

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 231014464
GALLAGHER’S IRISH PUB, INC.,)	CDTFA Case ID: 225-386
dba Gallagher’s Irish Pub)	
)	
)	

OPINION

Representing the Parties:

For Appellant:	Kelly Erben, Representative
For Respondent:	Nalan Samarawickrema, Hearing Representative Chad Bacchus, Attorney Jason Parker, Chief of Headquarters Ops.

For Office of Tax Appeals: Corin Saxton, Attorney

S. BROWN, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Gallagher’s Irish Pub, Inc. (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)¹ denying appellant’s timely petition for redetermination of a Notice of Determination (NOD) issued on April 11, 2018.² The NOD is for tax of \$19,333.16, plus applicable interest for the period April 1, 2014, through March 31, 2017 (liability period). As discussed below, CDTFA subsequently conducted reaudits that have reduced the tax liability to \$17,751.

Administrative Law Judge Suzanne B. Brown, Administrative Law Judge Greg Turner, and Hearing Officer Kim Wilson held an oral hearing for this matter in Sacramento, California, on August 19, 2025. At the conclusion of the hearing, the record was closed, and this matter

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 CDTFA. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to events that occurred before July 1, 2017, “CDTFA” refers to the board.

² The NOD was timely issued because on December 12, 2017, appellant signed the most recent in a series of waivers of the otherwise applicable three-year statute of limitations for the period April 1, 2014, through December 31, 2014, which allowed CDTFA until April 30, 2018, to issue an NOD. (R&TC, §§ 6487(a), 6488.)

was submitted for an Opinion pursuant to California Code of Regulations, title 18, section 30209(b).

ISSUE

Whether additional adjustments are warranted to the deficiency measure for unreported taxable sales.

FACTUAL FINDINGS

1. Appellant, a California corporation doing business as Gallagher's Irish Pub, operated two bar/restaurants, with one location in Eureka and one in Scotia.³ Appellant sold beer, wine, and liquor. Appellant also offered catering services at hotel banquet rooms. Both of appellant's businesses were located inside the hotels, and both businesses charged room rental fees for events held in the hotels' banquet rooms. Appellant did not own the hotels.
2. Upon audit, appellant provided the following documentation: point of sale (POS) reports for both locations for the liability period; alcohol purchase invoices for the periods July 1, 2015, through August 31, 2015, and July 1, 2017, through July 31, 2017; bank statements for the Eureka location for the period April 1, 2014, through March 31, 2017; bank statements for the Scotia location for the period April 1, 2014, through December 31, 2016; federal income tax returns (FITRs) for 2014 and 2015; and a menu.
3. Gross receipts reported on appellant's FITRs for 2014 and 2015 exceeded gross receipts reported on appellant's sales and use tax returns (SUTRs) by \$75,285. Using the gross receipts and cost of goods sold that appellant reported on its FITRs, CDTFA calculated an average markup of 117.51 percent for 2014 and 2015, which CDTFA found to be low for a restaurant with a bar. Given the discrepancy between gross receipts reported on FITRs and SUTRs, and CDTFA's finding that the book markup was low, CDTFA questioned the accuracy of appellant's reported taxable sales.
4. CDTFA performed a shelf-test markup analysis of alcohol sales, identifying a deficiency measure of \$394,086 for unrecorded alcohol sales. However, after identifying an error in the methodology, CDTFA reduced the deficiency measure to \$234,502, and CDTFA declined to use the markup analysis in its estimate of audited taxable sales. Instead, CDTFA used appellant's POS reports to calculate audited taxable sales.

³ The Scotia location closed on January 31, 2017. The Eureka location closed in August 2023.

5. The POS reports for the Eureka location listed ten categories of income: food, beer, wine, liquor, beverages, retail, house account deposits,⁴ nontaxable transactions, automatic gratuities, and tips. The POS reports for the Scotia location listed the same categories of income, except for house account deposits, which were not included in the Scotia POS reports.
6. Appellant told CDTFA that the POS category for nontaxable transactions consisted of rental fees for the banquet room. Appellant's website indicated that the rental fees were charged in connection with appellant's provision of catering food and drink at banquet room events.⁵ Therefore, CDTFA found that sales tax applies to the rental fees, as the fees were included as a part of the taxable sales of food and drinks appellant provided in banquet room events. CDTFA also found that sales tax applies to appellant's mandatory gratuities (i.e., "automatic gratuities").⁶
7. For both locations, CDTFA combined the income categories of food, beer, wine, liquor, beverages, retail, nontaxable, and automatic gratuities to calculate audited taxable sales of \$3,537,803 for the liability period. CDTFA compared audited taxable sales to reported taxable sales of \$3,303,188 to establish a deficiency measure of \$234,615 for unreported taxable sales. CDTFA noted that the markup analysis results supported the reasonableness of this measure of unreported taxable sales.
8. At the conclusion of the audit, appellant asserted that the deficiency measure might include loans that appellant processed through the POS system; however, appellant did not provide any supporting documentation for this assertion. CDTFA found this assertion to be implausible due to the impracticality of such an accounting method, and CDTFA made no adjustments for loans allegedly included in POS reports.
9. On April 11, 2018, CDTFA issued the NOD to appellant for \$19,333.16 in tax, plus applicable interest, for the liability period.

⁴ The audit workpapers state that during the audit, appellant told CDTFA that the house account deposit category consists of deposits for banquet room rentals and house charges to the hotel owner. The audit workpapers also state that the house account deposit category includes a \$10,000 loan from the owner of the Eureka hotel, Mr. Lee.

⁵ Appellant told CDTFA that it gave the rental fees to its landlord (the hotel). After CDTFA requested documentary support for this assertion, appellant provided the lease for the Eureka location. However, CDTFA found that the lease did not address rental fees, and, consequently, CDTFA found that appellant, not appellant's landlords, charged the rental fees.

⁶ A mandatory payment designated as a tip, gratuity, or service charge is included in the taxable gross receipts, even if the amount is subsequently paid by the retailer to employees. (Cal. Code Regs., tit. 18, § 1603(g).)

10. Appellant filed a timely petition for redetermination, and the parties held an appeals conference on February 9, 2023.
11. During CDTFA's internal appeals process, appellant provided documentation in support of its argument that co-owner Kelly Erben used personal funds to infuse cash into the business by charging it through the POS system.⁷ Appellant's documentation included credit card statements for Ms. Erben's various credit card accounts;⁸ bank statements from Ms. Erben's bank accounts listing charges and payments to appellant; a November 7, 2015 manager report from appellant's POS system, showing a single credit card charge of \$6,000; a portion of an undated daily POS report showing retail sales of \$5,541.30; and three receipts from the Eureka location with a description of "PERSONAL LOAN KELLY" entered below the "Room Fee" charge. Those three receipts from the Eureka location reflect: a November 15, 2016 receipt that includes \$1,000 charge to Ms. Erben's Visa card; and two November 18, 2014 charges of \$1,500 to Ms. Erben's Discover card and Visa card.
12. Appellant also provided evidence of gift certificates for the fourth quarter of 2015 (4Q15), 1Q16, and 2Q16. CDTFA conceded that appellant ran sales of gift certificates in the POS system; thus, CDTFA compared the gift certificates to the nontaxable income listed in the POS reports for 4Q15, 1Q16, and 2Q16 to calculate a gift certificate percentage to apply to nontaxable income for the remainder of the audit period.
13. CDTFA issued a Decision on June 30, 2023, ordering a reaudit to make two corrections to the audit. First, CDTFA found that the deficiency measure should be reduced by \$3,138 to account for gift certificate sales included in the nontaxable category of the POS reports. Second, CDTFA found that the POS information scheduled for the Scotia location for 4Q16 was duplicative of the information for 4Q14, and thus CDTFA deemed

⁷ The business was owned by Ms. Erben and W. Paden; however, W. Paden left the business prior to its closing.

⁸ The Bank of America statements show charges of \$2,500 on March 6, 2015, \$6,000 on November 10, 2015, and \$10,000 on December 8, 2015. Appellant notes that the March 16, 2015 and December 8, 2015 charges were listed under House Accounts Deposits. A Discover card statement shows charges of \$4,300 on November 4, 2014, and \$2,500 on November 5, 2014. Chase statements show charges of \$1,500 on November 18, 2014, \$4,000 for a check on December 26, 2015, and \$1,000 on June 14, 2016. A Citibank statement shows charges of \$2,000 on June 14, 2016, and \$4,000 on October 26, 2016. Appellant notes that the June 14, 2016 charge was listed under House Accounts Deposits.

the POS reports unreliable.⁹ Instead, CDTFA performed a bank deposit analysis to calculate audited taxable sales of \$50,463 for the Scotia location for 4Q16,¹⁰ which resulted in a reduction of \$16,408 to the deficiency measure. CDTFA rejected appellant's argument that the deficiency measure included nontaxable loan amounts on the basis that appellant had failed to show that loan amounts were included in the POS data used for the audit.

14. According to a printout of appellant's CDTFA sales and use tax account from CDTFA's website, in July 2023 appellant made payments for its audit liability that resulted in a zero balance. CDTFA states that its records reflect that around July 6, 2023, appellant paid approximately \$28,000 to satisfy the audit liability.
15. Pursuant to the June 30, 2023, Decision, CDTFA completed a reaudit dated August 9, 2023, which reduced the deficiency measure by \$19,546 (\$3,138 + \$16,408) from \$234,615 to \$215,069, and thus reduced the tax to \$18,102.¹¹
16. Contemporaneous with the issuance of the reaudit report, CDTFA also identified an overpayment of \$1,560.31 for 1Q17. Consequently, CDTFA issued a refund to appellant for that amount on September 12, 2023.
17. This timely appeal to OTA followed.
18. On June 12, 2024, CDTFA completed a second reaudit to correct a data entry error for application of the district tax amount in the first reaudit; the second reaudit reduced the tax to \$17,751.
19. In this appeal to OTA, appellant stated that it paid the liability at issue in full in July 2023, in order to remove a lien imposed by CDTFA, and that it is requesting CDTFA issue a refund of all tax paid, plus interest. At the hearing, CDTFA stated that appellant had not filed a claim for refund, although time remains for appellant to do so because the liability

⁹ The 4Q16 POS report for Scotia is not in the record. CDTFA explains that while appellant provided a 4Q16 POS report for Scotia during the audit, CDTFA was unable to provide that report during this appeal because the report was saved on a corrupted file that would not open.

¹⁰ Audited taxable sales of \$884,870 for 2Q14 through 3Q16 represent an error ratio of 47.72 percent when compared to bank deposits of \$1,854,361 for this period. CDTFA applied this percentage to 4Q16 bank deposits of \$105,573 to establish audited taxable sales of \$50,463 for 4Q16. (Any differences are due to rounding.)

¹¹ Following the reaudit, appellant sent spreadsheet calculations and proposed amended returns to CDTFA, but CDTFA responded that it did not agree with appellant's proposed adjustments. Due to the ongoing appeal, CDTFA did not accept appellant's proposed amended returns.

is not yet final,¹² but that a refund would only be granted if appellant prevails on this appeal.

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, 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.) 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*; Cal. Code Regs., tit. 18, § 30219(a).) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Talavera*, *supra*.)

Appellant's contentions can be summarized as follows: First, appellant argues that most of the sales listed as "nontaxable" on its POS records were nontaxable loans, hotel room charges, event deposits, and gift certificates. Second, appellant contends that CDTFA should use appellant's POS records¹³ rather than a bank deposit analysis or markup analysis, to establish taxable sales.

¹² CDTFA's claim for refund form can be found at: <https://cdtfa.ca.gov/formspubs/cdtfa101.pdf>. R&TC section 6902(a)(1) provides that no claim for refund may be approved after the later of: (1) three years from the last day of the calendar month following the close of the reporting period for which the overpayment was made (i.e., the return due date); (2) with respect to a determination issued pursuant Article 2, 3 or 4 of the R&TC, no later than six months from the date the determination becomes final; or (3) six months from the date of the overpayment.

¹³ Appellant submitted POS records for the Scotia location for 4Q16; however, these records do not list charges processed under the nontaxable and mandatory gratuity categories of appellant's POS system. It appears that appellant also argues that audited taxable sales for 3Q16 for the Scotia location should be reduced, but appellant has not provided a basis for this reduction, and therefore OTA gives this argument no further consideration.

With respect to appellant's assertion that loans were processed through the POS system, although such an approach might be expedient for appellant, it produces a cumbersome audit record. Nonetheless it is apparent from the three receipts stating "PERSONAL LOAN KELLY" for \$1,500 charged on Visa, \$1,500 charged on Discover, and \$1,000 charged on Visa, respectively, that appellant likely processed loans through the POS system during the audit period. The \$1,500 Visa charge is shown on Ms. Erben's Chase Visa account for the same date as the receipt, November 18, 2014. The other two receipts (\$1,500 Discover charge on November 18, 2014, and \$1,000 Visa charge on November 15, 2016) are not shown on Ms. Erben's Discover statement or any of Ms. Erben's Visa statements. Thus, the critical inquiry here is whether loan proceeds were processed via a POS category that was treated as taxable (either by appellant at the time of sale or by CDTFA during the audit).¹⁴ In this regard, OTA notes that the three receipts appellant provided (stating "PERSONAL LOAN KELLY") each characterize the type of charge as "Room Fee," and it is undisputed that appellant rung up rental fees for the banquet room as nontaxable, which CDTFA included in the taxable measure. However, there is no evidence, except for the \$1,500 Visa charge verified in the Chase Visa account, to show that these receipts were not voided,¹⁵ and thus, are not in either the house account deposits or the nontaxable categories. Therefore, OTA finds that loans totaling \$1,500 were included in CDTFA's calculation of audited taxable sales.

With respect to the POS reports¹⁶ and the credit card statements, this documentation fails to show how charges were processed via appellant's POS system. The Discover statement shows two transactions: \$4,300 on November 4, 2014, and \$2,500 on

¹⁴ Appellant argues that the loans were primarily processed as nontaxable in the POS system. However, appellant also argues that a loan amount of \$5,504 was included in the retail sales of \$5,541.30 listed in an undated daily POS report. Therefore, appellant argues that this amount was a loan that was processed through the retail sales category of the POS system. Additionally, appellant provided the November 7, 2015 manager report showing a \$6,000 charge, consisting of \$5,504.60 sale and tax of \$495.40; appellant testified that charging this as a retail sale was an inadvertent error. The November 7, 2015 manager report covers 4:00 a.m. through 10:36 p.m. on that date and shows gross sales of \$5,599.54 less discounts of \$94.94. The undated daily POS report shows total sales for the day of \$10,384.33 which includes retail sales of \$6,040 (\$5,541.30 sales + \$498.700 tax). It is unclear why there is a discrepancy between the daily POS report and the manager report.

¹⁵ The Restaurant Financial Overview report for 4Q14 does not show the date when the report was printed. The report shows training voids of \$12,613.54. Since the receipts are not shown in the credit card statements, other than the \$1,500 Visa charge, it is unclear if these receipts were voided or not.

¹⁶ Because the POS report showing retail sales of \$5,541.30 is undated, it is unclear whether this report was printed on the same day as the November 7, 2015 manager report showing a credit card charge of \$6,000.

November 5, 2014. However, these transactions are not supported by a receipt showing how they were recorded in the POS system. The detail POS report for Eureka for 4Q14 shows house account deposits of \$2,466 and nontaxable sales of \$7,281. The Visa charge of \$1,500 is in the nontaxable sales category, which leaves \$5,781 (\$7,281 - \$1,500) remaining in nontaxable sales and \$2,466 in house account deposits. The Discover statement transactions are both larger than the house account and together are more than the nontaxable amount remaining. As with the other quarters in the audit, the amounts on the reports do not reconcile with the evidence provided.¹⁷ Given that appellant's Eureka location included a house account deposit category in its POS category, a strong likelihood exists that some of these amounts were processed in the house accounts deposits category,¹⁸ which was not used to calculate audited taxable sales. In light of appellant's failure to reconcile these payments with the POS system's recorded receipts and among taxable and nontaxable POS categories, OTA finds appellant has failed to meet its burden of proving that further adjustments are warranted.

Regarding appellant's testimony that charges in the nontaxable POS category include hotel room charges and deposits for events, appellant has not provided any documentation establishing this. Additionally, OTA notes that appellant told CDTFA that deposits for room rentals were included in the house account deposit POS category.

With respect to appellant's argument that additional adjustments are warranted for gift certificates, CDTFA already made an adjustment for gift certificates based on the documentation appellant provided, and appellant has not submitted any additional documentation nor has appellant established any flaws in the methodology CDTFA used to calculate the adjustment. Therefore, appellant has not shown that additional adjustments are warranted for sales of gift certificates.

¹⁷ The following are discrepancies between the alleged loans and other documentation in evidence. For 1Q15, the Bank of America statement shows a \$2,500 charge which appears to be shown in the house account deposits; yet the POS report for the house account shows \$7,640 and nontaxable \$726. For 2Q15, the Citibank statement shows a \$2,000 charge which does not appear to be in either account; yet the POS report for the house account shows \$0 and nontaxable \$949. For 4Q15, the Bank of America statement shows \$16,000 (\$6,000 on November 10, 2015 + \$10,000 on December 8, 2015), and the Chase statement shows a \$1,500 charge (matched to receipt) and a check for \$4,000; yet the POS report for house account shows \$10,000 and nontaxable \$8,339. For 2Q16, the Chase statement shows \$1,000 and the Citibank statement shows \$2,000, which both appear to be in the house account; yet the POS report shows house account totaling \$4,800, and nontaxable \$858. In 4Q16, the Citibank statement shows \$4,000; yet the POS report shows house account of \$0 and nontaxable \$8,610.

¹⁸ As noted above, the audit workpapers show that the house account deposit category includes a loan from Mr. Lee for \$10,000 in 4Q15.

Next, appellant argues that CDTFA should rely on appellant's actual invoices, rather than on CDTFA's estimates. In this case, the audit and reaudits ultimately relied on appellant's own records, except for 4Q16 for the Scotia location, which is based on bank deposits¹⁹ because the 4Q16 POS report was unusable. CDTFA's estimate based on bank deposits established audited taxable sales of \$50,463 for 4Q16. Therefore, in the absence of complete POS records for 4Q16 for the Scotia location, CDTFA's bank deposit analysis was reasonable and rational, and CDTFA has met its burden of proof. Appellant has not shown that there were errors in the bank deposit analysis; OTA does not find appellant's evidence sufficient to establish either that CDTFA's estimate is inaccurate nor that an alternative result is warranted.²⁰

Finally, regarding the shelf-test markup analysis, CDTFA did not use the markup analysis in its estimate of audited taxable sales. Thus, OTA does not consider the markup results in analyzing whether adjustments are warranted.

In summary, OTA concludes that the deficiency measure should be reduced by \$1,500 for loans. In all other respects, appellant has not established that any further adjustments are warranted.

¹⁹ Bank deposits are not gross receipts. (R&TC, § 6012(a).) However, where, as here, a retailer is engaged in the business of making retail sales of tangible personal property, the retailer's bank deposits, net of deposits from non-sale or nontaxable transactions, are evidence of gross receipts from the retail sale of tangible personal property, which CDTFA can use to determine audited taxable sales when sales cannot be accurately established using a direct approach.

²⁰ OTA notes that if taxable sales were calculated using an average of the audited taxable sales for the three prior quarters (an approach that would be consistent with the general audit methodology), the result would be taxable sales of \$88,302, which is significantly higher than the result of CDTFA's bank deposit analysis. In other words, CDTFA's use of bank deposits resulted in a lower deficiency measure in appellant's favor.

HOLDING

An additional adjustment of \$1,500 to the deficiency measure for unreported taxable sales is warranted.

DISPOSITION

Reduce the deficiency measure by \$1,500, in addition to the adjustments made in the reaudit and second reaudit. Otherwise, CDTFA's decision to deny the petition for redetermination is sustained.

Signed by:

Suzanne B. Brown

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Suzanne B. Brown
Administrative Law Judge

We concur:

Signed by:

Kim Wilson

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Kim Wilson
Hearing Officer

Signed by:

Greg Turner

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Greg Turner
Administrative Law Judge

Date Issued: 11/17/2025