

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No.: 240917497
ABAJIAN & GARCIA ENTERPRISES, LLC,)	CDTFA Case ID: 3-882-912
dba Mardo Cigars)	
)	
)	

OPINION

Representing the Parties:

For Appellant:	Mitchell Stradford, Representative
For Respondent:	Damian Armitage, Hearing Representative

S. RIDENOUR, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 30261, Abajian & Garcia Enterprises, LLC, dba Mardo Cigars (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 June 1, 2022, which assessed a liability under the California Cigarette and Tobacco Products Tax Law. The NOD is for tax of \$405,167, plus applicable interest, and a negligence penalty of \$40,516.70¹ for the period January 1, 2019, through December 31, 2021 (liability period), based on a deficiency measure of \$680,281.²

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 Neither appellant’s submissions to OTA, nor CDTFA’s decision from which the present appeal was made, address the negligence penalty. Therefore, this Opinion will not address whether penalty relief is warranted, as it does not appear to be in dispute.

² CDTFA timely issued the NOD because appellant waived the otherwise applicable three-year statute of limitations and gave CDTFA until October 25, 2022, to issue the NOD. (See R&TC §§ 30207, 30208.)

ISSUE

Whether appellant has established that adjustments are warranted to the determined unreported taxable distributions of tobacco products.³

FACTUAL FINDINGS

1. During the liability period, appellant operated a cigar bar and retail store selling cigars and cigar accessories. Appellant also distributed tobacco products from a business location in California.
2. Appellant was a licensed tobacco distributor and a licensed tobacco retailer. Appellant's tobacco products distributor account and sales and use tax account were valid from February of 2017, until both were closed effective December 31, 2021, because the respective tobacco licenses expired on the same date. Appellant filed monthly tobacco products distributor tax returns through December 2018, then filed them on a quarterly basis beginning the first quarter of 2019 (1Q19) through 4Q21.
3. For the liability period, appellant reported wholesale cost of tobacco products distributed within the state of \$79,833,⁴ with tax rates varying between 56.93 percent and 63.49 percent, for total tax due of \$48,276
4. By letter dated January 20, 2022, CDTFA informed appellant it was commencing an audit for the liability period and requested appellant provide its books and records. Subsequently, CDTFA sent appellant an Information/Document Request form on February 7, 2022, and again on March 14, 2022, requesting appellant provide its books and records for audit.
5. Appellant did not provide CDTFA its books and records, information regarding its reporting method, or any information regarding the methods appellant used to calculate the reported taxes due. Therefore, CDTFA examined appellant's Sales and Use Tax Returns (SUTRs) for 1Q19 through 4Q21. Appellant reported a total of \$1,596,827 in gross sales, which CDTFA then adjusted to account for sales of tobacco accessories

³ In pertinent part, "Tobacco products" includes, but is not limited to, a product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to, cigars, little cigars, chewing tobacco, pipe tobacco, or snuff, but does not include cigarettes. (R&TC, § 30121(b).)

⁴ Differences are due to rounding.

- and other non-tobacco sales (10 percent reduction) and a markup⁵ for profit (25 percent reduction).
6. During audit, appellant informed CDTFA that all sales made in California were made at retail. Appellant also informed CDTFA that it purchased some of the tobacco products from a registered California distributor and, thus, tobacco taxes were paid on those products before being sold to appellant. Therefore, CDTFA made further adjustments to account for in-state, taxpaid purchases (25 percent reduction) to arrive at an estimate of unreported taxable distributions of tobacco products based on appellant's out-of-state purchases that were placed into retail stock. CDTFA then reduced this amount by \$48,276, the amount of tobacco product taxes appellant reported and paid to California.
 7. According to CDTFA, since appellant did not claim any exempt distributions and none were found during audit, all untaxed purchases were treated as taxable distributions of tobacco products. Based on the various adjustments, CDTFA calculated an audited wholesale cost of tobacco products distributed within the state of \$760,114. When compared to the \$79,833 in reported taxable distributions, CDTFA determined appellant had unreported taxable distributions of tobacco products totaling \$680,281 (\$760,114 - \$79,833).
 8. On June 1, 2022, CDTFA issued the NOD to appellant.
 9. Appellant filed a timely petition for redetermination protesting the NOD.
 10. CDTFA held an appeals conference with appellant, and subsequently issued a decision on August 27, 2024, denying appellant's petition.
 11. Appellant timely appealed to OTA.

DISCUSSION

The Cigarette and Tobacco Products Tax Law requires every person desiring to engage in the sale of tobacco products as a distributor to apply with CDTFA for a distributor's license. (R&TC, § 30140.) A distributor shall apply for and obtain a license for each place of business at which it engages in the business of distributing tobacco products. (*Ibid.*) Every distributor shall pay a tax upon his or her distribution of tobacco products based upon the wholesale cost of these products. (R&TC, §§ 30101, 30123(b), 30131.2(b).) "Distributor" includes every person who distributes tobacco products, or who sells or accepts orders for tobacco products which are

⁵ "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 \$.80 and it charges customers \$1.00, the markup is \$0.20. The formula for determining the markup percentage is markup amount ÷ cost. In this example, the markup percentage is 25 percent (.20 ÷ .80 = 0.25).

to be transported from a point outside this state to a consumer within this state. (R&TC, § 30011.) The term “distribution” includes: (1) the sale of untaxed tobacco products in this state; (2) the use or consumption of untaxed tobacco products in this state; and (3) the placing in this state of untaxed tobacco products in a vending machine or in retail stock for purposes of selling these items to consumers. (R&TC, § 30008.) “Use or consumption” includes the exercise of any right or power over cigarettes or tobacco products incident to the ownership thereof, other than the sale of cigarettes or tobacco products or the keeping or retention thereof by a licensed distributor for the purpose of sale. (R&TC, § 30009.) Unless the contrary is established, it shall be presumed that all tobacco products acquired by a distributor are untaxed tobacco products, and that all tobacco products manufactured in this state or transported to this state, and no longer in the possession of the distributor, have been distributed. (R&TC, § 30109.)

Every distributor must keep records, receipts, invoices, and other pertinent papers that pertain to dealing in, transporting, or storing cigarettes or tobacco products in this state, and the distributor must provide those records to CDTFA for examination upon request. (R&TC, §§ 30453, 30454; Cal. Code Regs., tit. 18, § 4026.) A taxpayer must maintain and make available all records necessary to determine the correct tax liability and for the proper completion of the required tax return or report, including but not limited to, bills, receipts, invoices, cash register tapes, or other documents of original entry supporting the entries in the books of account. (Cal. Code Regs., tit. 18, § 4901(b)(1)(B).)

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 available to it. (R&TC, § 30201.) 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.*) The applicable burden of proof is by a preponderance of evidence, meaning that the taxpayer must prove that the circumstances it asserts are, more likely than not, correct. (*Appeal of East Coast Foods, Inc.*, 2023-OTA-289P.) Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Talavera, supra.*)

Here, appellant failed to provide any books, business records, or information regarding the methods appellant used to calculate the reported taxes due for the audit. Therefore, CDTFA examined appellant’s SUTRs for the liability period and calculated a total in reported gross sales, which CDTFA then reduced to account for sales of tobacco accessories and other non-

tobacco sales and a markup for profit. CDTFA made further reductions to account for in-state, taxpaid purchases in the amount of \$48,276, which is the amount of tobacco product taxes appellant reported and paid to California. Based on the lack of information and documentation available to CDTFA for audit, OTA finds that CDTA's determination, which is based on the adjustments discussed above to the gross sales appellant reported on its SUTRs, to be reasonable and rational. Therefore, the burden shifts to appellant to prove that a different amount is warranted.

Appellant contends that the proposed liability is overstated. Specifically, appellant asserts that while CDTFA estimated the wholesale cost of the distributed tobacco products "by marking down" the taxable sales appellant reported on its SUTRs during the audit, CDTFA "fail[ed] to properly account for excise tax incurred in the computation of the wholesale cost."

Despite appellant's contentions, CDTFA accounted for excise taxes and reduced the estimated wholesale cost by \$48,276, the amount of tobacco product taxes appellant reported and paid to California, before arriving at the audited wholesale cost. Pursuant to R&TC section 30109, unless the contrary is established, it shall be presumed that all tobacco products acquired by a distributor are untaxed tobacco products, and that all tobacco products manufactured in this state or transported to this state, and no longer in the possession of the distributor, have been distributed. Appellant has not provided any documentary evidence in this appeal, let alone evidence substantiating a further reduction for excise tax is warranted. An unsupported assertion is not sufficient to satisfy appellant's burden of proof. (*Appeal of Talavera, supra.*) Accordingly, appellant has not established that an adjustment to the determined unreported taxable distributions of tobacco products is warranted.

HOLDING

Appellant has not established that adjustments are warranted to the determined unreported taxable distributions of tobacco products.

DISPOSITION

CDTFA's action denying appellant's petition for redetermination is sustained.

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Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

We concur:
DocuSigned by:
Keith T. Long
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Keith T. Long
Administrative Law Judge

DocuSigned by:
Josh Aldrich
48745BB806914B4...

Josh Aldrich
Administrative Law Judge

Date Issued: 11/5/2025