OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 221212081
	CDTFA Case ID: 1-727-698
E. HONARCHIAN,	
dba Eddie's Auto World	

OPINION

Representing the Parties:

For Appellant:	E. Honarchian, Owner
For Respondent:	Ravinder Sharma, Hearing Representative Christopher Brooks, Attorney Jason Parker, Chief of Headquarters Ops.
For Office of Tax Appeals:	Craig Okihara, Business Taxes Specialist III

J. ALDRICH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, E. Honarchian, dba Eddie's Auto World, (appellant) appeals a Decision issued by the California Department of Tax and Fee Administration (respondent)[1] partially denying appellant's petition for redetermination of a Notice of Determination (NOD) dated September 5, 2019.[2] The NOD is for tax of $267,760.00, plus applicable interest, and a penalty of $26,776.04 for the period January 1, 2016, through December 31, 2018 (liability period).

As explained below, respondent subsequently performed a reaudit reducing the total determined taxable measure to $3,164,229, which resulted in a reduction to the determined tax and penalty.

Office of Tax Appeals (OTA) Administrative Law Judges Teresa A. Stanley, Josh Lambert, and Josh Aldrich held an oral hearing for this matter in Fresno, California, on

[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 respondent. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to events that occurred before July 1, 2017, "respondent" shall refer to the board.

[2] The NOD was timely issued because on February 5, 2019, appellant signed a waiver of the otherwise applicable three-year statute of limitations for the period January 1, 2016, through June 30, 2016, which allowed respondent until October 31, 2019, to issue an NOD. (R&TC, §§ 6487(a), 6488.)

April 17, 2024. At the conclusion of the hearing, the record was closed and this matter was submitted for an Opinion.[3]

ISSUES

1. Whether further adjustments to the amount of unreported taxable sales are warranted.[4]
2. Whether any adjustments to the amount of disallowed claimed returned taxable merchandise are warranted.
3. Whether the negligence penalty is warranted.

FACTUAL FINDINGS

1. Appellant, a sole proprietor, operated a used car dealership located in Fresno, California, during the liability period.[5] Appellant was issued a seller's permit with an effective start date of June 1, 2009. Appellant was previously audited for the period April 1, 2012, through March 31, 2015. Appellant did not provide complete records for the prior audit. In the prior audit, respondent established unreported taxable sales of $2,360,484 and an error ratio of approximately 154 percent.
2. For the liability period, appellant reported on his sales and use tax returns (SUTRs) total sales of $4,566,999, claiming deductions of $60,841 for returned taxable merchandise, $14,552 for nontaxable labor, "other" for an unidentified deduction of $2,062, and smog fees of $479, resulting in reported taxable sales of $4,489,065. Appellant also reported

[3] At the beginning of the hearing, appellant requested a postponement. OTA denied appellant's request because appellant did not establish good cause. (See Cal. Code Regs., tit. 18, § 30220(a).) In addition to appellant's argument, OTA considered the pertinent procedural history. On August 3, 2023, this appeal was noticed for an August 30, 2023 prehearing conference (PHC) and an October 18, 2023 oral hearing. OTA also issued a prehearing conference statement request (PHCSR) to the parties. On September 6, 2023, OTA issued Minutes and Orders of Prehearing Conference (M&Os), which in pertinent part granted appellant's request for a 120-day postponement. After the 120-day postponement expired, OTA issued notices for a second PHC and an oral hearing on February 8, 2024. OTA also issued a second PHCSR. Appellant did not respond to the second PHCSR and did not appear at the second PHC. In light of the circumstances, the March 30, 2024 M&Os requested that appellant confirm his attendance by April 2, 2024, for the oral hearing scheduled for April 17, 2024. Appellant timely confirmed his attendance with no mention of a postponement request.

[4] Following a reaudit, the remaining measure for this audit item consists of: unreported taxable sales of $2,803,811 based on DMV Reports of Sale (ROS) data; and unreported taxable sales of $270,668 based on Franchise and Income Tax Return differences.

[5] Respondent reports that appellant also had a smog check shop at a separate location that was not in operation during the liability period.

purchases of $4,496 subject to use tax. In sum, appellant reported a taxable measure of $4,493,561 ($4,489,065 + $4,496).

3. Respondent made numerous requests for books and records. Appellant did not provide any records such as sales journals, sales contracts, DMV Reports of Sale (ROS), purchase journals, merchandise purchase invoices, or sales tax worksheets to verify reported sales for the liability period. Due to the lack of books and records, respondent concluded that an indirect audit method would be necessary to verify appellant's reported taxable sales.

4. Respondent obtained federal income tax returns (FITRs) for 2016 and 2017. Respondent compared total sales reported on the SUTRs for 2016 and 2017 to the corresponding gross receipts reported on the FITRs noting a large difference of $270,668 (rounded) in 2017. Appellant was unable to explain the reason for the difference or provide documentation to substantiate reported gross receipts. As explained below, respondent concluded that this difference was attributable to unreported sales identified in its analysis of DMV ROS data but decided to establish a separate taxable measure for unreported taxable sales of $270,668 based on the differences with the FITR allocated equally to each quarter in 2017.

5. Respondent then obtained the DMV ROS data for the liability period from DMV. Using Vehicle License Fee (VLF) codes listed in the DMV ROS data, respondent estimated the sales prices and compiled 582 taxable vehicle sales totaling $7,560,500 for the liability period.[6]

6. Respondent made several requests to appellant for deal jackets.[7] During a site visit at the business, respondent obtained six deal jackets; three from 2016 and three from 2017. Respondent compared the sales price from the sales contract to the corresponding estimated sales price based on the DMV ROS data and found that respondent's estimated

[6] Respondent reports that the sales information obtained from the DMV included the Vehicle Identification Number, license plate number, year and make of the vehicle, vehicle registration date, and a two-letter Vehicle License Fee (VLF) code designating a range of sales prices in $200 increments. Respondent considered the registration date to have occurred shortly after the actual date of sale, and thus respondent used the vehicle registration date to group the vehicles into quarterly periods in which the vehicles were sold. Respondent used the VLF code to assign the lowest estimated sales price in the $200 range, designated by a particular code. For example, VLF code "AA" designates that the sales price of the vehicle was between $13,000 and $13,199, and respondent would assign a sales price of $13,000 for sales involving VLF "AA."

[7] Deal or dealer jackets are routinely used by car dealers, and each deal jacket contains the various documents related to the sale, including but not limited to the vehicle sales contract, the DMV ROS, and vehicle purchase invoice.

sales price was the same for one sale and less than the actual contract sales price in the remaining five sales. For the six sales combined, the estimated sales price was 2.51 percent less than the actual contract sales price. Respondent concluded that the estimated sales prices were reasonable, if not conservative. Respondent also noted that appellant also separately charged taxable documentation processing fees of $65.00 and smog inspection fees of $50.00 for each sale.

7. Thus, for the 582 vehicle sales, respondent calculated taxable documentation processing and smog inspection fees of $66,930 (($65 + $50) × 582).

8. In total, respondent calculated audited taxable sales of vehicles of $7,627,430 ($7,560,500 + $66,930). Upon comparison to taxable sales of $4,549,906 reported on the SUTRs, respondent computed a difference of $3,077,524 ($7,627,430 - $4,549,906) for the liability period.[8]

9. As noted above, respondent decided to establish a separate taxable measure for the 2017 FITR difference of $270,668. Thus, respondent deducted the $270,668 from the difference of $3,077,524 to compute unreported taxable sales of $2,806,856 ($3,077,524 - $270,668). Respondent noted credit differences (reported taxable sales exceeded recorded taxable sales) in each quarter during the period January 1, 2016, through September 30, 2016, totaling $140,675. Respondent concluded that appellant had not overstated his reported taxable sales for that period because appellant was unable to explain the difference and did not provide documentation to support reported amounts. Thus, respondent computed unreported taxable sales of $2,947,531 ($2,806,856 + $140,675) for the liability period.

10. A credit difference also occurred in the first quarter of 2017 (1Q17), but respondent believed it was due to its allocation of the FITR difference. Thus, respondent decided to offset the credit amount of $6,542 with unreported taxable sales in the following quarter (2Q17). This resulted in redistributing the difference (unreported taxable sales) but did not change the total of $2,947,531 for the liability period.

11. In computing the difference of $3,077,524 between audited taxable sales and reported taxable sales of $4,549,906, respondent excluded the deduction for claimed returned

[8] The calculation of $4,549,906 in taxable sales consists of: $4,493,561 reported taxable sales - $4,496 reported purchases subject to use tax + $60,841 claimed returned taxable merchandise.

taxable merchandise and addressed returned taxable merchandise separately. Appellant did not provide documentation to support claimed returned taxable merchandise. Therefore, respondent disallowed claimed returned taxable merchandise of $60,841.

12. In a discussion between respondent and appellant, appellant stated that he did not own a vehicle, but he and his wife used vehicles from inventory for personal use. Respondent concluded that the use of the vehicles was subject to use tax under R&TC section 1669.5.[9] Since appellant was a sales person, it is presumed that the vehicles used were frequently demonstrated or displayed, and appellant would be liable for 1/60th of the cost of the vehicle (fair rental value) per month.[10] However, because appellant's wife was not an employee, it is presumed that the vehicles used were not frequently demonstrated or displayed, and appellant would be liable for use tax on the entire cost of the vehicle.[11]

13. Because appellant did not provide vehicle purchase information for the vehicles used, respondent obtained sales data from the various automobile auction houses. From the available auction house sales data, respondent compiled 105 vehicles purchased by appellant totaling $892,785 for 2016 and 2017. Respondent computed an average cost per vehicle of $8,503 ($892,785 ÷ 105 vehicles). Respondent then computed a monthly fair rental value of $142 ($8,503 ÷ 60) and a measure of $5,100 ($142 × 36 months) (rounded) for the liability period.

[9] As relevant here, R&TC section 1669.5(a)(6) states that "Vehicles withdrawn from resale inventory for personal or business use are subject to use tax except as provided in paragraph (a)(5). If the vehicle is not frequently demonstrated or displayed while holding it for resale in conjunction with such business or personal use, the tax is measured by the purchase price of the vehicle."

[10] R&TC section 1669.5(b)(2) states that "When a vehicle dealer or lessor assigns a vehicle as a demonstrator to vehicle sales personnel for a period not exceeding 12 months, it will be presumed that such vehicles are frequently demonstrated or displayed, and that they are also used partly for other purposes. Under these circumstances, the measure of tax is the fair rental value of the vehicle for the periods of personal or business use which are interspersed with the demonstration or display. It will be further presumed that the fair rental value for such business and personal use is 1/60th of the purchase price of the vehicle for each month of combined demonstration or display and use. As used here, the term 'sales personnel' is limited to vehicle sales persons and vehicle sales managers, and to sole proprietors, partners, or corporate officers who directly participate in negotiating sales."

[11] R&TC section 1669.5(b)(3)(B) states that "When a vehicle dealer or lessor assigns a vehicle to persons other than employees or officers, such as relatives or business associates, it will be presumed that the vehicle is not frequently demonstrated or displayed. Tax must be paid measured by the purchase price of such vehicles."

14. Regarding purchases subject to use tax, appellant stated that he reported purchases of parts from out-of-state vendors. Although appellant did not provide supporting documentation, respondent concluded that the parts were likely used on vehicles for resale and not subject to use tax. Respondent deducted the $4,496 reported purchases subject to use tax from the fair rental value of vehicles used by appellant. Respondent noted credit differences totaling $2,796. Appellant provided no supporting documentation to show that he overstated his reported purchases subject to use tax. Thus, respondent computed $3,400 ($5,100 - $4,496 + $2,796) as the fair rental value of vehicles used by appellant for the liability period.
15. Respondent concluded appellant's wife would use one vehicle per year and calculated a measure of $25,509 ($8,503 × 3 years). In total, respondent calculated $28,909 ($3,400 + $25,509) for unreported cost of vehicles subject to use tax for the liability period.[12]
16. Respondent issued the NOD to appellant on September 5, 2019, with a tax liability of $267,760.00, plus applicable interest, and a negligence penalty of $26,776.04.
17. Appellant filed a timely petition for redetermination protesting the NOD in its entirety.
18. Respondent held a discussion of audit findings with appellant and allowed additional time for him to provide documentation supporting his contentions. Appellant failed to provide any documentation. In response to appellant's assertion that the DMV ROS data included duplicate sales, respondent re-examined the DMV ROS data and identified nine sales that it concluded were duplicates. Respondent compiled duplicated vehicle sales of $160,600.
19. Accordingly, respondent prepared a reaudit which reduced the determined taxable measure by $143,720 from $3,307,949 to $3,164,229, which remains in dispute.[13] The reaudit included the following changes:
    a. Respondent removed the nine duplicate sales; and calculated 573 (582 - 9) taxable vehicle sales totaling $7,399,900 ($7,560,500 - $160,600) for the liability period. For the 573 vehicle sales, respondent calculated taxable documentation preparation and smog inspections fees of $65,895 (($65 + $50) × 573).

[12] Appellant has not disputed the unreported cost of vehicles subject to use tax in his appeal here; thus, OTA does not discuss it further.

[13] $2,803,811 unreported taxable sales based on DMV ROS data + $270,668 unreported taxable sales based on FITR differences + $60,841 disallowed claimed returned taxable merchandise + $28,909 unreported cost of vehicles subject to use tax.

b. In total, respondent calculated audited taxable sales of vehicles of $7,465,795 ($7,399,900 + $65,895). Upon comparison to taxable sales of $4,549,906 reported on the SUTRs, respondent computed a difference of $2,915,889 ($7,465,795 - $4,549,906) for the liability period.

c. Respondent deducted the 2017 FITR difference of $270,668 from the difference of $2,915,889 to compute unreported taxable sales of $2,645,221 ($2,915,889 - $270,668). Respondent again noted credit differences in each quarter during the period January 1, 2016, through September 30, 2016, totaling $158,590. Respondent concluded that appellant had not overstated his reported taxable sales for that period. Thus, respondent computed unreported taxable sales of $2,803,811 ($2,645,221+ $158,590) for the liability period.

d. The credit difference also occurred in 1Q17, but respondent believed it was due to its allocation of the FITR difference. Respondent offset the credit amount of $19,457 with unreported taxable sales in the following quarter (2Q17). This resulted in redistributing unreported taxable sales but did not change the total of $2,803,811 for the liability period. Thus, unreported taxable sales based on DMV ROS data decreased by $143,720 from $2,947,531 in the audit to $2,803,811 in the reaudit.

20. Respondent issued a Decision on November 10, 2022.

21. Appellant timely appealed to OTA.

DISCUSSION

Issue 1: Whether further adjustments to the amount of unreported taxable sales are warranted.

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 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*.) To satisfy its burden of proof, a taxpayer must prove both: 1) that the tax assessment is incorrect, and 2) the proper amount of the tax. (*Appeal of AMG Care Collective*, 2020-OTA-173P.)

Here, appellant failed to provide books and records for audit; thus, respondent was unable to verify appellant's reported sales, deductions, and use tax for the liability period using a direct audit method (that is, compiling audited sales directly from appellant's records). Taxpayers are required to maintain and make available for examination on request by respondent, or its authorized representative, all records necessary to determine the correct tax liability under the Sales and Use Tax Law and all records necessary for the proper completion of the SUTRs. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).) Such records include but are not limited to: (a) the normal books of account ordinarily maintained by the average prudent businessperson engaged in the activity in question; (b) bills, receipts, invoices, cash register tapes, or other documents of original entry supporting the entries in the books of account; and (c) schedules or working papers used in connection with the preparation of the tax returns. (Cal. Code Regs., tit. 18, § 1698(b)(1).) Given the lack of records, OTA finds that it was reasonable and rational for respondent to examine appellant's reported sales and use taxes by utilizing an indirect audit method. Respondent used DMV ROS data and appellant's FITRs as the basis for its determination, which are both standard and generally accepted audit procedures for used car dealerships, and thus, OTA finds it was reasonable for respondent to use these two sources to compile additional taxable sales. (See *Riley B's, Inc. v. State Bd. Of Equalization* (1976) 61 Cal.App.3d 610, 612-613.) OTA also finds that the DMV ROS data is a reliable source from which to establish audited sales because it is data maintained by a neutral third party (DMV). Therefore, OTA concludes that respondent has established that its determination is reasonable and rational, and accordingly, the burden of proof shifts to appellant to show errors in the audit.

Appellant asserts that respondent failed to audit his records. Appellant argues that the liability is "way off." Appellant asserts that the audited tax is 90 percent more than what he actually owes. For the liability period, appellant claims that he owes only $56,987.32 in tax. Appellant posits that if respondent is not willing to accept the taxes as reported, then respondent should review all of his invoices. Appellant further argues that respondent is improperly including sales tax on nontaxable labor (i.e., smog inspections). Appellant requests a credit for returned vehicles as well as for repairs performed on vehicles after the sale.

Respondent requested appellant's books and records during the audit fieldwork. Respondent was only able to obtain six deal jackets directly from appellant. Appellant also did not provide documentation supporting his contentions at the appeals conference held by respondent. The record shows that respondent's inability to examine appellant's books and records was due to appellant's failure to make them available to respondent during the audit and appeals processes with respondent. Appellant has not provided any supporting documentation or evidence to support his contentions in his appeal with OTA. Thus, OTA finds appellant's assertions are unpersuasive.

OTA understands appellant disputes the inclusion of documentation preparation fees and smog inspection fees in the taxable measure. Gross receipts mean the total amount of the sale and includes any services that are part of the sale. (R&TC, § 6012(a), (b)(1).) Here, appellant's charges for documentation preparation fees and smog inspection fees were included as part of the sale, as respondent identified in appellant's sales contracts, and as such are taxable.

Appellant also argues that respondent did not make an allowance for repairs on vehicles after the sale. The estimated sales prices were based on the lower end of the sales price range of the VLF code for each vehicle in the DMV ROS data plus the taxable documentation preparation fees and smog inspection fees. Appellant is mistaken that the taxable measure includes any repair labor. Accordingly, OTA rejects appellant's contention that adjustments are warranted for nontaxable repair labor.

Appellant states that he only owes $56,987.32 in sales tax. Appellant has not explained how he determined this amount. Appellant has failed to provide any documentation or other evidence to show that respondent's tax assessment is incorrect. Appellant has not identified any

specific sale from the DMV ROS data which he believes is erroneous or otherwise nontaxable.[14] The DMV ROS data is based on information from the ROS that appellant reported to DMV when he made a retail sale of a vehicle and represents sales during the liability period. Appellant has not provided any evidence that he erroneously reported sales to the DMV. Thus, OTA finds that appellant has failed to meet his burden of establishing that a reduction to the measure of unreported taxable sales is warranted.

In summary, OTA finds that respondent computed audited taxable sales based on the best available evidence. Appellant has not identified any errors in respondent's computation of audited taxable sales or provided documentation or other evidence in support of his contentions from which a more accurate determination could be made. The taxpayer cannot carry his burden simply by asking OTA to find unidentified errors in respondent's determination. (*Appeal of Amaya*, 2021-OTA-328P.) As appellant bears the burden of proof in this case, OTA must conclude that no adjustments are warranted.

Issue 2: Whether any adjustments to the amount of disallowed claimed returned taxable merchandise are warranted.

Appellant argues that respondent did not allow deductions for returned taxable merchandise.

Gross receipts do not include the sale price of property returned by customers when that entire amount is refunded either in cash or credit, but this exclusion shall not apply in any instance when the customer, in order to obtain the refund, is required to purchase other property at a price greater than the amount charged for the property that is returned. (R&TC, § 6012(c)(2).)

Appellant has not identified any specific sale from the DMV ROS data which was returned and properly refunded to the customer and has not provided any documentation or evidence in support. Thus, OTA finds that appellant has failed to meet his burden of establishing that an adjustment to the disallowed claimed returned taxable merchandise is warranted.

[14] The September 6, 2023 Minutes and Orders, referenced above in footnote 3, "asked appellant to identify disputed sales, by vehicle identification number, in this audit." Likewise, OTA asked appellant to "provide the basis for any disputed sale and any supporting documentation associated therewith." OTA received no response to this request.

Issue 3: Whether the negligence penalty is warranted.

Appellant has not explicitly disputed the negligence penalty. However, out of an abundance of caution, OTA will address the negligence penalty.

Respondent imposed the negligence penalty because appellant failed to maintain and provide his books and records for audit, the audit disclosed a substantial understatement of taxable sales, and the issues found in the prior audit were repeated in the current audit.

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.) In *Independent Iron Works, Inc. v. State Board of Equalization* (1959) 167 Cal.App.2d 318, 323, it was held that a negligence penalty is warranted where errors are continued from one audit to the next.

A taxpayer is required to maintain and make available for examination on request by respondent 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 or intent to evade the tax. (Cal. Code Regs., tit. 18, § 1698(k).)

Appellant has not made any specific arguments regarding the negligence penalty but contended in his request for appeal that the liability is overstated by 90 percent. In addition to his assertion that audited taxable sales are incorrect, appellant argues that all his invoices are available for examination. Appellant did not provide complete books and records for audit. Of the 573 taxable vehicle sales disclosed from the DMV ROS data during the liability period, appellant provided six deal jackets. Despite multiple opportunities to do so, appellant did not

provide any documentation or other evidence to support his contentions. Accordingly, OTA finds that the failure to provide complete and accurate books and records supporting sales is evidence of negligence.

OTA notes that the unreported taxable measure of $3,164,229 from the reaudit represents an error ratio[15] of 70 percent when compared to the reported taxable measure of $4,493,561 during the liability period. Audited taxable sales were computed using DMV ROS data which was based on information from the ROS that appellant reported to DMV when he made a retail sale of a vehicle. Thus, appellant knew or should have known that reported taxable sales on his SUTRs were understated. OTA finds the substantial understatement and large error ratio determined in respondent's reaudit is evidence of negligence.

Appellant was previously audited for the period April 1, 2012, through March 31, 2015. Appellant did not provide complete books and records for the prior audit. OTA expects that appellant would have been made aware of the requirement to maintain and make available for examination on request by respondent all records necessary to verify the accuracy of any return filed. Thus, OTA finds that for the audit at issue here, appellant knew or should have known that complete and adequate records were needed and the failure to make them available is evidence of negligence.

Furthermore, unreported taxable sales of $2,360,484 established in the prior audit were also based on DMV ROS data and represented an error ratio of approximately 154 percent. Unreported taxable sales based on DMV ROS data in the current audit was $2,803,811 and represented an error ratio of 62.40 percent. The error in reporting continued from one audit to the next and while the percentage of error decreased, the dollar amount of unreported taxable sales increased. Appellant failed to correct his reporting which resulted in an increase of the amount of the deficiency, which OTA finds is evidence of negligence.

For the above-mentioned reasons, OTA finds that appellant was negligent, and the negligence penalty was properly imposed.

[15] That is, the "error ratio" is the percentage of unreported taxable sales to reported taxable sales.

HOLDINGS

1. Appellant has not shown that further adjustments to the measure of unreported taxable sales are warranted.
2. Appellant has not shown that adjustments to disallowed claimed returned taxable merchandise are warranted.
3. Appellant was negligent and the penalty was properly imposed.

DISPOSITION

Respondent's action in recommending that the determined measure be reduced to $3,164,229 as recommended in respondent's reaudit but otherwise denying the petition is sustained.

DocuSigned by:
Josh Aldrich
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Josh Aldrich
Administrative Law Judge

We concur:

DocuSigned by:
Teresa A. Stanley
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Teresa A. Stanley
Administrative Law Judge

DocuSigned by:
Josh Lambert
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Josh Lambert
Administrative Law Judge

Date Issued: 7/17/2024