OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **B. DOLIVEK,** **dba Beverlee's**	OTA Case No.: 231114784 CDTFA Case ID: 3 -512-730

OPINION

Representing the Parties:

For Appellant: B. Dolivek

For Respondent: Jennifer Barry, Attorney
Jarrett Noble, Attorney
Jason Parker, Chief of Headquarters Ops.

For Office of Tax Appeals: Corin Saxton, Attorney

S. KIM, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, B. Dolivek, doing business as Beverlee's (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 January 10, 2022.[2] The NOD is for tax of $10,493 plus applicable interest for the period October 1, 2014, through September 30, 2017 (liability period).

Office of Tax Appeals (OTA) Panel Members Teresa A. Stanley, Natasha Ralston, and Steven Kim 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, (Regulation) section 30209(b).

[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 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.

[2] CDTFA timely issued the NOD because appellant waived the otherwise applicable three-year statute of limitations and extended the NOD issuance deadline to January 31, 2022. (See R&TC, §§ 6487(a), 6488.)

ISSUES

1. Whether any adjustment to the measure of unreported taxable sales is warranted.
2. Whether any additional relief from tax is warranted due to reasonable reliance on written advice from CDTFA.
3. Whether any additional interest relief is warranted.

FACTUAL FINDINGS

1. Appellant, a sole proprietor doing business as Beverlee's, operates a full-service party planning, staffing, and equipment rental company located in Thousand Oaks, California.
2. On April 18, 2008, CDTFA provided erroneous written advice,[3] stating, as relevant here, that "if you have a client to whom you're providing bartender services only without providing any tangible personal property, your charges for the services are exempt."
3. During the liability period, appellant reported gross sales of $378,601 and claimed deductions of $261,305, resulting in reported taxable sales of $117,296. Based on CDTFA's erroneous written advice,[4] appellant did not add any sales tax reimbursement on invoices where appellant only provided bartenders or servers and did not provide any tangible personal property. On invoices where appellant provided tangible personal property,[5] appellant added sales tax reimbursement for the total charge (including services).
4. CDTFA audited appellant for the liability period. Appellant provided federal income tax returns for 2015 and 2016, Form 1099-K[6] information, sales invoices for the first quarter of 2016 (1Q16) and 3Q17, and profit and loss statements for 2015 and 2016. CDTFA examined the sales invoices for 1Q16 and 3Q17. CDTDA derived error rates[7] by

[3] Appellant's mother, the predecessor of his business, requested written advice from CDTFA regarding whether charges for bartenders and servers are taxable when no tangible personal property is sold.

[4] Because appellant was the legal successor of his mother's business, appellant was entitled to rely on CDTFA's written advice. (See Cal. Code Regs., tit. 18, § 1705(a).)

[5] Appellant typically contracted with third-party vendors to provide other services and tangible personal property (such as food and drinks). For these invoices, appellant paid the third-party vendors directly for the cost of the services and/or tangible personal property, and then appellant separately billed his customers for those amounts.

[6] A Form 1099-K (Payment Card and Third Party Network Transactions) is an IRS form used to report payments that merchants receive from customers through payment cards (i.e., credit card or debit cards) and/or third-party networks (e.g., PayPal).

[7] CDTFA computed error rates of 195.57 percent for 1Q16 and 209.36 percent for 3Q17.

comparing the taxable sales recorded on the invoices to taxable sales reported on the corresponding sales and use tax returns (SUTRs) for 1Q16 and 3Q17. Then CDTFA applied the error rates to reported taxable sales during the liability period and computed additional taxable sales of $230,693.[8]

5. Because appellant relied on erroneous written advice from CDTFA regarding the taxability of bartenders and waitstaff service transactions when no tangible personal property was provided (or service transactions),[9] CDTFA removed such invoices from the measure of additional taxable sales. Based on the 1Q16 and 3Q17 sales invoices, CDTFA established percentages of service transactions. CDTFA determined that 34.39 percent of total sales for 1Q16 and 26.63 percent of total sales for 3Q17 were from service transactions. CDTFA applied the corresponding service transactions rate for 1Q16 and 3Q17, and the higher rate for the remaining quarters of the liability period. CDTFA removed $117,420 of service transactions from the additional taxable sales measure of $230,693, resulting in unreported taxable sales of $113,273 for the liability period.
6. On January 10, 2022, CDTFA issued the NOD to appellant.
7. Appellant timely filed a petition for redetermination disputing the NOD.
8. CDTFA issued a decision dated January 24, 2023, granting interest relief for the periods March 1, 2018, through September 30, 2018, and July 1, 2020, through December 31, 2021, but otherwise denying the petition.
9. Appellant timely filed this appeal.

DISCUSSION

Issue 1: Whether any adjustment to the measure of unreported taxable sales is 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,

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[8] CDTFA applied the corresponding error rates for 1Q16 and 3Q17, and the lower error rate for the remaining quarters of the liability period.

[9] Although CDTFA's written advice only addressed bartender services, CDTFA provided appellant with relief from tax for both bartender services and waitstaff services when no tangible personal property was provided because the original inquiry had asked about both types of services.

§ 6091.) "Gross receipts" means the total amount of a retail sale and includes any services that are a part of the sale. (R&TC, § 6012(a), (b)(1).) 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, or in the case of a failure to file a return, 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, 6511.) 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.*)

A "caterer" is a person engaged in the business of serving meals, food, or drinks on the premises of the customer, or on premises supplied by the customer, including premises leased by the customer from a person other than the caterer, but does not include employees hired by the customer by the hour or day. (Cal. Code Regs., tit. 18, § 1603(i)(1).) Tax applies to the entire charge made by caterers for serving meals, food, and drinks, inclusive of charges for food, the use of dishes, silverware, glasses, chairs, tables, etc., used in connection with serving meals, and for the labor of serving the meals, whether performed by the caterer, the caterer's employees, or subcontractors. (Cal. Code Regs., tit. 18, § 1603(i)(3)(A).) Tax applies to charges made by caterers for preparing and serving meals and drinks even though the food is not provided by the caterers. (*Ibid.*)

Here, appellant did not provide sufficient books and records to support his reported sales for the liability period, and CDTFA was unable to verify appellant's reported sales. Due to the limited availability of records, CDTFA utilized an indirect audit methodology. CDTFA derived error rates based on a test period (i.e., the two quarters of sales invoices that appellant provided) and projected the error rates to the remaining quarters of the liability period to establish additional taxable sales for the liability period. When complete records are unavailable, CDTFA may compute an error rate based on a test period and project that error rate to the remainder of the audit period. (See *Appeal of Micelle Laboratories, Inc.*, 2020-OTA-290P.) In addition, CDTFA used the invoices for the test period to establish percentages of service transactions. CDTFA determined that 34.39 percent of total sales for 1Q16 and 26.63 percent of total sales for 3Q17 were from service transactions. CDTFA applied the corresponding service transactions rate for 1Q16 and 3Q17, and the higher rate for the

remaining quarters of the liability period. After applying the service transactions rate, CDTFA determined that there were $117,420 in service transactions during the liability period. Based on R&TC section 6596, CDTFA relieved appellant of the tax on the determined measure of service transactions. Based on the foregoing, OTA finds that CDTFA's determination was reasonable and rational, and the burden shifts to appellant to prove that adjustments are warranted.

Appellant argues that he is "technically" not a caterer because he is only a staffing service, he does not provide food and meals, and he charges his customers by the hour.[10] Appellant also asserts that there are several invoices for service transactions included in the audit period that are not subject to tax. Specifically, appellant argues that invoice 5154 and invoice 5442 do not include any sales of tangible personal property.[11] For invoice 5154, appellant argues that the photo booth was subcontracted from an outside company who assured him there was no sales tax on photography services. For invoice 5442, appellant asserts that he already paid sales tax reimbursement when he purchased the equipment and food supplies, which were used in connection with the provision of services.

Despite appellant's assertion that he is not a caterer and that he does not provide food and meals, appellant contracted with third-party vendors to provide food and/or drinks and then billed his customers for those costs. Thus, appellant is engaged in the business of serving food and/or drinks on the premises of the customer and appellant is considered a caterer even if he does not provide the food or drinks that he serves. (See Cal. Code Regs., tit. 18, § 1603(i)(1), (i)(3)(A).) Additionally, appellant's sales invoices indicate that his services include the following: bartending, party coordinating, staffing services, catering, audio, lighting, DJ, rentals, and design. Although appellant's customers may have hired him by the hour, the exception for hourly employees under Regulation section 1603(i)(1) applies to employees *hired*

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[10] Appellant submits four third-party invoices/estimates from staffing companies for hourly bartender/waitstaff services that do not include any charges for sales tax. The third-party invoices/estimates are dated outside of the liability period, and two of them list appellant as the customer. Appellant argues that other companies similar to his business are not charging sales tax. However, those other companies are not a part of this appeal, and the invoices/estimates do not involve appellant's sales during the liability period. Therefore, OTA declines to further address the invoices/estimates.

[11] Invoice 5154, dated February 21, 2016, consists of charges for bartenders, servers, and a photo booth package, which includes two attendants, photograph prints, a scrap book, and a photo CD. Invoice 5442, dated September 1, 2017, consists of charges for a chef meeting, day of captain, bartenders, valet attendants, greeters, chefs, waitstaff, equipment and food shopping fee, and equipment and shopping supplies.

by the customer, and not employees hired by the caterer.[12] Moreover, CDTFA already removed service transactions (both bartender service and waitstaff service sales where no tangible personal property was provided) from the audited taxable measure. Appellant has not provided any additional sales invoices or other records for the liability period.

Regarding invoice 5154, the photo booth package included the taxable sale of tangible personal property with mandatory services (i.e., mandatory attendants together with the transfer of photograph prints, scrap book, and photo CD), and thus, the total sale amount is taxable, including any services that are part of the sale. (See R&TC, § 6012.) It is irrelevant that appellant subcontracted the photo booth from an outside company, as he is the one who invoiced the customer for the photo booth.

As for invoice 5542, appellant provided chefs, waitstaff, bartenders, valet attendants, greeters, equipment for cooking food, food items, and food ingredients. Tax applies to the entire charge made by caterers for serving meals, food, and drinks, inclusive of charges for food, the use of equipment used in connection with serving meals, and for the labor of serving the meals. (Cal. Code Regs., tit. 18, § 1603(i)(3)(A).) While appellant was given an allowance for tax-paid purchases resold for other transactions during the liability period, appellant did not provide source documents to show the amount of sales tax reimbursement he paid for the equipment, food items, or food ingredients. Further, appellant did not follow the requirement of Regulation section 1701 for claiming a tax-paid purchases resold deduction. Accordingly, OTA finds that no further adjustments for this item is warranted.

In sum, CDTFA removed service transactions from the taxable measure and appellant has not shown that additional adjustments are warranted.

<u>Issue 2: Whether any additional relief from tax is warranted due to reasonable reliance on written advice from CDTFA.</u>

If a taxpayer's failure to pay sales or use tax is due to the taxpayer's reasonable reliance on written advice from CDTFA, the taxpayer may be relieved of the tax and any associated penalties and interest. (R&TC, § 6596.) Relief may be granted pursuant to R&TC section 6596 if the taxpayer files a statement under penalty of perjury setting forth the facts on which the request for relief is based, and four conditions are satisfied. First, the taxpayer must have

[12] See also CDTFA's Sales and Use Tax Annotation 550.0838 (8/17/90). Annotations are brief summaries of legal opinions written by CDTFA's legal department to aid taxpayers and tax practitioners. Annotations do not have the force or effect of law. (*Appeal of Praxair, Inc.*, 2019-OTA-301P.) Nevertheless, OTA may still afford weight to an annotation. (See *Appeal of Martinez Steel Corporation*, 2020-OTA-074P.)

requested written advice from CDTFA regarding whether a particular activity or transaction is subject to tax, and the request must fully describe the specific facts and circumstances of the activity or transaction. (R&TC, § 6596(b)(1).) Second, CDTFA must have responded in writing to the request, stating whether or not the described activity or transaction is subject to tax, or stating the conditions under which the activity or transaction is subject to tax. (R&TC, § 6596(b)(2).) Third, in reasonable reliance on CDTFA's written advice, the taxpayer must have, as relevant here, failed to charge or collect sales tax reimbursement from customers for the described activity or transaction. (R&TC, § 6596(b)(3)(A).) Fourth, the liability for taxes must have occurred before CDTFA rescinded or modified the advice by sending written notice, or before a change in the law renders the advice no longer valid. (R&TC, § 6569(b)(4).)

Here, appellant asserts that CDTFA only removed bartender service transactions from the audited taxable measure but did not remove sales of waitstaff services where no tangible personal property was transferred. However, the record reflects that CDTFA removed both bartender service sales and waitstaff service sales where no tangible personal property was transferred from the audited taxable measure. Appellant has not provided additional sales invoices for the liability period or otherwise established that additional service transactions should be removed from the audited taxable measure. Therefore, additional relief from tax is not warranted due to reasonable reliance on written advice from CDTFA.

Issue 3: Whether any additional interest relief is warranted.

There is no statutory right to interest relief. (*Appeal of Micelle Laboratories, Inc.*, *supra*.) The law allows CDTFA, in its discretion, to grant relief of all or any part of the interest imposed on a person under the Sales and Use Tax Law in certain circumstances including, as relevant here, where the failure to pay the tax was due in whole or in part to an unreasonable error or delay by an employee of CDTFA acting in their official capacity. (R&TC, §§ 20, 6593.5(a)(1).) An unreasonable error or delay shall be deemed to have occurred only if no significant aspect of the error or delay is attributable to an act of, or failure to act by, the taxpayer. (R&TC, § 6593.5(b).) Any person requesting interest relief must include a statement under penalty of perjury setting forth the facts on which the request is based. (R&TC, § 6593.5(c).) When reviewing a denial of a request for interest relief, OTA generally examines the record to determine whether there was an abuse of discretion by CDTFA. (See *Appeal of Micelle Laboratories, Inc.*, *supra*.)

Here, appellant provided the requisite statement signed under penalty of perjury. (See R&TC section 6593.5(c). Appellant argues that interest should be relieved because he was misled by CDTFA's erroneous advice and because of many years of delay.

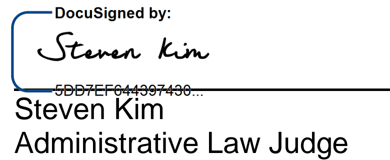
CDTFA granted interest relief for the period March 1, 2018, through September 30, 2018, and the period July 1, 2020, through December 31, 2021. CDTFA also granted automatic interest relief for the period March 1, 2020, through June 30, 2020, for periods impacted by COVID-19. However, the evidence does not establish an unreasonable error or delay by a CDTFA employee acting in their official capacity. The mere passage of time does not establish error or delay in performing a ministerial or managerial act. (See *Appeal of Gorin*, 2020-OTA-018P.) Also, there were also periods where the delays are attributable to appellant's acts or failure to act (e.g., rescheduling or not attending appointments as well as requests for extensions of time to provide supporting documents), and for those periods appellant is not entitled to interest relief. Further, the evidence does not show that CDTFA's denial of interest relief for the remainder of the liability period was an abuse of discretion. Therefore, OTA finds there is no basis to relieve additional interest.

HOLDINGS

1. An adjustment to the measure of unreported taxable sales is not warranted.
2. Additional relief from tax is not warranted due to reasonable reliance on written advice from CDTFA.
3. Additional interest relief is not warranted.

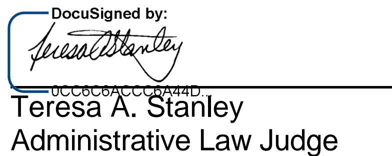
DISPOSITION

CDTFA's action is sustained.

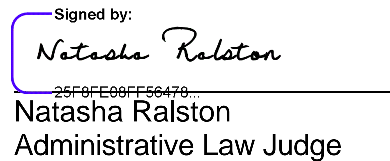


Steven Kim
Administrative Law Judge

We concur:



Teresa A. Stanley
Administrative Law Judge



Natasha Ralston
Administrative Law Judge

Date Issued: 8/20/2025