OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **CITIES OF FILLMORE, LOS ANGELES, ONTARIO, PALM SPRINGS, SAN DIEGO, SAN JOSE, AND COUNTY OF SACRAMENTO**	OTA Case No. 18011887 CDTFA Case ID: 468771

OPINION

Representing the Parties:

For Appellant:	Michael J. Cataldo, Attorney
For Respondents:	Janis Varney, Representative
For Agency:	Chad T. Bacchus, Tax Counsel IV Scott Claremon, Tax Counsel V Cathy Stocker, Hearing Representative

S. RIDENOUR, Administrative Law Judge: Pursuant to California Code of Regulations, title 18, (Regulation) section 35056(c), City of Fillmore (appellant) appeals a March 30, 2017 Supplemental Decision and Recommendation (SD&R) issued by the agency California Department of Tax and Fee Administration (CDTFA)[1] granting, in part, the petitions for reallocation of local tax revenue filed by the respondents Cities of Los Angeles, Ontario, Palm Springs, San Diego, San Jose, and County of Sacramento (collectively, petitioners). Specifically, the SD&R held that, of the $1,214,373 in local tax directly reported to appellant during the

[1] Appellant originally requested an oral hearing before the State Board of Equalization (BOE), pursuant to former Regulation section 1807, which was repealed and replaced by Regulation section 35056, operative March 19, 2019. The Office of Tax Appeals (OTA) notes that the replacement by Regulation section 35056 does not change the substantive analysis in this appeal; therefore, while former Regulation section 1807 was operative during the period at issue, citations in this Opinion will refer to both Regulation section 35056 and former Regulation section 1807 for ease of reference.

Sales taxes were formerly administered by BOE. In 2017, functions of BOE relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to acts or events that occurred before July 1, 2017, "CDTFA" shall refer to BOE. Pursuant to Government Code sections 15600(d)(2) and 15672, the duty of processing administrative appeals for local tax matters is vested in OTA, beginning January 1, 2018.

period April 1, 2007, through December 31, 2007[2] (allocation period): $838,937 be reallocated directly or indirectly to petitioners; $364,967 be reallocated directly, indirectly, or through countywide pools, to non-petitioning jurisdictions; and $10,469[3] retained by appellant.

Office of Tax Appeals (OTA) Administrative Law Judges Andrew Wong, Suzanne B. Brown, and Sheriene Anne Ridenour held an oral hearing for this matter in Sacramento, California, on December 15, 2022. At the conclusion of the hearing, the record was held open to allow the parties to provide additional briefing. After briefing was completed, the record was closed on March 10, 2023, and this matter was submitted for an opinion.

INTRODUCTION

This appeal involves a petition for reallocation of local taxes under the Bradley-Burns Uniform Local Sales and Use Tax Law (Revenue and Taxation Code (R&TC), § 7200 et seq.). As background, OTA observes that for over 60 years, CDTFA has interpreted the local sales and use tax law as being consistent with, and part of, California's Sales and Use Tax Law (R&TC, § 6001 et seq.). Accordingly, California subjects the retail sale of tangible personal property to a local sales tax whenever the state sales tax applies, and subjects such a sale to a local use tax whenever the state use tax applies. (See Cal. Code Regs., tit. 18, § 1803.) Whether CDTFA administers a local sales or use tax has significant consequences for California cities and counties: all local sales tax revenue goes to the city where the sale was consummated, while local use tax revenue is generally allocated to the county[4] and distributed by the county to its cities out of a countywide pool. Thus, the city in which the sale was transacted will usually receive less revenue when a local use tax is imposed. (*City of South San Francisco v. Bd. of Equalization* (2014) 232 Cal.App.4th 707, 712.)

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[2] The allocation period ends on December 31, 2007. For sales of jet fuel on or after January 1, 2008, the rules for allocating local tax on sales of jet fuel changed such that the place of sale is the point of delivery of the jet fuel to the aircraft. (Revenue and Taxation Code (R&TC), §§ 7204.03, 7205(b)(2); Cal. Code Regs., tit. 18, § 1802(b)(6)(B).)

[3] This amount consists of the local tax that is out-of-statute for non-petitioning jurisdictions (see R&TC, § 7209; Cal. Code Regs., tit. 18, § 35056(b)(3) & (e); see also former Cal. Code Regs., tit. 18, § 1807(a)(5) & (e)) and thus cannot be reallocated. The amount retained by appellant is not in dispute.

[4] For transactions of $500,000 or more, retailers must report the local use tax directly to the jurisdiction of first functional use. (Cal. Code Regs., tit. 18, § 1802(d)(1).)

Here, Retailer,[5] a fuel purchasing limited liability company, allocated on its sales and use tax returns filed for the allocation period the applicable local tax directly to appellant as sales tax. Retailer's allocation of the local tax due is based on the position that Retailer had an office space located in the City of Fillmore (Fillmore office) which was the place of sale. Petitioners objected to Retailer's allocation by filing petitions for reallocation of the local tax (petitions) received by CDTFA's Allocation Group (AG) on March 29, 2008, contending that use tax applies to the sales because the Fillmore office was not a place of business of Retailer that participated in the sales.

ISSUES

1. Whether the disputed amount of local tax allocated as sales tax directly to appellant should be reallocated.
2. If reallocation of tax is warranted, whether reallocation is barred under the equitable doctrine of laches.

FACTUAL FINDINGS

Background Facts

1. Appellant and Inspired Development, LLC (Inspired) entered into an Economic Development Agreement, effective March 1, 2003, which was signed by appellant, Inspired, and the tax services firm Ryan & Company, Inc. (now known as Ryan, LLC (Ryan)). The Economic Development Agreement states that Ryan and Inspired entered into a Joint Marketing Agreement[6] under which Ryan and Inspired agreed to bring appellant new retail establishments, each of which was expected to generate in excess of $10 million in annual taxable sales, and in return for such services, appellant agreed to pay Inspired 85 percent of the local sales tax attributable to sales made within the City of

[5] To maintain the confidentiality of the taxpayer, OTA shall refer to taxpayer solely as Retailer. The submission of an appeal generally constitutes a waiver of the right to confidentiality with regard to all of the briefing and other information provided to OTA by either the party or an agency, including CDTFA. (Cal. Code Regs., tit. 18, § 30430(a).) However, Retailer (i.e., the taxpayer) has not joined the appeal as a party, and a representative in this matter did not obtain a waiver from the taxpayer allowing access to its confidential information; therefore, OTA is precluded from divulging the confidential tax information of taxpayers to third parties. (See R&TC, § 7056(a)(1).)

[6] OTA requested that appellant provide a copy of the Joint Marketing Agreement; however, appellant indicated it was unable to locate the agreement.

Fillmore (Fillmore) by the new retail establishments utilizing the facilities and services of Inspired.

2. Retailer had its corporate headquarters in Houston, Texas, and sold jet fuel[7] exclusively to its parent international air carrier company (Parent), and to Parent's affiliates and subsidiaries (collectively, Customer).[8] It is undisputed that Retailer was a buying company within the meaning of Regulation section 1699(i).[9]

3. Prior to Retailer's formation, Retailer and Inspired entered into a 20-year Agency Agreement, dated June 1, 2006 (Agency Agreement).[10] The Agency Agreement states that Retailer desired to establish a regional sales administration center in host cities (such as appellant) to qualify for certain retail incentive programs offered by Inspired, and that Inspired's duties included: securing by lease, sublease, assignment or purchase, commercial space to house Retailer's regional sales administration in host cities (such as appellant); that the space is to be "leased in [Inspired's] own name on its own account and not as agent for [Retailer];" and that Retailer shall have no obligation to make any payments for same. In addition, Inspired agreed to remit to Retailer an incentive equal to 50 percent of the local sales tax received by appellant due to Retailer's retail sales.

4. Thus, the subject local taxes remitted by Retailer to CDTFA and distributed by CDTFA to appellant are shared as follows: 50 percent to Retailer, 35 percent to Inspired (with an unknown portion shared with Ryan), and 15 percent retained by appellant.

5. On Thursday, September 28, 2006,[11] Retailer and Customer met to execute a 20-year Master Sale Agreement (MSA) with an effective date of October 1, 2006. Under the MSA, Customer agreed to purchase its requirements of aviation fuel and other related items for use in California solely from Retailer, with an obligation to purchase a

[7] While jet fuel is a type of aviation fuel, the terms will be used interchangeably in this Opinion.

[8] Retailer has ceased business operations and its California seller's permit has been closed. Retailer did not join this appeal as a party.

[9] Regulation section 1699 was amended, operative July 1, 2014, and prior to this amendment this language was contained in subdivision (h).

[10] Retailer was not formed until June 27, 2006; however, none of the parties dispute the formation of the Agency Agreement.

[11] While it is unclear from the record whether the meeting took place on Wednesday, September 27 or Thursday, September 28, 2006, appellant clarified during the oral hearing that it was the latter.

minimum of 2.5 million gallons, and a maximum of 15 million gallons, of aviation fuel per month. The MSA is a requirements contract.[12]

6. On Sunday, October 1, 2006, Retailer and Inspired entered into a nine-year commercial sublease for Retailer's nonexclusive use of office space located in the Fillmore office, for a monthly rent of $100, with an agreement not to assign or sublease the office space without prior written consent.[13]

7. There is no dispute that the Fillmore office is the only California location at issue as a possible place of business of Retailer.

Jet Fuel Sales

8. The subject sales are sales of jet fuel delivered to Customer's aircraft at the following California airports: Los Angeles International Airport (LAX), Ontario International Airport (ONT), Palm Springs International Airport (PSP), San Diego International Airport (SAN), San Jose International Airport (SJC), Sacramento International Airport (SMF), Oakland International Airport (OAK), John Wayne Airport (SNA), and San Francisco International Airport (SFO).

9. Fuel delivered to aircraft at SFO (which is located in an unincorporated area of San Mateo County) was delivered from storage tanks located in South San Francisco; therefore, the storage tanks were in a different local taxing jurisdiction from the place of delivery although still within San Mateo County. Fuel delivered to aircraft at the other airports was delivered from storage tanks located at the respective airport; therefore, the storage tanks and the place of delivery were within the same local taxing jurisdiction.

10. It is undisputed that the storage tanks were not owned or operated by Retailer and that the fuel located in the storage tanks was commingled with fuel owned by other persons.

11. It is undisputed that title passed and the sales occurred in California when the jet fuel was delivered to Customer.

[12] A requirements contract is an agreement where one party agrees to buy all of the requirements of a product from the other party. (*RMR Equipment Rental, Inc. v. Residential Fund 1347, LLC* (2021) 65 Cal.App.5th 383, 396-397 [in a requirements contract, the buyer agrees to purchase, and the seller agrees to sell, all or up to a stated amount of what the buyer needs or requires; the quantity term is not fixed at the time of contract, as the buyer's needs are variable and uncertain]; see also Cal. U. Com. Code, § 2306.)

[13] Prior to the sublease agreement between Inspired and Retailer, Inspired entered into a lease agreement with the owner of the Fillmore office property.

Petitions

12. After receiving petitioners' petitions, AG conducted a site visit on May 7, 2008, of the Fillmore office, which had a front signage display for Inspired, not Retailer. After AG found the office locked with no one present, AG telephoned the landlord. During the telephone call, the landlord stated that he never heard of Retailer, that he only knew of Inspired, and that Inspired has "something to do with sales tax."

13. Based on its investigation, AG determined that the Fillmore office was not a valid sales office because Retailer had no employees conducting sales at that office, and that Retailer's sales were negotiated at its Houston, Texas headquarters. On August 4, 2008, AG notified appellant that it proposed to reallocate local tax distributed to appellant beginning April 1, 2007. Appellant responded by letter dated August 28, 2008, stating that it reserved its rights with respect to an appeals conference administered by CDTFA's Appeals Bureau[14] and requested a 30-day extension, which was granted with a new due date of October 3, 2008.

14. By letter dated October 3, 2008, appellant filed a timely petition of the August 4, 2008 notification. Appellant indicated that it was "in the early stages of confirming the facts of this matter" and that "[t]his objection correspondence is sent pursuant to [former Regulation section 1807(b)(5) through (7)] for the [AG's] consideration." Appellant stated that the "suggestion of an appeals conference is premature, and that an initial review of this objection by [AG] is clearly contemplated by [former Regulation section 1807(b)(5) through (7)]." Appellant indicated that it was in the process of obtaining evidence, which it expected to provide AG within 30 days and requested AG to "await such period of time before issuing the supplemental decision contemplated by [former Regulation section 1807(b)(7)]."

15. AG acknowledged receipt of appellant's petition by letter dated October 29, 2008, and indicated that it was referring the matter to the Appeals Bureau, and provided AG's contact information should appellant have any questions. Thereafter, AG sent appellant another letter dated November 10, 2008, stating that appellant's "appeal did not present

[14] Appeals conferences were formerly administered by BOE's Appeals Division. Operative July 1, 2017, appeals conferences for tax matters, including local tax, were transferred to CDTFA's Appeals Bureau. (See Gov. Code, §§ 15570.50, 1557.52.) For ease of reference, when this Opinion refers to acts or events that occurred before July 1, 2017, "Appeals Bureau" shall refer to the Appeals Division.

any new information which would cause [AG] to change [its] position" and since appellant requested an appeals conference, it was referring the matter to the Appeals Bureau. However, the Appeals Bureau determined that the matter was not ripe for Appeals Bureau consideration and returned the matter to AG with directives to issue a decision and, if necessary, a supplemental decision.[15]

16. AG issued its decision on September 26, 2012, and its supplemental decision on December 21, 2012. In both decisions, AG recommended reallocation of the disputed local tax. Appellant filed a timely objection to AG's decision and supplemental decision on November 12, 2012, and February 15, 2013, respectively.

17. On March 18, 2013, the matter was transferred to the Appeals Bureau. Subsequently, on March 22, 2013, AG made a timely request to have the matter returned for further investigation. AG sent questionnaires to Retailer and appellant, and, after reviewing the responses, AG issued a second supplemental decision recommending reallocation. Appellant timely requested review by the Appeals Bureau.

18. While this matter was with CDTFA, appellant submitted documentation, including:

    a. Two documents signed on an unstated day in September 2006 by J. Misner. J. Misner signed one document in his capacity as Executive Vice President and CFO of Parent/Customer and delegated to R. Avant his "authority to execute" an MSA with Retailer on behalf of Parent/Customer. He signed the other document in his capacity as Manager of Retailer and delegated to D. Bowman his "authority to execute" an MSA with Parent/Customer on behalf of Retailer.

    b. A signed declaration of J. Cooperman, dated April 6, 2016, declaring, among other things, that she "was the office manager and worked at [Inspired], located at [the Fillmore office]" from 2003 to 2010, and that she was "hired to serve as the office manager for Inspired … and [she] acted as an agent for [Retailer]." J. Cooperman further declared that as agent for Retailer she "reviewed the purchase orders [from Customer] and ensured the orders were within the prescribed requirements set forth by the [MSA]," and if a "purchase order was not correct, it was [her] duty to reject the order and notify [Customer] as to the basis for the rejection;" however, if a

[15] A local tax allocation matter is properly before the Appeals Bureau when petitioner or any notified jurisdiction timely appeals the AG's *supplemental* decision. (Cal. Code Regs., tit. 18, § 35056(d)(1) & (2); see also former Cal. Code Regs., tit. 18, § 1807(c)(1) & (2).)

purchase order was deemed acceptable, she would notify Retailer via an Authorization to Release Inventory that it was authorized to release inventory to Customer. J. Cooperman indicated that any questions regarding the release of inventory were to be directed to her and it was under her sole discretion to accept or reject orders.

c. Documentation identified as "Purchase Orders"[16] on Parent/Customer's stationery with a Houston, Texas address, indicating Customer's intent to purchase from Retailer:

> This purchase order signifies the intent of [Customer] to buy from [Retailer] [Customer's] *requirements of aviation fuel to be specified during the month* [for which the fuel is being ordered]. Aviation fuel purchased *shall be at least 250,000 gallons of aviation fuel per month, not to exceed 5 million gallons of aviation fuel per mont*h. This purchase order shall constitute an "order" as that term is defined and used in that certain [MSA] dated October 1, 2006. [¶] [Retailer] will sell the aviation fuel to [Customer] pursuant to this purchase order . . . .

(Original underline; italics added.) Attached to some of the purchase orders were facsimile (fax) coversheets from a Houston, Texas, area code to Inspired.[17]

d. Documentation identified as "Authorization to Release Inventory"[18] on Parent/Customer's stationery[19] with the Fillmore office's address, indicating Retailer's authorization for the release of inventory to Customer during stated month, as requested pursuant to the stated purchase order number, and that "The maximum inventory value that may be released to this customer for shipment to California locations during the [stated month] is 5 million gallons of aviation fuel."

[16] While the parties disagree whether the documents were actual purchase orders, OTA uses the same term when discussing the documentation for ease of reference.

[17] The bottom of the fax coversheets states a Kathy, Texas address; however, the fax number sending the documents has a Houston, Texas, area code. Appellant does not dispute that the purchase orders were faxed from Houston, Texas.

[18] While the parties disagree whether the documentation were authorizations to release inventory, OTA uses the same term when discussing the documentation for ease of reference.

[19] The stationery denotes Parent/Customer's name and logo in large, bold lettering centered at the top of the document, under which is Retailer's name and the Fillmore office's address.

(Original underline.) Attached to some of the inventory release authorizations were fax coversheets with Inspired's logo and the Fillmore office's address, and which were faxed from J. Cooperman to Houston, Texas.

e. Documents identified as Invoices on Parent/Customer's stationery with a Houston, Texas address, indicating the description of fuel, the location of delivery, net gallons of fuel sold, and the sales amount. Invoices were dated the month after the month of sales (i.e., an invoice dated May 4, 2007, is for sales made in April 2007).

19. CDTFA's Appeals Bureau held an appeals conference with the parties on March 8, 2016, and issued its Decision and Recommendation (D&R) on August 30, 2016. Thereafter, appellant filed a timely request for reconsideration, and the Appeals Bureau issued its SD&R on March 30, 2017, sustaining the D&R. Appellant timely appealed the SD&R to OTA.

DISCUSSION

Issue 1: Whether the disputed amount of local tax allocated as sales tax directly to appellant should be reallocated.

California imposes upon a retailer a sales tax measured by the retailer's gross receipts from the retail sale of tangible personal property in this state unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, §§ 6012, 6051.) California state sales tax applies to a retail sale of tangible personal property if two conditions are satisfied: (1) title passes (i.e., the sale occurs) in California; and (2) there is some participation in the sale by a California location of the retailer. (R&TC, § 6051; Cal. Code Regs., tit. 18, § 1620(a)(1) & (2).) Thus, if title passes outside California, or if there is no participation in the sale by a California location of the retailer, sales tax does not apply. (See R&TC, §§ 6201, 6401.)

When sales tax does not apply, use tax is imposed on the sales price of property purchased from a retailer for the storage, use, or other consumption of property inside this state. (R&TC, §§ 6201, 6401.) The use tax is imposed on the person storing, using, or otherwise consuming the property. (R&TC, § 6202.) A retailer "engaged in business in this state," including any retailer with substantial nexus with this state for purposes of the commerce clause of the United States Constitution, is required to collect the use tax from the purchaser. (R&TC, § 6203.)

The same rules are applicable to determine whether the local tax is sales tax or use tax. (R&TC, §§ 7202, 7203; Cal. Code Regs., tit. 18, § 1803; *City of South San Francisco v. Bd. of Equalization, supra*, 232 Cal. App.4th at pp. 714, 730.)

Where, as here, it is undisputed that title passes in California, in order for local sales tax to apply, there must be some participation in the sale by a California location of the retailer. Where a California location of the retailer that participates in the sale is the only location of the retailer in California, that location is the place of sale. (R&TC, § 7205; Cal. Code Regs., tit. 18, § 1802(a)(1).) Where the retailer has more than one California location that participates in the sale, the sale occurs at the place of business where the principal negotiations are carried on. (Cal. Code Regs., tit. 18, § 1802(a)(2)(B).) If there is no participation in the sale by a California location of the retailer, then local use tax would apply.

Local use tax is allocated to the place of use, which is the jurisdiction of the first functional use of the purchased property (Cal. Code Regs., tit. 18, § 1802(d)), and this is usually accomplished by allocating the local use tax indirectly to such jurisdiction through its countywide pool (Article III, paragraph B, of the Agreement for Administration of Local Sales and Use Tax).[20] However, for transactions of $500,000 or more, retailers must report the local use tax directly to the jurisdiction of first functional use. (Cal. Code Regs., tit. 18, § 1802(d)(1).)

Petitioners bear the burden of proving, by a preponderance of the evidence, that there was an incorrect allocation of local or district tax. (Cal. Code Regs., tit. 18, § 35056(c)(3); see also former Cal. Code Regs., tit. 18, § 1807(b)(2) & (d)(5).) That is, petitioners must establish by documentation or other evidence that the circumstances petitioners assert (i.e., there was an incorrect allocation of tax) are more likely than not to be correct. (*Concrete Pipe and Products of Cal., Inc. v. Construction Laborers Pension Trust for So. Cal.* (1993) 508 U.S. 602, 622.)

Petitioners' and CDTFA's Position

Petitioners and CDTFA contend that the Fillmore office was not a place of business of Retailer that participated in the sales and, therefore, the local tax on the disputed sales was misallocated to appellant. Relying on Regulation section 1620(a)(2)(A), CDTFA determined that the disputed sales were subject to use tax because no California place of business of Retailer

[20] CDTFA and individual cities enter into form contracts titled "Agreement for Administration of Local Sales and Use Tax," whereby the city agrees that CDTFA will administer the city's local sales and use taxes. (See R&TC, § 7204; see also *City of Commerce v. State Bd. of Equalization* (1962) 205 Cal.App.2d 387.)

participated in the sales, and, therefore, the local use tax should be reallocated either indirectly to the places of use through the countywide pools or directly to the place of first functional use for transactions of $500,000 or more.[21]

CDTFA found, and asserts here, that the Fillmore office was not a place of business of Retailer. CDTFA and petitioners argue that Inspired performing activities at its Fillmore office pursuant to its agreement with Retailer does not transform Inspired's place of business in Fillmore into a place of business of Retailer. CDTFA and petitioners also argue that Retailer's alleged physical presence at the Fillmore office for the September 28, 2006 meeting between Retailer and Customer did not result in the office becoming Retailer's place of business on that date. In addition, CDTFA and petitioners contend that regardless of the alleged validity of the sublease, Retailer did not enter into the sublease with Inspired with the intent of actually making use of the Fillmore office. Having found that the Fillmore office was not a place of business of Retailer, CDTFA also found that Retailer was not properly issued a seller's permit under Regulation section 1699(a), which requires that a seller's permit be held for each California place of business of a person actively engaged in business as a seller of tangible personal property of a kind subject to the sales tax.

CDTFA also found, and asserts here, that the Fillmore office did not participate in the sales under Regulation section 1802(a). CDTFA contends that the only possible term of the agreement that may have been negotiated in Fillmore was the minimum and maximum limits that were handwritten into the agreement. CDTFA also contends that since J. Misner only delegated to R. Avant and D. Bowman authority to execute the agreement and there is no evidence either had authority to negotiate the terms of the agreement, "the most likely explanation is that [R.] Avant and [D.] Bowman received instructions from [J.] Misner as to the numbers to write into the agreement for the minimum and maximum limits" and, therefore, no real negotiations took place at the Fillmore office. Petitioners similarly contend that there is insufficient evidence of any actual negotiation and, nevertheless, the alleged negotiation of the MSA at the Fillmore

[21] Although CDTFA found the local tax was misallocated to appellant, the SD&R reallocated from appellant $1,203,904 of the $1,214,373 in local tax in dispute for the allocation period, resulting in appellant retaining $10,469. AG operationally documented April 8, 2008, as the date of knowledge that applies to non-petitioning jurisdictions. The April 8, 2008 date of knowledge permitted reallocation to non-petitioning jurisdictions only back to the period starting July 1, 2007, with remaining amounts being out-of-statute and thus retained by appellant. (R&TC, § 7209; Cal. Code Regs., tit. 18, § 35056(e); see also former Cal. Code Regs., tit. 18, § 1807(e).) The $10,469 retained by appellant is not at issue and will not be discussed further.

office was not participation in the sale by a California location of Retailer since the office belonged to Inspired until October 1, 2006.

Additionally, CDTFA and petitioners contend that the purchase orders and inventory release authorizations were merely unnecessary reminders of the aviation fuel requirement terms of the MSA and, therefore, receipt of the documentation does not constitute participation in the sale. CDTFA and petitioners assert that there is no evidence that Inspired had direct contact with Customer from the Fillmore office for purposes of processing the actual orders. CDTFA and petitioners contend that Retailer's Houston headquarters was the location where Retailer received the orders required by Article II, section 7 of the MSA,[22] and that preparation of the monthly sales invoices was not participation "in the sale" since the preparation took place after delivery occurred.

For these reasons, CDTFA and petitioners assert that the disputed local tax was incorrectly allocated to appellant and should be reallocated, some either indirectly to the places of use through the countywide pools or directly to the place of first functional use for transactions of $500,000 or more.

Appellant's Position

Appellant asserts that Retailer correctly allocated the disputed local tax to appellant and that petitioners failed to meet their burden of proof that there was a misallocation of tax. Appellant contends that Retailer maintained a place of business at the Fillmore office, in that Retailer subleased the office from Inspired and CDTFA issued Retailer a seller's permit for that location, and Retailer "appointed [Inspired] to conduct ongoing, sales-related activity on its behalf from those premises." Alternatively, appellant argues that the Fillmore office was a place of business of Retailer because the office was a place of business of appellant's agent, Inspired. Appellant also contends that Retailer "actively participated in the sales transactions."

Appellant asserts that Retailer and Customer both negotiated the material terms of the MSA, "including, to be sure, the minimum and maximum gallon [purchase] limits," and executed the contract at the Fillmore office. Regarding the chronology of when Retailer and

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[22] Article II, section 7 of the MSA, under the heading "Delivery Order," provides:

> [Customer] shall notify [Retailer] or [Inspired] when specific deliveries are required. [Customer's] delivery orders shall indicate the delivery location, manufacturer, model number, quantity desired and preferred delivery date.

Customer met to execute the MSA (i.e., Thursday, September 28, 2006) and when Retailer and Inspired entered into a sublease (i.e., Sunday, October 1, 2006), appellant contends that there is nothing unusual about Retailer signing the MSA the week prior so that it could "open for business when the work week resumed on October 2." Appellant also contends that the chronology is nevertheless not relevant because Retailer and Inspired "ratified these arrangements by their systematic conduct over the subsequent months," leaving "no doubt that [Retailer and Inspired] intended for the Fillmore office to be [Retailer's] place of business at all times relevant to this case."

In the alternative, appellant asserts that since Retailer and Inspired entered into the Agency Agreement in June 2006, which specifically included Inspired opening and running an office in Fillmore, anything Inspired did at the Fillmore office was done as an agent of Retailer. Appellant contends that Inspired, as Retailer's agent, was at the Fillmore office on behalf of Retailer and, therefore, Retailer had a place of business where Inspired was located (i.e., the Fillmore office).

Appellant also contends that Customer routinely sent fuel purchase orders detailing the amount of fuel required to Retailer at the Fillmore office and, therefore, Retailer participated in the sales transactions as a matter of law. Appellant asserts that the use of "in any way" in Regulation section 1620(a)(2)(A) directs a broad interpretation of "participation in the transaction." Appellant argues that the MSA called for Inspired, as Retailer's agent, to review Customer's fuel orders and authorize the release of fuel only if the orders were consistent with the terms of the agreement, which, appellant asserts, Inspired did on a regular basis. Appellant contends that there is "no plausible dispute" that Retailer received fuel orders at the Fillmore office, routinely reviewed the orders, and checked them against the MSA, and thus participated in the sales transactions "in any way" pursuant to Regulation section 1620(a)(2)(A).

Finally, appellant notes that the parties do not dispute that Retailer was a buying company. Appellant asserts that since the Fillmore office was the buying company's (i.e., Retailer's) only location, the sales tax must be allocated to that location pursuant to Regulation section 1699(i) (formerly subdivision (h)), which says in part: "A buying company that is not formed for the sole purpose of so re-directing local sales tax shall be recognized as a separate legal entity from the related company on whose behalf it acts for purposes of issuing it a seller's

permit. Such a buying company shall be issued a seller's permit and shall be regarded as the seller of tangible personal property it sells or leases."

Appellant also asserts that the arrangement between it and Retailer is nearly identical to an arrangement between the City of Oakland and United Airlines, and, in that matter, BOE concluded that the local sales tax was properly allocated to Oakland.[23] Appellant argues that pursuant to R&TC section 7224,[24] its arrangement with Retailer must be treated the same way.[25]

For the foregoing reasons, appellant asserts that the sales were properly allocated directly to appellant under Regulation section 1802(a), and that petitioners have not met the burden of proof under Regulation section 35056(c)(3) (see also former Regulation section 1807(b)(2) & (d)(5)) to show by a preponderance of evidence that a misallocation occurred.

ANALYSIS

Here, the subject sales occurred inside this state. Thus, whether sales tax or use tax applies depends on whether *Retailer* had any California place of business that participated in the sales. (Cal. Code Regs., tit. 18, § 1620(a)(2)(A).) For a location to be considered a retailer's place of business in California, the location must be an actual place of business for the retailer. (*Long Beach Container Terminal, Inc.* (SBE Memo.) 1994 WL 719051 (*Long Beach Container*); see also, e.g., Sales and Use Tax Annotation (Annotation) 710.0013 (7/18/91)[26] [providing in relevant part that in order for a location to be considered "a place of sale" (i.e., location participating in the sale) of a retailer for local tax purposes (i.e., retailer's place of business), the

[23] Appellant refers to an August 31, 2016 nonprecedential BOE summary decision (*Appeal of Cities of Ontario, et al.*; see https://www.boe.ca.gov/legal/pdf/Cities_of_Ontario_et_al_525325_525326.pdf) which, like here, involved jet fuel sales made on or before December 31, 2007. However, unlike here, in *Appeal of Cities of Ontario, et al.*, there was no dispute that the taxpayer (i.e., the retailer) had a business location in Oakland. Furthermore, BOE found that the taxpayer's Oakland office participated in the sales at issue and was the taxpayer's only California business location.

[24] R&TC section 7224 states that "Each local jurisdiction has the right to have the law administered in a uniform manner."

[25] The proper allocation of local tax is not determined by the arrangement between parties. Rather, the allocation of local tax depends on whether the sales occurred inside California, and, if so, whether the taxpayer (i.e., the retailer) had any California place of business that participated in the sales. In other words, for sales that occurred in California, the proper allocation of local tax depends on the actions taken (i.e., participation in the sale) and the location of such actions (i.e., the retailer's California place of business), regardless of the agreements.

[26] Annotations do not have the force or effect of law but are entitled to some consideration and may be afforded greater weight in an appeal before OTA when they represent a longstanding interpretation by CDTFA of a statute that CDTFA is charged with interpreting. (*Appeal of Martinez Steel*, 2020-OTA-074P.)

retailer "must have a proprietary interest" in the premises].) For any sale in which a California place of business *of Retailer* did participate, the sales tax applies. (R&TC, § 6051.) Participation supporting imposition of sales tax on a particular sale must be participation in that particular transaction (i.e., sale). (Cal. Code Regs., tit. 18, § 1620(a)(2)(A).) For any sale in which a California place of business of Retailer did not participate, the use tax applies. (R&TC, § 6201.)

In other words, if OTA finds that the Fillmore office was a place of business of Retailer throughout the allocation period *and* that the Fillmore office participated in the subject sales, then the applicable tax is sales tax. (See R&TC, §§ 6051, 6401; Cal. Code Regs., tit. 18, § 1620(a)(2)(A).) On the other hand, if OTA finds that the Fillmore office was not a place of business of Retailer throughout the allocation period *or* that the Fillmore office did not participate in the subject sales, then the applicable tax is use tax. (See R&TC, § 6201.)

Place of Business

The initial inquiry in this analysis, then, is whether the Fillmore office was a business location of Retailer and, if so, whether it was a place of business of Retailer throughout the allocation period. Substantial evidence establishes that the Fillmore office was Inspired's place of business, not Retailer's. First, the Agency Agreement between Retailer and Inspired specifically required Inspired to secure by lease, sublease, assignment, or purchase such commercial space as may be necessary to house Retailer's regional sales administration in host cities (such as appellant). The Agency Agreement further required that such space *be leased in Inspired's own name* on its own account *and not as agent for Retailer*, and that Retailer shall have no obligation to make any payments for same.

Second, Retailer and Customer visited the Fillmore office on Thursday, September 28, 2006, to hold a meeting regarding the MSA. The meeting took place before Retailer and Inspired entered into the purported sublease on Sunday, October 1, 2006. Therefore, it is clear from the facts that the meeting took place at *Inspired's* place of business.

Third, there is no evidence that any of Retailer's employees ever worked out of, at, or in the Fillmore office, nor that Retailer made any use of the Fillmore office while under the purported sublease. And there is no evidence that Retailer had any external indicia tending to show the Fillmore office as its own place of business (e.g., external signage, advertising, etc.).[27] Instead, it was Inspired who was listed as the occupant displayed on the Fillmore office building and door, and, according to J. Cooperman's declaration, she "was hired to serve as the office manager for Inspired … and [she] acted as an agent for [Retailer]." It was Inspired who not only operated the Fillmore office as its own place of business, but who also had exclusive dominion and control over the location.

Furthermore, OTA rejects appellant's contention that the acts of the agent pursuant to an agency agreement are treated as the acts of the principal, citing to *People v. Frangadakis*, 184 Cal.App.2d 540 (1960) ("There is seldom any reason to distinguish between the *service* of an agent and that of a servant or employee. Most of the rules relating to duties, authority, liabilities, etc., are applicable to servants as well as to other agents." (Original italics.)). As explained more fully below, appellant's contention is inapplicable in a local tax context, because for local tax allocation purposes, it must be the *retailer's* place of business that participates in the sale (Cal. Code Regs., tit. 18, § 1620(a)(2)(A)), and the acts of an agent do not transmute the location from which the agent performed those acts into a location of the principal. (See *Borders Online v. State Bd. of Equalization* (2005) 129 Cal.App.4th 1179 (*Borders*).)

Fourth, there is no authority in support of the proposition that an agent's place of business qualifies as the retailer's place of business for purposes of local tax allocation. To the contrary, ample authority holds that the retailer must have a proprietary interest[28] in the premises in order to qualify as the retailer's place of business. (Cal. Code Regs., tit. 18, § 1620(a)(2)(A); *Long Beach Container*, *supra*; Annotation 710.0013 (7/18/91).) While an agent may conduct business

[27] AG conducted a site visit of the Fillmore office on May 7, 2008. While appellant indicated during the hearing that the "office was closed down" in 2008, appellant proffers no evidence of the move-out date, nor evidence that Retailer had any external indicia tending to show the Fillmore office as its own place of business during the allocation period.

[28] OTA notes that Retailer and Inspired entered into a sublease on October 1, 2006, for Retailer's *nonexclusive* use of office space located in the Fillmore office, for a monthly rent of $100. OTA finds that while a lease for the nonexclusive use of a portion of a location may create a right of use for the lessee, it does not, however, create a proprietary interest for the lessee.

for a principal at a location, that does not by itself make the location from which the agent performed the services a business location of the principal.[29]

Accordingly, OTA finds that the Fillmore office was not a place of business of Retailer. Since the Filmore office was not Retailer's place of business, OTA also finds that Retailer improperly held a seller's permit for the Fillmore office.[30] (See R&TC, §§ 6066, 6067, & 6072; Cal. Code Regs., tit. 18, § 1699(a); see also *Cities of Agoura Hills, et al.* (SBE Memo.) 2012 WL 12535748.)

Participation in the sales

As discussed above, for sales tax to apply to the sales at issue, the Fillmore office must have been a place of business of Retailer throughout the allocation period, and there must be some participation in the sales by Retailer at the Fillmore office. (See Cal. Code Regs., tit. 18, § 1620(a)(2)(A).)

While Regulation section 1620(a)(2)(A) identifies two specific activities that constitute participation in the sale (i.e., the taking of the order and the delivery of the purchased property), the regulation also makes clear, by stating that "[p]articipation in the transaction in any way" by a California location of the retailer supports sales tax, that these are not the only activities that constitute sufficient participation to support sales tax. However, OTA finds that "participation in

[29] Appellant, citing to *Borders* and *Scripto, Inc. v. Carson* (1960) 362 U.S. 207 (*Scripto*), asserts that since Inspired conducted business at the Filmore office as Retailer's agent, Retailer is considered to have conducted business at the Fillmore location, due to agency law, and therefore the Fillmore location qualifies as Retailer's place of business. However, neither *Borders* nor *Scripto* involve the imposition of sales tax; rather, both involve whether an authorized agent's selling activities undertaken in this state on behalf of the out-of-state retailer created a use tax obligation on the retailer. For example, in *Borders*, the Court of Appeal found that the retailer's authorized agent in California engaged in selling activity such that the principal was "engaged in business" in California under R&TC section 6203 for purposes of retailer's use tax collection obligation. The court in *Borders* did not address whether the presence and activity of an agent's employee at a given location transmutes that location into the principal's "place of business." Indeed, if such were the case, the principal in *Borders* would have had a sales tax liability rather than a use tax collection obligation.

[30] It appears to OTA that appellant contends that Retailer was issued a seller's permit for the Fillmore office, ergo the Fillmore office was Retailer's place of business, citing Annotation 710.0024 (8/5/83) ("To constitute a 'place of business,' the retailer's location must be a permanent office, must have a seller's permit issued to that address, and must have personnel negotiating sales assigned there on a permanent basis"). However, such a contention is misplaced. R&TC section 6066 and Regulation section 1699 require a seller to hold a permit under certain criteria. However, neither authority supports the proposition that being issued a seller's permit creates any presumption that the location is a place of business of the seller, nor that the issuance of a seller's permit is determinative of local tax allocation. Rather, Regulation section 1699(f), addressing inactive permits, supports a finding that a seller's permit may be revoked if it is determined that it was not properly issued, including because the location was not actually a place of business of the permit recipient.

any way" for purposes of this provision does not include a meaningless activity performed solely as a basis to reallocate local tax away from the jurisdiction(s) entitled to that tax. Rather, "participation in any way" necessarily means a California business location of the retailer having some *meaningful effect* on the sales process (e.g., negotiating sales contracts with the customer, accepting or approving orders from the customer, approving credit, billing, or delivering goods to the customer).[31] However, the activity supporting imposition of sales tax on a particular sale must be tied to that sale. For example, participation by a California business location of a retailer in that retailer's purchases of resale inventory, the internal process of price setting via discussions among the retailer's employees, and participation in activities taking place after the sale occurred, are not participation in the sale. In other words, the participation by a California business location of the retailer must serve some real purpose in the actual sales process and involve some genuine physical interaction with the sale from that location.

Appellant asserts that Retailer and Customer "negotiated the material terms of the [MSA] and executed the contract at the [Fillmore office]," thereby participating in the sales. However, the evidence belies appellant's contention. R. Avant and D. Bowman derived their authority to sign the MSA from the same person. In his capacity as Executive Vice President and CFO of Parent, on an unstated day in September 2006, J. Misner delegated *only* his authority to execute the agreement on behalf of Parent to R. Avant. In his capacity as Manager of Retailer, on an unstated day in September 2006, J. Misner delegated *only* his authority to execute the agreement on behalf of Retailer to R. Bowman. There is no evidence that J. Misner delegated any other authority to R. Avant or to D. Bowman, nor any evidence that they had any authority whatsoever to *negotiate* any of the terms in the agreement. Thus, OTA finds that the MSA was not negotiated at the Fillmore office and the execution of the MSA is not participation in the sales by the Fillmore office.

Moreover, even if the MSA was negotiated at the Fillmore office, OTA finds that negotiation of a requirements contract (i.e., the MSA) is not participation in the sale for purposes

[31] The sale occurs when title passes and, unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes performance with reference to the physical delivery of the goods. (Cal. U. Com. Code, § 2401(2).) Therefore, to have meaningful effect on the sales process, the "participation in anyway" must occur before or at the time of title passage. OTA notes that billing can be done before title passes and the sale occurs (such as is common when general consumers place orders over the Internet) or after (as appears was the common process for the disputed sales here). While billing before the sale would certainly qualify as participation in the sale under Regulation section 1620(a)(2)(A) (and also for purposes of Regulation section 1802), billing after the sale cannot qualify as participation in the sale.

of Regulation section 1620. Requirements contracts create a mutually enforceable long-term relationship as to a purchase and sale *arrangement*. (See *RMR Equipment Rental, Inc. v. Residential Fund 1347, LLC* (2021) 65 Cal.App.5th 383, 396-397.) OTA finds that a requirements contract is a contract that *contemplates* a sale of goods, but it is not itself a contract that transfers title to any tangible personal property for consideration, and therefore it is not a sale of tangible personal property. Accordingly, any participation by the parties in negotiating and executing a requirements contract is *not* participation in the actual subsequent sale of tangible personal property, and thus, it is not participation *in the sale* for purposes of Regulation section 1620.

Appellant also asserts that the purchase orders from Customer were regularly and systematically reviewed, processed, and approved at the Fillmore office, and this activity qualifies as Retailer's participation in the sales. The purchase orders Customer sent to the Fillmore office signify an intent to purchase "at least 250,000 gallons of aviation fuel per month, not to exceed 5 million gallons of aviation fuel per month." (Original underline.) OTA notes that the range in each purchase order is inconsistent with the maximum and minimum amounts delineated in the MSA (i.e., a minimum of 2.5 million gallons, and a maximum of 15 million gallons, per month). The inconsistent amounts calls into question J. Cooperman's declaration that she "reviewed the purchase orders [from Customer] and ensured the orders were within the prescribed requirements set forth by the [MSA]," and if a "purchase order was not correct, it was [her] duty to reject the order and notify [Customer] as to the basis for the rejection," as there is no evidence that J. Cooperman rejected the incorrect purchase orders. Instead, J. Cooperman repeatedly sent an Authorization to Release Inventory in response to the purchase orders, even those with inconsistent amounts. Furthermore, as discussed below, the provided invoices show that Customer's purchases far exceeded the 5-million-gallon maximum amount per month that Customer indicated on the purchase orders, which calls into question the purpose of the purchase orders.

Nevertheless, even if the amounts on the purchase orders matched those stated on the MSA and Customer's purchases did not exceed the amounts indicated on the purchase orders, OTA finds that the purchase orders (and the processing of the purchase orders) served no real purpose in the actual sales process. The purchase orders merely restate what was already known by the parties by virtue of the MSA (i.e., Customer intends to purchase from Retailer an amount

of jet fuel to be specified at a later date). More importantly, according to Article II, section 7 of the MSA, Customer was required to notify Retailer or Inspired when specific deliveries are required, and the delivery orders must "indicate the delivery location, manufacturer, model number, quantity desired, and preferred delivery date." Appellant has proffered no evidence establishing that Customer's orders, as required by this section, were received by Retailer at the Fillmore office. The purchase orders indicate that "[Retailer] will sell the aviation fuel to [Customer] pursuant to this purchase order…"; however, W. Coursey[32] explained during the March 8, 2016 Appeals Bureau appeals conference that Retailer knew how much fuel to make available at each location based on the needs Customer communicated to Retailer at its corporate headquarters in Houston, Texas. Therefore, OTA finds that Customer's communication to Retailer in *Houston* were the actual orders placed in accordance with Article II, section 7 of the MSA. OTA also finds that the purchase orders sent to the Fillmore office, and the processing of those purchase orders, had no meaningful effect on the sale process and, therefore, do not constitute participation in the sale for purposes of Regulation section 1620.

With regard to the inventory release authorization forms, the forms also merely restate what was already known by the parties by virtue of the MSA (i.e., Retailer will release to Customer an amount of jet fuel to be specified at a later date). More importantly, despite the inventory release authorization forms authorizing a maximum of 5 million gallons of aviation fuel for the applicable month (as opposed to the maximum of 15 million gallons stated in the MSA), each provided sales invoice indicates that Customer purchased (i.e., Retailer released) *over the maximum* quantity of aviation fuel the authorization forms authorized for release each month,[33] which calls into question the purpose of the inventory release authorization forms. Given all the evidence, OTA finds that the inventory release authorization forms had no meaningful effect on the sale process and, therefore, do not constitute participation in the sale for purposes of Regulation section 1620.

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[32] W. Coursey did not participate in the appeal before OTA. However, W. Coursey did participate in the appeal before CDTFA as a Director of Ryan. W. Coursey signed a declaration dated October 19, 2015, declaring that he "regularly provided services to" Retailer and Customer.

[33] According to the sales invoices, Customer purchased in 2007: 5,333,535 gallons in April; 6,201,157 gallons in May; 6,787,507 gallons in June; 8,304,881 gallons in July; 8,451,653 gallons in August; 7,454,409 in September; 5,762,735 gallons in October; 6,003,914 gallons in November; and 6,132,928 gallons in December. These purchases far exceeded the 5-million-gallon maximum amount per month, as indicated on the purchase orders and as authorized under the authorization forms.

As for the monthly sales invoices, appellant contends that the billing activity qualifies as participation in the transaction in any way. However, while billing done before the sale occurs would qualify as participation in the sale under Regulation section 1620, billing *after* the sale cannot qualify as participation *in* the sale, as the sale (i.e., the transaction) has been completed before the billing.[34] (See Cal. U. Com. Code, § 2401.) Here, the invoices were issued monthly after delivery of the fuel to the aircraft, and after reconciling the fuel receipts with the orders. Accordingly, OTA finds that the invoices were issued after the sale and, therefore, do not constitute participation in the transaction for purposes of Regulation section 1620.

Next, the fact that Retailer was a buying company for Parent does not affect the analysis in this case, because a buying company still must satisfy the requirements of Regulation section 1620(a)(2)(A) in order to properly allocate the local sales tax to the buying company's location. (See *Cities of Agoura Hills, et al., supra*.) As discussed above, the Fillmore office was not Retailer's place of business, and Retailer did not meaningfully participate from that location in the disputed sales. Accordingly, Retailer's status as a buying company is immaterial.

Based on all of the foregoing, OTA finds that the tax applicable to Retailer's sales was use tax, and that petitioners met their burden of proving by a preponderance of the evidence that Retailer's allocation of the local tax to Fillmore as sales tax was incorrect. Since the sales at issue were subject to use tax, OTA also finds that the local tax portion of the sales should be reallocated indirectly to the places of first functional use through the countywide pools and, for transactions of $500,000 or more, directly to the jurisdiction of first functional use.

Issue 2: If reallocation of tax is warranted, whether reallocation is barred under the equitable doctrine of laches.

Laches is an equitable defense developed by courts "to protect defendants against 'unreasonable, prejudicial delay in commencing suit.'" (*SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC* (2017) 580 U.S. 328, 333, citing *Petrella v. Metro-Goldwyn-Mayer, Inc.* (2014) 572 U.S. 663, 667.) In general, laches is defined as the neglect or failure of a plaintiff to assert a right for such a period of time that results in prejudice to defendant requiring that the plaintiff's cause of action be barred in equity. (*Appeals of Renshaw* (86-SBE-191) 1986

[34] The determination of whether a sale is subject to sales tax or to use tax is made at the time of sale. (See, e.g., Cal. Code Regs., tit. 18, § 1684(a) [retailer must generally collect applicable use tax from purchaser at time of sale].)

WL 22873.) Whether any delay was unreasonable is a question of fact. (*Ibid*.) Moreover, the defense of laches depends not only upon an unreasonable delay in asserting a right, but also upon an injury to the plaintiff occasioned by that delay, since a mere lapse of time, without prejudice to the taxpayer therefrom, is in itself insufficient to constitute laches in equity. (*Ibid*.) Prejudice is never to be presumed; rather, it "must be affirmatively demonstrated … in order to sustain [the] burdens of proof and the production of evidence on the issue." (*Highland Springs Conference & Training Center v. City of Banning* (2016) 244 Cal.App.4th 267, 282, citing *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624.) The party asserting and seeking to benefit from laches bears the burden of proof of proving both that there was an unreasonable delay and that there was prejudice resulting from the delay. (*Mt. San Antonio Community College Dist. v. Public Employment Relations Bd*. (1989) 210 Cal.App.3d 178, 188.)

Appellant contends that the reallocation of tax is barred by laches.[35] Specifically, appellant argues that the four-year lapse of time between March 29, 2008 (when AG received petitioners' petitions) and September 26, 2012 (when AG issued its decision) is unreasonable and prejudicial to appellant because business operations in Fillmore had since closed, many documents were no longer available, and witnesses' memories waned.

The process for reviewing local tax allocation starts when a jurisdiction files a "petition" with AG to investigate a suspected misallocation. (Cal. Code Regs., tit. 18, § 35056(b)(10); see also former Cal. Code Regs., tit. 18, § 1807(a)(3).) When a jurisdiction files a petition, CDTFA (i.e., both AG and the Appeals Bureau) is neither a plaintiff nor a defendant.[36] Rather, CDTFA investigates and makes a finding regarding the proper allocation of tax. CDTFA is the first level trier of fact in local tax allocation matters; CDTFA is not commencing a suit against appellant from which appellant is entitled to protection from unreasonable, prejudicial delay. Thus,

[35] Appellant asserts that delay was caused by AG (i.e., CDTFA). Appellant does not assert, nor does the record indicate, that petitioners directly caused any delay.

[36] Appellant's contention that AG is a "party" pursuant to Regulation section 35056(b)(9) is misplaced. While Regulation section 35056(b)(9) defines "party" as "the jurisdiction filing a petition for redistribution, any notified jurisdiction, and the assigned section," the use of "party" throughout the regulation is limited to when the assigned section's (here, AG's) decision is appealed to the Appeals Bureau, and the steps taken during review by the bureau. AG submits arguments and evidence in support of its finding and attends the appeals conference. However, AG does not commence suit against the jurisdiction(s); rather, AG is a first level trier of fact in local tax allocation matters that participates as a party during review by the Appeals Bureau and is not asserting a right (much like CDTFA participates as a party in local tax allocation matters before OTA). Rather, the parties asserting a right throughout the entire process (from AG receiving petitions, to an appeal before OTA) are the petitioning jurisdiction(s) (here, petitioners) and notified jurisdiction(s) (here, appellant).

CDTFA is not asserting a right for which it may be found to have negligently or failed to assert in a timely manner, prejudicial to appellant. Therefore, OTA finds laches is inapplicable as a defense against CDTFA and its reallocation of tax in local tax allocation matters. Nevertheless, out an abundance of caution, OTA addresses whether the required elements of laches have been met in this matter.

Here, AG received petitioners' petitions seeking reallocation of the disputed local tax revenue on March 29, 2008. AG reviewed and investigated the petitions and just over four months later, on August 4, 2008, notified appellant that AG proposed to reallocate the local tax revenue at issue. Pursuant to Regulation section 35056(c)(3) & (4) (see also former Regulation section 1807(b)(2) & (3)), AG is granted a minimum of six months from receipt of a petition to issue a written decision to grant or deny the petition; thereafter, if a decision is not issued, the petitioner may request AG to issue a decision within 90 days of receiving the request. Here, AG reached its decision[37] within the minimum six-month timeframe. Therefore, there has been no showing that there was an unreasonable delay when AG notified appellant on August 4, 2008, that AG proposed to reallocate the local tax revenue at issue.

Regarding the time between August 4, 2008 (when AG notified appellant that it proposed to reallocate the local tax revenue at issue), and September 26, 2012 (when AG issued its decision), OTA asked the parties during the hearing to address what transpired during this four-year period in relation to laches. Appellant argues that when AG sent appellant the November 10, 2008 letter stating that appellant did not present any new information which would cause AG to change its position and the matter was being referred to the Appeals Bureau, AG's "decision had already been made" and that "everything went silent" thereafter until April 16, 2012, when appellant responded to AG's information request.[38] Appellant contends that there is no reasonable explanation for the lapse of time and that the delay was prejudicial. CDTFA counters that while there is no formal record of what transpired

[37] While the Appeals Bureau subsequently determined that the matter was not ripe for its consideration and returned the matter to AG with directives to issue a decision, appellant refers to the August 4, 2008 notification as AG's "decision" for purposes of Regulation section 35056(c)(3) & (4) (see also former Regulation section 1807(b)(2) & (3)), and argues that the option to request AG to issue a decision within 90 days of receiving the request was not available to appellant or petitioners since a decision was made within six months.

[38] The AG's request is not in the appeal record. During the hearing, CDTFA stated that appellant's April 16, 2012 letter was in response to AG again requesting appellant provide documentation in February 2012.

between January 2009 (after the Appeals Bureau returned the matter to AG),[39] and February 2012 (when AG sent a request to appellant), this matter was one of eight local tax matters before CDTFA involving appellant, and appellant, having participated with AG in deciding the prioritization of the appeals, gave several of the other appeals higher priority because CDTFA had not distributed some of the amounts that were reported to appellant pending the outcome of those appeals. CDTFA states that between 2009 and 2011, AG worked to complete the other appeals before working on this matter, which CDTFA asserts was beneficial to appellant and appellant's then-representative (who represented appellant in all eight matters) as it allowed for case prioritization.

Regarding the time between August 4, 2008 (when AG notified appellant that it intended to reallocate the local tax revenue at issue), and September 26, 2012 (when AG issued its decision), OTA notes that appellant had a significant role in the lapse of time. Appellant indicated in its October 3, 2008 petition that it was "in the process of obtaining copies [of documentation]," and that it expected to provide the information within 30 days. However, the record indicates that it was not until April 16, 2012, more than three and a half years from the date of appellant's petition, that appellant provided information to AG. In addition, this matter was one of eight CDTFA appeals to which appellant was concurrently a party, and appellant, having participated with AG in deciding the prioritization of the appeals, gave several of the other appeals higher priority because CDTFA had not distributed some of the amounts that were reported to appellant pending the outcome of the appeals. OTA finds that appellant, having a significant role in the lapse of time between August 4, 2008, and when AG issued its decision on September 26, 2012, is precluded from now claiming the delay was unreasonable. Moreover, OTA finds that there is no evidence of an unreasonable delay by AG before it issued its September 26, 2012 decision, and, therefore, the reallocation of tax is not barred by laches.

Furthermore, even if OTA did find an unreasonable delay by CDTFA, appellant has failed to establish that there was resulting prejudice to appellant, which is also required for laches. Appellant contends that by the time AG issued its September 26, 2012 decision, the Fillmore operations had been shut down for four years, that many of its documents "had been

[39] The Appeals Bureau's directive is not in the appeal record; however, CDTFA stated during the hearing that the Appeals Bureau returned the matter to AG in December 2008.

lost to history, and its witnesses' memories faded." However, appellant has not proffered any evidence of the steps it took to obtain the documentation and testimony, let alone that it was prejudiced in its pursuit. Appellant was notified as early as August 4, 2008, that AG proposed to reallocate the local tax revenue at issue.

During the hearing, OTA asked appellant to explain what steps, if any, it took to obtain evidence in support of its position after receiving the August 4, 2008 notification. Appellant states that since it believed its matter to be the same as the arrangement between the City of Oakland and United Airlines, appellant also believed that it had all the "essential" evidence it needed to support its position (i.e., the Agency Agreement, MSA, etc.). Appellant contends that thereafter AG sent appellant an information request in February 2012 requesting "irrelevant" information and evidence to which appellant no longer access, and that appellant "maybe would have been able to" obtain the information had it been requested in 2008. Appellant states that it did not provide AG the agreements it had in 2008 due to the "tone" of the AG letters indicating that the matter was going to the Appeals Bureau, rather than requesting appellant provide information. Appellant is not a novice to proposed reallocation matters before CDTFA. OTA finds that appellant's assumption that it had all the "essential" evidence (i.e., the various agreements) in 2008 to support its position since it had an arrangement similar to that between the City of Oakland and United Airlines, was appellant's conscious choice. As stated earlier, the proper allocation of local tax is not determined by the arrangement between parties; rather, for sales that occurred in California, the proper allocation of local tax depends on the actions taken (i.e., participation in the sale) and the location of such actions (i.e., retailer's California place of business), regardless of the agreements. Appellant's conscious election to secure only what it believed to be the "essential" evidence in 2008 to support its position, and to forego any additional evidence as "irrelevant," was appellant's choice and fails to demonstrate prejudice against appellant. Even if there were prejudice, it would be attributable to appellant's own choices. Thus, OTA finds that appellant has failed to affirmatively demonstrate that it suffered any prejudice as a result of delay. Therefore, OTA finds that appellant has not met its burden of proof as to either, let alone both, elements required for laches.

For the aforementioned reasons, OTA finds that the reallocation of tax at issue is not barred by laches.

HOLDINGS

1. Petitioners have established that the disputed amount of local tax allocated as sales tax directly to appellant shall be reallocated as directed by CDTFA's March 30, 2017 SD&R.
2. The reallocation of tax is not barred under the equitable doctrine laches.

DISPOSITION

CDTFA's action in partially granting and denying the petitions is sustained.

DocuSigned by:
Susana Seyller
6FE2EBECC6F6481... *for*

Sheriene Anne Ridenour
Administrative Law Judge

We concur:

DocuSigned by:
8A4294817A67463...

Andrew Wong
Administrative Law Judge

DocuSigned by:
Suzanne B. Brown
47F45ABE89E34D0...

Suzanne B. Brown
Administrative Law Judge

Date Issued: 6/19/2023