

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No.: 240616329
WAY STATION, LLC,)	CDTFA Case ID: 4-959-965
dba Way Station)	
)	
)	
)	

OPINION

Representing the Parties:

For Appellant:	Brian Back, Managing Member
For Respondent:	Jason Parker, Chief of Headquarters Ops. Cary Huxsoll, Attorney Ravinder Sharma, Hearing Representative

K. WILSON, Hearing Officer: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Way Station, LLC dba Way Station (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 May 11, 2023. The NOD is for tax of \$26,299, plus applicable interest for the period October 1, 2019, through September 30, 2022 (liability period).¹

Office of Tax Appeals (OTA) Panel Members Kim Wilson, Sheriene Anne Ridenour, and Keith T. Long held an oral hearing for this matter in Sacramento, California on September 17, 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, section 30209(b).

ISSUE

Whether adjustments are warranted to the unreported taxable sales.

¹ The NOD was timely issued because on December 21, 2022, appellant signed the most recent waiver in a series of waivers of the otherwise applicable three-year statute of limitations for the period October 1, 2019, through March 31, 2020, which allowed CDTFA until July 31, 2023, to issue an NOD. (R&TC, §§ 6487(a), 6488.)

FACTUAL FINDINGS

1. Appellant, a limited liability company, doing business as Way Station, began operating a restaurant in Fairfax, California on March 17, 2018. Appellant offered dine-in, take-out, and delivery through DoorDash, Grubhub and Uber Eats. In addition, appellant offered facility rentals and catering services.
2. Upon audit, the following books and records were made available: bank statements for fourth quarter 2019 (4Q19), 1Q20, 2Q21 and 3Q22; DoorDash summary reports for February 2021 through December 2021; DoorDash statements for January through September 2022; Grubhub reports for the liability period; Uber Eats reports for 2020 and 2021; Federal Income Tax Returns (FITRs) for 2019 and 2021; general ledger (G/L) for the liability period; point-of-sale (POS) sales reports for June 2022 through September 2022; and POS tax reports for 3Q20 through 3Q22.
3. Appellant prepared the Sales and Use Tax returns (SUTRs) using the POS reports. Appellant reported total and taxable sales as the same amounts on the SUTRs and did not claim any nontaxable transactions.
4. CDTFA compared gross receipts from FITRs with reported total sales on SUTRs and found differences of \$19,982 for 2019, \$73,696 for 2020, and \$84,731 for 2021. The 2020 FITR was not provided but the 2021 FITR had a tax return comparison with the 2020 information. The statements attached to the 2019 and 2021 FITRs provided a breakdown of gross receipts for each year.² CDTFA calculated a book markup³ of 157.49 percent and 176.92 percent, respectively, using appellant's FITRs for 2020 and 2021 and reported total sales. CDTFA found that the book markups were low for a restaurant.

² The statement attached to the 2019 FITR showed the following income: food and beverage sales \$453,212, DoorDash \$5,862, Grubhub \$428, Uber Eats \$208, and event service \$57,545. The statement attached to the 2021 FITR showed the following income: Food and beverage sales \$695,588, DoorDash \$28,655, Grubhub \$12,988, Uber Eats \$20,249, and event service \$25,042.

³ "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 \$0.70 and it charges customers \$1.00, the markup is \$0.30. The formula for determining the markup percentage is $\text{markup amount} \div \text{cost}$. In this example, the markup percentage is 42.86 percent ($0.30 \div 0.70 = 0.42857$). A "book markup" (sometimes referred to as an "achieved markup") is one that is calculated from the retailer's records. Markup and gross profit margin are different. The gross profit is the sales price minus the cost. The formula for determining the gross profit margin is $\text{profit amount} \div \text{sales price}$. In the above example, the gross profit margin is 30 percent ($0.30 \div 1.00 = 0.30$).

5. CDTFA compiled available 1099-K⁴ data for the periods 4Q19 through 4Q21 showing total credit card receipts of \$1,465,753. CDTFA then removed sales tax at a rate of nine percent and tips at 13.67 percent to arrive at total credit card sales adjusted for tax (ex-tax) and tips (ex-tip) of \$1,183,012. CDTFA compared the adjusted credit card sales to reported total sales ex-tax and ex-tip and found that credit card sales exceeded reported total sales by \$21,288 for this period. CDTFA then isolated credit card sales from third-party delivery service sales which totaled \$1,349,796. Again, CDTFA removed sales tax at a rate of nine percent and tips at 13.67 percent to arrive at total credit card sales ex-tax and ex-tip of \$1,089,421. When compared to reported total sales ex-tax of \$1,161,724, CDTFA found a difference of \$72,303.
6. CDTFA analyzed the POS sales data for 4Q20 through 3Q22 and found that appellant did not record sales from event services and sales through third-party delivery services in the POS. Since the POS did not contain all sales, CDTFA analyzed appellant's G/L for the liability period and found that appellant had underreported sales tax of \$12,744. CDTFA compiled total sales ex-tax from the G/L of \$1,930,073.
7. Appellant provided DoorDash summary reports for February 2021 through December 2021 and statements for 1Q22 through 3Q22.⁵ CDTFA analyzed the reports and computed an average percentage of error of 114.02 percent. This error rate was applied to DoorDash sales per G/L and CDTFA calculated \$33,428 taxable sales from DoorDash for 4Q19 through 4Q20. CDTFA then added the sales from the DoorDash summary reports to arrive at total DoorDash taxable sales of \$110,068. CDTFA was provided with Uber EATS reports for 2020 and 2021 and calculated that 117.92 percent of sales were taxable. CDTFA applied the taxable percentage to amounts in the G/L and calculated taxable sales of \$21,926 for the periods 4Q19 through 4Q20. CDTFA added the 1Q21 sales of \$7,124 from the G/L to the calculated amounts to arrive at \$21,926 Uber Eats⁶ taxable sales. DoorDash, Grubhub and Uber Eats were combined

⁴ Form 1099-K is an IRS Form titled, "Payment Card and Third Party Network Transactions", which shows the monthly and annual amounts paid to a merchant by a bank, credit card company, or third party network, during a given time period. Form 1099-K includes payments made by any electronic means, including, but not limited to, credit cards, debit cards, and PayPal.

⁵ DoorDash summary reports were missing for January 2021 and December 24, 2021, through December 31, 2021.

⁶ Beginning April 1, 2021, Uber Eats elected to be a marketplace facilitator instead of a delivery network company and began collecting and reporting sales tax on sales. A marketplace facilitator that is registered with CDTFA and facilitates the retail sale of tangible personal property (TPP) by a marketplace seller is the retailer selling the TPP sold through its marketplace. (R&TC, § 6043.)

- and CDTFA computed taxable sales of \$178,236 for sales made through third-party delivery services.
8. CDTFA computed taxable sales from food and beverage sales recorded in the G/L by removing tax of nine percent and tips of 13.67 percent to arrive at taxable food and beverage sales ex-tax and ex-tip of \$1,480,458. Since only 4Q20 through 3Q22 POS reports were available, CDTFA compared the calculated taxable food and beverage sales ex-tax and ex-tip for 4Q20 through 3Q22 with the available POS reports and found a difference of \$131,325, with an average error rate of 11.79 percent. This error rate was applied to the calculated taxable food and beverage sales ex-tax and ex-tip for the periods 4Q19 through 3Q20 along with the calculated error rates for the periods with POS reports to arrive at audited taxable POS sales of food and beverages of \$1,657,719.
 9. CDTFA combined audited taxable POS sales of food and beverages, third-party delivery sales, and event sales to arrive at \$1,909,739. Total audited sales were compared to reported taxable sales with differences found of \$294,554 for the liability period.
 10. CDTFA calculated an audited markup of 206.17 percent and 213.81 percent for 2020 and 2021, respectively. CDTFA found the markup to be reasonable for a restaurant and in support of the audit findings.
 11. On May 11, 2023, CDTFA issued the NOD for \$29,249.94 comprised of \$26,299 in tax and applicable interest.
 12. Appellant timely petitioned the NOD disputing sales from the third-party delivery services and the difficulty in ascertaining sales tax information from the third-party reports.
 13. On April 24, 2024, CDTFA issued a decision denying appellant's petition for redetermination.
 14. Appellant timely appealed to OTA.

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 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.*)

Although gross receipts from the sale of "food products" are generally exempt from the sales tax, sales of hot food and sales of food served in a restaurant are subject to tax. (R&TC, § 6359(a), (d)(1), (d)(2), and (d)(7).) Tax does not apply to sales of food products which are furnished in a form not suitable for consumption on the seller's premises. (R&TC, § 6359(f); Cal. Code Regs., tit. 18, § 1603(c)(1)(A).) For purposes of the tax exemption, the term "food products" does not include carbonated or effervescent bottled waters, spirituous, malt or vinous liquors, or carbonated beverages. (R&TC, § 6359(b)(3); Cal. Code Regs., tit. 18, § 1602(a)(2).) When more than 80 percent of a retailer's gross receipts are from sales of food products, and over 80 percent of its retail sales of food are subject to tax, then cold food sold in a form suitable for consumption on the retailer's premises is subject to tax even if it is purchased "to go." (R&TC, § 6359(d)(6).) When a retailer's sales fit within this provision, known as the "80-80 rule," the retailer may avoid its application by keeping a separate accounting of its sales to-go of cold food in a form suitable for consumption on the retailer's premises. Exemptions from tax are strictly construed against the taxpayer who has the burden of proving that the statutory requirements have been satisfied. (*H. J. Heinz Co. v. State Bd. of Equalization* (1962) 209 Cal.App.2d 1, 4.)

Here, CDTFA used a direct method when it relied on appellant's books and records (G/L, POS reports, and third-party delivery sales reports) to verify sales appellant reported on its SUTRs for the liability period. Therefore, OTA concludes that CDTFA has established that its determination is reasonable and rational, and accordingly, the burden shifts to appellant to show errors in the audit.

Appellant contends that Grubhub, DoorDash and Uber Eats should all fall under the marketplace facilitator act requirements of reporting sales tax on third-party delivery sales.

Additionally, appellant argues that it was difficult to ascertain the amounts to report on its SUTRs from the third-party sales reports.

R&TC sections 6040 through 6041.6 are part of what is known as the Marketplace Facilitator Act. R&TC section 6041(b) defines a marketplace facilitator as follows:

“Marketplace facilitator” means a person who contracts with marketplace sellers to facilitate for consideration, regardless of whether deducted as fees from the transaction, the sale of the marketplace seller’s products through a marketplace operated by the person or a related person and who does both of the following: (1) Directly or indirectly, through one or more related persons, engages in any of the following: (A) Transmitting or otherwise communicating the offer or acceptance between the buyer and seller, (B) Owning or operating the infrastructure, electronic or physical, or technology that brings buyers and sellers together, (C) Providing a virtual currency that buyers are allowed or required to use to purchase products from the seller, (D) Software development or research and development activities related to any of the activities described in paragraph (2), if such activities are directly related to a marketplace operated by the person or a related person; (2) Directly or indirectly, through one or more related persons, engages in any of the following activities with respect to the marketplace seller’s products: (A) Payment processing services, (B) Fulfillment or storage services, (C) Listing products for sale, (D) Setting prices, (E) Branding sales as those of the marketplace facilitator, (F) Order taking, or (G) Providing customer service or accepting or assisting with returns or exchanges.

A “Delivery network company” means a business entity that maintains an internet website or mobile application used to facilitate delivery services for the sale of local products. (R&TC, § 6041.5(b)(1).) Notwithstanding R&TC section 6041.5(a), a delivery network company that meets the definition set forth in R&TC section 6041(b) may elect, in a reasonable manner and duration prescribed by the department, to be deemed a marketplace facilitator pursuant to the Marketplace Facilitator Act. (R&TC, § 6041.5(c); Cal. Code Regs., tit. 18, § 1684.5.)

As relevant to this appeal, only Uber Eats has elected to be a marketplace facilitator and report sales and sales tax to CDTFA for sales made in association with appellant. Therefore, appellant remains responsible for collecting and remitting sales tax reimbursement with respect to its sales through DoorDash and Grubhub. As shown on appellant’s third-party sales reports from DoorDash and Grubhub, OTA finds that CDTFA correctly computed audited taxable sales based on the best available evidence, which is reasonable and rational. Appellant has not identified any errors in CDTFA’s computation of audited taxable sales or provided any evidence with which a more accurate determination could be made. As appellant has not met its burden of proof in this case, OTA concludes that no adjustments to the measure of tax are warranted.

HOLDING

Adjustments are not warranted to the unreported taxable sales.

DISPOSITION

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

Signed by:
Kim Wilson
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Kim Wilson
Hearing Officer

We concur:

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Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

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

Date Issued: 11/14/2025