

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No.: 240315710
EXPRESS CASH AND CARRY, INC.)	CDTFA Case ID: 2-915-553
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OPINION

Representing the Parties:

For Appellant:	Mitchell Stradford, Representative
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For Respondent:	Damian Armitage, Hearing Representative
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For Office of Tax Appeals:	Daniel Cho, Attorney
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G. TURNER, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 30261, Express Cash and Carry, Inc. (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)¹ denying appellant's timely petition for redetermination of a Notice of Determination (NOD) issued on June 18, 2021. The NOD is for tax of \$87,091, plus applicable interest, for the period May 1, 2018, through December 31, 2018 (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).

¹ Cigarette and tobacco product 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.

ISSUE²

Whether adjustments are warranted to the unreported taxable distributions of tobacco products.

FACTUAL FINDINGS

1. Appellant was a licensed tobacco products distributor from September 10, 2012, through December 31, 2018.
2. Appellant purchased tobacco products from both in-state and out-of-state suppliers; however, appellant distributed the tobacco products only to California retailers during the liability period.
3. Upon audit, appellant provided the following books and records: Tobacco Products Distributor Tax Returns; purchase invoices; and a spreadsheet listing its tobacco purchases. CDTFA also obtained manufacturer reports from tobacco product manufacturers.
4. CDTFA determined that appellant's books and records were adequate to verify appellant's reported tobacco products distributions. CDTFA performed an inventory reconciliation to verify appellant's reported tobacco products distributions for the liability period.
5. CDTFA obtained appellant's beginning inventory figure of \$150,569 from appellant's prior audit, which was for the period July 1, 2015, through April 30, 2018. CDTFA also determined that appellant's ending inventory was zero because appellant's distributor's license was closed at the end of the liability period. As a result, appellant was no longer able to legally acquire, maintain or distribute any untaxed tobacco products after December 31, 2018.
6. Using appellant's spreadsheet and the manufacturer reports, CDTFA determined that appellant purchased \$110,740 of tobacco products during the liability period. CDTFA also determined that appellant returned tobacco products of \$50,673 to a vendor based on a return invoice.
7. Based on the foregoing, CDTFA added appellant's purchases of tobacco products of \$110,740 to appellant's beginning inventory of \$150,569 and subtracted the returned

² On appeal, appellant's only argument is regarding the unreported taxable distributions of tobacco products. Appellant does not explain or dispute the disallowance of the tax-paid returns of tobacco products. As a result, OTA concludes that this issue is not in dispute for this appeal and will not address it further.

- tobacco products of \$50,673 to arrive at the wholesale cost of tobacco products available for distribution of \$210,636 for the liability period.
8. CDTFA compared the \$210,636 of available tobacco products for distribution to appellant's reported distributions of \$141,537, which resulted in a deficiency measure of \$69,099.
 9. CDTFA also determined that appellant improperly claimed an allowance of \$69,065 for tax-paid returns of tobacco products. CDTFA explained that as the distributor, appellant made a distribution at the time of sale. As a result, any tobacco product returned to a manufacturer prior to the sale of the tobacco product does not qualify as a tax-paid return. Therefore, CDTFA disallowed the entire amount of the claimed allowance of \$69,065 for tax-paid returns of tobacco products.³
 10. CDTFA issued the June 18, 2021 NOD to appellant based on the audit findings above.
 11. Appellant filed a timely petition for redetermination disputing the NOD.
 12. CDTFA issued a decision denying the petition for redetermination.
 13. This timely appeal followed.

DISCUSSION

The Cigarette and Tobacco Products Tax Law requires every person desiring to engage in the sale of tobacco products as a distributor to apply with CDTFA for a distributor's license. (R&TC, § 30140.) A distributor shall apply for and obtain a license for each place of business at which it engages in the business of distributing tobacco products. (*Ibid.*) Every distributor shall pay a tax upon his or her distribution of tobacco products based upon the wholesale cost of these products. (R&TC, §§ 30101, 30123, 30131.2(b).) "Distributor" includes every person who distributes tobacco products, or who sells or accepts orders for tobacco products which are to be transported from a point outside this state to a consumer within this state. (R&TC, § 30011.) The term "distribution" includes: (a) the sale of untaxed tobacco products in this state; (b) the use or consumption of untaxed tobacco products in this state; and (c) the placing in this state of untaxed tobacco products in a vending machine or in retail stock for purposes of selling these items to consumers. (R&TC, § 30008.) "Use or consumption" includes the exercise of any right or power over tobacco products incident to the ownership of the tobacco products, other than the sale of the tobacco products or the keeping or retention by a licensed distributor for the purpose of sale. (R&TC, § 30009.) Unless the contrary is established, it shall be presumed that all tobacco products acquired by a distributor are untaxed tobacco products, and that all tobacco

³ As previously noted, this item is not in dispute for this appeal.

products manufactured in this state or transported to this state, that are no longer in the possession of the distributor, have been distributed. (R&TC, § 30109.)

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, CDTFA used appellant's records, manufacturer reports, and the results of a prior audit to estimate appellant's unreported taxable distributions of tobacco products. OTA finds that CDTFA's determination is based on the best available evidence. Therefore, CDTFA's determination is both reasonable and rational, and the burden of proof shifts to appellant to establish that a different result is warranted.

On appeal, appellant argues that CDTFA failed to account for the remaining inventory that was not sold. Thus, appellant states that the determination is overstated and erroneous.

There is no dispute that appellant closed its tobacco products distributor's license as of December 31, 2018. As a result, appellant could no longer retain any untaxed tobacco products in its inventory after this date. Any remaining tobacco products in appellant's possession would have been distributed pursuant to R&TC section 30008(b) because appellant exercised its ownership over the tobacco products, which constituted a use or consumption. (See R&TC, § 30009.) Therefore, it is appellant's burden to establish that it did not distribute any or all of the remaining inventory when appellant closed its distributor's license.

While not explicitly argued in its appeal to OTA, appellant argued at the CDTFA appeal that some of the remaining inventory was unsaleable. In response, CDTFA attempted to provide appellant many opportunities in which CDTFA offered to witness the destruction of any alleged unsaleable tobacco products. However, appellant failed to participate in any such activity. As previously stated, it is presumed that any tobacco product not in the possession of the distributor has been distributed. For tobacco products that must be destroyed (for whatever reason), CDTFA offers to witness the destruction of such tobacco products. (See CDTFA Publication 93, p. 6.) It is OTA's understanding that CDTFA offers this service as a means to "establish the contrary" to the presumption of distribution in R&TC section 30109. While this is not the only means in which a taxpayer can establish that the tobacco products have not been distributed, CDTFA's witnessing of the destruction of the tobacco products appears to be a convenient and reliable method for taxpayers to utilize. Nonetheless, because appellant did not take advantage of this service, it is appellant's burden to establish to the contrary that it did not

distribute the tobacco products at issue in this appeal. Other than appellant's argument, appellant has not provided any documentation or evidence showing that the tobacco products that were available for distribution in ending inventory were no longer saleable and not distributed.

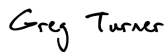
Based on the foregoing, OTA concludes that appellant did not meet its burden of proof.

HOLDING

No adjustments are warranted to the unreported taxable distributions of tobacco products.


DISPOSITION

CDTFA's action is sustained.

Signed by:

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Greg Turner
Administrative Law Judge

We concur:

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Sheriene Anne Ridenour
Administrative Law Judge

Signed by:

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Kim Wilson
Hearing Officer

Date Issued: 7/2/2025