OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **LA BAGUETTE LLC**	OTA Case No.: 240415991 CDTFA Case ID: 1-421-237

OPINION

Representing the Parties:

For Appellant: Mitchell Stradford, Representative

For Respondent: Courtney Daniels, Attorney

For Office of Tax Appeals: William J. Stafford, Attorney

S. KIM, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, La Baguette LLC (appellant) appeals a decision, sustained by a supplemental decision, issued by respondent California Department of Tax and Fee Administration (CDTFA)[1] denying appellant's administrative protest of a Notice of Determination (NOD) issued on June 21, 2019.[2] The NOD is for tax of $111,025 plus applicable interest for the period October 1, 2014, through September 30, 2017 (liability period).[3] CDTFA imposed a penalty pursuant to R&TC section 6565 for failure to pay the liability before the NOD became due and payable (finality penalty).

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

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[1] Sales and use taxes were formerly administered by the State Board of Equalization (board). In 2017, functions of the board relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to events that occurred before July 1, 2017, "CDTFA" shall refer to the board.

[2] Appellant did not timely protest the NOD with CDTFA and the determination became final. CDTFA accepted appellant's petition as an administrative protest.

[3] CDTFA timely issued the NOD because appellant signed a series of waivers of the otherwise applicable three-year statute of limitations for the period October 1, 2014, through March 31, 2016, which extended the deadline for issuing an NOD to July 31, 2019. (See R&TC, §§ 6487(a), 6488.)

ISSUE[4]

Whether an adjustment is warranted to the audited measure of disallowed claimed exempt sales of food products.

FACTUAL FINDINGS

1. Appellant, a California limited liability company, operates a bakery selling bread, various hot and cold prepared foods, and beverages, located within the Stanford Shopping Center (shopping center), an outdoor shopping mall in Palo Alto, California (Palo Alto location). Appellant also operated another location within a shopping mall in San Francisco, California (San Francisco location). Appellant operated both the San Francisco and Palo Alto locations under the same seller's permit number. Both locations had their own storefronts and were not located within a food court.
2. During the liability period, appellant reported total sales of $12,470,622 and claimed deductions totaling $12,356,294, including $11,927,418 of claimed exempt sales of food products, resulting in taxable sales of $114,328.
3. Around August 2017, CDTFA's Statewide Compliance and Outreach Program visited appellant's San Francisco location, which had four tables inside the bakery and 15 tables directly outside with umbrellas bearing appellant's name. Appellant's employee stated that customers were not asked whether orders were "for here" or "to go," and that sales tax was only charged if the items sold were programmed as taxable items in the point-of-sales system.
4. CDTFA audited appellant for the liability period. Appellant closed the San Francisco location in August 2018, prior to the start of the audit. CDTFA performed an observation test of the Palo Alto location on Friday, March 8, 2019.[5] The Palo Alto location did not have tables, chairs, or other seating inside the bakery, but the shopping center provided tables and chairs in the common area outside and immediately adjacent to the bakery (outdoor seating area). There were 17 tables with chairs in the outdoor seating area. Appellant did not ask customers whether sales were "for here" or "to go." Appellant charged sales tax reimbursement on sales of hot food products and soft drinks but not

[4] Appellant disputes the imposition of the finality penalty. However, CDTFA indicates that it will abate the finality penalty if appellant files a statement signed under penalty of perjury as required by R&TC section 6592(b) and pays the tax portion of the liability within 30 days from the date of mailing the notice of final action in this appeal. During this appeal, appellant submitted the required statement signed under penalty of perjury. Accordingly, OTA does not discuss the finality penalty as a separate issue.

[5] CDTFA proposed additional observation tests on different days, but appellant declined.

on sales of cold food products, even when the customer consumed the cold food products in the outdoor seating area. Based on the observation test, CDTFA computed a taxable sales ratio of 11.06 percent (i.e., cold food products consumed in the outdoor seating area) and disallowed claimed exempt food sales of $1,267,938 for the liability period.[6]

5. CDTFA timely issued the NOD. Appellant untimely filed a petition for redetermination, which CDTFA accepted as an administrative protest.
6. During CDTFA's appeals process, appellant submitted a lease agreement[7] for the Palo Alto location, which states, as relevant here, the following: (a) the outdoor seating area is not part of the premises leased to appellant; (b) the outdoor seating area is subject to the exclusive control and management of the shopping center; (c) appellant and its customers have the nonexclusive right to use the outdoor seating area; and (d) appellant shall pay the shopping center additional rent (tenant's share of operating costs) in consideration of the shopping center's operation, management, maintenance, and repair of the outdoor seating area.[8]
7. CDTFA issued a decision denying the administrative protest. Appellant timely filed a request for reconsideration protesting CDTFA's decision.
8. CDTFA issued a supplemental decision, continuing to deny appellant's administrative protest.
9. Appellant timely filed this appeal.

DISCUSSION

California imposes sales tax on a retailer's retail sales of tangible personal property sold in this state measured by the retailer's gross receipts, unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, §§ 6012, 6051.) For the purpose of the proper administration of the Sales and Use Tax Law and to prevent the evasion of the sales tax, the

[6] CDTFA applied the taxable sales ratio to sales from both the Palo Alto and San Francisco locations during the liability period. Appellant does not dispute the audit methodology.

[7] The lease agreement was signed on April 20, 2016, and has a commencement date of August 1, 2017, which covers the last two months of the liability period. Appellant did not submit a lease agreement covering the remainder of the liability period.

[8] Appellant also asserted that the shopping center removed the tables and chairs in the outdoor seating area during COVID-19 (after the liability period). Appellant submitted a temporary lease agreement, effective from July 1, through September 30, 2020, wherein the shopping center agreed to return the tables and chairs in the outdoor seating area in exchange for appellant's agreement to maintain the tables and chairs during the effective period.

law presumes that all gross receipts are subject to tax until the contrary is established. (R&TC, § 6091.) Generally, gross receipts derived from the sale of food products for human consumption are exempt from tax. (R&TC, § 6359(a).) The food products exemption does not apply in several instances, including: when food products are furnished, prepared, or served for consumption at tables, chairs, or counters provided by the retailer or by a person with whom the retailer contracts to furnish, prepare, or serve food products to others; and when food products are sold as hot prepared food products. (R&TC, § 6359(d)(2) & (7); Cal. Code Regs., tit. 18, § 1603(e) & (f).) Tax does not apply to sales of cold food products when sold on a "take-out" or "to go" order, unless the retailer meets the criteria of the 80-80 rule.[9] (R&TC, § 6359(d)(6); Cal. Code Regs., tit., 18, 1603(c)(1)(B).) A taxpayer bears the burden of proving entitlement to an exemption or exclusion and must provide credible evidence of that entitlement. (*Appeal of Owens-Brockway Glass Container, Inc.*, 2019-OTA-158P.)

If CDTFA is not satisfied with the amount of tax reported by the taxpayer, or in the case of a failure to file a return, CDTFA may determine the amount required to be paid on the basis of any information which is in its possession or may come into its possession. (R&TC, §§ 6481, 6511.) In the case of an appeal, CDTFA has a minimal, initial burden of showing that its determination was reasonable and rational. (*Appeal of Talavera*, 2020-OTA-022P.) Once CDTFA has met its initial burden, the burden of proof shifts to the taxpayer to establish that a result differing from CDTFA's determination is warranted. (*Ibid*.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid*.)

Here, appellant does not dispute CDTFA's audit methodology. Instead, appellant asserts that it did not provide the tables and chairs in the outdoor seating area and that the outdoor seating area was owned and maintained by the shopping center. Therefore, appellant argues that all of the sales at issue fall squarely within the food products exemption because they were sales of cold food products for "take-out" or "to go."

Tax applies to the sale of cold food products sold in a form for consumption at tables and chairs provided by the retailer. (R&TC, § 6359(d)(3); Cal. Code Regs., tit. 18, § 1603(f).) Appellant's San Francisco location had tables and chairs both inside and directly outside the bakery. While it is unclear from the record whether appellant was responsible for the maintenance of the outside seating at the San Francisco location, the outside tables had umbrellas bearing appellant's business name. Appellant's Palo Alto location did not have

[9] Under the 80-80 rule, tax applies to the sale of cold food products if more than 80 percent of a retailer's gross receipts are from the sale of food products, and more than 80 percent of the retailer's retail sales of food products are taxable. (R&TC, § 6359(d)(6); Cal. Code Regs., tit. 18, § 1603(c)(3).)

seating inside the bakery but had tables and chairs in the outdoor seating area. For the Palo Alto location, there is no dispute that the outdoor seating area was owned and maintained by the shopping center and not appellant. However, there is no requirement under the Sales and Use Tax Law or Regulations that the retailer must own or maintain the facilities at which food products purchased from the retailer are consumed. CDTFA has previously concluded in its Sales and Use Tax Annotations (Annotations)[10] that food products retailers provided facilities for consumption of food purchased from the retailers, even where the retailers did not own or maintain the facilities, when there was a reasonable and rational relationship between the food products retailer and the use of the facilities for consumption of food products purchased from the retailers. In Annotation 550.0095 (1/17/95), CDTFA found that a coffee cart (located in a general-purpose room with tables and chairs) provided facilities for consumption of food products, even though the coffee cart did not own or maintain the facilities, because there was a reasonable relationship between the presence of the coffee cart and use of the tables and chairs. In Annotation 550.0182 (3/22/91), CDTFA found that a concession stand (located in a park with bench seating one-quarter of a mile away from the stand) did not provide facilities for consumption of food products, noting that there must be a rational connection between a food products retailer and facilities furnished for the consumption of food products based on factors such as the proximity of the tables to the retailer and how readily accessible the facilities were to the retailer's customers.

For the Palo Alto location, appellant paid the shopping center an additional rent charge for the use and maintenance of the outdoor seating area, and appellant's customers had a right to use the outdoor seating area for the consumption of food products purchased from appellant. Although other shopping center patrons were allowed to use the outdoor seating area, appellant was the only food establishment in that area of the mall and the outdoor seating area was directly outside and adjacent to appellant's business. For the San Francisco location, the outside seating was directly outside of appellant's bakery, and although it is unclear whether other shopping mall patrons were allowed to use the seating area, the outside seating had umbrellas bearing appellant's business name. Based on the foregoing, it was reasonable and rational to find that the seating areas directly outside of appellant's bakeries were provided for

[10] Annotations are brief summaries of legal opinions written by CDTFA's legal department and are usually based on specific circumstances described in a document, such as an opinion letter or decision. Annotations are not law, and OTA is not required to follow them. (*Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal. 4th 1, 25.) However, OTA may look to them as examples of how CDTFA interprets the applicable law, and OTA will independently determine the weight, if any, to afford Annotations. (*Appeal of Martinez Steel Corporation*, 2020-OTA-074P.)

the consumption of appellant's food products. Therefore, OTA finds that appellant's sales of cold food products which were purchased for consumption at the tables and chairs directly outside of its bakeries are subject to sales tax.

Appellant bears the burden of proving entitlement to the food products exemption and must provide credible evidence of that entitlement. (See *Appeal of Owens-Brockway Glass Container, Inc.*, 2019-OTA-158P.) Appellant did not charge sales tax reimbursement for any of its sales of cold food products. Moreover, appellant did not ask customers whether their orders were "for here" or "to go," even though the San Francisco location had seating inside the bakery and both locations had outside seating directly outside of the bakeries. CDTFA established a taxable sales ratio of 11.06 percent based on its observation of customers who purchased cold food products for consumption at the outdoor seating area. Appellant does not dispute CDTFA's audit methodology. Accordingly, appellant has failed to meet its burden of proof to show that all its sales of cold food products are exempt from sales tax.

HOLDING

An adjustment to the audited measure of disallowed claimed exempt sales of food products is not warranted.

DISPOSITION

OTA sustains CDTFA's action in relieving the finality penalty if the tax portion of the liability is paid within 30 days from the date of mailing the notice of final action in this appeal but otherwise denying appellant's administrative protest.

DocuSigned by:
Steven Kim
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Steven Kim
Administrative Law Judge

We concur:

Signed by:
Kim Wilson
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Kim Wilson
Hearing Officer

Signed by:
Natasha Ralston
25F8FE08FE56478...
Natasha Ralston
Administrative Law Judge

Date Issued: 5/20/2025