

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 230813955
UNLIMITED ACTIVE WEAR, INC.)	CDTFA Case ID: 3-924-216
EL CENTRO STORE #3)	
)	
)	

OPINION

Representing the Parties:

For Appellant: Shawn Zali, Representative

For Respondent: Jason Parker, Chief of Headquarters Ops.

For Office of Tax Appeals: Daniel Cho, Attorney

J. ALDRICH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Unlimited Active Wear, Inc. El Centro Store #3 (appellant) appeals a Decision issued by respondent California Department of Tax and Fee Administration (CDTFA) denying appellant’s timely petition for redetermination of a Notice of Determination (NOD) issued on June 20, 2022.¹ The NOD is for tax of \$3,622, plus applicable interest, for the period October 1, 2017, through September 30, 2022 (liability period).

Appellant waived the right to an oral hearing; therefore, the matter was submitted to the Office of Tax Appeals (OTA) on the written record pursuant to California Code of Regulations, title 18, (Regulation) section 30209(a).

ISSUE

Whether adjustments are warranted to the determined measure of tax.

¹ The NOD was timely issued because on October 25, 2021, appellant signed the most recent waiver in a series of waivers of the otherwise applicable three-year statute of limitations for the period October 1, 2017, through March 31, 2019, which allowed CDTFA until July 31, 2022, to issue an NOD. (R&TC, §§ 6487(a), 6488.)

FACTUAL FINDINGS

1. During the liability period, appellant operated as a retailer of clothing, selling active wear, accessories, and other miscellaneous taxable merchandise.
2. Appellant reported total sales of \$1,583,455 and claimed deductions for sales tax reimbursement of \$120,683 included in total sales for the liability period. As a result, appellant reported taxable sales of \$1,462,772.
3. Upon audit, appellant provided the following books and records: federal income tax returns for 2017, 2018, and 2019; bank statements for the liability period; sales and use tax worksheets for the liability period; and a point-of-sale system report for March 2018. CDTFA obtained Form 1099-K data for 2017 through 2020.²
4. CDTFA accepted appellant's sales and use tax worksheets to be complete and accurate. CDTFA then compared the \$124,309 in sales tax reimbursement collected that appellant recorded on its sales and use tax worksheets to appellant's reported sales tax reimbursement collected of \$120,683, which resulted in a deficiency of \$3,624.³ CDTFA found that this deficiency represented underreported taxable sales measuring \$43,927.
5. Based on these audit results, CDTFA issued the June 20, 2022 NOD to appellant.
6. Appellant filed a timely petition for redetermination disputing the entire determination.
7. CDTFA issued a Decision denying the petition for redetermination.
8. This timely appeal followed.

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.) However, gross receipts do not include the sales price of property returned by

² Form 1099-K is used to report payments made to a taxpayer by payment card (e.g., credit or debit cards) processing companies (e.g., Visa, MasterCard, or American Express), third-party network (e.g., Venmo or PayPal), and others (e.g., Groupon, Inc.) who make payments to taxpayers that exceed certain thresholds. It is authorized by the IRS for tax administration purposes. (See 26 C.F.R. § 1.6050W-1.)

³ There is a \$2 difference due to rounding.

customers when that entire amount is refunded in either cash or credit. (R&TC, § 6012(c)(2).) Regulation section 1655(a) further provides that the amount upon which tax is computed does not include the amount charged for merchandise returned by customers if, (1) the full sale price, including the portion designated as “sales tax,” is refunded either in cash or credit, and (2) the customer, in order to obtain the refund or credit, is not required to purchase other property at a price greater than the amount charged for the property is returned. 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, CDTFA examined appellant’s sales and use tax worksheets and concluded that the records were accurate and reliable. As a result, CDTFA used a direct audit method of comparing appellant’s records to appellant’s reported taxable sales, which resulted in unreported taxable sales. Based on this method, OTA concludes that CDTFA’s determination is both reasonable and rational, and the burden of proof shifts to appellant to establish that a result differing from CDTFA’s determination is warranted.

On appeal, appellant argues that the sales and use tax worksheets did not account for returned merchandise. Appellant explains that it had returned merchandise during the liability period, which represented the difference between reported and recorded sales tax reimbursement collected. During CDTFA’s appeal process, appellant provided six handwritten invoices that all contained a notation that appellant paid cash back to different customers for differing amounts. However, appellant has not provided any means of tracing these alleged returns to the recorded taxable sales in its sales and use tax worksheets. Without such documentation, it is unclear whether these transactions were taxable sales during the liability period in which appellant

collected sales tax reimbursement. OTA also notes that some of the invoices contained descriptions of the following: (1) one box of pants gray Levi's for a credit of \$621; (2) six boxes of black pants fabric for a credit of \$816; and (3) three boxes of sports shirts with no label for a credit of \$391.12. While it is plausible that a customer may purchase boxes of the same type of clothing, it would seem more reasonable for a retailer to make these types of purchases for resale. OTA notes that CDTFA requested supporting documentation from appellant to confirm that these alleged returned merchandise transactions were included in the sales and use tax worksheet calculations; however, appellant did not provide any additional supporting documentation during the appeal proceeding with CDTFA. Likewise, appellant has not provided any additional supporting documentation to OTA to support its claim.

Furthermore, the Sales and Use Tax Law also requires that the full purchase price, including any amount for "sales tax," be refunded to the customer. However, appellant did not provide the original sales invoice to establish that appellant collected sales tax reimbursement on the original retail sale of the merchandise and that the full amount was refunded to the customer. There is no indication on the six handwritten invoices that any "sales tax" was refunded to the customers. Therefore, based on the foregoing, appellant has not met its burden of proof.

HOLDING

Adjustments are not warranted to the determined measure of tax.

DISPOSITION

CDTFA's action is sustained.

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Josh Aldrich
Administrative Law Judge

We concur:

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Kim Wilson
Hearing Officer

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Keith T. Long
Administrative Law Judge

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