

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

In the Matter of the Appeal of:	)	OTA Case No.: 230513199
<b>TAKEHARA CONCEPTS, INC.,</b>	)	CDTFA Case ID: 2-792-180
<b>dba Binchoyaki</b>	)	
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**OPINION**

Representing the Parties:

For Appellant: James Bourbeau, Attorney

For Respondent: Jason Parker, Chief of Headquarters Ops.

S. RIDENOUR, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Takehara Concepts, Inc., dba Binchoyaki, (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 April 29, 2021. The NOD is for tax of \$71,812, plus applicable interest, and a negligence penalty of \$7,181.20 for the period January 1, 2018, through September 30, 2020 (liability period). The NOD is based on \$717,173 in unreported taxable sales. Subsequently, CDTFA performed a reaudit which reduced the taxable measure by \$172,527, to \$544,646 in unreported taxable sales. In addition, CDTFA removed the negligence penalty.

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

**ISSUE**

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

**FACTUAL FINDINGS**

1. Appellant, a California corporation, operates a Japanese restaurant that serves hot and cold food as well as beer and wine.
2. For the liability period, appellant reported gross sales of \$1,463,244 and claimed deductions of \$16,951, resulting in reported taxable sales of \$1,446,293.

3. Upon audit, appellant provided bank statements for the liability period, federal income tax returns (FITRs) for years 2018 and 2019, and point-of-sale (POS)<sup>1</sup> data for the third quarter of 2019 (3Q19). Appellant did not provide POS records for 2018.<sup>2</sup> CDTFA determined that records were inadequate for sales and use tax purposes.
4. CDTFA compared the gross receipts reported on appellant's FITRs<sup>3</sup> with total sales reported on appellant's sales and use tax returns (SUTRs)<sup>4</sup> and calculated an error rate of 49.01 percent by dividing the total unreported taxable sales for 2018 and 2019 of \$579,366<sup>5</sup> by the total reported sales for 2018 and 2019 of \$1,182,077. Because appellant did not provide a copy of its 2020 FITR, CDTFA applied the 49.01 percentage of error to the total reported sales of \$281,167 for 1Q20 through 3Q20 on the SUTRs to calculate unreported taxable sales of \$137,807 for 1Q20 through 3Q20. The unreported taxable sales for the liability period totaled \$717,173.<sup>6</sup>
5. CDTFA also found that appellant failed to maintain or provide adequate books and records for the audit and substantially underreported its taxable sales for the liability period. Thus, CDTFA determined that a 10-percent negligence penalty was to be added to the liability.
6. On April 29, 2021, CDTFA issued the instant NOD to appellant, and appellant timely filed a petition for redetermination disputing the NOD.
7. On April 3, 2023, CDTFA issued a decision denying appellant's petition for redetermination.
8. Appellant timely appealed to OTA.

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<sup>1</sup> A POS system typically includes 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>2</sup> During the audit, appellant informed CDTFA that these records were lost and not available for review.

<sup>3</sup> Gross receipts per the FITRs were \$752,442 for 2018 and \$1,009,001 for 2019.

<sup>4</sup> Total reported sales per the SUTRs were \$545,540 for 2018 and \$636,537 for 2019.

<sup>5</sup> For 2018, unreported taxable sales amounted to \$206,902 (\$752,442 - \$545,540). For 2019, unreported taxable sales amounted to \$372,464 (\$1,009,001 - \$636,537).

<sup>6</sup> \$206,902 (2018 quarters) + \$372,464 (2019 quarters) + \$137,807 (2020 quarters) = \$717,173.

9. During the pendency of this appeal, CDTFA performed a reaudit using the credit card to cash ratio analysis to compute audited taxable sales. Based on Form 1099-K<sup>7</sup> data, CDTFA scheduled appellant's credit card deposits, with sales tax and tips removed. CDTFA then applied an 80-percent credit card ratio, as opposed to the 77 percent typical for the area.<sup>8</sup> CDTFA computed audited taxable sales of \$1,988,125.<sup>9</sup> Audited taxable sales were then compared to reported taxable sales to compute unreported taxable sales of \$544,646, reducing the original unreported taxable measure of \$717,173 by \$172,527. The reaudit also removed the negligence penalty.
10. OTA requested that appellant respond to the reaudit results and provide substantiation for its contention that its gross receipts included nontaxable loan proceeds. Appellant did not respond.

### 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

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<sup>7</sup> Form 1099-K (Payment Card and Third-Party Network Transactions) is an IRS form used to report payments that merchants receive from customers through payment cards (i.e., credit card or debit cards) and/or third-party networks (e.g., PayPal).

<sup>8</sup> The reaudit found that a similar business in the same general area was audited and found to have approximately 77 percent credit card sales.

<sup>9</sup> Generally, 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).) For 2Q20 and 3Q20, however, due to COVID, CDTFA allowed deductions for cold food sold to-go and applied a credit card ratio of 100 percent. For 2Q20, the audited taxable sales (\$64,153) were lower than reported (\$66,967), thus the reported sales were accepted.

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" for human consumption are generally exempt from sales tax pursuant to R&TC section 6359(a), the exemption does not apply to sales of alcoholic or carbonated beverages (R&TC, § 6359(b)(3)), to sales of food served in a restaurant (R&TC, § 6359(d)(1)), or to sales of hot food to-go (R&TC, § 6359(d)(7)). The general rule is that a sale of cold food to-go is exempt from tax. (Cal. Code Regs., tit. 18, § 1603(c)(1)(B).) However, there is a special "80/80" under which a sale of cold food to-go in a form suitable for consumption on the retailer's premises (e.g., a cold sandwich) is subject to tax. This rule applies when more than 80 percent of a retailer's gross receipts are from sales of food products, and over 80 percent of the retailer's sales of food are otherwise subject to tax. (R&TC, § 6359(d)(6); Cal. Code Regs., tit. 18, § 1603(c)(1)(A), (c)(3).) However, even when a retailer is covered by this rule, it may avoid its application by keeping a separate accounting of its sales of cold food to-go in a form suitable for consumption on the retailer's premises. (R&TC, § 6359(f); Cal. Code Regs., tit. 18, § 1603(c)(1)(A).) Therefore, where a retailer separately accounts for these sales, it is exempt from tax, but if the retailer does not do so, these sales are subject to tax unless the retailer is not covered by the "80/80" rule.

Here, appellant failed to provide complete books and records for the audit; thus, CDTFA could not verify sales appellant reported on its SUTRs for the liability periods using a direct audit method (that is, compiling audited sales directly from appellant's records). Thus, OTA finds that it was reasonable for CDTFA to use an indirect audit method to compute appellant's sales. Specifically, OTA has previously found that the credit card sales ratio method is a recognized and accepted audit method. (See *Appeal of Amaya*, 2021-OTA-328P.) Upon reaudit, to recalculate the unreported taxable sales measure, CDTFA scheduled credit card data reported on appellant's Forms 1099-K for each quarter and projected a credit card ratio of 80 percent to appellant's taxable sales, which is more conservative than the 77 percent typical for the area. Furthermore, CDTFA took into consideration COVID restrictions impacting the restaurant industry in the year 2020 and allowed a deduction for cold food sold "to go" and applied a 100 percent credit card ratio for 2Q20 and 3Q20, presuming that there were no in-person customers paying cash. Given the incomplete books and records, and the discrepancies between the FITRs and SUTRs that were not reconciled or substantiated, it was reasonable and rational for CDTFA to use the credit card ratio method to project appellant's audited taxable

sales. Accordingly, the burden shifts to appellant to show whether a reduction is warranted. (See *Appeal of Talavera, supra.*)

On appeal, appellant disputes the accuracy of the initial audit because it did not use appellant's records, asserting that appellant and appellant's bookkeeper "possess all of the receipts the business generated during the relevant periods" and that appellant "is actively organizing these receipts, and will offer them as additional evidence." In support, appellant provided its 2020 FITR as well as additional but incomplete POS data from 2018 and 2019, claiming that it could not retrieve the remaining data due to a system crash. Furthermore, appellant contends that CDTFA failed to consider the nontaxable transactions such as cold food to-go as well as loan receipts.

Analysis of appellant's additional POS data revealed that appellant was not charging or collecting sales tax on taxable beverages. Additionally, total recorded taxable sales amounts were lower than sales amounts reflected in the corresponding 1099-K transactions. Due to unreliable data from appellant, it was reasonable and rational for CDTFA to resort to a credit card ratio upon reaudit, which lowered the measure of taxable sales by \$172,527. Appellant was given an opportunity to respond to the results of the reaudit but did not do so. That is, appellant did not explain why the 1099-K amounts were higher than appellant's POS sales data, nor did appellant provide a separate accounting for the cold food sold "to go," for which CDTFA incidentally gave 100 percent allowance for 2Q20 and 3Q20. Hence, appellant failed to show that further adjustments are warranted.

As for appellant's argument that its gross receipts reported on the FITRs contained nontaxable loan proceeds,<sup>10</sup> it is moot, as the reaudit superseded the original audit with a credit card ratio method. In any case, appellant has not provided any evidence that its gross receipts for the liability period consisted of nontaxable loan proceeds. In the absence of any documentation or other evidence from which a more accurate determination may be made, OTA finds that no further adjustments to the measure of unreported taxable sales are warranted.

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<sup>10</sup> Gross income includes "[i]ncome from discharge of indebtedness," which is also known as cancellation of debt (COD) income. (IRC, § 61(a)(11); R&TC, § 17071.) "A discharge of indebtedness occurs when 'the debtor is no longer legally required to satisfy his [or her] debt either in part or in full.' [Citations.]" (*Black v. Commissioner*, T.C. Memo. 2014-27, quoting *Caton v. Commissioner*, T.C. Memo. 1995-80.) The rationale for including discharge of indebtedness in gross income is that, to the extent a taxpayer has been released from indebtedness, the taxpayer has realized additional income because the cancellation of indebtedness effects a freeing of assets previously offset by the liability. (*Jelle v. Commissioner* (2001) 116 T.C. 63, 67; see also *U.S. v. Kirby Lumber Co.* (1931) 284 U.S. 1, 3.) COD income is generally recognized in the year the debt is cancelled. (*Bui v. Commissioner*, T.C. Memo. 2019-54.)

HOLDING

Further adjustments to the measure of unreported taxable sales are not warranted.

DISPOSITION

CDTFA's action reducing the measure of unreported taxable sales from \$717,173 to \$544,646, deleting the negligence penalty, but otherwise denying appellant's petition for redetermination is sustained.

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

We concur:  
DocuSigned by:  
*Andrew Wong*  
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Andrew Wong  
Administrative Law Judge

Signed by:  
*Josh Lambert*  
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Josh Lambert  
Administrative Law Judge

Date Issued: 12/17/2025