OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 20106818
	CDTFA Case ID: 638-422
PALMS THAI, INC.	

OPINION

Representing the Parties:

For Appellant:	Michael Sy, Representative Steven Boortz, Attorney
For Respondent:	Ravinder Sharma, Hearing Representative Kevin Smith, Attorney Jason Parker, Chief of Headquarters Ops.
For Office of Tax Appeals:	Richard Zellmer, Business Taxes Specialist III

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Palms Thai, Inc. (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA),[1] denying appellant's petition for redetermination of a Notice of Determination (NOD) dated October 18, 2018. The NOD is for tax of $150,207, plus applicable interest, and a negligence penalty of $15,020.66, for the period October 1, 2014, through September 30, 2017.

Office of Tax Appeals (OTA) Administrative Law Judges Teresa A. Stanley, Suzanne B. Brown, and Andrew J. Kwee held an oral hearing for this matter in Cerritos, California, on July 12, 2023. After the conclusion of the oral hearing and additional post-hearing briefing, OTA closed the record on August 24, 2023, and this matter was submitted for a written Opinion.

[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.

ISSUES

1. Has appellant shown that any reduction to the amount of unreported taxable sales is warranted?
2. Was appellant negligent?
3. Is appellant entitled to interest relief?

FACTUAL FINDINGS

1. Appellant operated a restaurant specializing in Thai-style cuisine. Appellant operated the restaurant seven days a week.
2. CDTFA audited appellant for the period October 1, 2014, through September 30, 2017 (audit period). For the audit period, appellant reported total sales of $9,163,958, and claimed deductions of $421,159 for nontaxable transactions ($371,397 for sales tax reimbursement and $49,762 for non-taxable sales of food), resulting in reported taxable sales of $8,742,799.
3. Upon audit, appellant provided federal income tax returns (FITRs) for 2015 and 2016, bank statements for the audit period, and printed point-of sale (POS) summary reports for the audit period. Additionally, appellant provided a download from its POS system for two days in August 2017 and the period September 1, 2017, through November 13, 2017 (hereafter, appellant's POS download).[2] CDTFA also downloaded live and backup POS data directly from appellant's computer system for the same periods (hereafter, CDTFA's POS download). Appellant also provided a USB drive which contained detailed POS data for the period December 1, 2017, through March 31, 2018.[3] At the time of the audit, appellant did not provide any paper copies of source documents of sales, such as guest checks or sales receipts.
4. The gross receipts reported on the FITRs exceeded total sales reported on the sales and use tax returns (SUTRs) by $174,852 in 2015 and $296,163 in 2016. CDTFA found that appellant was unable to explain these differences. CDTFA compared cost of goods sold reported on the FITRs to total sales reported on the SUTRs and computed book markups

[2] The period October 1, 2017, through November 13, 2017, is after the audit period.

[3] The period December 1, 2017, through March 31, 2018, is after the audit period.

of 123.21 percent for 2015 and 110.85 percent for 2016.[4] CDTFA found that the book markups were lower than the 250 percent markup that CDTFA expected for appellant's type of business.

5. Sales recorded on the printed summary POS reports reconciled with reported taxable sales for seven of the 12 quarterly periods in the audit period, with only minor differences. Taxable sales recorded on the printed summary POS reports were greater than reported taxable sales by $25,309 in the second quarter of 2016 (2Q16), and by $5,207 in 2Q17. Reported taxable sales were greater than taxable sales recorded on the printed summary POS reports by $1,617 in 4Q16, $1,182 in 1Q17, and $262,717 in 3Q16.[5] Sales recorded in the printed summary POS reports result in a credit card sales ratio of 88.27 percent.

6. CDTFA's POS download for the period November 1, 2017, through November 13, 2017, contained 51 cash sales totaling $2,345, which were not included in appellant's POS download for that same 13-day time period.

7. During the audit, CDTFA conducted undercover purchases (i.e., without appellant's knowledge) at appellant's restaurant on three different days and saved the sales receipts from the three undercover purchases made on December 1, 2017, December 5, 2017, and January 12, 2018. The three sales were either missing from appellant's POS download on the USB drive or recorded for a lower amount and with a different method of payment.[6]

[4] "Markup" is the amount by which the cost of merchandise is increased to set the retail price. For example, if the retailer's cost is $.70 and it charges customers $1.00, the markup is $0.30. A "book markup" (sometimes referred to as an "achieved markup") is one that is calculated from the retailer's records.

[5] The large unexplained difference in 3Q16 appears to be an aberration.

[6] The purchase on December 1, 2017 (sales receipt no. 1029) was a cash purchase in the amount of $29.50. Appellant's POS report recorded this as a credit card purchase in the amount of $15.98. The purchase on December 5, 2017 (sales receipt no. 2022) was a cash purchase in the amount of $60.72. Appellant's POS report recorded this as a credit card purchase in the amount of $33.97. The purchase on January 12, 2018 (sales receipt no. 1037) was a cash purchase in the amount of $35.53. CDTFA could not find this sales receipt number recorded in appellant's POS report.

8. Total sales from the printed POS summary reports for September 2017 matched the total sales information from appellant's POS download;[7] thus, CDTFA concluded that the printed POS summary reports were unreliable.
9. CDTFA computed appellant's sales using the credit card sales ratio method using the sales information from CDTFA's POS data download, resulting in a credit card sales ratio of 72.99 percent of the total sales. Using appellant's bank statements, CDTFA compiled credit card deposits of $9,018,501. CDTFA subtracted service fees, sales tax, and tips from the $9,018,501 amount to compute credit card deposits, excluding service fees, sales tax, and tips, of $7,448,408 for the audit period. CDTFA applied the credit card sales ratio of 72.99 percent to compute taxable sales, excluding sales tax and tips, of $10,204,696 for the audit period.
10. The printed POS summary reports recorded mandatory service charges of $212,162 for the audit period, which were taxable.[8] This amount, when added to audited unreported taxable sales, results in unreported taxable sales of $1,674,059.
11. CDTFA added a 10 percent penalty to the audit liability because it concluded that appellant was negligent in reporting and recordkeeping.
12. CDTFA issued the October 18, 2018 NOD to appellant for tax of $150,207, applicable interest, and a negligence penalty of $15,020.66 for the audit period.
13. Appellant filed a timely petition for redetermination of the NOD.
14. Thereafter, appellant provided CDTFA with sales receipts for July, August, September, November, and December 2019; however, because some sales receipts from each month were missing, CDTFA found that the receipts were incomplete and thus could not be used to calculate a credit card sales ratio.
15. CDTFA held an appeals conference with appellant on March 3, 2020. In its Decision issued on September 21, 2020, CDTFA denied appellant's petition.
16. Appellant filed a Request for Reconsideration of CDTFA's Decision. CDTFA issued a Supplemental Decision dated April 14, 2021, which recommended no change.

[7] September 2017 is the only month for which CDTFA had a printed POS report and a POS download from appellant.

[8] Although CDTFA found the printed POS reports to be unreliable, CDTFA accepted the $212,162 amount as reasonably accurate based on its analysis that the service fees represented 2.14 percent of total sales. The $212,162 amount represents 2.08 percent of unreported taxable sales computed from the credit card sales ratio analysis.

17. Appellant filed the instant appeal with OTA.
18. After the hearing, appellant requested interest relief for the audit period, in a statement signed under penalty of perjury, which CDTFA denied.
19. CDTFA granted interest relief from March 1, 2020, through June 30, 2020, as part of a state-wide response to the COVID-19 pandemic.

DISCUSSION

Issue 1: Has appellant shown that any reduction to the amount of unreported taxable sales is warranted?

California imposes a sales tax on a retailer's retail sales of tangible personal property in this state, measured by the retailer's gross receipts, unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, § 6051.) All of a retailer's gross receipts are presumed subject to tax unless the retailer can prove otherwise. (R&TC, § 6091.) Although gross receipts from the sale of "food products" are generally exempt from the sales tax, sales of hot food and sales of food served in a restaurant are subject to tax. (R&TC, § 6359(a), (d)(1), (d)(2), (d)(7).)

When CDTFA is not satisfied with the amount of tax reported by the taxpayer, 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.) 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*.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid*.)

At the time of the audit, appellant did not provide any guest checks or sales receipts for the audit period. However, with its reply brief, appellant provided copies of 105 sales invoices from March 2016, which are not consecutively numbered and do not represent all sales for that month. Except for two days in August 2017 and the month of September 2017, appellant did not provide any detailed computerized record of its individual sales for the audit period. On appeal, appellant also submitted a September 2019 handwritten net, cash sales report. OTA thus finds that appellant's books and records were inadequate for sales and use tax audit purposes. CDTFA

found that the gross receipts reported on the FITRs exceeded total sales reported on the SUTRs by $174,852 in 2015 and $296,163 in 2016. Appellant could not explain these differences. CDTFA computed book markups of 123.21 percent for 2015 and 110.85 percent for 2016, which were much lower than the expected markup of at least 250 percent. Based on that, CDTFA had sufficient reason to doubt the accuracy of reported taxable sales.

Appellant's POS download for 76 days records credit card sales of $625,993, service fees on credit card sales of $12,462, cash sales of $87,298 and service fees on cash sales of $13,634. The CDTFA POS download for the same 76 days records credit card sales of $625,993 and service fees on credit card sales of $12,462, both of which are identical to the amounts recorded on appellant's POS download for service fees on credit card sales. However, the CDTFA POS download recorded cash sales of $231,024, which is much greater than cash sales of $87,298 recorded on appellant's POS download. The CDTFA POS download also recorded service fees on cash sales of $16,461, which is significantly greater than the $13,634 amount recorded on appellant's POS download for service fees on cash sales. The recorded credit card sales and associated service fees are almost identical on both sets of POS downloads, but there are substantial differences in the cash sales and associated service fees recorded on the two sets of POS download data. This gives the impression that cash sales recorded in appellant's POS download have been deleted or altered.

CDTFA found 51 specific instances in which cash sales made during the period November 1, 2017, through November 13, 2017, were recorded on CDTFA's POS download but were not recorded in appellant's POS download. That represents an average of about four missing cash sales each day. Also, CDTFA found that three purchases made by CDTFA's auditor were either not recorded in the USB drive POS data or were recorded in that POS data at a lower amount and with a different method of payment (e.g., recorded as credit card sales instead of cash sales).

For all the above reasons, OTA finds that CDTFA had sufficient reason to doubt the accuracy of the POS data furnished by appellant, and further that CDTFA acted reasonably in using the CDTFA POS download to compute a credit card sales ratio. OTA also finds that CDTFA acted reasonably in applying the credit card sales ratio to the actual amount of credit card sales as recorded in appellant's own bank statements. The credit card sales ratio method is a standard and accepted audit procedure. (See *Riley B's, Inc. v. State Bd. of Equalization* (1976)

61 Cal.App.3d 610, 612-613.) While an observation test may be used to verify a credit card sales ratio, CDTFA's use of appellant's records is a reasonable alternative.[9] Thus, CDTFA has met its initial burden to show that its determination was reasonable and rational, and the burden of proof shifts to appellant to show errors in the audit.

Appellant contends that its books and records were adequate for sales and use tax purposes. Appellant contends that the POS data download it provided contained detailed information regarding individual sales. However, as stated above, appellant's books and records are inadequate for sales and use tax purposes because appellant only furnished detailed information regarding individual sales for 32 days within the audit period,[10] and because the POS information appellant furnished was missing a significant number of cash sales. Thus, OTA is unpersuaded by appellant's contention that its books and records were adequate.

Appellant contends that CDTFA's expected markup of 250 percent is unreasonable. Appellant has not provided any evidence to support an industry-average markup of less than 250 percent for similar restaurants in appellant's area. Furthermore, the 250 percent expected markup was not used to calculate the audit liability, and thus, it has no direct impact on the audit liability. Thus, OTA finds this contention unconvincing.

Appellant contends that the 72.99 percent credit card sales ratio is too low. Appellant argues that the ratio should be as high as 88 percent. The 72.99 percent credit card sales ratio was based on 76 days of sales recorded in CDTFA's POS download. As stated above, the other POS data furnished by appellant is unreliable because it is missing transactions, and appellant has not provided any reliable data to support a credit card sales ratio of more than 72.99 percent.

Appellant argues that the sample size used to compute the 72.99 percent credit card sales ratio is too small. CDTFA may use testing techniques in its audits. (*Paine v. State Bd. of Equalization* (1982) 137 Cal.App.3d 438). In this case, the sample size is 76 days of appellant's POS records. Appellant has not shown that the sample size is too small, nor has appellant even stated what would be an acceptable sample size. Appellant has not provided any additional reliable POS records that could be used to expand the sample. As part of its appeal with CDTFA, appellant provided incomplete sales receipts for July, August, September, November,

[9] See section 0810.12 of CDTFA's Audit Manual, which states in relevant part that when using the credit card projection method, the auditor should use a representative test period, which can be accomplished using an observation test *or* an examination of sales records for a test period.

[10] Appellant also furnished detailed POS data for periods outside of the audit period.

and December 2019.[11] However, since these sales receipts are incomplete, they could not be used to compute a credit card sales ratio. As discussed above, appellant's POS download was unreliable because it failed to include known purchases, leaving the CDTFA POS download as the only reliable data available to CDTFA. In light of all of these facts, the CDTFA POS download is the best available evidence. Thus, OTA is unpersuaded by appellant's argument that the sample size is too small.

Appellant disputes CDTFA's contention that the three purchases made by CDTFA's auditor were either not recorded or altered in appellant's records. The available evidence shows that the purchases on December 1, 2017, and December 5, 2017, were recorded in appellant's POS reports at different amounts and with different methods of payment than shown on CDTFA's receipts, and that the purchase on January 12, 2018, was not recorded at all. Appellant has not provided entries from the relevant POS reports that reconcile to the paper sales receipts from the three undercover purchases. Thus, OTA finds appellant's position unpersuasive.

At the hearing, appellant contended that the owners were not "IT people," and that a technology expert hired by appellant was unable to access the POS data to determine whether the data could be manipulated. Appellant contends that CDTFA's IT representative should have appeared at the hearing so that appellant could question him to determine how CDTFA was able to extract the CDTFA POS download, which appellant's IT person could not. OTA finds that the material fact is that CDTFA was able to extract the backup data, not how it was accomplished. The contents of the CDTFA POS download do not change. This is not a reason for redetermination of the tax liability.

Appellant alleges that it asked CDTFA to perform an observation test, but CDTFA refused. CDTFA counters that the data from appellant's POS records were partially within the audit period with the remainder of the data being closer to the audit period than an observation test would have been. Thus, the POS data more accurately represent the credit card sales ratio than later observation tests might. CDTFA cites section 0810.12 of CDTFA's Audit Manual, which states in relevant part that when using the credit card projection method, the auditor should use a representative test period, which can be accomplished using an observation test or an examination of sales records for a test period. Also, CDTFA may determine the amount

[11] The sales invoices were incomplete because some sales receipts for each of the five months were missing.

required to be paid on the basis of *any* information which is in its possession or that may come into its possession. (R&TC, § 6481.) Thus, there is no requirement that CDTFA perform an observation test, as CDTFA may examine sales records in lieu of performing an observation test. Also, appellant has not shown that a three-day observation test[12] would produce more reliable results than the examination of 76 days of POS records, which partially overlap the audit period.

Appellant contends that based on the seating capacity of the restaurant, it is impossible for the business to generate the amount of sales computed in the audit. Appellant prepared its own analysis of seating and average cost of meals purchased, claiming average daily sales of between $4,332 and $5,550 per day. Appellant additionally claims that the average selling price per meal during the audit period was $8.99, less than what CDTFA computed. To support this argument, appellant provided copies of end-of-day sales reports generated from its POS system for Monday, November 11, 2019, Thursday, November 21, 2019, Wednesday, December 4, 2019, and Tuesday, December 10, 2019. The four end-of-day sales reports provided by appellant show average sales of $8,239 per day,[13] which is significantly greater than appellant's estimated range of $4,332 to $5,550 per day. Moreover, the four end-of-day sales reports reflect a total of 1,227 customers, which means that the average selling price of a meal over these four days is just $6.71, much lower than that claimed by appellant, which shows that appellant's analysis is itself unreliable. CDTFA did not use these averages for audit purposes, so even if appellant's four end-of-day sales reports represented the entire audit period, it would have no effect on the audit results. Thus, appellant's assertion is irrelevant.

OTA notes that the audit results in average sales (including the mandatory service charges) of $9,513 per day, which is significantly lower than the average sales of $10,328 per day reflected in the CDTFA POS download. Based on the CDTFA POS download, OTA finds that appellant's restaurant is certainly capable of making the audited average of $9,513 in sales per day. The above-mentioned four end-of-day sales reports result in sales averaging $8,239 per day, which is significantly lower than the audited average per day and the average per day calculated from the test of 76 days of CDTFA POS download data. However, the four end-of-day sales reports all occurred Monday through Thursday. Appellant has not provided

[12] CDTFA's Audit Manual section 0810.30 states that, when using an observation test, a minimum of three days must be used to project sales.

[13] ($8,106 + $7,884 + $7,989 + $8,976) ÷ (4 days) = $8,239 per day.

end-of-day sales reports for a Friday or Saturday, which would generally be expected to be higher than Monday through Thursday. There is no way to tell whether the four end-of-day sales reports are representative of appellant's average sales. The larger sample of 76 days of CDTFA's POS download data (which includes two entire months of September and October 2017) is a larger and more representative sample of appellant's sales than appellant's four-day test. Thus, OTA is unpersuaded by appellant's argument that its restaurant is not large enough to generate the sales calculated in the audit.

Appellant argues that credit card deposits are $8,616,820, not $7,448,408 as used in the audit. First, credit card deposits compiled in the audit are $9,018,501, not $7,448,408. As explained above, credit card deposits were reduced to account for service fees, sales tax, and tips. Second, appellant incorrectly excluded 4Q14 from its calculation and incorrectly included November 2017 in its calculation. If adjustments are made to appellant's $8,616,820 amount to add the credit card deposits for the period October 1, 2014, through December 31, 2014, and subtract the credit card deposits for November 2017, the resulting amount of credit card deposits totals $9,030,019, which is greater than the $9,018,501 amount compiled by CDTFA.

Because appellant has failed to provide reliable documentation or other such evidence from which a more accurate determination could be made, appellant has failed to meet its burden to establish that a reduction to the measure of unreported taxable sales is warranted.

Issue 2: Was appellant negligent?

R&TC section 6484 provides that, if any part of a 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. Negligence is generally defined as a failure to exercise such care that a reasonable and prudent person would exercise under similar circumstances. (*Warner v. Santa Catalina Island Co.* (1955) 44 Cal.2d. 310, 317; see also *People v. Superior Court (Sokolich)* (2016) 248 Cal. App. 4th 434, 447.)

A taxpayer is required to maintain and make available for examination by CDTFA all records necessary to verify the accuracy of any return filed, or, if no return has been filed, to ascertain and determine the amount required to be paid. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).) Such records include, but are not limited to: (1) the normal books of account ordinarily maintained by the average prudent businessperson engaged in the activity

in question; (2) bills, receipts, invoices, cash register tapes, or other documents of original entry; and (3) schedules of working papers used in connection with the preparation of the tax returns. (Cal. Code Regs., tit. 18, § 1698(b)(1).) Failure to maintain and provide complete and accurate records will be considered evidence of negligence. (Cal. Code Regs., tit. 18, § 1698(k).)

A negligence penalty should not be added to a deficiency determination associated with the first audit of a taxpayer if the evidence establishes that any bookkeeping and reporting errors can be attributed to the taxpayer's good faith and reasonable belief that its bookkeeping and reporting practices were in substantial compliance with the requirements of the Sales and Use Tax Law or authorized regulations. (Cal. Code Regs., tit. 18, § 1703(c)(3)(A); see also *Independent Iron Works, Inc. v. State Bd. of Equalization* (1959) 167 Cal.App.2d 318, 321-324.) In the case at hand, appellant had not been previously audited.

Here, CDTFA states that it imposed the negligence penalty provided by R&TC section 6484 because of the large size of the understatement and because appellant's books and records were inadequate for sales tax purposes. Appellant asserts that the penalty should not apply because it has exercised care and prompt reporting of its sales taxes since its inception. Appellant contends that it reported its sales based on the printed summary POS reports.

The understatement of $1,674,059 represents an error ratio of 19.15 percent when compared to reported taxable sales of $8,742,799, meaning that appellant failed to report nearly 20 percent of its taxable sales. The size of the understatement is evidence of negligence. At the time of the audit, appellant did not provide any paper copies of guest checks or sales receipts for any days within the audit period, and with its appeal to OTA appellant has provided incomplete sales receipts for March 2016. Appellant provided summary POS reports for the entire audit period, but appellant provided detailed POS reports showing information for individual sales for only 32 days within the three-year audit period. The lack of guest checks, sales receipts, and detailed POS reports is evidence of negligence in recordkeeping.

Regarding the negligence penalty, the evidence in this appeal strongly suggests that cash sales were modified or deleted from the POS data and reports. As stated above, recorded cash sales are substantially less in appellant's POS download than in CDTFA's POS download, but credit card sales are almost identical on the two POS downloads. Appellant has not explained how the cash sales recorded on the two reports could be so different while the credit card sales are almost identical. Moreover, CDTFA found 51 specific instances in which cash sales

recorded in the CDTFA POS download were not recorded in appellant's POS download for 13 days in November, which averages four unrecorded cash sales each day. Finally, the evidence shows that three undercover purchases made by CDTFA were either not recorded in the relevant POS data or were recorded at lower amounts and with different methods of payment. The evidence shows that significant amounts of cash sales were deleted from appellant's POS reports, which appellant has not explained. The significant discrepancies between appellant's own records are evidence of negligence, even if it was unintentional as appellant contends.[14] OTA finds that the understatement cannot be attributed to appellant's good faith and reasonable belief that its bookkeeping and reporting practices were in substantial compliance with the requirements of the Sales and Use Tax Law or authorized regulations. (Cal. Code Regs., tit 18, § 1703(c)(3)(a); see also *Independent Iron Works, Inc. v. State Bd. of Equalization*, *supra*, at pp. 321-324.) Thus, appellant was negligent.

Issue 3: Is appellant entitled to interest relief?

There is no statutory right to interest relief. The law allows CDTFA, 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 CDTFA acting in his or her official capacity. (R&TC, § 6593.5(a)(1).) Such an 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).) Any person requesting interest relief must include a statement signed under penalty of perjury setting forth the facts on which the request is based. (R&TC, § 6593.5(c); *Appeal of Micelle Laboratories, Inc.*, 2020-OTA-290P.)

OTA will not generally second-guess the standard timeframes determined by CDTFA for purposes of granting discretionary relief and will instead defer to CDTFA's timeframes absent evidence of an abuse of discretion. (*Appeal of Eichler*, 2022-OTA-029P.) To show an abuse of discretion, a taxpayer must establish that, in refusing to relieve interest, CDTFA exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law. (*Appeal of Eichler*, *supra.*)

[14] If the records were purposely modified, it would be an indication of fraud. CDTFA did not assert a fraud penalty in this case.

On appeal, appellant requests interest relief beginning on the first day of the audit period, October 1, 2014, through the end of the audit period, September 30, 2017. Appellant generally asserts that it is entitled to interest relief because: it had problems with its POS systems just before and during the audit; the auditor "disappeared for a year"; CDTFA did not respond to requests for observation tests; CDTFA did not accept the outcome of an unrelated sales tax case in the state of Washington (interpreting another state's laws) and cited by appellant or apply it to appellant; and appellant had "no intent to defraud the government." Appellant also asserts that OTA appeals hearings[15] were delayed several times due to the COVID-19 pandemic.

CDTFA responds that appellant's timeline included with its request for interest relief shows that communication was continuous throughout the audit process. CDTFA already granted interest relief for four months due to the COVID-19 pandemic and asserts no further relief is warranted.

Upon review of the record, OTA finds no unreasonable error or delay by a CDTFA employee between October 1, 2014, and September 30, 2017. CDTFA did not even contact appellant until September 20, 2017, to begin the audit; thus, there could have been no error or delay by CDTFA prior to that.

In an abundance of caution, OTA will address appellant's contentions regarding delays outside of the audit period. CDTFA's auditor first contacted appellant on September 20, 2017, and the audit was approved on October 16, 2018. The record reflects, as does appellant's timeline, that there was continuous communication between appellant's representative and CDTFA during that time period. Appellant's dissatisfaction with CDTFA's responses regarding the observation testing and the unrelated Washington state court case cited by appellant do not constitute an unreasonable error or delay. Additionally, the auditor was in contact with appellant until the audit results were approved and the NOD was issued. Appellant may be describing attempts to reach the CDTFA auditor after the NOD was issued. OTA finds that lack of responsiveness after an audit is complete does not warrant interest relief. Furthermore, appellant's malfunctioning POS system bears no relation to actions by any CDTFA employee. Nor is it relevant to interest abatement that CDTFA was able to retrieve backup data from

[15] Presumably, appellant is referring to OTA appeals hearings rather than CDTFA's internal appeals process as CDTFA held its appeals hearing on March 3, 2020, issued a Decision on September 21, 2020, and appellant's appeal to OTA was acknowledged on October 23, 2020.

appellant's POS system while appellant could not do so. Appellant's claim that it had no intent to defraud the government is also irrelevant as CDTFA has not asserted a fraud penalty here. Finally, even if the OTA hearing was postponed,[16] R&TC section 6593.5 authorizes CDTFA to grant interest relief for an unreasonable error or delay caused by a CDTFA employee. There is no authority in R&TC section 6593.5 to grant interest relief for a delay by OTA. For the above reasons, OTA finds that CDTFA did not abuse its discretion in denying appellant's request for interest relief.

HOLDINGS

1. Appellant has not shown that reductions to the measure of tax are warranted.
2. Appellant was negligent, and the penalty was properly imposed.
3. Appellant is not entitled to interest relief.

DISPOSITION

CDTFA's action denying appellant's petition is sustained.

DocuSigned by:
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Teresa A. Stanley
Administrative Law Judge

We concur:

DocuSigned by:
47F45ABE89E34D0...
Suzanne B. Brown
Administrative Law Judge

DocuSigned by:
3CADA62FB4864CB...
Andrew J. Kwee
Administrative Law Judge

Date Issued: 11/13/2023

[16] The hearing was postponed twice, both times at appellant's request.