OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **RYAN BURNS COLLECTIVE**	OTA Case No.: 240516196 CDTFA Case ID: 4-519-660

OPINION

Representing the Parties:

For Appellant: Jeffery I. Golden, Representative

For Respondent: Jennifer Barry, Attorney

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Ryan Burns Collective (appellant) appeals a decision issued by the California Department of Tax and Fee Administration (respondent) denying appellant's petition for redetermination of a December 28, 2022 Notice of Determination (NOD) for tax of $120,617, plus applicable interest, for the period July 1, 2018, through June 30, 2021 (liability period).[1]

Appellant waived the right to an oral hearing; and 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).

ISSUE

Did respondent correctly include the Long Beach business license tax (hereinafter, simply "the business license tax") in appellant's taxable sales measure?[2]

[1] The NOD was timely issued within the three-year statute of limitations for the period October 1, 2019, through June 30, 2021. (R&TC, § 6487(a).) It was also timely issued for the period July 1, 2018, through September 30, 2019, because on September 14, 2022, appellant signed the last in a series of timely and consecutive waivers of the otherwise applicable three-year statute of limitations, which allowed respondent until January 31, 2023, to issue an NOD for that period. (R&TC, § 6488.)

[2] Audit methodology, audit execution, and determined amounts are not at issue in this appeal. The sole issue is a legal issue, as stated above.

FACTUAL FINDINGS

1. Appellant is a California corporation that was engaged in the retail sale of cannabis, cannabis products, and related tangible personal property (TPP) in the City of Long Beach during the liability period.
2. During the liability period, appellant was required to pay the business license tax and any sales tax that was due. Appellant was also required to collect state excise tax (hereinafter simply "the excise tax") from the purchasers.[3]
3. Respondent audited appellant for the liability period and determined an audited taxable measure of $9,445,812 for the liability period, which included both the excise tax and the business license tax. Appellant reported total taxable sales of $8,269,069. On that basis, respondent determined unreported taxable sales measured by $1,176,743.
4. Respondent issued the December 28, 2022 NOD.
5. Appellant filed a petition for redetermination, and the parties participated in an appeals conference as part of respondent's internal appeals process.
6. Respondent issued its decision denying appellant's petition.
7. This timely appeal followed.

DISCUSSION

California imposes sales tax on a retailer's retail sales of TPP 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).)

The term "gross receipts," as defined in R&TC section 6012(a), refers to the total sales price of TPP. Gross receipts include the excise tax. (R&TC, 34011(d).) However, gross

[3] The business license tax in this case was measured by 8 percent of "gross receipts," which is defined, generally, as the total amount of sales in any calendar year. (Long Beach Municipal Code, § 3.80.160.). Such gross receipts do not include any state, city or city and county sales or use tax required by law to be included in or added to the purchase price and collected from the consumer or purchaser. (*Ibid*.) The excise tax was measured by 15 percent of the average market price of any retail sale by a cannabis retailer, who was required to provide each purchaser with an invoice, receipt, or other document that includes the following: "The cannabis excise taxes are included in the total amount of this invoice."

receipts do not include the "amount of any tax imposed by any city, county, city and county, or rapid transit district within the State of California upon or with respect to retail sales of TPP measured by a stated percentage of sales price or gross receipts whether imposed upon the retailer or the consumer." (R&TC, § 6012(c)(5).) The sole issue here is whether gross receipts also include the business license tax.

Respondent's position is that only local sales taxes administered by it are excluded from the taxable measure for sales tax purposes, and that there is no authority for the similar exclusion of local business license taxes. It contends that local sales taxes administered by respondent include only those authorized by the Bradley-Burns Uniform Local Sales and Use Tax Law (hereinafter "Bradley-Burns;" see R&TC, §§ 7200 *et seq.*) and by the Transactions and Use Tax Law (R&TC, §§ 7251 *et seq.*).[4] Respondent has long held and disseminated the opinion that local business taxes imposed and administered by local jurisdictions are not taxes "upon or with respect to retail sales of TPP" (see Sales and Use Tax Annotation 295.1187);[5] and, therefore, such local taxes do not qualify for the exclusion described in R&TC section 6012(c)(5). Respondent contends that the business license tax is just part of the cost of doing business, which retailers, like appellant, may include in the sales price and thereby pass along to their customers.[6]

Appellant contends the business license tax is excluded from gross receipts. Appellant cites no specific authority for its position in its appeal to OTA, but appellant argued during its

[4] Such local sales tax ordinances impose local taxes not exceeding specified rates for the privilege of selling TPP at retail within the local jurisdiction. (R&TC, §§ 7202(a) and 7261(a).) Every local ordinance that establishes a local sales tax must include provisions that clearly identify it as such, including provisions identical to the sales tax provisions contained in the state Sales and Use Tax Law (R&TC, §§ 6001 et seq.). (R&TC, §§ 7202(b) and 7261(b).) Such ordinances must also contain a provision that the tax will be administered by respondent. (R&TC, §§ 7202(d) and 7270(a).)

[5] An annotation is a summary of a legal ruling by or opinion of respondent's legal department. Annotations do not have the force or effect of law. (*Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal. 4th 1, 25.) Nevertheless, OTA may consider and afford some weight to an annotation. (See, e.g., *Appeal of Martinez Steel Corporation*, 2020-OTA-074P.) This particular annotation states, in part: "Only local taxes imposed by a city and a county pursuant to section 7200 et. seq. are excluded from gross receipts (section 6012(c)(6)), while all other locally imposed taxes are included."

[6] Evidence that appellant actually informed purchasers, by itemized receipt or otherwise, that it included the business license tax in the price of TPP sold is lacking and would, in any event, be immaterial, at least in the opinion of the majority.

appeal to respondent that the business license tax is excluded from gross receipts pursuant to R&TC section 6012(c)(5).[7]

According to the Long Beach Municipal Code, section 3.80.140, the business license tax is a tax due for engaging in business in the City of Long Beach. Section 3.80.261 describes the business license tax as a general tax. The relevant Long Beach ordinances were not enacted pursuant to Bradley-Burns or the Transactions and Use Tax Law, and, contrary to what those statutory schemes require for local and district sales taxes, the business license tax is administered by the City of Long Beach, not by respondent.[8] OTA finds nothing in the relevant ordinances that suggests the business license tax is a sales tax.

OTA concludes that taxes "upon or with respect to retail sales of TPP," as that phrase is used in R&TC section 6012(c)(5), are sales and use taxes imposed pursuant to local ordinances that comply with Bradley-Burns or the Transactions and Use Tax Law. OTA also concludes that only such local and district taxes are excluded from gross receipts pursuant to R&TC section 6012(c)(5). (See R&TC, §§ 7200 *et seq.* and 7251 *et seq*.) Finally, OTA also finds that the business license tax is not a sales or use tax, and it is not excluded from gross receipts for the purpose of calculating sales or use tax.

[7] According to OTA's calculation, the retail price of the TPP sold by appellant during the liability period was $7,679,522, excluding tax. The 15 percent excise tax was $1,151,928. The business license tax was $614,362. The sum of those amounts is the determined total taxable measure for the liability period. The disputed tax is just $120,617, less than 20 percent of the determined business license tax. Appellant's argument that the disputed tax was the result of respondent adding an additional taxable measure of $1,176,743.00 reflecting the business license tax charged by appellant to its retail customers during the liability period is inconsistent with the evidence but need not be addressed here given the narrow scope of this appeal.

[8] In contrast, the City of Long Beach also imposes a tax on the privilege of making retail sales of TPP (including cannabis) in the city. Relevant ordinances are contained in Long Beach Municipal Code, Chapter 3.60, entitled "Sales and Use Tax." This tax was enacted pursuant to Bradley-Burns. According to respondent, this tax was not included in gross receipts for the purpose of calculating the taxable measure at issue.

HOLDING

Respondent correctly included the business license tax in appellant's taxable sales measure.

DISPOSITION

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

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Michael F. Geary
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Michael F. Geary
Administrative Law Judge

I concur:

Signed by:
Natasha Ralston
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Natasha Ralston
Administrative Law Judge

G. TURNER, concurring in result.

I agree with the majority's conclusion: Payments by customers of the City of Long Beach's Business License Tax[1] (City tax) to appellant here are not excluded from gross receipts for Sales and Use Tax Law purposes. However, the annotation on which the Opinion largely relies is conclusory and fails to address the central point raised by appellant. I offer the following as perspective on the foundation for the conclusion.

The City of Long Beach (the City) requires businesses operating within its borders to obtain a license to operate and pay a tax for that privilege.[2] Specifically at issue here is the license to operate a 'marijuana business.[3] For retailers, the ordinance imposes a tax of 8 percent of gross receipts.[4] Such local business license taxes have long been considered "privilege taxes" exacted for the privilege of engaging in a particular activity within the local jurisdiction's boundaries, even when measured by gross receipts. (*City of Los Angeles v. Belridge Oil Co.* (1954) 42 Cal.2d 823.) Somewhat unique for business license taxes, however, the City tax at issue here was apparently *passed through* to customers and itemized separately on each invoice.[5]

Revenue and Taxation Code (R&TC) section 6012 defines "gross receipts" to include all amounts received with respect to a sale of tangible personal property unless there is a specific statutory exclusion. However, where the retailer merely collects an amount which it is obligated to remit to the taxing authority, the California Department of Tax and Fee Administration (respondent) has excluded such receipts from the definition of "gross receipts" notwithstanding

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[1] Long Beach Municipal Code (LBMC) Chapter 3.80.

[2] LBMC §§ 3.80.136. "As used in this Chapter, "business license" or "license" means the certificate issued by the City to the taxpayer upon payment of a tax prescribed by this Chapter evidencing payment of such tax." LBMC § 3.80.140. "As used in this Chapter, "business license tax" or "business tax" or "license tax" shall mean the tax due for engaging in business in Long Beach."

[3] LBMC § 3.80.261(C).

[4] The City's ordinance defines "gross receipts" to include the transfer of title or possession of tangible personal property as well as the performance of any act or service of whatever nature it may be whether or not as part of the sale of goods, wares, or merchandise. (LBMC § 3.80.261(A)(2).)

[5] In its petition for redetermination, appellant stated that the tax was passed on to consumers, which presumably meant itemized separately as opposed to being absorbed in the normal selling price of an item. The City's ordinance neither expressly authorizes nor expressly prohibits the pass through of the tax.

the lack of specific statutory exclusion.[6] "In other words, since the retailer is obligated to remit to the state the reimbursement it collects from its purchaser for sales tax due, the amount collected as reimbursement is not part of the total amount of the retail sale for purposes of section 6012." (Backup Letter to Sales and Use Tax Annotation 295.1246 (06/12/24).)

Although the City tax is apparently itemized on invoices for purchasers, the City municipal code does not require the retailer to remit all the amounts received from their customers to the City. The retailer here is not acting merely to collect a charge either imposed on the consumer, or if imposed on the retailer, a charge the retailer is obligated to remit entirely to the taxing authority.[7] The pass-through of the City tax, consequently, acts as the "pass-through" of any other expense of the retailer. Because appellant received payment for the tax as a condition of the sale, the amounts it received from customers as payment for the City tax are included in gross receipts absent a specific statutory exclusion. (R&TC, § 6012(a).)

Appellant focuses its attention on R&TC § 6012(c)(5) which excludes from the definition of gross receipts:

> "The amount of *any tax* imposed by any city, county, city and county, or rapid transit district within the State of California *upon or with respect to retail sales* of tangible personal property measured by a stated percentage of sales price or gross receipts whether imposed upon the retailer or the consumer." (Italics added.)

Although the reference to "any tax" would suggest a broad application of the exemption, the key language is "upon or with respect to retail sales." While in a particular instance as to a particular customer, the pass-through of the City tax measured by "gross receipts" would appear to be "with respect to retails sales," it is not. The City tax is "upon or with respect to" the *privilege* of engaging in a marijuana business.[8] The distinction between a tax on the privilege of doing business and a tax upon or with respect to retail sales is made evident by the scope of the City's definition of gross receipts. While the City tax and the Sales and Use Tax Law use a

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[6] See Annotations 295.1140 (8/5/68) (collection of "bird band fee" from consumers not included in gross receipts); 295.1302.500 (03/21/00) (tire recycling fee imposed on customer collected by retailer not included in gross receipts); 295.1237 (02/24/05) (when retailers separately state the e-waste recycling fee they are not passing on expenses but fulfilling a collection obligation and these receipts are not subject to tax).

[7] While the state's cannabis excise tax might have fallen into the category of "collected taxes" excluded from sales and use tax, the Legislature specifically includes the excise tax in the measure of taxable gross receipts for sales and use tax purposes. (R&TC § 34011(d).)

[8] LBMC §§ 3.80.136, 3.80.140. (See also *City of Los Angeles v. Belridge Oil Co.*, *supra*, 42 Cal.2d 823.)

similar term "gross receipts" as the measure, the City's definition is much broader than R&TC section 6012 as it includes the sale of services.[9]

Perhaps more importantly, however, the State of California has restricted local governments from imposing any "sales tax" in addition to the one authorized by the Bradley-Burns Uniform Sales and Use Tax Law[10] should they wish to continue state administration. (R&TC, § 7203.5) The Legislature has also directed that a local government choosing to impose a sales or use tax, "shall do so in the same manner and use the same tax base as prescribed in [the Bradley-Burns Uniform Sales and Use Tax Law]." (Gov't Code, § 37101.) Consequently, even if the City might have intended its tax on marijuana businesses to be a sales or use tax, such a finding would jeopardize the legal basis for imposition of the tax and/or threaten the state administration of the City's existing sales and use tax. OTA found nothing in the ordinances' adoption or periodic amendments to suggest either was intended. Consequently, the City tax was not "upon or with respect to retail sales of tangible personal property" excluded from gross receipts by R&TC section 6012(c)(5).

Signed by:
Greg Turner
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Greg Turner
Administrative Law Judge

Date Issued: 7/9/2025

[9] LBMC § 3.80.261(A)(2).

[10] R&TC §§ 7200-7212.