

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 221111847
YUAN BAO INC.,)	CDTFA Case ID: 2-335-608
dba Caesar’s Mongolian Bar-B-Q)	
)	
)	

OPINION

Representing the Parties:

For Appellant:	Barbara Wang, President Sally Reddy, Attorney
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For Respondent:	Ravinder Sharma, Hearing Representative Chad Bacchus, Attorney Jason Parker, Chief of Headquarters Ops.
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For Office of Tax Appeals:	Craig Okihara, Business Taxes Specialist III
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K. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Yuan Bao Inc. (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)¹ denying appellant's timely petition for redetermination of a Notice of Determination (NOD) issued on October 22, 2020.² The NOD is for tax of \$90,803, plus applicable interest, for the period July 1, 2015, through June 30, 2018 (liability period).

Office of Tax Appeals (OTA) Administrative Law Judges Lauren Katagihara, Josh Lambert, and Keith T. Long held an electronic oral hearing for this matter on November 9, 2023. At the conclusion of the oral hearing, the record was closed, and this matter was submitted on the oral hearing record pursuant to California Code of Regulations, title 18,

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.

² The NOD was timely issued because on March 6, 2020, appellant signed the most recent in a series of waivers of the otherwise applicable three-year statute of limitations for the period July 1, 2015, through June 30, 2017, which allowed CDTFA until October 31, 2020, to issue an NOD. (See R&TC, §§ 6487(a), 6488.)

(Regulation) section 30209(b). Thereafter, the record was reopened pending additional briefing pursuant to Regulation section 30304(a), and a subsequent reaudit initiated by CDTFA, which reduced the taxable measure for the liability period.

ISSUE

Whether further adjustments to the measure of unreported taxable sales are warranted.

FACTUAL FINDINGS

1. Appellant, a corporation, doing business as Caesar's Mongolian Bar-B-Q, operated an all-you-can-eat Mongolian restaurant in Cerritos, California. Appellant obtained a seller's permit effective November 1, 2008. Appellant was previously audited for the period October 1, 2011, through September 30, 2014.
2. During the liability period, appellant filed sales and use tax returns reporting total sales of \$1,822,098, and claiming zero deductions, which resulted in reported taxable sales of \$1,822,098.
3. Upon audit, appellant provided the following: federal income tax returns for fiscal years ending (FYE) June 30, 2015, through June 30, 2018;³ bank statements for the period July 2015 through July 2018; an incomplete set of merchant statements for the period July 2015 through March 2019;⁴ a point-of-sales (POS) system sales data download for the period January 1, 2015, through August 15, 2018 (first download); a POS system sales data download for the period January 1, 2015, through January 9, 2019 (second download); POS monthly sales reports for the period July 2015 through July 2018; and cash register worksheets for August 2018 and December 2018.
4. Additionally for the audit, CDTFA obtained Form 1099-K⁵ data for the period 2015 through 2018; and photographs from Yelp.com of three cash register receipts dated July 2, 2015; January 18, 2016; and October 5, 2017 (Yelp receipts). CDTFA also made

³ Appellant filed federal income tax returns on a fiscal year basis covering the period July 1 of one year through June 30 of the next year.

⁴ Appellant did not provide a merchant statement for July 2016.

⁵ 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.

purchases at the business, paying with cash or credit card, on the following dates:
March 7, 2018; April 25, 2018; May 10, 2018; May 18, 2018; June 1, 2018; June 5, 2018;
June 22, 2018; October 19, 2018; October 25, 2018; October 27, 2018; October 29, 2018;
and November 4, 2018 (control purchases).

5. Upon audit, CDTFA compared appellant's federal income tax returns to appellant's sales and use tax returns and found immaterial differences. CDTFA then compared the sales reported on appellant's sales and use tax returns to the cost of goods sold (COGS) reported on appellant's federal income tax returns to compute a book markup of 319.57 percent for the four fiscal years, combined.⁶ However, appellant did not provide purchase invoices to support the COGS recorded on its federal income tax returns and the COGS could not, therefore, be verified.
6. CDTFA reviewed appellant's bank statements and compiled bank deposits from sales proceeds for the period July 2015 through July 2018.⁷ Appellant's bank statements revealed zero cash deposits during the liability period. Upon comparison, CDTFA found immaterial differences between the amounts recorded in appellant's bank deposits and appellant's reported taxable sales. Based on this information, CDTFA concluded that appellant likely did not report cash sales on its sales and use tax returns.
7. CDTFA reconciled appellant's Form 1099-K data with appellant's merchant statements. CDTFA used the Form 1099-K data to compile credit card sales of \$1,957,678 for the liability period. CDTFA reduced the recorded credit card sales by 10 percent for tips and the applicable sales tax rate for each quarter to calculate credit card sales (excluding sales tax reimbursement and tips) of \$1,614,763 for the liability period.

⁶ "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 \$0.70 and it charges customers \$1.00, the markup is \$0.30. The formula for determining the markup percentage is $\text{markup amount} \div \text{cost}$. In this example, the markup percentage is 42.86 percent ($0.30 \div 0.70 = 0.42857$). A "book markup" (sometimes referred to as an "achieved markup") is one that is calculated from the retailer's records.

⁷ Bank deposits are not gross receipts. (R&TC, § 6012(a).) However, where, as here, a retailer is engaged in the business of making retail sales of tangible personal property, the retailer's bank deposits, net of deposits from non-sale or nontaxable transactions, are evidence of gross receipts from the retail sale of tangible personal property which CDTFA can use to determine audited taxable sales when sales cannot be accurately established using a direct approach because of a lack of adequate records.

8. CDTFA compared appellant's credit card sales (excluding sales tax reimbursement and tips) and appellant's reported taxable sales to calculate a credit-card-sales ratio of 88.62 percent for the liability period.⁸
9. CDTFA used appellant's POS monthly sales reports to compile cash sales of \$242,181 and credit card sales of \$1,745,948 for the liability period, or total sales of \$1,988,130 (including sales tax). CDTFA compared the sales recorded in appellant's POS monthly sales reports to appellant's reported taxable sales (plus sales tax) and found immaterial differences. CDTFA compared the credit card sales recorded in appellant's POS monthly sales reports to the credit card tips reported on appellant's federal income tax returns for FYEs ending June 30, 2017, and June 30, 2018, to compute a reported credit card tip rate of 10.88 percent.⁹
10. CDTFA obtained the first download on August 15, 2018. CDTFA reviewed the first download and found that it did not include three of the seven control purchases. CDTFA also determined that two of the three Yelp receipts were not recorded in the first download. Additionally, CDTFA noted that the Yelp receipts and the control purchase receipts had different font types. Based on these discrepancies, CDTFA concluded that the first download was incomplete and unreliable.
11. CDTFA performed a two-week test of sales based on POS reports for the periods November 1, 2018, through November 4, 2018, and November 12, 2018, through November 20, 2018.¹⁰ According to the audit workpapers, appellant stated that it would only accept credit cards during the test period to prevent employee theft.¹¹ However,

⁸ According to CDTFA, appellant's credit-card-sales ratio was higher than expected for this type of business. CDTFA asserts that the expected credit-card-sales ratio for similar businesses is between 50 and 75 percent. CDTFA did not provide any information explaining how it calculated this range.

⁹ For FYEs ending June 30, 2017, and June 30, 2018, appellant reported negative other income. According to the audit workpapers, this amount was a reduction for tips and sales tax reimbursement included in gross receipts.

¹⁰ It appears that the two-week test of sales was originally intended for a consecutive two-week period beginning November 1, 2018. However, appellant unexpectedly closed the business because of a staffing shortage during the period November 5, 2018, through November 11, 2018. As a result, CDTFA included the dates November 12, 2018, through November 20, 2018, to complete the two-week test period.

¹¹ The date that appellant changed its payment policy is in dispute. At the oral hearing, appellant's president testified that the business changed its payment policy to credit-card-only on December 1, 2018. However, notes recorded in the audit workpapers indicate that on October 19, 2018, appellant informed CDTFA that "moving forward," she would only accept credit card payments.

- CDTFA made a control purchase during the test period (on November 4, 2018) and paid with cash. Upon review of appellant's POS reports for the test period, CDTFA's control purchase was not reflected therein. CDTFA concluded that the two-week test of sales was unreliable based on the missing transaction, appellant's unexpected closure, and credit-card-only payment policy which was inconsistent with the rest of the liability period.
12. CDTFA then performed a three-day observation test of the business between 11:30 a.m. to 2:30 p.m. and 5:00 p.m. to 9:00 p.m. on each of the following dates: Wednesday, August 21, 2019; Friday, August 23, 2019; and Monday, August 26, 2019. According to the audit workpapers, appellant posted a new sign during the observation test requiring customers to pay in advance. During the observation test, appellant recorded total sales of \$5,561, consisting of \$341 in cash sales and \$5,220 in credit card sales. After reducing total sales by the sales tax rate, CDTFA calculated taxable sales during the observation test of \$5,078, for a daily average of \$1,693. The average daily taxable sales from the observation test was lower than appellant's recorded average taxable sales of \$1,895 for August 2017 and August 2018.
 13. CDTFA also determined that the credit-card-sales ratio during the observation test was high compared to other months. CDTFA made a purchase on August 23, 2019, and was asked by appellant to pay in advance by credit card. CDTFA ultimately paid with cash. CDTFA also observed appellant asking other customers to pay in advance via credit card. CDTFA's contemporaneous notes state that it ordered drinks which were not included on the sales receipt. CDTFA's notes also state that appellant deducted payment for the drinks from the change appellant provided to CDTFA. For these reasons, CDTFA concluded that appellant did not properly record its sales in the POS system during the observation test period, and that the observation tests results were therefore unreliable.
 14. CDTFA obtained the second download on January 9, 2019. The amounts recorded in the second download reconcile with the amounts reported on appellant's sales and use tax returns. However, CDTFA found that one of its control purchases was not recorded in the second download and another had been entered as a credit card sale.
 15. From the second download, CDTFA compiled total sales of \$2,313,109 for the period July 1, 2015, through December 31, 2018, including cash sales of \$267,971 and credit

card sales of \$2,045,138. Appellant did not record any cash sales after October 20, 2018. According to the second data download, appellant voided sales totaling \$92,893 during the period July 1, 2015, through December 31, 2018.¹² This includes voided sales for December 2018 of \$29,149 (an increase of \$24,031 over the next highest month for voided sales). CDTFA prepared a graph analysis detailing appellant's voids per week during the period July 2015 through December 2018. According to the Report of Discussion of Audit Findings, this analysis revealed that appellant voided 40 sales per month on average during the period July 2015 through November 2018, but during December 2018, appellant voided 344 sales, a significant difference.

16. CDTFA further investigated appellant's sales data for December 2018. CDTFA noted that large time lapses occurred between the time an order was opened and when it was paid. Based on these facts, CDTFA concluded that appellant was altering the payments recorded in the POS (by not recording cash sales, reusing sales tickets, or using a different POS) to reflect that only credit card sales were made during that month.
17. To calculate audited taxable sales, CDTFA added the sales recorded in the second download (including tax) of \$53,295 for December 2018 to the recorded voided sales (including tax) of \$29,149 for that month to calculate "actual" sales of \$82,444. CDTFA compared appellant's recorded sales and the "actual" sales, excluding sales tax, and found a difference of \$26,620, which represents a recording error rate of 54.69 percent.
18. CDTFA applied the 54.69 percent error rate to the taxable sales reported on appellant's sales and use tax returns of \$1,822,098 to compute audited taxable sales of \$2,818,603 ($\$1,822,098 \times 1.5469$) and unreported taxable sales of \$996,505 ($\$2,818,603 - \$1,822,098$).
19. On October 22, 2020, CDTFA issued the aforementioned NOD for a tax of \$90,803, plus applicable interest. Appellant filed a timely petition for redetermination, which CDTFA denied.
20. This timely appeal followed.

¹² The second data download included information for the period January 1, 2015, through December 2018. It is unclear why CDTFA only scheduled recorded void payment amounts for the period July 1, 2015, through December 31, 2018. However, CDTFA separately scheduled the total number of voids separately including voids from January 2, 2015 through January 9, 2019.

21. During this appeal, CDTFA performed two reaudits. During the first reaudit, CDTFA reviewed the voided payments recorded by appellant during the period July 2015 through September 2015 and made a 2.85 percent allowance for voided payments for the liability period, which reduced the audited error rate from 54.69 percent to 51.84 percent. As a result of the reaudit, CDTFA reduced the taxable measure by \$51,930 from \$996,505 to \$944,576.
22. The second reaudit is based on information obtained by CDTFA during a subsequent audit of appellant's business for the fourth quarter of 2019 (4Q19) through 3Q22.¹³ Related to that audit, CDTFA submits email correspondence from appellant, which states:

As a compromise, we are requesting CDTFA consider an alternate estimation method to calculate taxable sales. One option would be to use statistical data to show average cash-credit card ratios for similarly situated restaurants and use the [Form] 1099-Ks to estimate total sales. Another option would be to calculate the cash-credit ratio from the first audit. While we disagree that the additional sales represented actual sales, the documentation clearly indicates that IF the restaurant had those unreported sales, then they would have to be cash sales. As a result, the cash ratio would have been 35 [percent].

CDTFA also submits a spreadsheet created by appellant calculating a cash ratio of 35 percent (which equates to a credit-card-sales ratio of 65 percent) for December 2018.¹⁴ Based on this information, CDTFA increased the credit-card-sales ratio for the current liability period from 56.73 percent to 66.9 percent.¹⁵ CDTFA applied the 66.9 percent credit-card-sales ratio to the credit card sales recorded on appellant's Form 1099-K (less tax and tips) for the liability period to calculate audited taxable sales of \$2,390,060.

¹³ Appellant disputes the taxable measure calculated by CDTFA in the subsequent audit. Appellant states that it has filed a petition for redetermination in that case, but that case has not been appealed to OTA. Therefore, the subsequent audit is not at issue in this appeal.

¹⁴ As discussed below, appellant disagrees with CDTFA's use of information obtained or negotiated for the subsequent audit in this audit.

¹⁵ The 65 percent credit-card-sales ratio (or 35 percent cash-sales ratio, as described in appellant's email for the subsequent audit) was increased to 66.9 percent by CDTFA to account for voided sales CDTFA considered to be legitimately voided.

When compared to reported taxable sales of \$1,822,098, the reaudited measure reveals unreported taxable sales of \$567,962.

DISCUSSION

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.) 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.*)

Here, appellant did not provide a complete set of books and records for the audit. Upon audit, CDTFA found immaterial differences between appellant's federal income tax returns and appellant's sales and use tax returns. However, appellant did not provide substantiating documents (such as purchase invoices to CDTFA) and appellant's COGS could not be verified. CDTFA also found that appellant's bank statements reconciled with reported taxable sales, but that appellant did not make any cash deposits during the liability period. During the audit, CDTFA made control purchases and paid cash despite claiming to have accepted credit card payments only. Thus, there is evidence that appellant made cash sales that were not deposited into appellant's bank account. Based on these facts, it was reasonable for CDTFA to conclude that appellant's cash sales were underreported.

Next, CDTFA attempted to verify the accuracy of appellant's books and records (i.e., the first and second downloads). CDTFA found that the downloads did not include CDTFA's

control purchases or sales corresponding to the Yelp receipts. In addition, the second download indicated a large increase in the number of voided sales, and an increase in the amount of time that a sales ticket remained open, during December 2018. Appellant could not explain these discrepancies. These unexplained discrepancies are sufficient reasons for CDTFA to doubt the accuracy of appellant's books and records.

When CDTFA cannot compute taxable sales from appellant's records, it is appropriate to use an indirect method. (See *Appeal of Las Playas #10, Inc.*, 2021-OTA-204P.) Here, CDTFA attempted two indirect audit methods. First, CDTFA attempted to perform a two-week test of sales. However, the test was deemed unreliable because it was interrupted by appellant's sudden closure and CDTFA's control purchase was not reflected in appellant's POS records. Then, CDTFA completed a three-day observation test, during which appellant changed its operating procedure by soliciting payment from customers in advance and via credit card. Appellant also issued an inaccurate receipt to CDTFA during the same period as the observation test, which excluded amounts charged to CDTFA during a control purchase. As a result, it was reasonable for CDTFA to conclude that the results of the observation test were also unreliable.

Therefore, to calculate the initial audit measure, CDTFA used the POS system data obtained from the second download. However, CDTFA found an abnormal increase in the number of voided transactions for the month of December 2018. Appellant could not explain the increase of voided sales.¹⁶ CDTFA argues that the voided transactions were cash sales and that because the second download was taken on January 9, 2019, appellant did not have the opportunity to further alter or delete the voided (cash) sales. CDTFA used the data in the second download but made adjustments by first comparing appellant's total "actual sales,"¹⁷ to recorded taxable sales (excluding voided transactions) for December 2018 to calculate an error rate. CDTFA then applied the error rate to appellant's reported taxable sales to compute the deficiency.

CDTFA then reduced the taxable measure by performing two reaudits. In the first reaudit, CDTFA made an allowance for transactions that were properly voided during the

¹⁶ At the oral hearing, appellant's president Ms. Wang provided testimony regarding the voided transactions. Appellant's representative asked: "Ms. Wang, do you know why there were 344 voided payment transactions from December 2018 POS?" In response, Ms. Wang stated: "No, I don't know why."

¹⁷ "Actual sales" in this context is the combined recorded taxable sales and voided sales.

liability period. In the second reaudit, CDTFA applied a credit-card-sales ratio, which was calculated by appellant using information from December 2018 (one month of the current liability period) for use in a subsequent audit.¹⁸ In that calculation, appellant treated all of the unsupported voids as cash sales to determine a cash-sales ratio of 35 percent (or a 65 percent credit-card-sales ratio). CDTFA adjusted the cash-sales ratio to account for voids that it considered to be legitimate, which increased the credit-card-sales ratio to 66.9 percent. Applying the 66.9 percent credit-card-sales ratio to appellant's credit card sales per its Form 1099-K data resulted in unreported taxable sales of \$567,962 (a reduction of \$428,543 to the original taxable measure).

OTA notes several issues that occurred during the audit: appellant failed to provide a complete set of books and records; appellant changed payment policies during the observation test; and appellant abruptly closed during the two-week test. In addition, the available records conflicted with receipts obtained by CDTFA. Moreover, appellant failed to report any cash sales during the period October 21, 2018, through January 9, 2019, even though CDTFA made a purchase with cash. According to CDTFA's contemporaneous notes, a control purchase was made with cash during this last period, but CDTFA received a receipt showing a credit card payment. In other words, the cash purchase was recorded by appellant as a credit card sale. Thus, it was reasonable and rational for CDTFA to conclude that both appellant's books and records and CDTFA's two observation tests were not reliable. Given the lack of deposited and reported cash sales and the number of voided sales, particularly in December 2018, it was also reasonable and rational for CDTFA to assume the voided sales represented unreported cash sales, to make the appropriate adjustments for legitimately voided sales, to adopt the resulting 66.9 percent credit-card-sales ratio, and to apply it to the Form 1099-K data. Accordingly, the burden of proof shifts to appellant to show that the taxable measure is warranted. (*Appeal of Talavera, supra.*)

On appeal, appellant concedes that the second download is inaccurate and made various arguments against CDTFA's use of the second download in its initial audit and first reaudit. However, given that CDTFA's second reaudit employs a different audit methodology, OTA considers CDTFA to have abandoned its previous audit methodology, which renders appellant's arguments related thereto moot.

¹⁸ See footnote 12.

With respect to the second reaudit, appellant objects to CDTFA using its compromise of a 65-percent credit-card sales ratio in a subsequent audit to the audit here. Appellant contends it did not accept cash during December 2018, that the 344 recorded voids do not constitute cash sales, and that it accurately reported all of its sales for that month. However, during the oral hearing, appellant's president was unable to explain the voids or the increase in the number of voids. Appellant alternatively asserts that the voids may have been a system error or glitch. Appellant also submits a forensic report asserting that the voided transactions do not represent voided sales but instead represent voided payments that were either legitimate voids or represented split payments. However, appellant's president did not offer any of these reasons when asked to explain the voids. Moreover, appellant does not provide any specific evidence or documents to support the findings in the forensic report or why split payments would appear as voids in the POS. Additionally, appellant has not provided any explanation as to why there was a sudden increase in voided transactions during December 2018, or why a payment would time-out multiple times. Thus, OTA finds CDTFA's decision to treat the voids as cash payments reasonable and rational.

Next, appellant argues that an alternative audit method should be used to verify taxable sales. Specifically, appellant argued at the oral hearing that a credit-card ratio using appellant's Form 1099-K information and statistical data based on similar restaurants in the area would be the best method. Appellant asserts that "use of the third-party forms would result in a more verifiable amount of taxable sales because it does not rely on data from a POS that contained inaccurate data as a result of a technical glitch." Appellant also states that during the audit it suggested other options such as a COGS test, and a credit-card-sales ratio based on the August 2019 observation test. With respect to the COGS test, appellant notes that a test was performed and CDTFA found that it matched the reported sales.

However, appellant has not provided any evidence that the use of statistical data from other businesses in appellant's area would result in a more accurate measure of taxable sales. As discussed above, CDTFA attempted multiple alternative audit methods. For example, CDTFA calculated a book markup by comparing reported taxable sales to COGS, as noted by appellant. However, CDTFA could not verify appellant's COGS because appellant did not provide copies of its purchase invoices. To date, appellant has not provided evidence from which COGS can be verified. CDTFA also reasonably found that the August 2019 observation test could not be

relied upon because appellant did not properly record its sales in the POS during the observation test period (based on its low sales and high credit-card-sales ratio), changes to appellant’s payment policy, and the results of CDTFA’s control purchase made at approximately the same time. Moreover, CDTFA’s use of a different audit methodology (i.e., the one adopted in the audit and first reaudit) resulted in a higher liability than asserted by CDTFA in its second reaudit. As such, appellant’s contention would not result in a reduction of its liability.

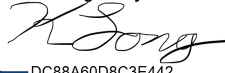
For all of these reasons, OTA finds that appellant has not provided sufficient evidence to show that CDTFA’s calculation is incorrect or that the measure of unreported taxable sales should be further reduced. Appellant has not met its burden of proof.

HOLDING

Reduce the measure of unreported taxable sales to \$567,962, in accordance with the second reaudit. Appellant has not shown that further adjustments are warranted.

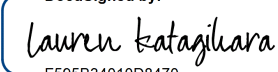
DISPOSITION

CDTFA’s actions in reducing the measure of unreported taxable sales from \$996,505 to \$567,962 and otherwise denying the petition are sustained.

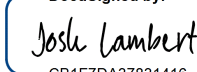
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Keith T. Long
Administrative Law Judge

We concur:

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Lauren Katagihara
Administrative Law Judge

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Josh Lambert
Administrative Law Judge

Date Issued: 7/9/2024