

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 230713881
R. BAZAR AND J. HICKS,)	CDTFA Case ID: 2-851-541
dba Greenhaven Garden Supply)	
)	
)	

OPINION

Representing the Parties:

For Appellant: R. Bazar, Partner

For Respondent: Jason Parker, Chief of Headquarters Ops.

For Office of Tax Appeals: Ada Kassa, Business Taxes Specialist III

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Partnership of R. Bazar and J. Hicks, dba Greenhaven Garden Supply (appellant) appeals a decision issued by the California Department of Tax and Fee Administration (respondent)¹ denying appellant’s petition for redetermination of an April 21, 2021 Notice of Determination (NOD).² The NOD is for tax of \$9,665, plus applicable interest for the period July 1, 2017, through June 30, 2020 (liability period).³ On

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 issued a November 23, 2022 Decision and a June 12, 2023 Supplemental Decision.

³ The NOD was timely issued for the period January 1, 2018, through June 30, 2020, because it was issued within three years after the last day of the calendar month following the quarterly periods for which deficiencies were determined, or within three years after the returns for those periods were filed, whichever period expired the later. (R&TC, § 6487(a).) The NOD was also timely for the period July 1, 2017, through December 31, 2017, because on October 1, 2020, appellant signed a waiver of the otherwise applicable three-year statute of limitations, which allowed respondent until April 30, 2021, to issue an NOD for that period. (R&TC, § 6488.)

August 26, 2021, respondent timely notified appellant of an increase in the determined amount of tax from \$9,665 to \$10,231, pursuant to R&TC section 6563.⁴

Appellant waived the right to an oral hearing and submitted the matter to the Office of Tax Appeals (OTA) on the written record pursuant to California Code of Regulations, title 18, section 30209(a).

ISSUE

Are adjustments to the measure of unreported taxable sales warranted?

FACTUAL FINDINGS

1. Appellant, a partnership, operated a retail store in Fairfield, California. Appellant sold primarily hydroponic equipment and supplies.⁵
2. Appellant's seller's permit was opened with an effective start date of January 1, 2011. Appellant closed (or sold) its business on June 30, 2020. This was appellant's first audit.
3. Appellant reported total sales of \$30,741, and claimed deductions of \$565 for sales tax reimbursement included in reported total sales, thus reporting taxable sales of \$30,176 (\$30,741 - \$565) for the liability period. Appellant's method of calculating and reporting taxable sales is unclear.
4. By letter dated August 27, 2020, respondent notified appellant regarding the audit and the records that respondent would require to complete the audit.
5. On October 2, 2020, appellant stated that it ceased operation of the business in March 2020 and requested additional time to gather records; but appellant provided none. With no books or records to audit, respondent obtained Form 1099-K⁶ data for the period January 1, 2014, through December 31, 2016. This data showed non-cash sales for 2014, 2015, and 2016 of \$22,880, \$26,707, and \$48,668, respectively, or a total for the three years of \$98,255. According to respondent, 1099-K data was not available for

⁴ R&TC section 6563(a)(1) provides, in pertinent part, that respondent may increase the amount of a determination before it becomes final, if respondent asserts a claim for increase at or before the oral hearing, and within three years after the first deficiency determination was issued.

⁵ Hydroponics is the technique of growing plants using a water-based nutrient solution rather than soil.

⁶ Respondent has an information sharing agreement with the Franchise Tax Board, which provides 1099-K data to respondent. Form 1099-K is used to report payments made to a taxpayer by payment card (e.g., credit or debit cards) processing companies (e.g., Visa, MasterCard, or American Express) or third-party network (e.g., Venmo or PayPal). It is authorized by the Internal Revenue Service for tax administration purposes. (See 26 C.F.R. § 1.6050W-1.)

- any later period. Respondent calculated average quarterly credit card receipts of \$8,188 ($\$98,255 \div 12$).
6. Respondent decided to use the credit card sales ratio method to estimate total sales.⁷ Because appellant did not provide any records, respondent could not determine appellant's actual credit card sales ratio. To estimate appellant's credit card sales ratio, respondent reviewed available data for appellant's business for 2014, 2015, and 2016 and found credit card ratios for these years of 30.71 percent, 37.94 percent, and 56.78 percent, respectively, or an average for the three years of 42.61 percent.
 7. Respondent also reviewed the audits of what it characterized as four "similar businesses" and found an average credit card ratio of 57.11 percent.⁸ Three of the four businesses had single locations: one in Ukiah, one in Sebastopol, and one in Woodland. The fourth had two locations: Graton and Sebastopol. Two of these businesses are identified as hardware/garden supply stores, and two are identified as garden supply stores. There is nothing in OTA's record that indicates whether any of these businesses sold hydroponic equipment or supplies.
 8. Respondent noted that, while appellant's average credit card ratio was 42.61 percent for the three years prior to the liability period, its credit card ratio for 2016 was 56.78 percent, which is closer to the average ratio found in the businesses respondent used for comparison. On these bases, respondent determined that a 60 percent credit card ratio was reasonable.
 9. Respondent divided \$8,188 by 60 percent for each of the quarters at issue to estimate taxable sales of \$163,764. Next, respondent removed sales tax of \$12,660 from estimated taxable sales. It then deducted reported taxable sales of \$30,176 to calculate unreported taxable sales of \$120,928 for the liability period.

⁷ A credit card sales ratio analysis typically involves the use of third-party data, such as bank statements or IRS Forms 1099-K, which show amounts paid to a merchant by a bank, credit card company, or third-party network when the customer pays for goods or services using a debit card, credit card, PayPal, or similar non-cash payment. If a reasonable estimate of the ratio of such non-cash sales to total sales (i.e., the credit card sales ratio) can be made, an equally reasonable estimate of total (i.e., cash and non-cash) sales can be made by simply dividing the credit card receipts by the credit card sales ratio. A credit card sales ratio analysis is a generally recognized and accepted procedure for estimating sales. (See *Appeal of Amaya*, 2021-OTA-328P.)

⁸ The ratios for the four businesses were 60.19 percent, 74.26 percent, 61.12 percent, and 32.86 percent.

10. When respondent was unable to secure a statute of limitations waiver extension from appellant in order to allow appellant additional time to provide books and records, respondent finalized the audit and, on April 21, 2021, issued the NOD to appellant.
11. Appellant filed a timely petition for redetermination protesting the tax liability.
12. On June 11, 2021, appellant provided QuickBooks sales reports without any supporting documentation.
13. Respondent reconciled the taxable sales and the sales tax per appellant's QuickBooks sales reports to the reported amounts. This resulted in reported taxable sales and reported sales tax exceeding the taxable sales and sales tax per the QuickBooks sales reports by \$4,223 (\$30,176 - \$25,953) and \$249 (\$2,423 - \$2,174), respectively. Due to the low amount of reported taxable sales, respondent asked appellant to provide its federal income tax returns (FITRs) and purchase invoices to further validate reported sales. However, appellant did not provide any of the requested documents.
14. Respondent noted that appellant did not report district taxes on \$9,088 of its sales made in the City of Fairfield, which were subject to the Solano County tax of .375 percent and a City of Fairfield tax of .75 percent, for the first quarter of 2019 (1Q19), 2Q19, 1Q20, and 2Q20. Therefore, respondent conducted a reaudit dated August 18, 2021, and included these taxes, which increased the NOD by \$566 in tax.⁹
15. On August 26, 2021, respondent timely notified appellant that it was asserting an increase to the NOD issued on April 21, 2021, to \$10,231 in tax plus applicable interest.
16. Respondent held an appeals conference as part of respondent's internal appeals process, but appellant did not participate. Respondent subsequently issued the November 23, 2022 Decision denying the petition.
17. On December 27, 2022, appellant filed a request for reconsideration of the Decision issued on November 23, 2022. With its request for reconsideration, appellant provided tax detail and sales detail reports for July through December 2017, January through December 2018, incomplete tax detail and sales detail reports for 2019, and some sales invoices. Appellant did not provide sales detail reports or invoices for the 2020 reporting periods.

⁹ Based on the measure of \$9,088 of sales that were subject to the district tax rate of 1.125 percent, OTA calculated \$102 ($\$9,088 \times 1.125$ percent) for City of Fairfield (appellant's business location), located in Solano County. The reaudit also appears to be correcting the tax due on the estimated unreported taxable sales of \$120,928, which was not computed using the correct tax rate of 8.375 percent at the time of the determination. The tax correction is \$463, a difference between \$10,128 ($\$120,928 \times 8.375$ percent) and \$9,665 ($\$120,928 \times 7.992$ percent). OTA calculated a total tax increase of \$565 (\$102 unreported district tax + \$463 tax correction) with minor rounding differences.

18. Respondent reviewed the provided documents and found that the reports and sales invoices were printed – each invoice indicates it is a “reprint” – on January 25, 2022, and January 26, 2022. In addition, respondent found the amounts for 2017 and 2018 were consistent with the previously provided summary reports, but it had inadequate evidence to draw the same conclusion regarding the periods 1Q19 through 2Q20. Therefore, respondent did not rely on the documents.
19. In addition, respondent noted that, with the exception of one sale that was paid by check, all the invoices provided showed receipt of payment in cash. Based on dated screenshots obtained using the internet archive commonly known as the Wayback Machine,¹⁰ respondent believed that appellant maintained a website during the liability period where customers could order merchandise to be shipped to their location, and that it was unlikely that such sales transactions would have been paid by cash. Also, due to appellant not providing previously requested FITRs, financial statements, purchase invoices and journals, general ledger, and bank statements that would have helped to verify reported sales, respondent concluded that the recently provided business records were not sufficient to warrant an adjustment to the tax liability. Therefore, respondent did not recommend any changes to the liability.
20. Respondent issued the June 12, 2023 Supplemental Decision, which again denied the petition.
21. This timely appeal followed.
22. OTA requested additional information from respondent.
 - When asked what respondent did to obtain Forms 1099-K for the period at issue and why those forms were unavailable, respondent replied as follows:

In general, the Department does not make requests to obtain 1099-K data from any third-party processors. However, the Department has an information sharing agreement with the Franchise Tax Board (FTB), whereby FTB sends 1099-K data to the Department. In other situations, taxpayer[s] provide their 1099-K data to the Department. The Department uses the 1099-K data in an attempt to match available information for each business with a seller’s permit. For Appellant’s business, the Department did not have any matching 1099-K data after 2016.

Regarding why those forms were unavailable, the Department is not aware of the specific reasons and does not intend to speculate. However, based on the Department’s research and analysis of Appellant’s business activities and other available information, it is the

¹⁰ The Wayback Machine (web.archive.org) is a website that can be used to access historical webpages for various websites.

Department's understanding that Appellant was making online sales during the audit period which would result in electronic payments. Therefore, Appellant should have received the 1099-K forms and provided the same to the Department. Instead, despite various requests, Appellant failed to provide any 1099-K forms.

- When asked to describe all evidence in the record that tends to prove that appellant accepted electronic forms of payment after 2016, respondent replied as follows:

Based on a review of the Internet Archive Wayback Machine website, the Department noted that Appellant had an operative website and was accepting online orders which would generally require electronic forms of payment.

Respondent also provided what purports to be archived screenshots of appellant's website from January 15, 2018, January 22, 2019, and January 26, 2020.

- When asked to state respondent's position regarding whether the unavailability of 1099-K data for periods after 2016 constitutes evidence that appellant did not accept electronic forms of payment after 2016, respondent responded as follows:

Pursuant to Revenue and Taxation Code, section 6481, the Department can determine amounts owed based on any information in its possession or that may come into its possession. Upon audit, Appellant did not provide records and did not respond to the Department's correspondence. The Department determined that Appellant's sales and use tax returns were not reliable based on available 1099-K data. While 1099-K data was not available or provided for periods after 2016, the Department found evidence that Appellant continued accepting online orders (Exhibit I), and the Department determined that a business accepting online orders would require credit card payment. The Department does not accept the position that the absence of 1099-K data is evidence that Appellant's did not accept electronic forms of payment.

- When asked to state or provide amounts reported on appellant's sales and use tax returns (SUTRs) for the period for which respondent provided Form 1099-K data, respondent provided appellant's reported amounts for 2014 through 2016 and a copy of the results of what respondent identifies as a "Reasonableness Test," which purports to compare total sales reported on appellant's FITRs, total sales reported on appellant's SUTRs, and the audit findings. This document shows that appellant reported total sales on FITRs for 2017 (3Q and 4Q, only), 2018, 2019, and 2020 (1Q and 2Q, only) of \$29,547, \$84,353, \$75,326, and

\$35,674, respectively, while reporting taxable sales on its SUTRs for those years of \$9,583 (3Q and 4Q, only), \$9,300, \$7,384, and \$3,909 (1Q and 2Q, only), respectively.¹¹ Respondent concludes that the audit results are reasonable because taxable sales reported on FITRs exceed the determined taxable measure by \$61,136.

23. OTA also requested additional information from appellant. Specifically, OTA asked appellant to provide copies of all bank statements for the period January 1, 2016, through June 30, 2020. Appellant was also afforded an opportunity to reply to respondent's submission. Appellant did not provide bank records or reply to respondent's submission.

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 when a taxpayer fails 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 different from respondent's determination is warranted. (*Ibid.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid.*)

Respondent argues that it is more likely than not that appellant received non-cash payments, such as credit card payments, for some of its sales transactions during the liability period. It contends that its credit card sales ratio analysis is sufficient to meet its burden. In addition, respondent asserts that appellant did not provide merchandise purchase invoices,

¹¹ As explained below, OTA finds that it is more appropriate to compare total sales reported on FITRs to total sales reported on SUTRs. Other evidence shows total sales reported on SUTRs for those years (or partial years) were \$9,583, \$9,300, \$7,949, and \$3,909.

bank statements, or other records to verify and support the business records that appellant eventually provided.

Despite appellant's repeated assurances that it had and would provide books and records sufficient for the sales and use tax audit, it initially failed to give any books or records to respondent. Respondent had to look elsewhere for information upon which to base the audit. Respondent has an information sharing agreement with FTB. FTB sends 1099-K data to respondent. In this case, though, FTB did not provide Form 1099-K data for the liability period. It provided 1099-K data for the three years prior to the liability period, and respondent decided to use that data to do a credit card sales ratio analysis.

OTA finds respondent's credit card sales ratio analysis problematic. As stated above (see footnote 7), for a credit card sales ratio analysis to produce a reasonable estimate of total sales, one needs reliable data regarding the amount of credit card sales, if not for the period in question, then at least for a period that is fairly representative of the period in question. The unexplained unavailability of 1099-K data for the liability period is troublesome. OTA does not agree with respondent's position regarding what that unavailability tends to prove or disprove.¹² In OTA's view, the unavailability of 1099-K data for the liability period is at least as relevant as respondent's "Wayback Machine" evidence.

OTA is also concerned about respondent's decision to use a 60 percent credit card sales ratio. Appellant's highest known credit card sales ratio was 56.78 percent, and there is a considerable difference among the ratios calculated for the businesses that respondent deemed to be similar, from 32.86 percent for the Ukiah garden supply store to 74.26 percent for the Woodland hardware and garden supply store. There is nothing in the evidence to show that appellant's customers, who were purchasing primarily hydroponic equipment and supplies, and the customers of the so-called similar retailers would have been equally motivated and able to make cash or non-cash purchases.¹³

There may be circumstances where respondent's analysis would be sufficient to meet its minimal burden. OTA need not decide that question here because, despite the evidentiary shortcomings discussed above, respondent now has appellant's FITRs for the liability period.¹⁴

¹² In general, evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

¹³ The customers' motivations and abilities might have been different if, for example, appellant's primary customer base consisted of cannabis growers while the primary customer base of the similar retailers were homeowners who were interested in lawn and garden care.

¹⁴ It is not clear when or how this evidence came into respondent's possession.

A comparison of amounts reported on those returns with amounts reported on appellant’s SUTRs indicates underreporting well in excess of amounts determined by respondent’s credit card sales ratio analysis. Respondent offers this new analysis as evidence of the reasonableness of the lesser taxable measure determined using the credit card sales ratio. However, OTA finds that the comparison of appellant’s FITRs and SUTRs is the more reasonable and rational method for estimating appellant’s total sales, and it accepts respondent’s agreement to limit the deficiency to the lesser amount because it benefits the taxpayer. Accordingly, the burden shifts to appellant to establish that a result different from respondent’s determination is warranted.

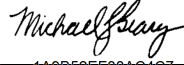
In its appeal to OTA, appellant states that it has provided all of the sales invoices for the liability period, and that its sales, all for cash, were far less than the determined amount. OTA finds that the evidence provided by appellant is unpersuasive. Appellant was given an opportunity to reply to respondent’s comparison of total sales reported on its FITRs and SUTRs, and to explain the substantial differences, but it did not do so. Appellant’s unsupported assertion that it accurately reported taxable sales is not sufficient to satisfy appellant’s burden of proof. (*Appeal of Talavera, supra.*) Consequently, OTA finds that the evidence does not establish that a result different from respondent’s determination is warranted.

HOLDING

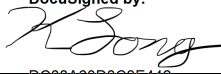
An adjustment to the measure of unreported taxable sales is not warranted.

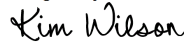
DISPOSITION

Respondent’s denial of appellant’s petition is sustained.

DocuSigned by:

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 Michael F. Geary
 Administrative Law Judge

We concur:

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 Keith T. Long
 Administrative Law Judge

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 Kim Wilson
 Hearing Officer

Date Issued: 6/11/2025