

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of:	)	OTA Case No.: 240917429
<b>YESENIA’S MEXICAN FOOD, LLC</b>	)	CDTFA Case ID: 5-142-745
<b>dba Harvest Taco Shop and</b>	)	
<b>dba Yesenia’s Mexican Food</b>	)	

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**OPINION**

Representing the Parties:

For Appellant: Peter Guerrero, Representative

For Respondent: Jason Parker, Chief of Headquarters Ops.

For Office of Tax Appeals: Daniel Cho, Attorney

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Yesenia's Mexican Food, LLC, dba Harvest Taco Shop and dba Yesenia’s Mexican Food (appellant) appeals a decision issued by the California Department of Tax and Fee Administration (respondent) denying appellant’s petition for redetermination of a July 12, 2023 Notice of Determination (NOD) for tax of \$215,599, plus applicable interest, for the period January 1, 2020, through December 31, 2022 (liability period).<sup>1</sup> After issuance of the decision, and while this appeal to OTA was pending, respondent performed a reaudit, which reduced the tax to \$165,990.

Appellant waived the right to an oral hearing and submitted the matter to the Office of Tax Appeals (OTA) on the written record pursuant to California Code of Regulations, title 18, (Regulation) section 30209(a).

**ISSUE**

Are further adjustments to the determined measure of tax warranted?

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<sup>1</sup> Because appellant filed its sales and use tax return for the first quarter of 2020 late, on August 1, 2020, the NOD was timely for all reporting periods. (See R&TC, § 6487(a).)

FACTUAL FINDINGS

1. Appellant, a limited liability company, operates two restaurants (Harvest Taco Shop and Yesenia's Mexican Food) in San Diego, where it sells hot prepared food for consumption on its premises and to-go.
2. For the liability period, appellant reported total taxable sales of \$7,530,538 and claimed no deductions. Appellant had a single-entry accounting system and used handwritten sales journals during the liability period. Appellant informed respondent that appellant used its business bank statements to report its taxable sales until 2023 (after the liability period), when it switched to a Clover point-of-sale (POS) system.<sup>2</sup>
3. Upon audit, appellant provided its business bank statements for the Harvest Taco Shop location for the entire liability period and for the Yesenia's Mexican Food location for the period January 1, 2020, through October 31, 2022. Respondent also obtained (from its own sources) Form 1099-K<sup>3</sup> data for both locations for calendar years 2020 and 2021.
4. Because appellant did not provide any sales invoices, cash register z-tapes,<sup>4</sup> POS system reports, sales journals, purchase invoices, purchase journals, or other documents of original entry, respondent concluded that it could not verify appellant's reported amounts through a direct audit method.<sup>5</sup> As a result, respondent decided to use an indirect audit method, specifically, the credit card sales ratio method (described below).

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<sup>2</sup> A point-of-sale system typically included one or more terminals, which are the modern equivalent of a cash register. Depending on the equipment and software, POS systems can generate reports that summarize sales activity for the period of time selected by the operator. These reports can include breakdowns of sales by type and amount, including product or service, credit or cash, and taxable or nontaxable.

<sup>3</sup> 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.

<sup>4</sup> A cash register z-tape is the portion of the cash register tape that summarizes sales by category for a certain time period (e.g., a day or a shift).

<sup>5</sup> A direct audit method is one that enables respondent to verify taxable sales directly from the taxpayer's business records. Generally, a direct audit involves a simple tabulation of taxable sales evidenced by source documents, such as sales invoices, cash register tapes, or verifiable POS data. A direct audit approach based on complete and accurate business records is generally the most accurate.

5. Respondent applied the 80-80 rule to appellant's sales, meaning that it considered all of appellant's sales (at both locations) taxable.<sup>6</sup>
6. Using the Form 1099-K data for both locations, respondent determined that appellant made credit card sales of \$4,698,674 for the period January 1, 2020, through December 31, 2021. Respondent reduced this amount by tips (estimated at 5 percent)<sup>7</sup> included in transaction amounts to compute credit card sales without tips (ex-tips) of \$4,474,928. Because the provided books and records were not sufficient to calculate an actual credit card sales ratio, respondent estimated a credit card sales ratio of 66.53 percent using an average of credit card sales ratios of similar businesses in San Diego. Respondent divided the total credit card sales ex-tip by the estimated credit card sales ratio to estimate total and taxable sales, including sales tax reimbursement, of \$6,726,181. Respondent then reduced this figure by the included sales tax reimbursement to compute audited taxable sales, ex-tax and tip, of \$6,242,394 for the period January 1, 2020, through December 31, 2021. Respondent deducted appellant's reported taxable sales of \$4,558,386 for the same period to calculate unreported taxable sales of \$1,684,008.
7. Because, at the time of the audit, respondent did not have appellant's Form 1099-K data for the last year in the liability period, respondent divided audited unreported taxable sales by reported taxable sales for each quarter of the period January 1, 2020, through December 31, 2021, to calculate error percentages. It then multiplied appellant's unreported taxable sales for each quarter in 2022 by the average of those error percentages, 36.94 percent, to estimate unreported taxable sales of \$1,097,913 for 2022. Finally, respondent combined the two unreported amounts to determine unreported taxable sales of \$2,781,921 for the liability period.
8. Respondent issued the NOD to appellant.
9. Appellant filed a timely petition for redetermination disputing the NOD.

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<sup>6</sup> 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. (R&TC, § 6359(f); Cal. Code Regs., tit. 18, § 1603(c)(1)(A).) 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).)

<sup>7</sup> Appellant did not provide books or records from which respondent could calculate an average tip percentage. Respondent estimated the tip percentage amount based on the basis of its observation that both locations appeared to be limited-service restaurants.

10. On May 2, 2024, the parties participated in an appeals conference as part of respondent's internal appeals procedure.
11. Respondent issued its decision denying appellant's petition for redetermination.
12. This timely appeal followed.
13. Respondent subsequently reconsidered some of its data, in part due to the probable effects of the COVID-19 pandemic. It increased the average tip percentage from 5 percent to 5.94 percent; and it increased the credit card sales ratio to 100 percent for the second quarter of 2020 (2Q20), 83.70 percent for 3Q20 and 4Q20, and 67.39 percent for the remainder of the liability period. Respondent also obtained appellant's Form 1099-K data for 2022, which obviated the need for reliance on the average error percentage based on the prior years. Based on the new information and updated percentages, respondent determined unreported taxable sales of \$2,141,798 for the liability period, which is a reduction of \$640,123 to the determined measure, and thus reduced the tax from \$215,599 to \$165,990.

#### 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 respondent is not satisfied with the amount of tax reported by the taxpayer, or in the case of a failure to file a return, respondent 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, respondent has a minimal, initial burden of showing that its determination was reasonable and rational. (*Appeal of Talavera*, 2020-OTA-022P.) Once respondent has met its initial burden, the burden of proof shifts to the taxpayer to establish that a result differing from respondent's determination is warranted. (*Ibid.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid.*)

At the time of the audit, the only books and records that respondent had in its possession were some (not all) bank records provided by appellant and 1099-K data for 2020

and 2021 that respondent was able to obtain through other sources. These records were not adequate for sales and use tax purposes. Respondent could not use them to verify reported amounts using a direct audit method. Therefore, OTA finds that it was reasonable and rational for respondent to use an indirect audit method to verify appellant's reported taxable sales. The credit card sales ratio method is a recognized and accepted sales tax auditing procedure. (See, e.g., *Appeal of Amaya*, 2021-OTA-328P.) Therefore, OTA concludes that respondent's decision to use that method for appellant's audit was a reasonable and rational one.

A credit card sales ratio analysis typically involves the use of third-party data, such as bank statements or IRS Forms 1099-K, which show amounts paid to a merchant by a bank, credit card company, or third-party network when the customer pays for goods or services using a debit card, credit card, PayPal, or similar non-cash payment. If a reasonable estimate of the ratio of such non-cash sales to total sales can be made, an equally reasonable estimate of total (i.e., cash and non-cash) sales can be made.

Here, third parties issued Forms 1099-K to report payments they made to appellant for non-cash sales. Generally, OTA considers financial data reported by third parties pursuant to IRS requirements to constitute reliable evidence of such data. The other key element for the correct use of the credit card sales ratio method is the ratio. Appellant did not provide records from which that ratio could be computed. Respondent states that it initially used an average calculated using credit card sales ratios from the audits of similar businesses in San Diego. OTA considers respondent's use of such an average as reasonable when respondent possesses no books and records from which a more accurate ratio can be calculated. Here, the fact that respondent later adjusted the ratios substantially upward indicates that respondent had been looking at audits of similar businesses in San Diego for periods before the COVID-19 pandemic. OTA has considered the adjustments and finds that the ratios used in the reaudit were rationally adjusted to compute reasonable estimates of appellant's credit card sales ratios during the pandemic. On the basis of the foregoing, OTA finds that respondent has met its initial burden to show that its determination was reasonable and rational. Consequently, the burden shifts to appellant to prove error and a more accurate taxable measure.

In its brief filed before respondent announced the results of its reaudit, appellant argued that the credit card sales ratio used by respondent was too low. Appellant claims that its restaurants are in areas where high credit card sales ratios are common and it requests a response to the information it sent out by mail, which purportedly shows a higher credit card ratio.


Appellant has not provided any documentation to OTA for its consideration. Also, respondent states in its brief that it has not received any information or report from appellant supporting its argument that higher credit card ratios should have been used. Consequently, OTA’s record contains only unsupported assertions, which are not sufficient to satisfy a taxpayer’s burden of proof. Therefore, OTA finds no basis in its record to warrant further adjustments to the taxable measure.

HOLDING


Further adjustments to the determined measure of tax are not warranted.


DISPOSITION

Respondent’s decision to reduce the measure of unreported taxable sales from \$2,781,921 to \$2,141,798, but otherwise deny the petition for redetermination, is sustained.

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Michael F. Geary  
Administrative Law Judge

We concur:

Signed by:  
  
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Josh Lambert  
Administrative Law Judge

Signed by:  
  
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Heather Boyd  
Administrative Law Judge

Date Issued: 12/2/2025