

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of:  
**ST. TOMAS MARKET, INC.,**  
**dba Ramona Market**

) OTA Case No.: 231114755  
) CDTFA Case ID: 3-789-443  
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**OPINION**

Representing the Parties:

For Appellant: Paul Azir, Representative

For Respondent: Nalan Samarawickrema, Hearing Representative  
Jason Parker, Chief of Headquarters Ops.  
Jarrett Noble, Attorney

For Office of Tax Appeals: Craig Okihara, Business Taxes Specialist III

S. BROWN, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, St. Tomas Market, Inc., dba Ramona Market, (appellant) appeals a Decision issued by respondent California Department of Tax and Fee Administration (CDTFA)<sup>1</sup> denying, in part, appellant’s timely petition for redetermination of a Notice of Determination (NOD) dated April 11, 2022.<sup>2</sup> The NOD is for tax of \$79,308, plus applicable interest, and a negligence penalty of \$9,123.15 for the period October 1, 2018, through September 30, 2021 (liability period).<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> The NOD was timely issued because on December 30, 2021, appellant signed a waiver of the otherwise applicable three-year statute of limitations for the period October 1, 2018, through December 31, 2018, which allowed CDTFA until April 30, 2022, to issue an NOD. (See R&TC, §§ 6487(a), 6488.)

<sup>3</sup> CDTFA initially miscalculated the 10 percent negligence penalty but subsequently corrected its calculation in the reaudit.

As explained below, CDTFA performed a reaudit that reduced the deficiency measure, which in turn reduced the tax to \$40,153, and reduced the negligence penalty to \$4,015.48. Office of Tax Appeals (OTA) Panel Members Andrew Wong, Steven Kim, and Suzanne B. Brown held a Virtual oral hearing for this matter on May 21, 2025. At the conclusion of the oral hearing, the record was closed and this matter was submitted on the oral hearing record pursuant to California Code of Regulations, title 18, section 30209(b).

### ISSUES

1. Whether further adjustments to the amount of unreported taxable sales are warranted.
2. Whether the negligence penalty was properly imposed.

### FACTUAL FINDINGS

1. Appellant, an S Corporation, operated a grocery store located in San Jacinto, California, selling items including hot prepared food, beer, carbonated drinks, tobacco products, taxable sundry items, and nontaxable food products. CDTFA issued appellant a seller's permit with an effective start date of November 15, 2013. CDTFA had previously audited appellant for the period January 1, 2015, through March 31, 2018, which disclosed unreported taxable sales measuring \$374,796, resulting in an error ratio of 214.19 percent when compared to the reported taxable measure of \$174,983.
2. For the liability period, appellant reported on its sales and use tax returns (SUTRs) total sales of \$1,008,576 and claimed deductions of \$467,689 for nontaxable sales of food products, and \$39,940 for sales tax reimbursement included in reported total sales, which resulted in reported taxable sales of \$500,947.
3. Upon audit, appellant provided federal income tax returns (FITRs) for calendar years 2019 and 2020.<sup>4</sup> Appellant did not provide other books and records such as sales tax worksheets, cash register tapes, guest checks, merchandise purchase invoices, or purchase journals for the liability period.
4. CDTFA examined the FITRs and found that reported gross receipts significantly exceeded total sales reported on the corresponding SUTRs. Appellant stated that the FITRs included check cashing and money gram revenue, which were excluded from the SUTRs, but CDTFA found that appellant did not provide documentation supporting reported gross receipts. CDTFA also found that appellant did not report merchandise

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<sup>4</sup> Appellant states that it also provided its bank statements, but the audit work papers do not mention any bank statements.

- purchases on the FITRs, and therefore CDTFA was unable to perform a book markup<sup>5</sup> analysis.
5. CDTFA concluded that due to the lack of complete books and records, an indirect audit method was necessary to verify appellant's sales reported on the SUTRs.
  6. Because appellant did not provide merchandise purchases details (i.e., purchase journals) for the liability period, CDTFA verified merchandise purchases using a survey of appellant's vendors. CDTFA requested purchase data from the vendors identified in the prior audit's purchase segregation test.<sup>6</sup> However, not all vendors responded, and several of the vendors who did respond only provided purchase totals for a portion of the liability period. To estimate merchandise purchases from vendors who did not provide complete information for the liability period, CDTFA used the quarterly average of the periods provided. For beer purchases, CDTFA compiled purchases of \$318,746 for the liability period. For carbonated drinks, CDTFA compiled purchases of \$42,410 from the two vendors that responded. CDTFA noted that these two vendors comprised 83.27 percent of appellant's carbonated drink purchases in the prior audit purchase segregation. CDTFA divided carbonated drink purchases of \$42,410 by 83.27 percent to compute carbonated drink purchases of \$50,930 for the liability period.
  7. CDTFA calculated that beer and carbonated drink purchases comprised 69.57 percent of total merchandise purchases in the prior audit purchase segregation. CDTFA divided beer and carbonated drink purchases of \$369,676 (\$318,746 + \$50,930) by 69.57 percent to compute audited total merchandise purchases of \$531,373 for the liability period.
  8. CDTFA added the audited weighted taxable markup of 59.14 percent based on audited sales for 2015 from the prior audit to the audited total merchandise purchases to compute audited taxable sales of \$845,627 for the liability period. Upon comparison to

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<sup>5</sup> "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  $\text{markup amount} \div \text{cost}$ . In this example, the markup percentage is 42.86 percent ( $0.30 \div 0.70 = 0.42857$ ). A "book markup" (sometimes referred to as an "achieved markup") is one that is calculated from the retailer's records.

<sup>6</sup> A purchase segregation test is used to establish the proportion of merchandise purchases in various product categories (such as cigarettes and cigars, other tobacco products, carbonated drinks, "other" taxable merchandise, food, and supplies) to compute the percentage of taxable merchandise purchases, as well as the percentages of merchandise in each category. In the purchase segregation test for appellant's prior audit, CDTFA used merchandise purchase invoices that appellant provided for the second quarter of 2018 to identify the major categories of taxable products as: carbonated drinks, beer, tobacco products, sundry items, hot food items, and nontaxable food.

- taxable sales of \$500,947 reported on the corresponding SUTRs, CDTFA computed unreported taxable sales of \$344,666.<sup>7</sup> (Audit item 1.)
9. To verify the reasonableness of the markup method results, CDTFA computed sales using the credit card sales ratio method. CDTFA obtained Form 1099-K<sup>8</sup> data for October 1, 2018, through December 31, 2020, and compiled credit card sales of \$620,860. CDTFA computed average quarterly credit card sales of \$90,207 for 2020. For January 1, 2021, through September 30, 2021, CDTFA used the 2020 quarterly average to calculate credit card sales of \$270,621 ( $\$90,207 \times 3$  quarters). In total, CDTFA established credit card sales of \$891,481 ( $\$620,860 + \$270,621$ ) for the liability period. CDTFA divided credit card sales by the credit card sales ratio based on prior audit sales<sup>9</sup> to compute audited taxable sales of \$1,000,691 for the liability period. Upon comparison to unreported taxable sales of \$344,666 per the markup method, CDTFA computed unreported taxable sales of \$656,025. (Audit item 2.)
  10. Thus, the audit determined a deficiency measure comprised of two audit items:
    - (1) unreported taxable sales of \$344,666 based on the markup method, and
    - (2) unreported taxable sales of \$656,025 based on the credit card sales ratio method.
  11. Based on the audit, CDTFA issued the NOD to appellant on April 11, 2022, for tax of \$79,308, plus applicable interest, and a negligence penalty of \$9,123.15.
  12. Appellant filed a timely petition for redetermination stating it disagreed with the audit method and calculations.
  13. Appellant submitted handwritten documents it identified as daily sales ledgers for the first quarter 2019 (1Q19) through 3Q21. CDTFA reviewed the ledgers and noted differences and inconsistencies with reported sales. CDTFA requested that appellant provide invoices of taxable purchases to verify the accuracy of sales reports, but appellant did not provide purchase invoices. Thus, CDTFA concluded that it could not rely on appellant's ledgers. However, CDTFA found an error in the calculation of

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<sup>7</sup> CDTFA initially calculated this amount as \$344,680, but reduced it to \$344,666 after computing and applying error ratios to reported taxable sales for the applicable quarterly periods.

<sup>8</sup> Form 1099-K is an IRS 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 data includes payments made by any electronic means, including, but not limited to, credit cards, debit cards, and PayPal.

<sup>9</sup> CDTFA obtained Form 1099-K data for January 1, 2016, through March 31, 2018. CDTFA compared credit card sales for this period to audited taxable sales from the prior audit and computed credit card sales ratios for taxable sales.

unreported taxable sales per the credit card sales ratio method, specifically that CDTFA had inadvertently compared (deducted) unreported taxable sales per the markup method instead of audited taxable sales per the markup method. Thus, CDTFA performed a reaudit that computed revised unreported taxable sales of \$165,226<sup>10</sup> per the credit card sales ratio method. The reaudit reduced unreported taxable sales based on the credit card sales ratio method to \$165,226, but unreported taxable sales based on the markup method of \$344,666 remained the same. In total, the reaudit reduced the deficiency measure to \$509,892.

14. CDTFA issued a Decision on October 11, 2023, reducing the deficiency measure and correcting the negligence penalty in accordance with the reaudit but otherwise denying the petition for redetermination.
15. Appellant timely appealed to OTA.
16. In its opening brief, CDTFA stated that it acquired Form 1099-K data for January 1, 2021, through September 30, 2021; CDTFA found that this data showed appellant's credit card sales exceeded the average quarterly amount computed in the reaudit, and would increase the deficiency measure by \$39,158 if used in place of the average computed in the reaudit. CDTFA indicates that it will not assert this increase unless OTA finds any adjustments in appellant's favor are warranted.<sup>11</sup>

### DISCUSSION

#### Issue 1: Whether further adjustments to the amount of unreported taxable sales are warranted.

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.) Although gross receipts from the sale of food products are generally exempt from sales tax pursuant to R&TC section 6359(a), the exemption does not apply to sales of alcoholic

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<sup>10</sup> Estimated taxable sales per the credit card sales ratio method (\$1,000,691) less estimated taxable sales per the markup method (\$845,613) plus an adjustment of \$10,148 for periods where the credit card sales ratio method resulted in taxable sales less than the markup method.

<sup>11</sup> CDTFA may increase the amount of an NOD only if CDTFA asserts an increase at or prior to the OTA hearing. (R&TC, § 6563(a).) Also, as relevant here, the increase must be asserted within three years after the first NOD was issued, or within three years after the time tax records requested by CDTFA are made available, whichever is later. (R&TC, § 6563(a)(1).)

or carbonated beverages (R&TC, § 6359(b)(3)), or to sales of hot prepared food products (R&TC, § 6359(d)(7).)

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).) Such records include but are not limited to: (A) the normal books of account ordinarily maintained by the average prudent businessperson engaged in the activity in question; (B) bills, receipts, invoices, cash register tapes, or other documents of original entry supporting the entries in the books of account; and (C) schedules or working papers used in connection with the preparation of the tax returns. (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.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*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 the tax. (*Appeal of AMG Care Collective*, 2020-OTA-173P.)

Here, appellant did not provide a complete set of books and records for the audit; appellant failed to provide documents such as sales tax worksheets, cash register tapes or guest checks, merchandise purchase invoices, or purchase journals for the liability period. Due to the incomplete records, CDTFA was unable to perform a preliminary analysis, such as a book markup or reconciliations with amounts reported on the SUTRs, and was unable to verify sales reported on appellant's SUTRs for the liability period using a direct audit method (that is, compiling audited sales directly from appellant's records). CDTFA also found that reported gross receipts on appellant's FITRs significantly exceeded total sales reported on the corresponding SUTRs. Therefore, OTA finds that it was reasonable for CDTFA to question appellant's reported sales and to use indirect audit methods to verify appellant's sales. CDTFA's use of the credit card sales ratio method and the markup method as the basis for its determination are recognized and accepted accounting procedures. (See *Appeal of Amaya*, 2021-OTA-328P.) Considering the incomplete books and records, OTA finds that it was rational for CDTFA to use the results of a prior audit in the calculation of appellant's audited taxable

sales for the current liability period and the results are reasonable. OTA also finds that Form 1099-K data is evidence from a third party of appellant's sales paid by credit card and is a reliable source of data from which to establish audited sales. Therefore, OTA concludes that CDTFA has established that its determination is reasonable and rational; accordingly, the burden shifts to appellant to show errors in the audit.

Appellant argues that its sales ledgers were accurate and that CDTFA did not accurately separate taxable sales from nontaxable sales and therefore contends that the audit calculations should instead rely on the sales ledgers. However, appellant did not provide purchase invoices or cash register tapes, and thus there is no source documentation to corroborate the sales ledgers, which means that the information in the ledgers is not verifiable. Moreover, CDTFA is not required to accept a taxpayer's books and records as conclusive evidence, even if such books and records are internally consistent; CDTFA can determine the amount of tax due in an audit based upon any available information and using recognized and standard accounting procedures. (*Riley B's v. State Bd. of Equalization* (1976) 61 Cal.App.3d 610; see *Appeal of Amaya, supra*.) Appellant has not identified any specific errors in CDTFA's audit methodology, and there is nothing in the evidentiary record supporting appellant's assertion that the audit failed to accurately separate taxable and nontaxable sales. Given that appellant bears the burden of proof in this case, OTA concludes that no further adjustments to the deficiency measure are warranted.

Issue 2: Whether the negligence penalty was properly imposed.

R&TC section 6484 provides that, if any part of a deficiency for which a deficiency determination is made is due to negligence or intentional disregard of the Sales and Use Tax Law or authorized rules and regulations, a penalty of 10 percent of the amount of the determination shall be added thereto.

A taxpayer is required to maintain and make available for examination on request by CDTFA all records necessary to determine the correct tax liability under the Sales and Use Tax Law. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).) Such records include, but are not limited to: (A) normal books of account ordinarily maintained by the average prudent businessperson engaged in the activity in question; (B) bills, receipts, invoices, cash register tapes, or other documents of original entry; and (C) schedules or working papers used in connection with the preparation of tax returns. (Cal. Code Regs., tit. 18, § 1698(b)(1).) Failure to maintain and keep complete and accurate records will be considered evidence of negligence or intent to evade the tax. (Cal. Code Regs., tit. 18, § 1698(k).) Imposition of a negligence

penalty is warranted where errors are continued from one audit to the next.

(*Independent Iron Works, Inc. v. State Board of Equalization* (1959) 167 Cal.App.2d 318, 321-324.)


For audit, appellant provided only FITRs and sales ledgers but did not provide any other books and records such as sales tax worksheets, cash register tapes, guest checks, merchandise purchase invoices, or purchase journals for the liability period. OTA finds that appellant failed to maintain and keep complete and accurate records, which is evidence of negligence. OTA notes that appellant repeated similar errors from the prior audit. In addition, the understatement of \$509,892 represents an error ratio of 101.79 percent when compared to reported taxable sales of \$500,947; this error rate is further evidence of negligence. Based on the foregoing, OTA finds that the negligence penalty was properly imposed.

HOLDING

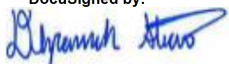
1. No further adjustments to the amount of unreported taxable sales are warranted.
2. The negligence penalty was properly imposed.


DISPOSITION

CDTFA's action is sustained.

Signed by:  
  
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 Suzanne B. Brown  
 Administrative Law Judge

We concur:

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 43E5DCA21D8D46B For  
 Steven Kim  
 Administrative Law Judge

DocuSigned by:  
  
 8A4294817A67463  
 Andrew Wong  
 Administrative Law Judge

Date Issued: 8/14/2025