**OFFICE OF TAX APPEALS**

**STATE OF CALIFORNIA**

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| In the Matter of the Appeal of:<br>**E. ABOAID,**<br>**dba Eden Gift & Tobacco** | OTA Case No.: 241118026<br>CDTFA Case ID: 4-603-674 |

## OPINION

Representing the Parties:

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| For Appellant: | Rami Said, Representative |
| For Respondent: | Jason Parker, Chief of Headquarters Ops. |
| For Office of Tax Appeals: | Mia Marasigan, Business Taxes Specialist |

N. RALSTON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, E. Aboaid, dba Eden Gift & Tobacco (appellant) appeals a decision issued by the California Department of Tax and Fee Administration (respondent) denying, in part, appellant's timely petition for redetermination of a Notice of Determination (NOD) issued on January 23, 2023. The NOD is for tax of $57,850, plus applicable interest, and a negligence penalty of $5,784.97 for the period October 1, 2019, through February 22, 2022 (liability period).[1]

Subsequent to issuing the NOD, respondent performed a reaudit, which reduced the determined tax. While preparing for this appeal, respondent performed a second reaudit further reducing the determined tax to $25,723 and the negligence penalty to $2,572.35.

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).

[1] Respondent timely issued the NOD because appellant waived the otherwise applicable three-year statute of limitations and extended the NOD issuance deadline to January 31, 2023. (See R&TC, §§ 6487(a), 6488.)

## ISSUE[2]

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

## FACTUAL FINDINGS

1. Appellant, a sole proprietor, operated a smoke shop selling tobacco, vaping products, and accessories in Pomona, California. Appellant also was a California Lottery retailer. This was appellant's first audit.
2. For the liability period, appellant reported total sales of $528,471 and claimed deductions of $68,496, which was comprised of sales tax reimbursement included in total sales of $41,514 and other deductions for lottery sales of $26,982. As a result, appellant reported taxable sales of $459,975. Appellant used point-of-sale (POS)[3] reports to prepare his sales and use tax returns (SUTRs).
3. Upon audit, appellant did not provide any books or records for examination. Therefore, respondent obtained federal Form 1099-K (1099-K) data[4] for 2019 through 2021 and found material discrepancies between the credit card receipts appellant reported on the 1099-K data and the reported taxable sales for the liability period. Further, respondent performed a credit card sales ratio analysis,[5] comparing the credit card receipts (including sales tax reimbursement) to reported total sales to compute credit card sales ratios of 114.76 percent for 2019, 147.41 percent for 2020, and 82.64 percent for 2021. Respondent determined the reported taxable sales were understated because appellant's credit card sales alone were greater than appellant's reported taxable sales.

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[2] Appellant does not dispute the negligence penalty. Thus, OTA will not discuss the negligence penalty in this Opinion.

[3] A POS system typically include 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.

[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 data includes payments made by electronic means, including, but not limited to, credit cards, debit cards, and electronic payment services.

[5] 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 form of 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.

As a result, respondent determined that it could not rely on the reported sales on appellant's SUTRs.

4. Accordingly, respondent used an indirect method (the credit card sales ratio method) to verify appellant's reported taxable sales. Respondent computed a 49.82 percent credit card sales ratio based on audits of similar business establishments in the same geographic area. Respondent then compiled the credit card receipts reported on the 1099-K data and divided the credit card receipts by an estimated 49.82 percent credit card sales ratio to compute audited total sales. Respondent computed error ratios[6] by dividing the unreported taxable sales by the reported taxable sales for 2019, 2020 and 2021, and applied the error ratios to reported taxable sales for the respective periods to determine unreported taxable sales of $556,242 for the liability period.
5. Appellant did not report a district tax for the third quarter of 2020 (3Q20) on sales of $27,814. Therefore, respondent determined unreported district tax of $834 (City of Pomona district tax of 3 percent × reported taxable sales of $27,814) for 3Q20.
6. Respondent also determined that a 10 percent negligence penalty was warranted because appellant was negligent in record keeping and preparing his SUTRs because reported taxable sales were significantly underreported.
7. Respondent issued an NOD to appellant on January 23, 2023, imposing a tax liability of $57,850, plus applicable interest, and a negligence penalty of $5,784.97 for the liability period.
8. Appellant filed a petition for redetermination disputing the NOD in its entirety.
9. Respondent held an appeals conference on November 30, 2023. During the appeals conference, appellant asserted a 70 percent credit card sales ratio is more appropriate for his business. Appellant also conceded the unreported district tax of $834. Following the appeals conference, appellant asserted a gross profit ratio[7] of 30 percent.[8] To

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[6] Error ratios are the percentages of unreported taxable sales to reported taxable sales.

[7] The Decision described this ratio as a mark-on.

[8] Respondent computed a markup of 42.86 percent (gross profit of $165,167 ÷ total purchases of $385,393) in the Decision. "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. 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 profit amount ÷ sales price. In the above example, the gross profit margin is 30 percent (0.30 ÷ 1.00 = 0.30).

explain the higher credit card ratio, appellant also contended that he used contactless payment methods due to the COVID-19 pandemic.[9]

10. In support of his contentions, appellant provided the business bank statements for December 2019 through September 2022, quarterly sales tax reports for 4Q19 through 3Q22,[10] federal income tax returns for 2019 through 2022, 1099-K data for 2022, daily payment type reports for January 1, 2021, through June 30, 2021, and yearly purchases for 2019 through 2022.
11. Respondent agreed to use the credit card sales reported on the 1099-K data for 2022 provided by appellant following the appeals conference; however, respondent declined to make any other adjustments because respondent asserted that appellant did not provide the POS download for the liability period or detailed sales receipts for 2021. Respondent also stated that the 30 percent gross profit ratio was not reasonable and rejected the yearly purchases for 2019 through 2022 that appellant provided. Nonetheless, respondent performed an analysis using the yearly purchases, 1099-K data, and reported taxable sales. Respondent found the credit card receipts reported on the 1099-K data exceeded reported taxable sales for 2019 and 2020 and computed low markups of 14 percent for 2020 and 20 percent for 2021. Therefore, respondent concluded the yearly purchases and reported taxable sales were incomplete.
12. Respondent issued its Decision on July 31, 2024, ordering a reaudit to reduce unreported taxable sales based on the documentation appellant provided after the appeals conference, but otherwise denied the petition for redetermination.
13. Respondent prepared a reaudit reducing the taxable measure to $565,200, which reduced the tax liability to $55,916, plus applicable interest, and reduced the negligence penalty to $5,591.64.
14. In a letter dated October 11, 2024, respondent notified appellant that the liability had been adjusted in accordance with the Decision.
15. Appellant timely appealed to OTA.
16. In preparation for this appeal, respondent determined a reaudit should be performed to address appellant's contentions that exempt sales of food products were included in the audit liability and that payment by credit cards increased considerably in recent years,

[9] "COVID periods" refers to the COVID-19 pandemic era, which for this audit covers the period March 2020 through the end of the liability period. Businesses such as restaurants and bars were allowed to reopen in June 2020 with restrictions that limited capacity.

[10] Appellant described these reports as POS reports.

which justified use of a higher credit card sales ratio. Accordingly, respondent conducted a second reaudit, which further reduced the taxable measure by $294,561 from $565,200 to $270,639, as explained below.

17. In the second reaudit, respondent compiled the credit card receipts reported on the 1099-K data of $565,027 for September 1, 2019, through September 30, 2022. Respondent used the 70 percent credit card sales ratio asserted by appellant during the appeals conference. Respondent also determined that using the 70 percent credit card sales ratio for the periods prior to the COVID-19 pandemic was reasonable because appellant alleged that his business was robbed during the latter part of January 2020 and was forced to use a contactless method of payment, thus decreasing cash sales transactions.

18. Therefore, respondent applied the 70 percent credit card ratio to credit card sales to compute audited taxable sales. Further, based on photographs of appellant's business, respondent also made a 1 percent adjustment for the exempt sales of food products.

19. The second reaudit reduced the tax liability to $25,723 and reduced the negligence penalty to $2,572.35.

## 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).)

A taxpayer is required to maintain and make available for examination on request by respondent all records necessary to determine the correct tax liability under the Sales and Use Tax Law and all records necessary for the proper completion of SUTRs. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).) Such records include but are not limited to: (1) normal books of account ordinarily maintained by the average prudent businessperson engaged in the activity in question; (2) bills, receipts, invoices, cash register tapes, or other documents of original entry supporting the entries in the books of account; and (3) schedules or working papers used in connection with the preparation of the tax returns. (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*.)

Here, appellant did not initially provide any books and records upon audit.[11] Therefore, respondent obtained appellant's 1099-K data and found material discrepancies in reconciliation of the credit card receipts (including sales tax reimbursement) and reported taxable sales. Appellant's credit card sales alone were greater than appellant's reported taxable sales for the corresponding periods. Thus, it appeared that appellant's reported taxable sales were underreported. Consequently, OTA finds that it was appropriate for respondent to compute appellant's taxable sales using an indirect method, the credit card sales ratio method, which is a generally accepted method to determine audited sales. (See *Appeal of Amaya*, 2021-OTA-328P.) OTA also finds that appellant's 1099-K data, which is evidence from a third party (merchant card processors) of appellant's sales paid by credit card, are reliable sources of data from which to establish audited sales. Accordingly, respondent has met its initial burden to show that its determination was reasonable and rational, and the burden of proof shifts to appellant to show that further adjustments are warranted.

Appellant argues that the audit liability is overstated because respondent failed to account for nontaxable or exempt sales. Appellant has not identified any additional allowable deductions or provided verifiable evidence to support an amount greater than the 1 percent allowed in the second reaudit. Accordingly, OTA has no basis to recommend any adjustments.

Further, appellant asserts that he provided data from his cash register on an actual basis demonstrating that he did not underreport taxable sales. Respondent is not required to accept as conclusive evidence the taxpayer's books and records, even if in agreement with each other, where respondent, using recognized and accepted accounting procedures, established in an audit that the books and records did not disclose the correct amount of tax liability. (See *Appeal*

[11] As noted in the Factual Findings, appellant provided some records for examination after the appeals conference with respondent.

*of Amaya*, *supra*.) To satisfy his burden of proof, appellant must prove by a preponderance of evidence that respondent's tax assessment is incorrect and what the proper amount of tax should be. (Cal. Code Regs., tit. 18, § 30219(b); *Appeal of AMG Care Collective*, 2020-OTA-173P.) Appellant's unsupported assertions are not sufficient to meet his burden of proof.

Accordingly, OTA finds that respondent computed the unreported taxable sales based on the best available evidence, which is reasonable and rational. Appellant has not identified any errors in respondent's computations of unreported taxable sales in the second reaudit or provided any new records or evidence to support appellant's contentions from which a more accurate determination could be made. OTA did not discover any errors in respondent's audit procedures, computations, and conclusions, and thus, OTA concludes that appellant has not met his burden of proving a different result.

## HOLDING

No further adjustments to the unreported taxable sales are warranted.

## DISPOSITION

Respondent's action reducing the taxable measure to $270,639,[12] and the negligence penalty to $2,572.35 but otherwise denying the petition for redetermination is sustained.

Signed by:
Natasha Ralston
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Natasha Ralston
Administrative Law Judge

We concur:

Signed by:
Josh Lambert
CB1F7DA37831416...
Josh Lambert
Administrative Law Judge

DocuSigned by:
DC88A60D8C3E442...
Keith T. Long
Administrative Law Judge

Date Issued: 5/7/2026

[12] This amount includes the measure for the unreported district tax.