OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **BLOOM INVESTMENT CORP.,** **dba The Car Store**	OTA Case No. 230212529 CDTFA Case IDs: 1-011-615, 1-961-750, 1-231-599, 1-941-446, 2-170-877, 2-366-226

OPINION

Representing the Parties:

For Appellant: Mitchell Stradford, Representative

For Respondent: Jason Parker, Chief of Headquarters Ops.

For Office of Tax Appeals: Lisa Burke, Business Taxes Specialist III

A. WONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) sections 6561 and 6901, Bloom Investment Corp. (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA) denying appellant's petitions for redetermination of three Notices of Determination (NODs), as well as corresponding protective claims for refund,[1] for the following three periods: (1) July 1, 2012, through June 30, 2015; (2) October 1, 2015, through March 31, 2017; and (3) April 1, 2017, through September 30, 2018 (hereafter, collectively referred to as "liability period").[2]

The first NOD, issued on September 18, 2019, is for tax of $476,284 (based on unreported taxable sales of $5,979,018), plus applicable interest, and a negligence penalty of $47,628.39 for the period July 1, 2012, through June 30, 2015.[3] The second NOD, issued on

[1] A taxpayer will sometimes file both a petition for redetermination *and* a claim for refund to protect its right to claim a refund or credit for overpayments that may be discovered during either an audit or the taxpayer's appeal of the NOD. Such claims are frequently referred to as "protective claims for refund."

[2] The State Board of Equalization (BOE) formerly administered sales and use taxes. On July 1, 2017, BOE functions relevant to this appeal transferred to CDTFA. (See Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to events that occurred before July 1, 2017, "CDTFA" refers to BOE.

[3] CDTFA timely issued the first NOD on September 18, 2019, because appellant waived the otherwise applicable three-year statute of limitations and extended CDTFA's deadline to issue the first NOD to October 31, 2019. (See R&TC, §§ 6487(a), 6488.)

April 9, 2020, is for tax of $467,357 (based on unreported taxable sales and disallowed claimed nontaxable sales for resale totaling $5,802,414),[4] plus applicable interest, and a negligence penalty of $46,735.70 for the period October 1, 2015, through March 31, 2017.[5] The third NOD, issued on September 15, 2020, is for tax of $259,784 (based on unreported taxable sales of $3,219,237),[6] plus applicable interest, and a negligence penalty of $25,978.38 for the period April 1, 2017, through September 30, 2018.[7]

As explained more fully below, for the second NOD, CDTFA concedes to reducing the determined measure of tax from $5,802,414 to $3,412,372, which will reduce the corresponding tax and negligence penalty.

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

ISSUE

Whether further reductions to the determined measures of tax are warranted.[8]

FACTUAL FINDINGS

1. During the liability period, appellant, a corporation doing business as The Car Store, operated a used car dealership in Santa Ana, California.
2. Upon audit, CDTFA made multiple requests for appellant's books and records for the liability period, but appellant did not provide them, so appellant's reporting method was unknown to CDTFA. CDTFA turned to third parties and obtained the following records:

[4] CDTFA also asserted additional district taxes on a taxable measure of $66,334.

[5] CDTFA timely issued the second NOD on April 9, 2020, because appellant waived the otherwise applicable three-year statute of limitations and extended CDTFA's deadline to issue the second NOD to April 30, 2020. (See R&TC, §§ 6487(a), 6488.)

[6] CDTFA also asserted additional district taxes on a taxable measure of $91,150 and district taxes on a taxable measure of $359,451.

[7] CDTFA timely issued the third NOD on September 15, 2020, because appellant late filed its sales and use tax return for the second quarter of 2017 on October 7, 2017 (the return was due by July 31, 2017), and CDTFA issued the third NOD within three years after that October 7, 2017 filing date (i.e., by October 7, 2020). (See R&TC, § 6487(a).)

[8] On appeal to OTA, appellant did not dispute the negligence penalties, so OTA will not discuss their merits further.

appellant's federal income tax returns for 2012 through 2018; vehicle auction house reports for the liability period; California Department of Motor Vehicles (DMV) Report of Sale (ROS) data for the liability period;[9] and Form 1099-K data for the period October 2015 through 2018.[10]

3. Using the DMV ROS data, CDTFA compiled the total amount of appellant's sales of vehicles for each quarterly period within the liability period. CDTFA also assumed that appellant's customers registered each vehicle soon after its date of sale, so CDTFA used the vehicle registration dates to group the transactions into the quarterly periods in which appellant presumably sold the vehicles. To estimate the sale price for each vehicle sold, CDTFA used the lowest price in the $199.99 range indicated by the Vehicle License Fee (VLF) code shown in the DMV ROS data.[11]

First Audit Period: July 1, 2012, through June 30, 2015

4. For the period July 1, 2012, through June 30, 2015 (first audit period), appellant reported total sales of $3,695,375 and claimed a deduction of $423,901 for nontaxable sales for resale for the second quarter of 2015, which resulted in reported taxable sales of $3,271,474.
5. Using DMV ROS data, CDTFA compiled vehicle sales of $9,250,492 for the first audit period. In the absence of documentation supporting claimed nontaxable sales for resale, CDTFA found that all the vehicle sales were subject to tax.
6. A comparison of audited taxable sales of $9,250,492 with reported taxable sales of $3,271,474 showed unreported taxable sales of $5,979,018 for the first audit period.

[9] The DMV ROS data is based on the ROSs appellant submitted to DMV for its vehicle sales and included the vehicle identification number, license plate number, year and make of vehicle, vehicle registration date, and a two-letter Vehicle License Fee (VLF) code designating a range of sales prices in $199.99 increments for each of the recorded transactions.

[10] Form 1099-K is an Internal Revenue Service form titled "Payment Card and Third Party Network Transactions," which shows the monthly and annual amounts a bank, credit card company, or third-party network paid to a merchant during a given time period. Form 1099-K includes payments made by any electronic means, including, but not limited to, credit cards, debit cards, and PayPal. In its appeal brief to OTA, CDTFA included Form 1099-K data for appellant for the period 2011 through 2019.

[11] For example, if DMV ROS data showed a VLF code of "AC" for a transaction, CDTFA estimated a sale price of $200 because VLF code "AC" indicates that the sale price of the vehicle was between $200 and $399.99. CDTFA notes that, due to the lack of available records, it could not determine whether taxable documentation fees and/or smog fees were included in the sale price designated by the VLF code. However, CDTFA found that the materiality of potential increases to the estimated vehicle sale prices did not warrant further investigation.

7. CDTFA issued the first NOD to appellant on September 18, 2019, with a tax liability of $476,284, plus applicable interest, and a negligence penalty of $47,628.39.
8. Appellant filed a timely petition for redetermination disputing the first NOD in its entirety, as well as a protective claim for refund.

Second Audit Period: October 1, 2015, through September 30, 2018

9. For the period October 1, 2015, through September 30, 2018 (second audit period), appellant reported total sales of $8,632,372 and claimed deductions of $5,985,386 for nontaxable sales for resale, which resulted in reported taxable sales of $2,646,986.
10. Using DMV ROS data, CDTFA compiled vehicle sales of $9,286,995, which exceeded appellant's reported taxable sales for the second audit period by $6,640,009.
11. In the absence of documentation supporting claimed nontaxable sales for resale, CDTFA found that all vehicle sales were subject to tax and disallowed appellant's claimed nontaxable sales for resale that exceeded unreported taxable sales based on DMV ROS data. Specifically, CDTFA disallowed claimed nontaxable sales for resale totaling $2,381,642 for the second audit period. However, as noted above and explained more fully below, CDTFA conceded this measure of tax.
12. CDTFA noted that appellant reported taxable sales only under the Orange County district tax jurisdiction (i.e., where its business was located) for the period October 1, 2015, through March 31, 2018, and reported no taxable sales subject to any district tax for April 1, 2018, through September 30, 2018, even though appellant made taxable sales of vehicles subject to registration in jurisdictions imposing district taxes.[12]
13. Based on DMV ROS data, CDTFA found that appellant made sales to customers in other district tax jurisdictions and, for the three district tax jurisdictions where appellant made the most sales (Orange County, Los Angeles County, and Riverside County), CDTFA calculated the percentage of sales appellant made in each of these three district tax jurisdictions compared to the total sales made in the three district tax jurisdictions combined (district tax jurisdiction ratio). CDTFA then applied the district tax jurisdiction

[12] The law provides in pertinent part that any retailer of vehicles subject to registration pursuant to Chapter 1 (commencing with Section 4000) of Division 3 of the Vehicle Code, is a retailer engaged in business in any district where a district tax is imposed and is required to collect the applicable district tax from the purchaser and pay it to CDTFA when the vehicle is registered in that district. (Cal. Code Regs., tit. 18, § 1823(a)(1).)

ratios to reported taxable sales and established a separate deficiency measure for additional district taxes on reported taxable sales.

14. For the period October 1, 2015, through March 31, 2017, CDTFA computed sales of $66,334 subject to the Los Angeles County district tax.[13]

15. For the period April 1, 2017, through March 31, 2018, CDTFA computed total sales of $91,150 subject to the Los Angeles County and City of Riverside district taxes.[14]

16. For the period April 1, 2018, through September 30, 2018, CDTFA computed total sales of $359,451 subject to either the Orange County, Los Angeles County, or Riverside County district taxes.

17. Appellant did not respond to CDTFA's requests to discuss the audit results and, because the applicable three-year statute of limitations for a portion of the second audit period was about to expire, CDTFA decided to split the second audit period into the following two periods and issue separate audit reports and NODs for each: October 1, 2015, through March 31, 2017; and April 1, 2017, through September 30, 2018.

18. For the period October 1, 2015, through March 31, 2017, CDTFA prepared an audit report dated April 2, 2020, for unreported taxable sales of $3,420,772 based on DMV ROS data, disallowed claimed nontaxable sales for resale of $2,381,642, and reported taxable sales subject to additional district taxes of $66,334. Based on this audit report, CDTFA issued the second NOD to appellant on April 9, 2020, for a tax liability of $467,357, plus applicable interest, and a negligence penalty of $46,735.70 for the period October 1, 2015, through March 31, 2017.

19. For the period April 1, 2017, through September 30, 2018, CDTFA also prepared an audit report dated April 3, 2020, for unreported taxable sales of $3,219,237 based on DMV ROS data, reported taxable sales of $91,150 subject to additional district taxes, and reported taxable sales of $359,451 subject to district taxes. Appellant failed to provide documentation to support any adjustments, so, based on this audit report, CDTFA issued the third NOD to appellant on September 15, 2020, for a tax liability of $259,784, plus

[13] Los Angeles County's district tax rate was higher than Orange County's.

[14] For the second audit period, Riverside County's district tax rate was the same as Orange County's; however, beginning April 1, 2017, the City of Riverside's district tax rate was higher than Orange County's due to a transit tax that went into effect on that date.

applicable interest, and a negligence penalty of $25,978.38 for the period April 1, 2017, through September 30, 2018.

20. Appellant filed timely petitions for redetermination disputing the second and third NODs in their entirety, as well as protective claims for refund.

Post-Audit Appeals Proceedings

21. CDTFA held a consolidated appeals conference with appellant for all related appeals and on January 18, 2023, issued a decision denying appellant's petitions for redetermination and protective claims for refund.

22. Appellant timely appealed to OTA.

23. During CDTFA's preparation of additional briefing for this appeal before OTA, CDTFA prepared a reaudit report dated November 7, 2023, for the second audit period. CDTFA had obtained from DMV a new download of ROS data for the second audit period and identified duplicate vehicle sales (unwinds) of $19,600.[15] Although appellant provided no supporting documentation, CDTFA concluded that these unwinds were nontaxable. CDTFA also noted a vehicle sale of $11,200 in the new DMV ROS data that was not in the original DMV ROS data obtained during the audit. CDTFA also deleted disallowed claimed nontaxable sales for resale of $2,381,642 because it did not have evidence that appellant made any sales beyond those reflected in the DMV ROS data. Finally, CDTFA recalculated, on an actual basis, the deficiency measure for additional district taxes, which resulted in a $66,334 reduction (corresponding specifically to the period October 1, 2017, through March 31, 2017). Thus, for the second audit period, CDTFA concedes to reducing the aggregate determined measure of tax from $5,802,414 to $3,412,372 ($5,802,414 - $2,381,642 - $19,600 + $11,200).[16]

[15] An "unwind" (also called a "roll back" or "buyback") occurs when a vehicle is purchased, reported as sold to DMV, operated, and then returned to the dealer (because credit was unavailable, the customer changed his or her mind, etc.) prior to completion of the transaction and issuance of the title. (CDTFA Audit Manual § 0607.75.) CDTFA states that based on vehicle identification numbers, it identified several transactions involving the same vehicle, and therefore, it allowed the initial sale as an unwind when the subsequent sale occurred within six months of the initial sale, and the odometer readings showed the vehicle was driven less than 1,000 miles between sales.

[16] The district tax measure will also be reduced from $5,868,748 to $3,412,372 ($5,868,748 - $2,381,642 - $19,600 + $11,200 - $66,334).

DISCUSSION

California imposes upon all retailers 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.) For the purpose of the proper administration of the Sales and Use Tax Law and to prevent the evasion of the sales tax, it is presumed 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).) 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).)

If CDTFA is not satisfied with the tax returns or the amount of tax required to be paid to the state by any person, CDTFA may compute and determine the amount required to be paid on the basis of any information within its possession or that may come into its possession. (R&TC, § 6481.)

In the case of an appeal, CDTFA has a minimal, initial burden of showing that its determination was reasonable and rational. (*Appeal of Las Playas #10*, 2021-OTA-204P.) If CDTFA's determination is not reasonable and rational, then the determination should be rejected. (See *Appeal of Praxair, Inc.*, 2019-OTA-301P; see also *In re Renovizor's, Inc.* (9th Cir. 2002) 282 F.3d 1233, 1237, fn. 1.) If CDTFA's determination is reasonable and rational, then the determination is presumed correct. (See *In re Renovizor's, Inc.*, *supra*, 282 F.3d at p. 1237, fn. 1; see also *Paine v. State Bd. of Equalization* (1982) 137 Cal.App.3d 438, 445 (*Paine*).) The burden of overcoming this presumption is on the taxpayer. (*Paine*, *supra*, 137 Cal.App.3d at p. 445.)

Generally, appellant bears the burden of proof as to all issues of fact. (Cal. Code Regs., tit. 18, § 30219(a).) The standard of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(b).) That is, a party must establish by documentation or other evidence

that the circumstances it asserts are more likely than not to be correct. (*Appeal of AMG Care Collective*, 2020-OTA-173P.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Las Playas #10, Inc.*, *supra*.) To satisfy its burden of proof, a taxpayer must prove both that the tax assessment is incorrect and what the proper amount of tax should be. (*Appeal of AMG Care Collective*, *supra*.)

Here, appellant failed to provide its books and records for any of the audits at issue. As a result, CDTFA was unable to verify sales appellant reported on its sales and use tax returns for the liability period using a direct audit method (i.e., compiling audited sales directly from appellant's books and records). Because appellant failed to provide any of its books and records, OTA finds that it was reasonable for CDTFA to use an indirect audit method to compute appellant's sales.

In audits of used car dealerships, CDTFA's standard audit practice is to obtain DMV ROS data. CDTFA's Compliance Policy and Procedures Manual (CPPM) and Audit Manual set forth CDTFA's policy and procedure, respectively, for CDTFA to obtain this information from DMV and use it in an audit.[17] (See CDTFA's CPPM, § 720.030; CDTFA's Audit Manual, § 0607.35.) OTA finds that using DMV ROS data to compute appellant's taxable sales is a recognized and accepted auditing procedure for CDTFA. Further, CDTFA obtained DMV ROS data from a third-party California state government agency (i.e., DMV), which OTA finds is a reliable source of data. Accordingly, OTA concludes that DMV ROS data is evidence of appellant's sales and CDTFA's determination is reasonable and rational and thus presumed correct. The burden of overcoming this presumption is now on appellant.

On appeal, appellant makes two main arguments. First, appellant argues that for the first audit period, CDTFA erroneously used the "work date" (i.e., the vehicle registration date) rather than the "estimated sale date" to compile vehicle sales from DMV ROS data, which resulted in overstating audited taxable sales. However, appellant did not provide any evidence or documentation that using the "estimated sale date" rather than the vehicle registration date would reduce its tax liability (e.g., a summary of DMV ROS data by "estimated sale date" and a comparison to audited taxable sales showing that CDTFA overstated audited taxable sales). Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of*

[17] CDTFA's Audit Manual merely summarizes CDTFA's audit policies and procedures and has no precedential value in an appeal before OTA. (See *Appeal of Micelle Laboratories, Inc.*, 2020-OTA-290P.)

Las Playas #10, Inc., *supra*.) To satisfy its burden of proof, a taxpayer must prove both: (1) that the tax assessment is incorrect; and (2) the proper amount of tax. (*Appeal of AMG Care Collective*, *supra*.) Because appellant has not satisfied its burden of proof, OTA has no basis to recommend adjustments for this argument.

Second, appellant contends that DMV ROS data fails to account for bad debts and unwinds, so CDTFA overstates the audited taxable measure.

Regarding bad debts, a retailer is relieved from liability for sales tax that became due and payable insofar as the measure of tax is represented by accounts that have become worthless and charged off for income tax purposes by the retailer or, if the retailer is not required to file income tax returns, charged off in accordance with generally accepted accounting principles. (R&TC, § 6055(a); Cal. Code Regs., tit. 18, § 1642(a).) When there is a repossession, a bad debt deduction is allowable only to the extent that the retailer sustains a net loss of gross receipts upon which tax has been paid. (Cal. Code Regs., tit. 18, § 1642(f)(1).) This will be when the amount of all payments and credits allocated to the purchase price of the merchandise, including the wholesale value of the repossessed article, is less than the purchase price. (*Ibid*.)

In support of deductions for bad debts, retailers must maintain adequate and complete records showing: (1) the date of original sale; (2) the name and address of purchaser; (3) the amount the purchaser contracted to pay; (4) the amount on which the retailer paid tax; (5) the jurisdiction(s) where the local taxes and, when applicable, district taxes were allocated; (6) all payments or other credits applied to the account of the purchaser; (7) evidence that the uncollectible portion of gross receipts on which tax was paid actually has been legally charged off as a bad debt for income tax purposes, or, if the retailer is not required to file income tax returns, charged off in accordance with generally accepted accounting principles; and (8) the taxable percentage of the amount charged off as a bad debt properly allocable to the amount on which the retailer reported and paid tax. (Cal. Code Regs., tit. 18, § 1642(e).)

Here, appellant did not claim bad debt deductions on its sales and use tax returns during the liability period, and appellant has not identified any specific sale from the DMV ROS data, which resulted in a bad debt. In addition, appellant did not provide evidence that it legally charged off bad debts for income tax purposes. Basically, appellant has not provided any documentation supporting bad debts as required under Regulation section 1642 for the liability period. Accordingly, OTA finds no basis to recommend any adjustment for bad debts.

Regarding unwinds, in reviewing the new DMV ROS data for the second audit period, CDTFA made allowances for unwinds. Although appellant provided no supporting documentation, CDTFA identified, based on vehicle identification numbers, a subsequent sale of several vehicles and allowed the initial sale as an unwind when the subsequent sale occurred less than six months apart and the odometer readings showed less than 1,000 miles were driven.[18] Appellant has not identified any specific sale from the DMV ROS data where the vehicle was returned or the sale was otherwise nontaxable. Appellant also has not provided any evidence supporting additional allowances for unwinds. Accordingly, OTA finds no basis to recommend any further adjustments for unwinds.

In summary, OTA finds that CDTFA computed audited taxable sales based on the best-available evidence. Appellant has not identified any errors in CDTFA's computation of audited taxable sales or provided documentation or other evidence in support of its contentions from which a more accurate determination could be made. Because appellant did not carry its burden of proof in this case, OTA concludes that no further adjustments are warranted.

[18] See footnote 15, *ante*, page 6.

HOLDING

No further reductions to the determined measures of tax are warranted.

DISPOSITION

For the second NOD, issued on April 9, 2020, reduce the determined measure of tax from $5,802,414 to $3,412,372 as conceded in CDTFA's reaudit. Otherwise, CDTFA's action in denying appellant's petitions for redetermination and protective claims for refund is sustained.

DocuSigned by:
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Andrew Wong
Administrative Law Judge

We concur:

DocuSigned by:
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For
Lauren Katagihara
Administrative Law Judge

Signed by:
CB1F7DA37831416...
Josh Lambert
Administrative Law Judge

Date Issued: 12/3/2024