

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No.: 240516189
HANTOOT & ANGTUACO, LLC,)	CDTFA Case ID: 992-705, 1-033-046
dba Dinosaur Coffee)	
)	
)	

OPINION

Representing the Parties:

For Appellant: Mitchell Stradford, Representative

For Respondent: Jason Parker, Chief of Headquarters Ops.

For Office of Tax Appeals: Crystal Spratley,
Business Taxes Specialist III

N. RALSTON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Hantoot & Angtuaco, LLC dba Dinosaur Coffee (appellant) appeals a decision issued by the California Department of Tax and Fee Administration (respondent)¹ partially denying appellant’s timely petition for redetermination of a Notice of Determination (NOD) issued on February 12, 2019, and denying the corresponding protective claim for refund.

The NOD is for tax of \$41,896, plus applicable interest, for the period January 1, 2015, through December 31, 2017 (liability period).²

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 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 respondent. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to events that occurred before July 1, 2017, “respondent” shall refer to the board.

² Respondent timely issued the NOD because on January 2, 2019, appellant waived the otherwise applicable three-year statute of limitations by signing a series of waivers, which gave respondent until July 31, 2019, to issue the NOD for the period of January 1, 2015, through March 31, 2016. (R&TC §§ 6487(a), 6488.)

ISSUE

Whether adjustments to the amount of disallowed claimed non-taxable sales are warranted.

FACTUAL FINDINGS

1. Appellant, a limited liability company (LLC), operates a coffee shop located in Los Angeles. Appellant sells hot and cold coffee, small pastry items, coffee accessories, and other coffee-related merchandise. All pastries are sold cold, and the business does not sell hot food items.
2. Appellant provided sales and use tax returns (SUTRs) for the liability period, which appellant prepared using its point-of-sale (POS) data. Appellant reported total sales, ex-tax,³ of \$2,637,544 and claimed \$2,100,702 in deductions for non-taxable sales of food products, resulting in taxable sales of \$536,842. Appellant's reported taxable sales ratio was 20.35 percent, which respondent considered low for this type of business in this area.
3. For audit, appellant provided the following books and records: federal income tax returns (FITRs), bank statements, and POS data for the liability period. Additionally, respondent obtained 1099-K⁴ data for the year 2015.
4. During its preliminary visit, respondent made a purchase and noted that appellant's staff did not ask respondent's staff whether their order was "for here" or "to go."
5. Respondent compared total sales reported on SUTRs for 2015, 2016, and 2017 to gross receipts reported on FITRs and found differences of negative \$2,235 for 2015, \$1,395 for 2016, and negative \$1,966 for 2017 with an overall difference of negative \$2,806 for the liability period. The taxable amounts appellant reported to respondent were more than the gross receipts appellant reported on FITRs. Respondent also compared gross receipts for 2015 and 2016 to the corresponding cost of goods sold (COGS) reported on FITRs and computed FITR book markups of 149.10 percent for 2015, 166.01 percent for 2016, and an overall 157.90 percent for both years combined.

³ Ex-tax means without payment of California sales tax reimbursement or use tax to the seller or to respondent.

⁴ Form 1099-K is an Internal Revenue Service form titled, "Payment Card and Third-Party Network Transactions", which shows the monthly and annual amounts paid to a merchant by a bank, credit card company, or third-party network, during a given time period. Form 1099-K includes payments made by electronic means, including, but not limited to, credit cards, debit cards, and PayPal.

6. Appellant provided bank statements which showed deposits of \$2,685,796 for the liability period, which was \$48,252 more than gross sales reported on appellant's SUTRs of \$2,637,544.
7. Appellant reported gross sales of \$805,659 for 2015. Respondent calculated electronic deposits of \$602,938. Respondent then divided the credit card deposits by reported gross sales, to arrive at an overall credit card ratio of 74.84 percent ($\$602,938/\$805,659$).
8. Respondent reviewed the POS data and scheduled net sales for the second quarter of 2015 (2Q15) through 4Q17 in the amount of \$2,498,823. Respondent compared this data with reported amounts for the same period of \$2,458,713 to arrive at an immaterial difference of -\$3,386, or less than a 1 percent difference.
9. To verify the reasonableness of the taxable sales, respondent conducted observation tests which consisted of three full days of observation: Tuesday, June 12, 2018, Thursday, June 14, 2018, and Sunday, June 24, 2018. Appellant did not meet the criteria for the 80-80 rule;⁵ therefore, sales to-go were non-taxable and sales for dine-in were taxable. Respondent counted the number of the nontaxable "to-go" orders, and the taxable "dine-in" orders and computed, the average taxable sales ratio of 43.15 percent.
10. Respondent applied the calculated taxable sales ratio based on the observation test of 43.15 percent to reported gross sales of \$2,637,544 to arrive at audited taxable sales of \$1,138,037. Respondent subtracted the audited taxable sales of \$1,138,037 from reported gross sales of \$2,637,544 to arrive at \$1,499,507 of allowed non-taxable sales of food products. Respondent compared the allowed non-taxable sales of food products of \$1,499,507 to the claimed amount of \$2,100,702 to arrive at \$601,195 of disallowed non-taxable sales.
11. Respondent revised the original audit to accept 1Q15 reported taxable sales of 35.14 percent as the taxable sales because it was consistent with the lowest observed taxable ratio of 37.78 percent and in range for this type of business. Additionally, respondent increased the 1Q15 taxable sales ratio by 1 percent every quarter to reach the 43.15 calculated in the observation test. Respondent reduced the disallowed claimed non-taxable sales by \$138,210 in measure, from \$601,195 to \$462,985, resulting in an overall average audited taxable sales ratio of 37.90 percent.

⁵ The 80-80 rule is described below.

12. Respondent held an appeals conference on October 5, 2023, and issued a decision on February 6, 2024. The decision determined that the results of the observation test were likely overstated. Therefore, respondent's decision ordered a reaudit to lower the taxable sales ratio to 30 percent for 1Q15 and 2Q15 and to increase by 1 percent every quarter thereafter to ultimately end at 37 percent for 4Q17.
13. The reaudit decreased the overall disallowed non-taxable sales from the NOD by \$132,117 from \$462,985 to \$330,868 and the applicable tax by \$11,912 from \$41,896 to \$29,984. The decision otherwise denied the claim for refund.⁶
14. Subsequently appellant filed this timely appeal with OTA.

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 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 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.*)

In general, sales of food are exempt from tax. (R&TC, § 6359.) However, certain sales of food are excluded from the exemption and are thus subject to tax. As relevant here, sales of

⁶ OTA notes that the decision ordered a 5 percent reduction to the taxable sales ratio for each quarter and then further explained the adjustment to be lowering the taxable sales ratio in 1Q15 and 2Q15 to 30 percent and then increase 1 percent every quarter thereafter to end with 37 percent in 4Q17. However, increasing by 1 percent each quarter after 2Q15 would result in 40 percent in 4Q17. The current reaudit workpapers shows a 1 percent increase every two quarters with the ratio ending at 37 percent in 4Q17. This is in line with a reduction of 5 percent for each quarter and is in appellant's favor. OTA does not order adjustments to this.

food are subject to tax if the food is sold for consumption at the facilities provided by the retailer or if the food is sold as hot prepared food products. (R&TC, §§ 6359(d)(2), 6359(d)(7).)

Additionally, when more than 80 percent of a retailer's gross receipts are from sales of food products, and over 80 percent of its retail sales of food are subject to tax, then cold food sold in a form suitable for consumption on the retailer's premises is subject to tax even if it is purchased "to go." (R&TC, § 6359(d)(6).) When a retailer's sales fit within this provision, which is known as the "80-80 rule," the retailer may avoid its application by keeping a separate accounting of its sales to-go of cold food in a form suitable for consumption on the retailer's premises. (R&TC, § 6359(f); Cal. Code Regs., tit. 18, § 1603(c)(1)(A).)

When respondent cannot compute taxable sales from appellant's records, it is appropriate to use an indirect audit approach to calculate the taxable measure. (See *Appeal of Las Playas #10, Inc.*, 2021-OTA-204P.) Here, respondent concluded that the information and records appellant provided, while they had immaterial differences, showed an average reported taxable sales ratio of only 20.35 percent, which respondent considered to be low for this type of business in appellant's geographic area. Respondent determined that further testing was warranted to validate the reasonableness of the reported taxable sales ratio. Respondent completed an observation test spanning three days and calculated a taxable sales ratio of 43.15 percent, which was higher than the amounts reported by appellant. Using appellant's actual sales data from the observation test and prior purchases made by respondent staff, respondent determined that taxable and non-taxable sales were not being recorded properly. Respondent concluded that appellant's POS system was not set up to record dine-in sales accurately. Respondent also observed that appellant's staff failed to ask patrons if the orders were "for here," which would be taxable, or "to go," which would be non-taxable, which caused appellant to underreport taxable sales. Despite the observed taxable sales ratio of 43.15 percent, respondent agreed to reduce the 1Q15 and 2Q15 ratios to 35 percent, increasing the ratio by 1 percent each quarter throughout the liability period.

Appellant argues that even with the adjustments respondent made to the taxable sales ratio, the audit results were not representative of appellant's business activity and that the adjusted observed taxable ratios used were too high. Appellant specifically argues that the observation testing done in June 2018 was over-inflated due to a temporary influx of customers because appellant had recently installed new patio furniture. Additionally, appellant argued that the following month, July 2018, the taxable sales ratio decreased and returned to normal business levels which averaged 18.11 percent. Appellant provided graphs and a summary

analysis to support this contention. However, appellant did not provide source documentation to support the graph and summary analysis.

Respondent's decision ordered an additional reduction of 5 percent to the taxable sales ratio for each quarter in the liability period to give further allowance for fluctuations in appellant sales due to differences in weather and seasons. This adjustment reduced the taxable ratio percent from a range of 35 to 42 percent in the original audit to a range of 30 to 37 percent in the reaudit, effectively decreasing the overall disallowed non-taxable sales from the NOD by \$132,117 from \$462,985 to \$330,868 and the applicable tax by \$11,912 from \$41,896 to \$29,984.

OTA finds that respondent established a reasonable and rational basis for the NOD that used appellant's own records and the observation tests as well as allowing for additional adjustments as explained. The burden of proof, therefore, shifts to appellant to prove that additional adjustments are warranted. Appellant has failed to provide supporting documentation to verify its claims that taxable sales were lower in the month immediately preceding and immediately after the observation test. Despite the lack of supporting documentation, respondent took this information into consideration when ordering further adjustments pursuant to the reaudit. Upon appeal to OTA, appellant did not provide any documentation or other evidence from which a more accurate determination could be made, nor has appellant pinpointed errors in the liability assessed. Therefore, OTA concludes that appellant has failed to overcome the presumption that respondent's determination is correct or otherwise shown that the deficiency amount should be reduced.

HOLDING

Appellant has not shown that additional adjustments to unreported taxable sales are warranted.

DISPOSITION

Respondent's actions in reducing the tax by \$11,912, from \$41,896 to \$29,984, but otherwise denying the petition and claim for refund are sustained.

Signed by:

Natasha Ralston

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Natasha Ralston
Administrative Law Judge

We concur:

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Teresa A. Stanley

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Teresa A. Stanley
Administrative Law Judge

DocuSigned by:

Michael F. Geary

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Michael F. Geary
Administrative Law Judge

Date Issued: 7/16/2025