OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No.: 221111924
D. ELHAJJ,	CDTFA Case ID: 1-597-914
dba Daniel's Smoke Shop	

OPINION

Representing the Parties:

For Appellant: Nader Shahatit, Representative

For Respondent: Ravinder Sharma, Hearing Representative
Chad Bacchus, Attorney
Jason Parker, Chief of Headquarters Ops.

K. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, D. Elhajj (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 December 11, 2019. The NOD is for tax of $47,763, plus applicable interest,[2] for the period July 1, 2016, through June 30, 2019 (liability period).[3] As discussed below, prior to the oral hearing, CDTFA performed a reaudit, which reduced the measure of unreported taxable sales and will reduce the asserted tax liability.

Office of Tax Appeals (OTA) Panel Members Natasha Ralston, Andrew Wong, and Keith T. Long held a virtual oral hearing for this matter on July 15, 2025. At the conclusion of the oral hearing, OTA held the appeals record open for additional briefing. After the completion of briefing, OTA closed the record and this matter was submitted for an Opinion.

[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" shall refer to the board.

[2] CDTFA states that, pursuant to an executive order issued by the Governor, interest did not accrue during the period March 1, 2020, through June 30, 2020.

[3] CDTFA timely issued the NOD because on September 9, 2019**,** appellant signed a waiver of the otherwise applicable three-year statute of limitations for the period July 1, 2016 through December 31, 2016, which allowed CDTFA until April 30, 2020, to issue an NOD. (R&TC, §§ 6487(a), 6488.)

ISSUES

1. Whether further adjustments to the measure of unreported taxable sales are warranted.
2. Whether interest abatement is warranted.

FACTUAL FINDINGS

1. Appellant, a sole proprietor, operated a smoke shop in San Bernardino, California. Appellant sold cigarettes, tobacco products, vape products, sundry taxable items, carbonated beverages, and nontaxable food such as chips and water. Appellant obtained a seller's permit effective January 19, 2016. CDTFA closed the seller's permit upon the business's incorporation on July 31, 2019.
2. During the liability period, appellant reported total and taxable sales of $1,137,187 on his sales and use tax returns.
3. On July 1, 2019, CDTFA commenced an audit of appellant's business.[4] For the audit, appellant provided federal income tax returns for the period 2016 through 2018, bank statements for the liability period, an incomplete set of purchase invoices for 2018 and September 2019, and a daily point of sales (POS) report for the period September 18, 2019, through September 23, 2019.[5] CDTFA also obtained purchase data from appellant's vendors. Appellant did not provide other books and records such as a general ledger, sales journal, or cash register z-tapes.[6]
4. A comparison of the gross receipts reported on appellant's federal income tax returns to the total sales reported on his sales and use tax returns revealed no differences for the 2016 tax year. However, reported gross receipts exceeded reported total sales by $135,109 for 2017 and $26,041 for 2018. CDTFA also compared appellant's reported gross receipts to the cost of goods sold (COGS) that appellant reported on his federal

[4] On July 24, 2019, appellant signed a letter acknowledging the audit's scope. The letter also explained that CDTFA may request a waiver of the statute of limitations to issue an NOD.

[5] The September 2019 merchandise purchase invoices and POS reports were after the liability period and issued by the successor corporation.

[6] 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).

income tax returns to computed book markups[7] of 34.89 percent for 2016, 24.68 percent for 2017, and 33.07 percent for 2018.

5. CDTFA used appellant's bank statements to compile bank deposits[8] for the liability period of $1,506,451 including: cash deposits of $269,880; credit card deposits of $1,175,732; and cigarette rebate deposits of $60,839. CDTFA found that appellant's credit card deposits exceeded appellant's reported taxable sales and continued the audit.

6. CDTFA used appellant's vendor data to compile taxable purchases of $1,160,439 for the liability period.[9] CDTFA conducted a purchase segregation test[10] for each of the major product categories, which disclosed that cigarette purchases accounted for 85.54 percent, tobacco product purchases accounted for 7.59 percent, vape product purchases accounted for 5.02 percent, sundry taxable item purchases accounted of 1.37 percent, and carbonated beverage purchases accounted for 0.48 percent of merchandise purchases of non-exempt food items for the liability period.

7. CDTFA performed a shelf test[11] and computed shelf test markups including the following: 6.53 percent for cigarettes; 63.46 percent for tobacco; 121.47 percent for vape products; 132.77 percent for sundry taxable items; and 88.67 percent for carbonated beverages. CDTFA applied the product purchase percentages from the

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[7] "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 markup amount ÷ cost. In this example, the markup percentage is 42.86 percent (0.30 ÷ 0.70 = 0.42857). A "book markup" (sometimes referred to as an "achieved markup") is one that is calculated from the retailer's records.

[8] 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. CDTFA can use this evidence to determine audited taxable sales when it cannot accurately establish sales using a direct approach because of a lack of adequate records.

[9] CDTFA noted that for 2018, appellant's vendor purchase data exceeded the purchases that appellant reported on his federal income tax returns and the purchases recorded in the purchase invoices that appellant provided for the audit.

[10] A purchase segregation test is used to establish the proportion of merchandise purchases in various product categories (such as cigarettes and cigars, tobacco products, "other" taxable merchandise, soda, food, and supplies) in order to compute the percentage of taxable merchandise purchases, as well as the percentages of merchandise in each category.

[11] A shelf test is an accounting comparison of known costs and associated selling prices used to compute markups.

segregation test to calculate a weighted taxable markup of 18.76 percent. To calculate audited taxable sales, CDTFA reduced the purchases recorded in appellant's vendor survey data by 1 percent for pilferage during the liability period, and additional reduction for pilferage of $1,764 during 2019,[12] to calculate appellant's COGS available for sale during the liability period of $1,147,070. CDTFA applied the weighted markup average of 18.76 percent to the COGS available for sale to compute audited taxable sales of $1,362,261 for the liability period, which when compared to recorded taxable sales resulted in a deficiency measured by taxable sales of $225,074.

8. CDTFA also compared the audited taxable sales per the markup test to appellant's credit card deposits to compute the following credit-card-sales ratios: 69.94 percent for the third quarter of 2016 (3Q16) through 4Q16; 65.99 percent for 2017; 72.09 percent for 2018; and 835.83 percent for 1Q19 through 2Q19.[13]

9. CDTFA reviewed the result of the markup test and determined that further audit was warranted. CDTFA's decision was based on differences between appellant's vendor data, federal income tax returns, and sales and use tax returns for 2018, as well as missing purchase invoices for glass pipes sold in the store. As a result, CDTFA decided to use the credit-card-sales ratio method to project appellant's taxable sales.

10. To compute appellant's credit-card sales ratio, CDTFA performed a full day observation of appellant's business on Wednesday, September 18, 2019, observing a credit-card-sales ratio of 50.54 percent for that day. CDTFA also used appellant's POS report to calculate a credit-card-sales ratio of 67.09 percent for the period September 19, 2019, through September 23, 2019. CDTFA then used this combined information to compute an overall credit-card-sales ratio of 63.71 percent. During this test, CDTFA also noted that 99.40 percent of appellant's sales were subject to tax.

11. CDTFA applied the 63.71 percent credit-card-sales ratio to appellant's credit card deposits (excluding sales tax) for each quarter of the liability period to find audited total sales (excluding sales tax) of $1,845,443. CDTFA then applied the 99.40 percent taxable sales rate to audited total sales to calculate audited taxable sales per the credit-card-sales ratio of $1,834,371. When compared to appellant's sales and use tax

[12] During the audit, appellant provided a police report to support the additional pilferage reduction. The police report showed that a burglary had occurred during 2019 and listed several items as stolen.

[13] CDTFA recalculated the credit-card-sales ratios for the liability period during the revised audit as follows: 69.90 percent for 3Q16 through 4Q16; 65.95 percent for 2015; 72.05 percent for 2018 and 81.07 percent for 1Q19 and 2Q19. The resulting reaudit is discussed below.

returns, appellant's audited taxable sales revealed a deficiency measure of $697,184 (audit item 1).

12. As noted above, appellant's bank statements revealed cigarette rebates of $60,839. CDTFA determined that these rebates were unreported taxable gross receipts. Therefore, CDTFA included a separate measure of $60,839 for unreported taxable rebates (audit item 2).

13. Thereafter, CDTFA met with appellant and agreed to adjust the credit-card-sales ratio. CDTFA revised the audit, using the credit card sales ratios, which it computed during the markup analysis, of 69.90 percent for the 3Q16 through 4Q16; 65.95 percent for 2017, and 72.05 percent for 2018. CDTFA also applied the 72.05 percent credit-card-sales ratio to 1Q19 and 2Q19. This resulted in revised audited taxable sales of $1,671,800. In total, the revised audit reduced the measure of audit item 1 by $162,571, from $697,184 to $534,613.

14. The revised audit also increased appellant's purchases per the vendor survey for the period 1Q19 and 2Q19 from $27,362 to $265,365. CDTFA made adjustments for pilferage and applied an 18.83 percent weighted markup,[14] which resulted in audited taxable sales per the markup method for that period to $310,083 and a credit-card-sales ratio per the markup method of 81.07 percent. However, CDTFA did not use the 81.07 percent credit-card-sales ratio. Instead CDTFA applied a credit-card-sales ratio of 72.05 percent.[15]

15. On December 11, 2019, CDTFA issued the aforementioned NOD. Appellant filed a timely petition for redetermination dated December 19, 2019. In the petition, appellant disputed the NOD in its entirety. Appellant's petition also included a request to be admitted into CDTFA's settlement program.

16. On July 21, 2022, CDTFA held an appeals conference in this matter. Appellant did not appear at the appeals conference. CDTFA held the record open until August 5, 2022, for appellant to provide briefing and present any argument.[16]

17. On November 2, 2022, CDTFA issued a decision denying appellant's petition for redetermination.

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[14] The revised audit resulted in a slight increase to the weighted markup from 18.76 percent in the original audit to 18.83 percent.

[15] As discussed below, CDTFA later conducted a reaudit, applying the 81.07 percent credit-card-sales ratio, which further reduced the taxable measure.

[16] It does not appear that appellant made a submission following the appeals conference.

18. This timely appeal followed.

19. Prior to the oral hearing, CDTFA conducted a reaudit, applying the 81.07 percent credit-card-sales ratio for 1Q19 and 2Q19 to appellant's credit card deposits for those quarters. This further reduced the measure of audit item 1 by $38,585, from the revised audit amount of $534,613 to $496,028.

DISCUSSION

Issue 1: Whether further adjustments to the measure of unreported taxable sales are warranted.

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*.)

Here, appellant did not provide a complete set of books and records for audit. CDTFA reviewed appellant's federal income tax returns and found discrepancies for 2017 and 2018 that could not be explained. Additionally, CDTFA reviewed appellant's bank statements and found that appellant's credit card sales deposits exceeded both the gross receipts reported on appellant's federal income tax returns and the total sales reported on appellant's sales and use tax returns. As such, it was reasonable for CDTFA to question the accuracy of appellant's reported taxable sales. Further, because appellant failed to provide a complete set of books and records for CDTFA to verify taxable sales, it was reasonable for CDTFA to use an indirect method to compute audited taxable sales.

For the audit, CDTFA used the results of its observation test and appellant's daily POS reports to calculate a credit-card-sales ratio and project taxable sales. OTA has previously found that the credit-card-sales method is a recognized and accepted audit method. (*Appeal of Amaya*, 2021-OTA- 328P.) During the revised audit, CDTFA agreed to use the credit-card-sales ratios calculated based on the markup analysis of 69.90 percent for the period 3Q16 through 4Q16, 65.95 percent for 2017, and 72.05 percent for 2018 through 2Q19. There is no dispute that appellant agreed to the use of these credit card rates, and the revision reduced the taxable measure. Similarly, the reaudit further reduces the taxable measure to appellant's benefit by increasing the credit-card-sales ratio for 1Q19 and 2Q19. Considering the incomplete books and records, and the discrepancies that could not be explained, OTA finds that it was rational to calculate a credit-card-sales ratio from the results of the markup analysis, and the results are reasonable. Finally, CDTFA's examination of appellant's bank statements revealed that appellant received taxable rebates that he did not report. Absent evidence to the contrary, it was reasonable for CDTFA to include these rebate amounts in the taxable measure. Accordingly, the burden of proof shifts to appellant to show that a further reduction is warranted.

On appeal, appellant asserts that the measure of unreported taxable sales is overstated. Appellant contends that there are differences between the audited taxable sales from one quarter to the next, which appellant believes are indicative of a mistake. As an example, appellant contends that it is unreasonable to conclude that audited taxable sales for 1Q18 were $448,094 when the audited taxable sales for 4Q17 were $66,070. Appellant also asserts CDTFA calculated audited taxable sales of $590,402 for 2Q19 and audited taxable sales for of $60,867 for 1Q19. Appellant argues that these differences are evidence of an error.

However, it appears that appellant has misinterpreted the audit workpapers. OTA's review of the reaudit workpapers reveal a taxable measure of $42,429 for 1Q18 and $52,611 for 2Q19.[17] These numbers do not reflect large differences but instead show consistent audited taxable sales over time.

Next, appellant contends that the measure of taxable rebates should be reduced.

Appellant has not provided any evidence to show that CDTFA's calculations are incorrect or that a reduction is warranted based on audited taxable sales. Appellant also has not provided any evidence that he previously reported taxable rebates upon filing his sales and use tax returns. Accordingly, OTA finds no merit in appellant's contention.

[17] The reaudit also reflects reduced unreported taxable sales of $61,101 for 4Q17 and $40,701 for 1Q19.

Finally, at the oral hearing, appellant argued that a greater reduction should be allowed for pilferage based on the submission of a police report. As discussed above, CDTFA allowed a 1 percent reduction for pilferage and an additional reduction of $1,764 based on the information contained in appellant's police report. Appellant has not provided any evidence to show that a greater reduction is warranted. Thus, appellant has not met his burden of proof. OTA finds no basis to reduce the taxable measure.

Issue 2: Whether interest abatement is warranted.

The imposition of interest is mandatory. (See R&TC, § 6482.) There is no statutory right to interest relief. (See R&TC, § 6593.5.) CDTFA, in its discretion, may grant relief of all or any part of the interest on a person under the Sales and Use Tax Law where the failure to pay the tax is due in whole or in part to an unreasonable error or delay by CDTFA's employee(s) acting in their official capacity. (R&TC, § 6593.5(a)(1).) Such a delay could be, for example, due to an unreasonable failure to work on an appeal. (*Appeal of Micelle Laboratories, Inc.*, 2020-OTA-290P.) An unreasonable error or delay shall be deemed to have occurred only if no significant aspect of the error or delay is attributable to an act of, or failure to act by, the taxpayer. (R&TC, § 6593.5(b).) Any person requesting interest relief must include a statement under penalty of perjury setting forth the facts on which the request is based. (R&TC, § 6593.5(c).) The burden of proving unreasonable error or delay rests with the taxpayer. (Cal. Code Regs., tit. 18, § 30219(a), (b).)

OTA reviews CDTFA's decision to deny interest relief on an abuse of discretion standard. (*Appeal of Micelle Laboratories, Inc.*, *supra.*) To show an abuse of discretion, a taxpayer must establish that, in refusing to relieve interest, CDTFA exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law. (*Appeal of Eichler*, 2022-OTA-029P.)

On appeal, appellant provided a completed CDTFA-735 (*Request for Relief From Penalty Collection Cost Recovery Fee, and/or Interest*) form signed under penalty of perjury and requesting interest relief for the period 3Q16 through 2Q19. Appellant appears to argue that CDTFA delayed in issuing the NOD because "[t]here was no communication from the CDTFA indicating any issues or errors with the returns for over three years after filing." Appellant further contends that the audit took place during the COVID-19 pandemic, which created additional delays during the audit and appeal.

Here, the record establishes that CDTFA commenced an audit of appellant's business on July 1, 2019. According to CDTFA, it completed the audit and met with appellant to discuss

the audit findings during the period September 2019 through October 2019. Thereafter, CDTFA issued a timely NOD dated December 11, 2019. Appellant does not assert any specific delay during this period and OTA does not find any in the record.

Next, as discussed above, appellant filed a petition for redetermination dated December 12, 2019, which included a request for settlement. CDTFA explains that appellant entered into its settlement program in January 2020, but a settlement was not reached. CDTFA states that the file was forwarded to its Petitions section in March 2020. According to CDTFA, its Petitions section completed a summary analysis on July 2, 2020 and the case was forwarded to CDTFA's Appeals Bureau. OTA notes that interest did not accrue during the period March 1, 2020, through June 30, 2020.

Less than one month later, on July 27, 2020, CDTFA explains that it attempted to schedule a virtual appeals conference. CDTFA states that as a result of the COVID-19 pandemic, during the period March 2020 through March 2022, it only held virtual appeals conferences. However, appellant declined to have a virtual appeals conference and instead chose to wait for an in-person conference. According to CDTFA, it scheduled and held an appeals conference on July 21, 2022, shortly after in-person conferences resumed. However, as noted above, appellant did not appear at the appeals conference. Therefore, CDTFA held the record open and gave appellant until August 5, 2022, to provide written arguments. On August 10, 2022, CDTFA states that it closed the appeals record. CDTFA issued a timely decision, less than 90 days later on November 2, 2022.

Based on this information, it appears that CDTFA worked continuously on appellant's file during the period July 1, 2016 through November 2, 2022. Any delays occurred during the period March 2020 through August 5, 2022, when appellant requested a postponed appeals conference and then failed to appear at the scheduled in-person conference. Absent evidence to the contrary, appellant has not established that in refusing to relieve interest, CDTFA exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law.

Regarding any alleged delays during this appeal, OTA finds no authority in R&TC section 6593.5 to grant interest relief for a delay by OTA. Even if there was authority, appellant has not provided any evidence or argument to show an unreasonable delay occurred that was not attributable to him. Rather, the record reflects that upon filing his appeal, appellant

requested a number of hearing postponements.[18] Thus, OTA finds that CDTFA did not abuse its discretion in denying appellant's request for interest relief.

HOLDING

1. Further adjustments to the measure of unreported taxable sales are not warranted.
2. Interest abatement is not warranted.

DISPOSITION

Reduce the taxable measure by $38,585 from the revised audit amount of $534,613 to $496,028 in accordance with the reaudit. Otherwise, CDTFA's action in denying the petition for redetermination is sustained.

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Keith T. Long
Administrative Law Judge

We concur:

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Andrew Wong
Administrative Law Judge

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Natasha Ralston
Administrative Law Judge

Date Issued: 1/7/2026

[18] On November 18, 2022, appellant filed this appeal with OTA. The initial briefing period lasted from November 22, 2022, through June 22, 2023, during which CDTFA requested additional time to conduct a reaudit reducing the measure of unreported taxable sales. Thereafter, OTA assigned an appeals panel and informed appellant of the panel on December 21, 2023, and scheduled an oral hearing on June 11, 2024. Appellant requested a postponement for personal reasons, which was granted. The oral hearing was rescheduled to take place in person on March 11, 2025. However, the hearing was further postponed because appellant requested that the in-person hearing be converted to a virtual hearing. Thereafter, an oral hearing was held on July 15, 2025, and after a period of additional briefing the record was closed and the appeal submitted for an Opinion.