OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **LIL' MAN IN THE BOAT, INC.,** **dba Just Dreaming Yacht Charters**	OTA Case No.: 240315753 CDTFA Case ID: 4-387-443

OPINION

Representing the Parties:

For Appellant:	Lawrence Murray, President & Attorney David Ongaro, Attorney
For Respondent:	Amanda Jacobs, Attorney Jarrett Noble, Attorney Jason Parker, Chief of Headquarters Ops.
For Office of Tax Appeals:	Andrea L.H. Long, Attorney Supervisor

S. RIDENOUR, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6901, Lil' Man In The Boat, Inc., dba Just Dreaming Yacht Charters (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA) denying appellant's claim for refund of $17,218 for the period July 1, 2018, through December 31, 2022.

Office of Tax Appeals (OTA) Panel Members Josh Lambert, Kim Wilson, and Sheriene Anne Ridenour held a virtual oral hearing on this matter on July 15, 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).

ISSUE

Whether OTA has jurisdiction to determine whether Title 33 of the United States Code (33 U.S.C.) section 5(b), a federal statute, preempts or otherwise prohibits California from taxing retail sales of alcoholic beverages on a vessel under R&TC section 6051; and if OTA has jurisdiction, whether California is preempted.

FACTUAL FINDINGS

1. Appellant is a commercial charter business that operates a licensed charter vessel in the navigable waters of the San Francisco Bay since 1994. During the period at issue, appellant held an active seller's permit and sold alcoholic beverages to its passengers and collected sales tax, which it reported and remitted to CDTFA.
2. On November 29, 2022, appellant filed a claim for refund of $17,218 on its alcohol sales for the period at issue. Appellant contended that it is entitled to a refund under 33 U.S.C. section 5(b), which appellant alleged prevents California from imposing any tax on a vessel operating on navigable waterways.
3. In a decision dated February 28, 2024, CDTFA denied the claim. CDTFA determined that appellant did not timely file its claim for the period between the third quarter of 2018 (3Q18) and 3Q19.[1] For the remaining quarters, 4Q19 through 4Q22, CDTFA determined that appellant was not entitled to a refund for excess sales tax reimbursement collected and remitted with its sales of alcoholic beverages.
4. This timely appeal followed.

DISCUSSION

Generally, California imposes sales tax on retailers based on a percentage of their gross receipts from retail sales of tangible personal property that are sold in California. (R&TC, § 6051.) It is presumed that all gross receipts are taxable unless the contrary is established. (R&TC, § 6091.) A retailer includes sellers who make any retail sales of tangible personal property. (R&TC, § 6015(a)(1).) Every person engaged in the business of selling tangible personal property subject to sales tax must obtain a seller's permit for each location within California where sales are regularly conducted with customers. (Cal. Code Regs., tit. 18, § 1699(a).)

In a claim for refund, the taxpayer carries the burden to show that CDTFA's determination is incorrect and produce evidence from which a proper tax determination can be made. (*Paine v. Bd of Equalization* (1982) 137 Cal.App.3d 438.) The taxpayer, therefore, has the burden to prove entitlement to any claimed exemptions or exclusions. (*Appeal of Specialized Orthopedic Solutions*, 2024-OTA-463P.) Here, there is no dispute that appellant held a seller's permit. Additionally, it is undisputed that appellant sold alcoholic beverages on

[1] The amount in dispute for the period between 3Q18 and 3Q19 is $7,950. Appellant does not address whether the statute of limitations bars its claim for refund for this period. Accordingly, this issue is considered waived and will not be addressed.

the vessel in the San Francisco Bay and remitted the sales tax related to its sales of alcoholic beverages to CDTFA.

Appellant argues that the taxes it collected and remitted to CDTFA for the sale of alcoholic beverages must be refunded based on federal preemption. Appellant notes that 33 U.S.C. section 5, commonly known as the Rivers and Harbors Act, prohibits the levying of taxes "or any other impositions whatever," upon vessels, watercraft, or their passengers or crew, by "any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States." Appellant argues that 33 U.S.C. section 5 prohibits California from collecting tax on all vessels, which includes the sales tax appellant collected from the sale of alcoholic beverages on its vessel and, thus, the taxes must be refunded to appellant.[2]

OTA's jurisdiction is established by statute. (Cal. Code Regs., tit. 18, § 30104.) OTA has jurisdiction to resolve appeals involving California taxes, including sales and use tax appeals. (Gov. Code, §§ 15671(a), 15672(b); Cal. Code Regs., tit. 18, § 30103(b)(1).) Once OTA has jurisdiction over an appeal, it must act within powers conferred on it by law and may not validly act in excess of such powers. (See *Ferdig v. State Personnel Bd.* (1969) 71 Cal.2d 96, 104.)

As thoroughly examined in OTA's precedential opinion, *Appeal of Acosta and Castro*, 2022-OTA-235P, OTA lacks jurisdiction to rule whether a California statute is preempted by a federal statute. (See also *Appeal of Landeros,* 2024-OTA-655P.) Article III, section 3.5, of the California Constitution provides, in relevant part, that an administrative agency has no power to "declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations." OTA regulations in turn specify that OTA does not have jurisdiction to determine "[w]hether a California statute is invalid or enforceable under the United States or California

[2] When an amount represented by a person to a customer as constituting reimbursement for taxes due is computed upon an amount that is not taxable or is in excess of the taxable amount and is actually paid by the customer to the person, the amount so paid shall be returned by the person to the customer or remitted by the person to CDTFA. (R&TC, § 6901.5; see *Appeal of Farrell*, 2023-OTA-095P.)

Therefore, even if appellant prevailed in this matter and excess tax reimbursement were returned to appellant, appellant would not be entitled to keep the returned amounts. Rather, appellant would be required to refund the excess tax reimbursement to customers who actually paid the tax, and for any amounts appellant was unable to demonstrate were refunded to identified customers, appellant would be obligated to remit those amounts to CDTFA.

Constitutions, unless a federal or California appellate court has already made such a determination." (Cal. Code Regs., tit. 18, § 30104(a).)

Appellant relies on appellate court decisions from Illinois, Tennessee, and Alaska, which held that a charge imposed in that state was improper because the local or state law was preempted by the Rivers and Harbors Act in their respective jurisdictions.[3] Appellant, referring to Article III, section 3.5 of the California Constitution, argues that since the Constitution does not limit OTA from considering appellate court decisions from jurisdictions outside of California, OTA has jurisdiction and should adopt the same findings. In essence, appellant argues that R&TC section 6051, a broadly applicable statute imposing sales tax on a retailer's sales of tangible personal property, is similarly preempted by federal statute.

However, as appellant points out, none of these cited cases discuss California law, much less have determined that R&TC section 6051 is preempted by the Rivers and Harbors Act. Administrative agencies, like OTA, cannot act contrary to the law. (*Ferdig v. State Personnel Board*, *supra*, 71 Cal.2d at pp. 103-104.) There is nothing implicit in the constitutional or statutory scheme that empowers OTA to find jurisdiction for itself based on case law that does not directly address R&TC section 6051. (See *Id.* at p. 106.) To do otherwise would be a bridge too far. OTA regulations make it clear that a *federal* or *California* appellate court must determine that a California statute is invalid or enforceable. (Cal. Code Regs., tit. 18, § 30104(a).) Appellant does not direct OTA to, nor is OTA aware of, any federal or California appellant court ruling on whether 33 U.S.C. section 5(b) preempts R&TC section 6051. Consequently, the cases upon which appellant relies do not prohibit CDTFA from applying R&TC section 6051 and collecting sales tax from alcoholic beverage sales, nor do they provide OTA with jurisdiction to determine whether R&TC section 6051 is invalid or enforceable.

Appellant also relies on *Lil' Man in the Boat, Inc. v. City and County of San Francisco* (9th Cir. 2021) (*Lil' Man*) 5 F.4th 952, in support of its contentions. While *Lil' Man* is a federal appellate court decision, OTA finds appellant's reliance on *Lil' Man* is nevertheless misplaced. As background, appellant brought action alleging that landing fees imposed on commercial charters operating out of a marina violated the Rivers and Harbors Act. (*Lil' Man In The Boat, Inc. v. City and County of San Francisco, et al.* (N.D. Cal., Nov. 26, 2019) 2019 WL 8263440.)

[3] Appellant relies on *City of Chicago Through Dept. of Finance v. Wendella Sightseeing, Inc.* (Ill. App. Ct. 2019) 143 N.E.3d 771, affd. (2023) 226 N.E.3d 636; *High Country Adventures, Inc. v. Polk County* (Tenn. Ct. App., Nov. 10, 2008, No. E200702678COAR3CV) 2008 WL 4853105; *Moscheo v. Polk County* (Tenn. Ct. App., Sept. 2, 2009, No. E200801969COAR3CV) 2009 WL 2868754; and *State of Alaska, Dept. of Natural Resources v. Alaska Riverways, Inc.* (Alaska 2010) 232 P.3d 1203

The United States District Court for the Northern District of California, finding that Congress did not intend the Rivers and Harbors Act to restrict the type of fees that were at issue, granted summary judgment in favor of defendants. (*Ibid*.) Thereafter, appellant appealed to the Ninth Circuit.

The Ninth Circuit in *Lil' Man* affirmed the lower court, but on alternate grounds; specifically, it found "no indication that Congress intended to create an implied private right of action in" 33 U.S.C. section 5(b). (*Lil' Man*, *supra*, 5 F.4th at pp. 963-964.) The court did not, however, reach a decision on the merits as to whether the fees violated 33 U.S.C. section 5(b). (*Ibid*.) Appellant, acknowledging that the court in *Lil' Man* found that 33 U.S.C. section 5 did not create private right of action, argues that the court nevertheless "upheld" 33 U.S.C. section 5. However, the issue in the current matter is not whether 33 U.S.C. section 5 is valid or should be upheld,[4] but whether OTA has jurisdiction to determine if 33 U.S.C. section 5(b) preempts R&TC section 6051 and, if so, whether R&TC section 6051 is preempted. As discussed above, in order for OTA to have jurisdiction to determine whether a California statute (here, R&TC section 6051) is invalid or enforceable under the United States or California Constitutions, a federal or California appellate court must first determine that the California statute is invalid or enforceable. (Cal. Code Regs., tit. 18, § 30104(a).) The Ninth Circuit court in *Lil' Man* found as a "threshold question" (*Lil' Man*, *supra*, 5 F.4th at p. 957) that 33 U.S.C. section 5 did not create a private right of action; therefore, the court did not opine as to whether the fees at issue in that matter, let alone whether R&TC section 6051, were invalid or enforceable. Thus, OTA finds that the Ninth Circuit holding in *Lil' Man* does not provide OTA with the necessary jurisdiction under Regulation section 30104 to determine whether R&TC section 6051 is invalid or enforceable.

Although the supremacy clause of the U.S. Constitution dictates that federal law preempts state law in certain circumstances, OTA's constitutional and statutorily limited jurisdiction does not allow it to ignore California authority without explicit power to do so. (See *Appeal of Acosta and Castro*, *supra*.) OTA is an independent appeals body and not a court of general jurisdiction, let alone a tax court. (Gov. Code, § 15672(b); see Gov. Code, § 15670 et seq.) "The purpose of [article III, section 3.5 of the California Constitution] was to prevent agencies from using their own interpretation of the Constitution or federal law to thwart the mandates of the Legislature." (*Reese v. Kizer* (1988) 46 Cal.3d 996, 1002.) Therefore, OTA cannot, and, more importantly, will not act contrary to California law.

[4] OTA does not have jurisdiction to decide "[w]hether a provision of the California Constitution is invalid or unenforceable under the United States Constitution, unless a federal or California appellate court has already made such a determination. (Cal. Code Regs., tit. 18, § 30104(b).)

Appellant also argues that CDTFA is estopped from asserting that OTA lacks jurisdiction from determining the preemption issue. Appellant contends that CDTFA's failure to bring its jurisdictional argument until this appeal "harms [appellant's] ability to participate and constitutes sandbagging and a late ambush." Appellant also contends that if CDTFA wanted to argue that OTA lacked jurisdiction in this matter, then CDTFA "should not have funneled [appellant] into this process to challenge the tax" and that "this entire process should not be employed though [CDTFA] insisted on it while dissuaded [*sic*] [appellant] from seeking relief in Superior Court."

OTA's authority to act is of limited subject matter jurisdiction, and it cannot act beyond the scope of its enabling statute. (*Appeal of Moy*, 2019-OTA-057P.) Subject matter jurisdiction cannot be waived and may be raised at any time. Subject matter jurisdiction is a fundamental requirement for judicial consideration of claims. (*Saffer v. JP Morgan Chase Bank, N.A.* (2014) 225 Cal.App.4th 1239, 1248.) Subject matter jurisdiction may not be conferred by consent, waiver, agreement, acquiescence, or estoppel. (*Ibid*., citing *Totten v. Hill* (2007) 154 Cal.App.4th 40, 47.) In line with these well-settled principles, OTA regulations do not set time limits for raising jurisdictional issues. (See Cal. Code Regs., tit. 18, § 30105(b) ["If OTA accepts an appeal and does not raise any issues regarding jurisdiction or timeliness, any such issues may be raised and addressed in briefing, and if raised, will be determined by OTA."].)

Additionally, OTA did not have jurisdiction over this appeal until appellant timely filed its appeal pursuant to Regulation section 30103(b). CDTFA could not raise OTA's jurisdictional issues until this appeal was properly before OTA. CDTFA providing argument as to OTA's purported lack of jurisdiction at any time before a taxpayer decides to appeal to OTA, such as when CDTFA issues an adverse Appeals Bureau decision, would be premature at best. Therefore, CDTFA waiting to provide OTA jurisdiction arguments until after appellant filed its appeal with OTA cannot be considered an attempt to "ambush" or "harm" appellant's ability to participate in the appeals process. As for appellant's argument that CDTFA "funneled" appellant into "this process to challenge the tax" and "dissuaded" appellant from seeking relief in superior court, OTA notes that despite appellant's unsubstantiated contentions,[5] appellant had the option to directly file an action in a superior court, as opposed to first filing an appeal with OTA. Specifically, when CDTFA issues a denial on a claim for refund, like here, the law

[5] OTA notes that, as an informational courtesy, CDTFA sends a cover letter with its decisions letting the recipient (here, appellant) know what steps need to be taken should the recipient decide to accept CDTFA's decision, request that CDTFA reconsider its decision, or file an appeal to OTA (and CDTFA encloses a Request for Appeal form (OTA Form L-01) for ease of access for the recipient). OTA does not find that CDTFA's cover letter "funnels" a taxpayer into one option, or "dissuades" a taxpayer from another.

provides the claimant 90 days after the mailing of the denial notice to file an action in court for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed. (R&TC, § 6933, see also R&TC, § 6934.) As a claimant, appellant had the option to file an action in superior court without first filing an appeal with OTA, an option appellant chose on its own accord not to pursue.

Accordingly, OTA lacks subject matter jurisdiction to determine whether CDTFA's refund claim denial is invalid due to federal preemption. The right forum for appellant to seek such a remedy is to pursue its constitutional arguments in the courts. (See *Hyatt v. Yee* (9th Cir. 2017) 871 F.3d 1067, 1074; *Appeal of Landeros*, *supra*.)

HOLDING

OTA does not have jurisdiction to determine whether 33 U.S.C. section 5(b), a federal statute, preempts or otherwise prohibits California from taxing retail sales of alcoholic beverages on a vessel under R&TC section 6051.

DISPOSITION

CDTFA's action denying the claim for refund is sustained.

DocuSigned by:
Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

We concur:

Signed by:
Josh Lambert
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Josh Lambert
Administrative Law Judge

Signed by:
Kim Wilson
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Kim Wilson
Hearing Officer

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