OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **J. SAMPERIO,** **dba Samperio Turbo Rebuild**	OTA Case No.: 240415969 CDTFA Case ID: 3-065-002

OPINION

Representing the Parties:

For Appellant: Juan Guzman, CPA

For Respondent: Jason Parker, Chief of Headquarters Ops.

S. BROWN, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, J. Samperio, dba Samperio Turbo Rebuild (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA) denying appellant's timely petition for redetermination of a Notice of Determination (NOD) issued on August 5, 2021.[1] The NOD is for tax of $209,774, plus applicable interest, and a negligence penalty of $20,977.43 for the period October 1, 2017, through June 30, 2020 (liability period).

Following issuance of the NOD, CDTFA conducted two reaudits, resulting in deletion of the negligence penalty and reduction of the determined tax by $50,700, from $209,774 to $159,074.

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).

ISSUE

Whether further adjustments to the taxable measure are warranted.

[1] The NOD was timely issued because on June 2, 2021, appellant signed an extension to a waiver of the otherwise applicable three-year statute of limitations for the period October 1, 2017, through September 30, 2018, which allowed CDTFA until October 31, 2021, to issue an NOD. (R&TC, §§ 6487, 6488.)

FACTUAL FINDINGS

1. Appellant, a sole proprietor, operated an auto repair business specializing in rebuilding turbos for semitrucks. Appellant obtained a seller's permit with an effective start date of October 1, 2014, and initially operated at a single location in Fontana, California; effective July 1, 2019, appellant opened a second location in Victorville, California.
2. During the liability period, appellant filed sales and use tax returns (SUTRs) reporting total sales of $3,635,746. Appellant claimed deductions of $2,329,008 for non-taxable labor and $52,363 for sales tax reimbursement included in reported total sales, which resulted in reported taxable sales of $1,254,375 for the liability period.
3. For audit, appellant provided the following books and records: federal income tax returns (FITRs) for 2017, 2018, and 2019; profit and loss statements (P&Ls) and bank statements for the liability period; general ledger purchases journal for the period January 1, 2020, through June 30, 2020; and various sales invoices from January 2020 and January 2021. CDTFA also obtained appellant's Form 1099-K data[2] for credit card transactions for the liability period.
4. CDTFA determined that appellant's gross receipts reported on his FITRs exceeded reported total sales by $18,513 for 2017 and $239,870 for 2019. CDTFA also found that comparing appellant's reported taxable sales to the merchandise purchases recorded in the P&Ls revealed negative book markups[3] for the liability period. As a result, CDTFA concluded that appellant's provided books and records were inadequate for sales and use tax audit purposes, and that an indirect audit method was warranted.
5. CDTFA requested that appellant provide documentation (sales invoices and corresponding purchase invoices) for a shelf test,[4] but CDTFA did not receive that documentation from appellant during the audit.
6. CDTFA compared the gross receipts reported on the FITRs to the total sales reported on the SUTRs to compute unreported taxable sales of $83,980.

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[2] Form 1099-K is filed with the IRS by processors of electronic or online payments (payments by credit card, debit card, PayPal, etc.) to report each of their customer's receipts paid electronically.

[3] "Markup" is the amount by which the cost of merchandise is increased to set the retail price. For example, if the retailer's cost is $0.70 and it charges customers $1.00, the markup is $0.30. The formula for determining the markup percentage is markup amount divided by cost. In this example, the markup percentage is 42.86 percent (0.30 ÷ 0.70 = 0.42857). A "book markup" (sometimes referred to as an "achieved markup") is one that is calculated from the retailer's records.

[4] A shelf test is an accounting comparison of costs and selling prices used to compute markups.

7. CDTFA used the markup method to compute audited sales.[5] Based on its experiences auditing similar businesses, CDTFA estimated that appellant had a markup of 50 percent. Based on information in the P&Ls and purchase journals, CDTFA calculated audited taxable purchases of $2,616,775, then applied the 50 percent markup factor to determine audited taxable sales of $3,925,162. Comparing appellant's reported taxable sales of $1,254,379, CDTFA calculated unreported taxable sales of $2,670,798 ($3,925,162 - $1,254,379). After subtracting the unreported taxable sales of $83,980, CDTFA calculated understated taxable sales of $2,586,818. In addition, CDTFA used appellant's general ledger purchases journal to compile the unreported cost of self-consumed taxable merchandise of $25,547 subject to use tax. CDTFA also imposed a negligence penalty.
8. Based on the audit, CDTFA issued the August 5, 2021 NOD to appellant.
9. Appellant filed a timely petition for redetermination. CDTFA held an appeals conference on May 31, 2023.
10. Following the appeals conference, CDTFA agreed to delete the negligence penalty and make the following adjustments: reduce from $2,597,230 to $2,586,817 the unreported taxable sales based on the markup method; and reduce from $25,547 to $93 the unreported cost of self-consumed taxable merchandise subject to use tax.
11. Also following the appeals conference, appellant agreed to provide documentation for a shelf test as support for his position that he had a taxable markup of 25 percent, instead of the 50 percent markup that CDTFA used in its computations. Appellant subsequently provided sales invoices and merchandise purchase invoices for a one-week period in July 2023. Thereafter, CDTFA requested that appellant complete a shelf test for a one-week period during the liability period, but appellant did not do so.
12. On November 21, 2023, CDTFA issued a decision that ordered a reaudit to delete the negligence penalty and reduce the taxable measure according to CDTFA's concessions but otherwise denied appellant's petition for redetermination. The decision also indicated that in a letter dated August 3, 2023, appellant conceded unreported taxable sales of $1,164,504 claimed as nontaxable labor for the liability period.
13. In a request dated April 16, 2024, appellant timely appealed to OTA.
14. In preparing its response to OTA, CDTFA determined that adjustments were warranted for the estimated markup. CDTFA used available data for similar businesses and

[5] Generally, a markup audit method entails adding a markup amount or percentage to the cost of taxable merchandise sold.

calculated a markup of 26.73 percent for appellant. Using that percentage, CDTFA issued a second reaudit that reduced to $1,968,487 the measure of unreported taxable sales based on the markup method, which thus reduced the entire deficiency measure to $2,052,560 and reduced the tax to $159,074.

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 CDTFA is not satisfied with the amount of tax reported by the taxpayer, 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.) 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*.) 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*, 2020-OTA-173P.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid*.) The applicable burden of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(b).)

Here, CDTFA found that appellant's gross receipts reported on his FITRs exceeded reported total sales for 2019, and that a comparison of appellant's reported taxable sales to the merchandise purchases recorded in the P&Ls revealed negative book markups for the liability period. Given these circumstances, it was appropriate for CDTFA to conclude that appellant's reported taxable sales on his SUTRs were likely understated. CDTFA utilized the markup method, which is a recognized and accepted accounting procedure. (See *Appeal of Amaya*, 2021-OTA-328P; CDTFA Audit Manual § 0407.10.)[6] In the most recent reaudit, CDTFA used

[6] CDTFA's Audit Manual does not provide binding legal authority; however, OTA may look to it for guidance. (*Appeal of Micelle Laboratories, Inc.*, 2020-OTA-290P.)

available data for similar businesses and calculated a markup of 26.73 percent for appellant. In light of all evidence, OTA finds CDTFA's determination to be reasonable and rational. Accordingly, the burden shifts to appellant to establish that any further adjustments are warranted.

In his appeal to OTA, appellant states that CDTFA never went to the business premises because the audit occurred during the COVID-19 pandemic. Appellant argues that the business was labor-intensive and thus the 50 percent markup that CDTFA used was too high, and that instead CDTFA should have used a 20 percent markup.

As noted above, CDTFA conducted a reaudit that reduced the markup from 50 percent to 26.73 percent, which is very similar to the 25 percent markup that appellant previously argued CDTFA should have used. Appellant has not provided or identified any evidence that supports further reduction to the markup percentage. Regarding appellant's statement that CDTFA did not visit the business premises due to pandemic restrictions, appellant fails to establish how this supports a further reduction to the deficiency measure; nothing in the evidence indicates that the COVID-19 restrictions interfered with CDTFA obtaining the necessary information to complete the audit, including communicating with appellant and receiving information and documentation.[7]

[7] The record reflects that during the COVID-19 pandemic, CDTFA communicated with taxpayers by mail, telephone, email, and online video meetings via Microsoft Teams, and offered options for taxpayers to submit documents electronically, by mail, or in person.

HOLDING

Appellant has not established that any further adjustments to the taxable measure are warranted.

DISPOSITION

As conceded by CDTFA, reduce to $1,968,487 the measure of unreported taxable sales based on the markup method, reduce to $93 the unreported cost of self-consumed taxable merchandise subject to use tax, and delete the negligence penalty. Otherwise, CDTFA's actions are sustained.

DocuSigned by:
Sheila Pacheco For
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Suzanne B. Brown
Administrative Law Judge

We concur:

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Huy "Mike" Le
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Huy "Mike" Le
Administrative Law Judge

DocuSigned by:
Teresa A. Stanley
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Teresa A. Stanley
Administrative Law Judge

Date Issued: 7/22/2025