OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **C. GUASSAC,** **dba Long Lodge Tribal Enterprise**	OTA Case No. 230613610 CDTFA Case ID: 4-079-381

OPINION

Representing the Parties:

For Appellant: C. Guassac

For Respondent: Jennifer Barry, Attorney

For Office of Tax Appeals: Craig Okihara, Business Taxes Specialist III

S. KIM, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, C. Guassac, dba Long Lodge Tribal Enterprise (appellant) appeals a decision issued by the California Department of Tax and Fee Administration (respondent) denying appellant's timely petition for redetermination of a Notice of Determination (NOD) issued on July 21, 2022. The NOD is for tax of $182,993, plus applicable interest, and a negligence penalty of $18,299.33 for the period October 1, 2020, through June 30, 2021 (liability period).

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

ISSUES

1. Whether any adjustments are warranted to the audited measure of unreported taxable sales.
2. Whether respondent properly imposed the negligence penalty.
3. Whether OTA has jurisdiction to address an alleged violation of due process, and if so, whether respondent violated appellant's due process rights.

FACTUAL FINDINGS

1. Appellant, a sole proprietorship, operated a cannabis dispensary[1] located in Costa Mesa, California.
2. For the liability period, appellant filed sales and use tax returns (SUTRs) reporting total sales and taxable sales of $31,877, with no claimed deductions.[2]
3. Respondent audited appellant for the liability period. Appellant did not provide any books or records for the audit. Respondent obtained appellant's point-of-sale (POS) sales data from appellant's POS vendor.[3, 4] Respondent compiled taxable sales of $2,393,090[5] for the liability period from the POS sales data.[6] Upon comparison to appellant's reported taxable sales for the liability period, respondent computed unreported taxable sales of $2,361,213.[7]
4. Respondent previously audited appellant for the period January 1, 2018, through September 30, 2020 (prior audit). Appellant disputed the prior audit in an agency-level appeals process with respondent. On June 13, 2023, respondent issued a supplemental decision for that appeal, and the liability for the prior audit period is now final.
5. On June 19, 2019, the Department of Consumer Affairs, Cannabis Enforcement Unit (predecessor to the Department of Cannabis Control) issued a property receipt to

[1] Appellant did not have a valid license issued by the Department of Cannabis Control to sell cannabis.

[2] Appellant reported zero sales for the second quarter of 2021 (2Q21).

[3] A POS system typically includes one or more terminals at which sales can be recorded. Depending on the equipment and software, POS systems can generate receipts for the customer showing items purchased, sales price, amount tendered, cash or credit, and change provided, if any. POS systems can also produce various reports for the retailer, which can summarize sales activity for the period of time selected by the operator and can include breakdowns of sales by type and amount, including product or service, credit or cash, and taxable or nontaxable.

[4] The POS vendor, Mindbody, provided respondent with the POS sales data on March 23, 2022, during respondent's appeals process for appellant's prior audit.

[5] On its SUTRs for the liability period, appellant did not claim any deductions for sales tax included in reported sales, or otherwise show that sales tax was included in the payment amount listed in the POS sales data. Thus, respondent determined that the recorded sales in the POS sales data was ex-tax (without payment of sales tax).

[6] During the liability period, appellant's POS sales data recorded 41,860 sales transactions, with an average sale price of $57.17 per transaction ($2,393,090 ÷ 41,860).

[7] The unreported taxable sales of $2,361,213 represents an error ratio of 7,407 percent when compared to reported taxable sales of $31,877.

appellant showing that various cannabis products,[8] documents, computers, and other electronic equipment were seized.

6. On April 9, and April 21, 2021, the California Highway Patrol (CHP) executed a till-tap warrant[9] of appellant's business in connection with the prior audit, which is not at issue in the current appeal. CHP seized a total of $25,645 from the cash register.[10]

7. Respondent issued appellant the July 21, 2022 NOD. Appellant timely filed a petition for redetermination disputing the NOD. On May 18, 2023, respondent issued a decision denying the petition.

8. Appellant timely appealed to OTA.

DISCUSSION

Issue 1: Whether any adjustments are warranted to the audited measure of unreported taxable sales.

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

[8] Among the seized cannabis products were 11.42 pounds of THC-based topicals, 27.92 pounds of THC concentrates, 66.47 pounds of THC edibles, and 8.62 pounds of cannabis flower.

[9] A till-tap warrant, issued by respondent for the enforcement of any liens and for the collection of any delinquent tax, allows CHP to collect cash and cash equivalents at a taxpayer's place of business. (See R&TC, § 55161.)

[10] On April 9, and April 21, 2021, appellant's POS sales data recorded 445 sales transactions, with an average sale price of $57.63 ($25,645 ÷ 445).

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, the taxpayer must prove both: (1) the tax assessment is incorrect; and (2) the proper amount of tax. (*Appeal of AMG Care Collective*, 2020-OTA-173P.)

Here, appellant did not provide any books or records for the audit. Respondent obtained appellant's POS sales data from appellant's POS vendor and computed the audited taxable sales based on that data. Respondent's reliance on the POS sales data was reasonable given that the sales information must have been provided to the POS vendor from appellant's POS system, and the POS vendor is an independent and disinterested source. Moreover, the POS data shows the date and payment amount for every sales transaction, and the average sale price during the liability period ($57.17) is consistent with the average sale price during the two days that the till-tap warrants were executed ($57.63). Accordingly, respondent's determination was reasonable and rational. Thus, the burden of proof to establish that a different determination is warranted shifts to appellant.

Appellant contends that his sales were substantially lower than the audited taxable sales based on the POS data. Appellant asserts that respondent relied on unverified information and "cherry-picked" evidence supporting respondent's position but ignored evidence that was unfavorable to respondent. Appellant argues that respondent's determination of his sales is unrealistic because over 50 unlicensed and licensed cannabis dispensaries were located in or near the city of Costa Mesa. Appellant asserts he submitted a declaration dated March 11, 2022,[11] establishing that his sales were substantially lower than determined by respondent and that not all sales were of cannabis.

However, appellant has not provided any books and records to support the contention his sales were substantially lower than the audited taxable sales. Appellant has not provided or even identified the evidence he asserts was unfavorable to respondent. The number of other cannabis dispensaries near appellant's business is irrelevant because respondent made its determination based on sales information that appellant recorded in his own POS system. Regarding

[11] Appellant did not submit the declaration to OTA as part of his briefing in the current appeal. Appellant submitted the declaration, dated March 11, 2022, to respondent in connection with the agency-level appeal of appellant's prior audit, which is not at issue in this appeal. Respondent provided a copy to OTA.

appellant's March 11, 2022 declaration, the statements included therein are not supported by any documentary evidence, and pertain to the prior audit period, not the liability period at issue here. Moreover, contrary to appellant's assertion, the declaration does not include any information establishing that the audited taxable sales based on the POS sales data was overstated or that not all sales were of cannabis.

Appellant asserts that the POS sales data was unreliable for determining taxable sales because it "was used only to reflect the quantity, not the price of products," and "only reflected quantity of sales, not the sales price, nor the donations made." In his reply brief, appellant states that the POS system was "used to catalog the *type* of products sold, not the price and quantity of products sold." (Emphasis in original.) Appellant argues that his business was a small tribal operation and that "changes to the software POS system could be made at any time by any person." Appellant also asserts that he donated a majority of the "medicinal cannabis" because the products were of inferior quality and that the POS system did not reflect the amount of donations made.

However, the POS sales data shows various dollar amounts paid for each sale ("PaymentAmount") but does not include any information about the type or quantity of the products sold.[12] Appellant has not provided evidence showing that any other individual had the authority to access and make changes to the POS system software, that any changes were made to the POS system, or how any changes could have impacted the POS sales data. Furthermore, respondent only asserted a liability for sales amounts recorded in the POS data. There is no evidence showing that any of the sales recorded in the POS data included any donations of cannabis.

Appellant also contends that his books and records were seized during three raids in 2021 and never returned to appellant.[13] Appellant asserts that he provided all available documents to respondent, and that respondent should have access to the seized books and records because the

[12] Although the POS sales data included a "BarcodeID" for each sale, every sale shows the same number.

[13] The Department of Consumer Affairs, Cannabis Enforcement Unit (the predecessor to the Department of Cannabis Control) issued a property receipt to appellant showing that various cannabis products, documents, computers, and other electronic equipment were seized on June 19, 2019. On April 9, and April 21, 2021, CHP executed a till-tap warrant of appellant's business in connection with a separate audit of appellant's business for the period January 1, 2018, and September 30, 2020, which is not at issue in the current appeal. A till-tap warrant, issued by respondent for the enforcement of any liens and for the collection of any delinquent tax, allows CHP to collect cash and cash equivalents at a taxpayer's place of business. (See R&TC, § 55161.)

seizure was carried out by the Department of Cannabis Control and respondent is a "sister state actor." Appellant also argues that he has offered to provide additional documents to respondent, including income tax returns, a "tribal business mission," and a declaration of "the process involved in the POS system."

However, appellant has not provided any evidence showing that his books and records were seized in 2021, either by respondent or any other agency. Although the Department of Cannabis Control seized various items, including business documents and computers, that seizure occurred on June 19, 2019, more than a year before the start of the liability period and would not have included the books and records for sales during the liability period. Also, pursuant to a till-tap warrant, CHP collected cash and cash equivalents from appellant's business on April 9, and April 21, 2021, but did not seize any other items or documents. Furthermore, appellant has not submitted any additional documents to OTA or provided any explanation for how any additional documents would support an adjustment to the audited measure of unreported taxable sales.

Based on the foregoing, OTA finds that appellant has failed to meet his burden of proof to establish that respondent's determination was incorrect or what the proper amount of tax should be. Accordingly, no adjustments are warranted to the audited measure of unreported taxable sales.

Issue 2: Whether respondent properly imposed the negligence penalty.

R&TC section 6484 provides for the imposition of a 10 percent negligence penalty if any part of the deficiency for which a deficiency determination is made was due to negligence or intentional disregard of the law or authorized rules and regulations.

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 keep complete and accurate records is considered evidence of negligence and may result in the imposition of

penalties. (Cal. Code Regs., tit. 18, § 1698(k).) A negligence penalty is generally justified where errors are continued from one audit to the next. (*Independent Iron Works, Inc. v. State Bd. of Equalization* (1959) 167 Cal.App.2d 318, 321-24.)

Here, appellant failed to provide any books or records for the liability period. Appellant's failure to maintain and keep any books or records of his sales is evidence of negligence. (See Cal. Code Regs., tit. 18, § 1698(k).) During the audit, respondent discovered that appellant had a substantial amount of unreported taxable sales. The evidence also shows that, in the prior audit for the period January 1, 2018, through September 30, 2020, appellant also failed to provide sufficient books and records, and had a substantial amount of unreported taxable sales.[14] Appellant's failure to address reporting errors from the prior audit is also evidence of negligence. (See *Independent Iron Works, Inc. v. State Bd. Of Equalization*, *supra*.)

Appellant argues that respondent caused appellant's inability to produce any books and records by seizing records and not returning them to appellant. Appellant asserts that respondent imposed the negligence penalty based on findings in prior audits, even though those prior audits are still in dispute and not final.

However, as discussed above, appellant has failed to establish that respondent, or any other agency, seized any of appellant's books or records for the liability period. Although the evidence shows a seizure of documents occurred on June 19, 2019, any books and records related to the liability period would not have existed at the time of the seizure. CHP collected cash on April 9, and April 21, 2021, pursuant to a till-tap warrant, but there is no evidence showing any books and records were seized at that time.

Although appellant also argues that he has offered to submit additional documents to respondent, appellant's offer to provide additional documents during respondent's appeals process, long after the audit has been completed, does not negate his failure to provide books and records during the audit. Moreover, as stated above, appellant has not submitted any additional documents to OTA or explained how these documents would support an adjustment to the audited measure.

Based on the foregoing, OTA finds that respondent properly imposed the negligence penalty.

[14] For the prior audit period, the unreported taxable sales of $7,359,230 represented an error ratio of 4,771 percent when compared to reported taxable sales of $131,077.

Issue 3: Whether OTA has jurisdiction to address an alleged violation of due process, and if so, whether respondent violated appellant's due process rights.

Appellant argues that he "has a constitutional right to dispute the findings of [respondent] and should not be penalized for doing so." Appellant asserts that respondent's "actions are discriminatory and a violation of civil rights." Appellant further contends that respondent caused appellant's inability to produce books and records, and that to "penalize [appellant] for the actions of [respondent] is unjust and a violation of [appellant's] constitutional rights."[15]

In general, except where the violation affects the adequacy of a notice, the validity of an action from which a timely appeal was made, or the amount at issue in the appeal, OTA is without jurisdiction to consider whether appellant is entitled to a remedy for respondent's actual or alleged violation of any substantive or procedural right. (Cal. Code Regs., tit. 18, § 30104(e).)

Appellant has not explained how any alleged violation of his constitutional rights affected the adequacy of a notice, the validity of an action from which a timely appeal was made, or the amount at issue in the appeal.[16] Appellant has not cited to any relevant California statute or authority granting OTA jurisdiction to address due process claims against respondent. Accordingly, OTA does not have jurisdiction to consider any alleged violations of due process raised by appellant.[17]

[15] Appellant cites the Fourth Amendment of the U.S. Constitution, which prohibits unlawful searches and seizures.

[16] The June 19, 2019 seizure was effectuated by the Department of Cannabis Control, not respondent. Furthermore, the execution of the till-tap warrants only resulted in the seizure of cash and cash equivalents, and not any books or records or other items.

[17] To the extent that appellant believes he was being treated unfairly by respondent, his options may include contacting respondent's Taxpayers' Rights Advocate Office.

HOLDINGS

1. Appellant has failed to establish that adjustments are warranted to the audited measure of unreported taxable sales.
2. Respondent properly imposed the negligence penalty.
3. OTA does not have jurisdiction to address any alleged violations of appellant's due process rights.

DISPOSITION

Respondent's action denying respondent's petition for redetermination is sustained.

DocuSigned by:
Steven Kim
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Steven Kim
Administrative Law Judge

We concur:

DocuSigned by:
Michael F. Geary
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Michael F. Geary
Administrative Law Judge

Signed by:
Kim Wilson
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Kim Wilson
Hearing Officer

Date Issued: 10/4/2024