In the Opinion, OTA considered whether adjustments were warranted to an assessment of tax, which CDTFA calculated using a credit-card sales ratio method of audit. OTA found that it was reasonable and rational for CDTFA to use a credit-card sales ratio to calculate the taxable measure. OTA concluded that appellant failed to provide sufficient evidence that the taxable measure should be reduced. However, OTA found that appellant was entitled to interest relief as conceded by CDTFA for the periods May 1, 2014, through July 31, 2014; December 1, 2016, through March 31, 2017; and November 1, 2017, through January 31, 2018.

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

On October 12, 2013, appellant timely petitioned for a rehearing with OTA on the basis that there is insufficient evidence to justify the Opinion. OTA concludes that the ground set forth in this petition does not constitute a basis for a new hearing.

OTA may grant a rehearing where one of the following grounds is met and materially affects the substantial rights of the party seeking a rehearing: (1) an irregularity in the appeal proceedings which occurred prior to issuance of the Opinion and prevented fair consideration of the appeal; (2) an accident or surprise, occurring during the appeal proceedings and prior to the issuance of the Opinion, which ordinary caution could not have prevented; (3) newly discovered evidence, material to the appeal, which the party could not have reasonably discovered and provided prior to issuance of the Opinion; (4) insufficient evidence to justify the Opinion; (5) the Opinion is contrary to law; or (6) an error in law in the OTA appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6);[2] *Appeal of Riedel*, 2024-OTA-004P.)

To find that there is an insufficiency of evidence to justify the Opinion, OTA must find that, after weighing the evidence in the record, including reasonable inferences based on that evidence, OTA clearly should have reached a different opinion. (*Appeals of Swat-Fame, Inc., et al.*, 2020-OTA-045P.)

In the petition for rehearing, appellant presents arguments, which are essentially the same as previously presented on appeal. Appellant argues that the liability measure is not based on actual sales data. Appellant reiterates its argument that the audit method does not consider the business's growth over time or expansion in size. Appellant argues that "[i]t is logical to assume that the sale[s] prior to the expansion would be much less than after the expansion . . . ." Appellant also contends that OTA did not consider all of the available evidence.

However, in the Opinion, OTA found that appellant failed to provide a complete set of books and records from which sales could be verified. Citing *Appeal of Amaya*, 2021-OTA-328P, OTA found that when CDTFA cannot compute taxable sales from appellant's records, it is appropriate to use an indirect approach to calculate the taxable measure. OTA noted that the credit card sales ratio method is an accepted and recognized audit methodology. OTA found that the credit-card sales ratio took the expansion of appellant's business into account. OTA

[2] California Code of Regulations, title 18, section 30604 is essentially based upon the provisions of California Code of Civil Procedure section 657; therefore, the language of California Code of Civil Procedure section 657 and applicable caselaw are appropriate and relevant guidance in determining whether a ground has been met to grant a rehearing. (*Appeal of Martinez Steel Corp.*, 2020-OTA-074P.)

explained that to calculate the taxable sales, CDTFA used appellant's merchant credit card statements and federal Form 1099-K[3] information to compile appellant's recorded credit card sales for the period January 1, 2011, through December 31, 2013, and then applied a credit card sales ratio. Thus, as appellant's recorded credit card sales increased over time, so did the audited taxable sales. The Opinion illustrates this fact by pointing to the gradual increase in audited taxable sales from $169,402 in the first quarter of 2011 (1Q11) to $337,113 in 4Q13.

Additionally, OTA considered submissions provided by appellant on appeal. These included appellant's own bank deposit analysis and information related to an audit of appellant performed by the IRS. As discussed in the Opinion, OTA rejected appellant's bank deposit analysis for several reasons. For example: appellant did not deposit cash into its bank account for several months during the liability period; appellant's bank deposit analysis did not reconcile with appellant's bank statements; appellant did not provide supporting documentation for the inclusion of a 12.5 percent tip ratio; and appellant did not provide support for the 12 percent "cash allowance," which appellant applied to offset the lack of cash deposits. As to the federal audit, OTA concluded that CDTFA has the authority to conduct its own audits (R&TC, § 6481) and is not obligated to rely on the results of an audit by another tax agency.

[3] Form 1099-K is an IRS Form titled "Payment Card and Third Party Network Transactions," which shows the monthly and annual amounts paid to a merchant by a bank, credit card company, or third-party network, during a given time period. Form 1099-K includes payments made by any electronic means, including but not limited to credit cards, debit cards, and PayPal.

Based on the foregoing, OTA finds that there was sufficient evidence to support the use of the credit-card sales ratio by CDTFA to calculate the liability measure. Accordingly, appellant's petition for rehearing is denied.

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Keith T. Long
Administrative Law Judge

We concur:

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Andrew Wong
Administrative Law Judge

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Huy "Mike" Le
Administrative Law Judge

Date Issued: 5/29/2024