OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **C. BUSBY,** **dba CLB Resources**	OTA Case No. 230613683 CDTFA Case ID: 1-509-566

OPINION

Representing the Parties:

For Appellant:	Tracy Fickett, CPA
For Respondent:	Jennifer Barry, Attorney Jarrett Noble, Attorney Jason Parker, Chief of Headquarters Ops.
For Office of Tax Appeals:	Corin Saxton, Attorney

A. WONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561 and California Code of Regulations, title 18, (Regulation) section 30103(b), C. Busby dba CLB Resources (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 January 23, 2020.[1] The NOD is for tax of $217,418, plus applicable interest, for the period January 1, 2015, through September 30, 2016 (liability period).[2] As relevant here, the tax liability is based in part on unreported taxable sales of $2,655,401.

Office of Tax Appeals (OTA) Administrative Law Judges Andrew Wong, Josh Aldrich, and Michael F. Geary held an online oral hearing for this matter on August 21, 2025. At the conclusion of the oral hearing, the record closed and the parties submitted this matter to OTA for an opinion based on the oral hearing record pursuant to Regulation section 30209(b).

[1] The State Board of Equalization (BOE) formerly administered sales and use taxes. On July 1, 2017, BOE administrative functions relevant to this case 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 BOE.

[2] CDTFA timely issued the NOD because appellant waived the otherwise applicable three-year statute of limitations and gave CDTFA until January 31, 2020, to issue the NOD. (See R&TC, §§ 6487(a), 6488.)

ISSUE

Whether the amount of unreported taxable sales should be reduced.

FACTUAL FINDINGS

1. During the liability period, appellant, a partnership, sold watches at both wholesale and retail through two online stores, various trade shows, and a physical retail store in Newport Beach, California.[3]
2. For the liability period, appellant reported total sales of $11,870,686 and claimed deductions for the following: nontaxable sales for resale of $6,139,757; and nontaxable sales in interstate commerce of $5,570,627.
3. Upon audit, appellant provided, as relevant to this appeal, sales invoices for each quarter in 2015 and the third quarter of 2016 (3Q16). Appellant also provided shipping records and travel records relating to some of these sales invoices.
4. CDTFA's liability determination comprises four audit items, but only two are relevant to this appeal; of these two audit items, only one is disputed.
5. Audit item 1, which appellant does not dispute, was for unreported taxable sales of $82,515 that appellant had treated as taxable (i.e., sales for which appellant had collected sales tax reimbursement but had failed to report or remit such reimbursement).
6. Audit item 2, which appellant disputes, was for unreported taxable sales of $2,655,401.
7. In determining audit item 2, CDTFA first compared the total sales recorded on the sales invoices for 2015 and 3Q16 with the total sales that appellant reported for these same periods, and found the former exceeded the latter. Using the differences between recorded and reported total sales, CDTFA calculated error ratios for 1Q15, 2Q15, 3Q15, 4Q15, and 3Q16. CDTFA then applied the average error ratio for 2015 to reported total sales for 1Q16 and 2Q16 to estimate unreported total sales for those two quarters.[4]

[3] Technically, appellant was a husband-and-wife co-ownership consisting of C. Busby and P. Busby, as opposed to a partnership. Under certain circumstances, an unincorporated business jointly owned by a married couple (i.e., joint venture, co-ownership, or partnership by operation of law) may elect not to be taxed as a partnership for federal income tax purposes. (See Internal Revenue Code, § 761(f).) Instead, the qualifying members (husband and wife) may elect to file as sole proprietors. (*Ibid*.) Irrespective of federal income tax treatment, for California sales and use tax purposes, a husband-and-wife joint venture is recognized as a partnership by operation of law and treated as a separate entity. (See R&TC, §§ 6005, 6015.)

[4] CDTFA did not use the error ratio for 3Q16 (220.55 percent) because CDTFA found that appellant's failure to report the sales of inventory in its closeout return unreasonably skewed the overall percentage of error.

CDTFA then combined the estimated unreported total sales with reported total sales for 1Q16 and 2Q16 to establish audited total sales for those two quarters. CDTFA then removed appellant's reported taxable sales and the unreported taxable sales identified in audit item 1 for 1Q16 and 2Q16 (i.e., $30,963 out of $82,515) from audited total sales for those two quarters to calculate audited total sales for which appellant did not collect sales tax reimbursement for 1Q16 and 2Q16. In other words, CDTFA calculated the audited total sales that appellant treated as nontaxable in 1Q16 and 2Q16.

8. Next, CDTFA reviewed sales invoices for 2015 and 3Q16 and scheduled all sales that appellant treated as nontaxable.

9. Regarding claimed nontaxable sales for resale, appellant either could not provide resale certificates or declined to use the XYZ letter process,[5] so CDTFA disallowed all claimed nontaxable sales for resale for which CDTFA could not determine that appellant's customer was in the business of selling watches.[6]

10. Regarding appellant's claimed nontaxable sales in interstate commerce, CDTFA reviewed the travel records appellant provided (e.g., hotel bills, airfare receipts, etc.) to determine whether appellant attended out-of-state trade shows. If sales invoices did not indicate that these sales took place either online via one of appellant's two online stores or at appellant's physical retail store in California, CDTFA accepted as nontaxable all sales taking place within three days of trade shows attended by appellant.[7] As for claimed nontaxable sales made from either appellant's two online stores or its physical retail store in California, CDTFA disallowed claimed nontaxable sales in interstate commerce that were unsupported by bills of lading or other similar documentary evidence.

11. In total, CDTFA disallowed claimed nontaxable sales of $1,907,773 for 2015 and 3Q16.

12. As specifically relevant to this appeal, the disallowed claimed nontaxable sales of $1,907,773 for 2015 and 3Q16 included the following: 15 claimed nontaxable sales for

[5] XYZ letters are one of the methods CDTFA authorizes to assist a seller in satisfying its burden to show that a sale was for resale; the seller sends an XYZ letter to a purchaser to inquire about the purchaser's disposition of the property purchased from the seller. (Cal. Code Regs., tit. 18, § 1668(f).)

[6] CDTFA used sales and use tax permit information in its internal database to determine whether appellant's customers were in the business of selling watches.

[7] As each trade show lasted two days, CDTFA allowed a period of eight days for each trade show in which CDTFA accepted appellant's claimed nontaxable sales in interstate commerce without any additional evidence.

resale made to J. West; and 10 claimed nontaxable sales in interstate commerce made to J. Chow.

13. Regarding sales to J. West, CDTFA found that appellant failed to show these were sales for resale because appellant did not provide a resale certificate from this customer and because this customer is not in the business of selling watches (based on lack of a seller's permit). According to schedules in the audit working papers, the sales invoices for J. West list a California address for the ship-to destination.

14. Regarding sales to J. Chow, CDTFA disallowed these sales because appellant provided no bills of lading to support an allegation that the sales were made in interstate commerce. CDTFA also found that the sales were not made at out-of-state trade shows because the invoices indicated that the sales were made online or at appellant's physical retail store in California. As relevant here, the check used to pay for one of these sales lists a California address for the payor and was drawn from a California bank.

15. Because appellant did not provide any records for 1Q16 and 2Q16, CDTFA applied an error ratio of 20.2037 percent to sales of $3,700,452 that CDTFA determined appellant had treated as nontaxable in those two quarters, resulting in unreported taxable sales of $747,628 for 1Q16 and 2Q16. CDTFA based the error ratio on a comparison of appellant's disallowed claimed nontaxable sales of $1,907,773 for 2015 and 3Q16 with appellant's recorded taxable sales of $9,442,672 for these same periods.[8]

16. In total, CDTFA calculated a deficiency measure of $2,655,401 ($1,907,773 for 2015 and 3Q16 + $747,628 for 1Q16 and 2Q16) for disallowed nontaxable sales for the liability period (audit item 2).[9]

17. On January 23, 2020, CDTFA issued the NOD.

18. Appellant disputed the NOD and petitioned CDTFA for redetermination.

19. On August 31, 2022, CDTFA held an appeals conference with appellant and subsequently issued a decision denying the petition.

20. This timely appeal to OTA followed.

[8] To arrive at recorded taxable sales of $9,442,672, CDTFA reduced recorded total sales of $9,594,377 for 2015 and 3Q16 by reported taxable sales of $100,153 and a difference of $51,552 between recorded and reported taxable sales for these periods.

[9] CDTFA also established a deficiency measure of $27,679 for unreported withdrawals from resale inventory subject to use tax (audit item 3) and a deficiency measure of $2,500 for unreported sales of fixtures and equipment (audit item 4). Appellant does not dispute these audit items (along with audit item 1) so OTA will not discuss them further.

DISCUSSION

California imposes upon all retailers a sales tax measured by the retailer's gross receipts from the retail sale of tangible personal property in this state, 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, it is presumed that all gross receipts are subject to tax until the contrary is established. (R&TC, § 6091.)

California imposes a use tax on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer for storage, use, or other consumption in this state, measured by the sales price of the property, unless that use is specifically exempted or excluded by statute. (R&TC, §§ 6201, 6202, 6401.) Every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state must collect the use tax from the purchaser. (R&TC, § 6203(a).)

It is presumed that tangible personal property delivered outside this state to a purchaser known by the retailer to be a resident of this state was purchased from the retailer for storage, use, or other consumption in this state and stored, used, or otherwise consumed in this state. (R&TC, § 6247.) This presumption may be controverted by a statement in writing, signed by the purchaser or the purchaser's authorized representative and retained by the vendor, that the property was purchased for use at a designated point or points outside this state. (*Ibid*.) This presumption may also be controverted by other evidence satisfactory to OTA that the property was not purchased for storage, use, or other consumption in this state. (*Ibid*.)

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 tax returns or the amount of tax required to be paid to the state by any person, or if any person fails to make a return, CDTFA may compute and determine the amount required to be paid on the basis of any information within its possession or that 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 Las Playas #10*, 2021-OTA-204P.) If CDTFA's determination is not reasonable and rational, then the determination should be rejected. (*Appeal of Landeros*, 2024-OTA-655P.) If CDTFA's determination is reasonable and rational, then the determination is presumed correct. (*Ibid*.) The burden of overcoming this presumption is on the taxpayer. (*Ibid*.)

Generally, the appellant bears the burden of proof as to all issues of fact. (Cal. Code Regs., tit. 18, § 30219(a).) The standard of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(b).) That is, a taxpayer must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Appeal of AMG Care Collective*, 2020-OTA-173P.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Las Playas #10, Inc.*, *supra*.) To satisfy its burden of proof, a taxpayer must prove both that the tax assessment is incorrect and what the proper amount of tax should be. (*Appeal of AMG Care Collective*, *supra*.)

Here, CDTFA used a direct audit method to calculate appellant's deficiency measure for every quarter for which appellant provided sales invoices (i.e., all quarters in 2015 and 3Q16). For periods for which appellant provided no sales invoices (i.e., 1Q16 and 2Q16), CDTFA calculated the deficiency measure on a projection basis. Given that appellant failed to report total recorded sales and sales tax reimbursement collected, it was reasonable and rational for CDTFA to apply an error ratio to an estimate of the sales appellant treated as nontaxable during periods in which no sales invoices were provided (i.e., 1Q16 and 2Q16). After reviewing CDTFA's audit method and calculations for establishing audited taxable sales, OTA concludes that CDTFA has met its initial burden to show that its determination was reasonable and rational. Accordingly, the burden of proof now shifts to appellant to show that a different result is warranted.

On appeal, appellant argues that the trade show grace period preceding and following a trade show should be increased from three days to two weeks to account for appellant's policy of allowing some long-term clients, such as J. West and J. Chow, to take watches from the trade shows on a trial basis for up to two weeks. Thus, appellant argues that five of the disallowed sales to J. West and one of the disallowed sales to J. Chow should be accepted as nontaxable sales in interstate commerce. Appellant asserts that this would reduce the error ratio from 20.20 percent to 18.03 percent and reduce unreported taxable sales by $285,237.

Regarding appellant's requested two-week trade show grace period, there is a 15-day safe harbor for out-of-state retailers physically present in California for not more than 15 days and solely to engage in convention and trade show activities. (See Rev. & Tax. Code, § 6203(d).) However, this safe harbor does not apply to appellant because appellant is a California-based retailer. OTA finds no applicable authority to increase the three-day trade show grace period.

As for the sales to J. Chow and J. West at issue, appellant has not provided any evidence supporting its argument that these transactions took place at out-of-state trade shows.

Further, this assertion is contradicted by the invoice for the sale at issue to J. Chow, which indicates that appellant made the sale online through one of its two online stores. Additionally, the check for this sale to J. Chow lists a California address for the payor and was drawn from a California bank. And the invoices for the sales to J. West also list a California shipping address. So even if these sales to J. Chow and J. West took place at an out-of-state trade show, appellant would be liable for use tax because appellant, as a California retailer, has a use tax collection obligation with respect to out-of-state sales to purchasers it knows are residents of California. This is because the purchased items are presumed to have been stored, used, or otherwise consumed in California unless there is a written statement by the purchasers or other evidence to the contrary. But appellant did not obtain such statements from the purchasers or provide other supporting evidence. Consequently, appellant has failed to show that adjustments are warranted to audit item 2.

HOLDING

The amount of unreported taxable sales should not be reduced.

DISPOSITION

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

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Andrew Wong
Administrative Law Judge

We concur:

DocuSigned by:
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Josh Aldrich
Administrative Law Judge

DocuSigned by:
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Michael F. Geary
Administrative Law Judge

Date Issued: 11/14/2025