OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **MPAAKINC,** **dba Anandabhavan Biryamhut**	OTA Case No.: 240215328 CDTFA Case ID: 2105074

OPINION

Representing the Parties:

For Appellant: Sridhar Panchumarthi, CPA
Neeraj Bhatia, CPA, Attorney

For Respondent: Jason Parker, Chief of Headquarters Ops.

K. WILSON, Hearing Officer: Pursuant to Revenue and Taxation Code (R&TC) section 6561, MPAAKINC, dba Anandabhavan Biryamhut, (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 March 13, 2020.[2] The NOD is for tax of $84,142, plus applicable interest, for the period April 1, 2016, through March 31, 2019 (liability period).[3]

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).[4]

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[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] The NOD was timely issued because on May 20, 2019, appellant signed the most recent in a series of waivers of the otherwise applicable three-year statute of limitations for the period April 1, 2016, through March 31, 2017, which allowed CDTFA until April 30, 2020, to issue an NOD. (See R&TC, §§ 6487(a), 6488.)

[3] Although appellant ceased operations in January 2019, appellant filed on a quarterly basis; thus, the liability period is through March 31, 2019, which is the end of the first quarter of 2019 (1Q19).

[4] Appellant failed to respond to the oral hearing notice. Therefore, appellant is deemed to have waived its right to a hearing, and this appeal will be decided on the written record.

ISSUE

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

FACTUAL FINDINGS

1. Appellant, a corporation, operated a restaurant located in Milpitas, California, selling Indian-style food. Appellant was open daily for lunch from 11:30 a.m. to 2:30 p.m. and dinner from 5:30 p.m. to 10:00 p.m. The restaurant had seating for over 90 people. Appellant was issued its seller's permit with an effective start date of July 1, 2015, and closed with an effective close-out date of January 31, 2019. Appellant had not been previously audited.
2. For the liability period, appellant reported on its sales and use tax returns (SUTRs) total sales of $894,550 claiming no deductions, which resulted in reported taxable sales of the same amount. Appellant's reporting method was unknown.
3. For audit, appellant provided federal income tax returns (FITRs) for partial year July 1, 2015, through December 31, 2015, and calendar years 2016, 2017, and 2018; bank statements for June 2017 through December 2017; bank account reconciliation for 2016, 2017, and 2018; and credit card reports (daily journals) for July 2015 through December 2018.
4. CDTFA compared taxable sales reported on the SUTRs to the corresponding gross receipts reported on the FITRs, noting material differences. Appellant stated that gross receipts included other/nontaxable income. However, appellant did not provide supporting documentation for nontaxable sales. Thus, CDTFA concluded that an indirect audit method would be necessary to verify reported taxable sales and decided to perform an on-site observation test (site test).
5. CDTFA observed the business for a full business day on Thursday, February 22, 2018. From the one-day observation, CDTFA compiled total sales excluding sales tax reimbursement (ex-tax) of $784.59, sales tax reimbursement of $70.61, credit card tips of $104.62, credit card sales (ex-tax) of $769.24, and cash sales (ex-tax) of $15.35. All sales were taxable. CDTFA calculated a credit card sales ratio of 98.04 percent ($769.24 ÷ $784.59) and a credit card tip ratio of 11.09 percent ($104.62 ÷ $943.09 credit card sales including sales tax reimbursement and credit card tips). Based on the site test, CDTFA concluded that appellant's sales met the "80-80 rule" such that all of

appellant's food sales were subject to sales tax unless appellant kept a separate accounting of its cold food sales to-go.[5]

6. Due to the limited books and records provided, CDTFA concluded that gross receipts per the FITRs were the best evidence of total sales. For each year (2016, 2017, and 2018), CDTFA deducted credit card sales tips[6] and sales tax reimbursement[7] to compute audited taxable sales of $1,909,062 for the three years combined. Upon comparison to taxable sales reported on the corresponding SUTRs, CDTFA computed additional taxable sales of $991,213. CDTFA also computed percentages of error for each year, and the three years combined.
7. CDTFA applied the error rates for each year to taxable sales reported on the SUTRs of the respective quarters, and the combined error ratio to taxable sales reported on the SUTR for first quarter of 2019 (1Q19). In total, CDTFA computed unreported taxable sales of $946,610 for the liability period.
8. CDTFA issued the NOD to appellant on March 13, 2020, based on the above-mentioned audit, with a tax liability of $84,142 plus applicable interest.[8]
9. Appellant filed a timely petition disputing the NOD.
10. CDTFA held an appeals conference with appellant and issued a Decision on April 4, 2023, denying appellant's petition for redetermination.
11. Appellant filed a Request for Reconsideration. In a Supplemental Decision issued on January 8, 2024, CDTFA continued to deny the petition for redetermination.
12. Appellant timely appealed to OTA.

[5] Generally, the sale of cold food to-go is exempt from tax. (See Cal. Code Regs., tit. 18, § 1603(c)(1)(B).) However, there is a special "80-80" rule under which a sale of cold food in a form suitable for consumption on the retailer's premises (e.g., a cold sandwich) is subject to tax even if sold on a to-go basis. This rule applies when more than 80 percent of a seller's gross receipts are from sales of food products, and more than 80 percent of the seller's retail sales of food are taxable. (R&TC, § 6359(d)(6); Cal. Code Regs., tit. 18, § 1603(c)(1)(A), (3).)

[6] Using the daily journals for January 2016 through December 2018, CDTFA compiled recorded credit card sales and multiplied the result by the credit card tip ratio of 11.09 percent to compute credit card sales tips of $207,046 for that period.

[7] Gross receipts less credit card tips multiplied by the applicable sales tax rate.

[8] The NOD reflects a payment/credit of $2,212.47.

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 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*.) To satisfy its burden of proof, a taxpayer must prove both: (1) that the tax assessment is incorrect; and (2) the proper amount of tax. (*Appeal of AMG Care Collective*, 2020-OTA-173P.)

In general, sales of food are exempt from tax. (R&TC, § 6359.) However, certain sales of food are excluded from the exemption (and are thus subject to tax). As relevant here, sales of food are subject to tax if the food is sold for consumption at facilities provided by the retailer (R&TC, § 6359(d)(2)) or if the food is sold as hot prepared food products (R&TC, § 6359(d)(7)). Exemptions from tax are strictly construed against the taxpayer who has the burden of proving that the statutory requirements have been satisfied. (*Standard Oil Co. v. State Bd. of Equalization* (1974) 39 Cal.App.3d 766.)

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. Tax does not apply to sales of food products which are furnished in a form not suitable for consumption on the seller's premises. (R&TC, § 6359(f); Cal. Code Regs., tit. 18, § 1603(c)(1)(A).)

CDTFA received limited books and records for examination. Accordingly, CDTFA conducted a site test, which showed that all sales were taxable and the 80-80 rule was applicable to appellant. CDTFA found a large difference totaling $1,483,012 for the period July 1, 2015, through December 31, 2018, when comparing gross receipts of $2,628,541 reported on the FITRs to total sales of $1,145,529 reported on the SUTRs. Appellant was unable to provide source documentation to support nontaxable sales. CDTFA then used reported gross receipts for 2016, 2017, and 2018, combined to compute an error ratio, which CDTFA then applied to the remaining quarter in the liability period (1Q19). OTA finds that CDTFA correctly concluded that the books and records appellant provided for audit were incomplete or otherwise unreliable, and CDTFA could not use the provided records to verify reported taxable sales with a direct audit.[9] When, as is the case here, CDTFA cannot compute taxable sales from appellant's records, it is appropriate to use an indirect audit approach (such as the FITR analysis) to calculate the taxable measure. (See *Appeal of Las Playas #10, Inc.*, 2021-OTA-204P.) In sum, the evidence shows that CDTFA's use of appellant's reported gross receipts in an indirect audit was reasonable and rational. Thus, the burden of proof shifts to appellant to show that the tax assessment is incorrect, and the proper amount of tax.

Appellant contends that CDTFA did not meet its burden of proof for the assessment. As discussed above, OTA has found that CDTFA has met its minimal initial burden to show that its determination is reasonable and rational. The burden of proof now rests with appellant. To carry that burden and to prevail in this appeal, appellant must provide arguments and evidence to persuade this panel that a measure less than that determined by CDTFA is more accurate. (*Appeal of Talavera*, *supra*.)

Appellant asserts that it provided sufficient records for audit and no additional liability is due. CDTFA may compute and determine the amount required to be paid based upon any information in its possession or that may come into its possession. (R&TC, § 6481.) There is no requirement that CDTFA must use one audit method over another. It is up to CDTFA's discretion on what method it believes is the most accurate way to audit a taxpayer's business. Furthermore, CDTFA is not required to accept as conclusive evidence the taxpayer's books and records, even when these are in agreement with each other, where CDTFA, using recognized and accepted accounting procedures, established in an audit that the books and records did not disclose the correct amount of tax liability. (*Riley B's, Inc. v. State Bd. of Equalization* (1976)

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[9] A direct audit method is one that enables CDTFA 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.

61 Cal.App.3d 610, 615.) To satisfy its burden of proof, appellant must prove by a preponderance of evidence that CDTFA'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*, *supra*.) Appellant has not provided verifiable source documentation to quantify nontaxable sales of frozen food to-go. Accordingly, OTA finds that appellant's assertion that records were sufficient and reliable is not persuasive nor does it provide a basis for adjustment.

Appellant argues that in the audit of its related business, SABSV Inc. (SABSV), two site observations were performed on September 28, 2017, and January 24, 2018, respectively, which showed that 30 percent of sales were nontaxable. Appellant asserts that CDTFA delayed completing that audit and had the opportunity to perform a third site test but did not and asserted a higher liability than initially discussed with SABSV. OTA understands that appellant is arguing that like SABSV, appellant had nontaxable sales and should have been given an allowance for nontaxable sales of frozen food to-go.

In appellant's case, the February 22, 2018 site test included only taxable sales. CDTFA concluded that appellant met the criteria of the 80-80 rule and appellant was unable to provide supporting source documentation for any nontaxable sales of frozen food to-go.

As noted above, a seller may avoid the 80-80 rule application by keeping a separate accounting of its to-go sales 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).) Any seller meeting the 80-80 rule criteria and claiming a deduction for the sale of cold food products in a form not suitable for consumption on the seller's premises must support the deduction by complete and detailed records of such sales made. (R&TC, § 6359(f); Cal. Code Regs., tit. 18, § 1603(c)(3).) The types of records that taxpayers are required to maintain and make available for examination include but are not limited to: (a) the normal books of account ordinarily maintained by the average prudent businessperson engaged in the activity in question; (b) bills, receipts, invoices, cash register tapes, or other documents of original entry supporting the entries in the books of account; and (c) schedules or working papers used in connection with the preparation of the tax returns. (Cal. Code Regs., tit. 18, § 1698(b)(1).)

Appellant has not identified any errors in CDTFA's computations of unreported taxable sales. Appellant has not provided any new documentation or other verifiable evidence in support of nontaxable sales of frozen food to-go during the liability period. Accordingly, OTA finds no basis to recommend any adjustments.

In addition, OTA notes that appellant cites to several Opinions allegedly issued by OTA; however, the purported Opinions cited do not exist. The submission of hallucinated or fictitious citations is concerning and inappropriate. (See *Noland v. Land of the Free, L.P.* (2025) 114 Cal.App.5th 426.) No filing to OTA should contain any citations or statements of law which are false or fabricated, and no filing should contain any citations—whether provided by generative artificial intelligence (AI) or any other source—that the individual responsible for submitting the filing has not personally read and verified. (See *Noland*, *supra*, 114 Cal.App.5th at p. 431.) Parties and representatives appearing before OTA are expected to know about the risk of AI hallucination. Therefore, OTA does not address appellant's arguments regarding the nonexistent legal authority.

HOLDING

No adjustments to the measure of unreported taxable sales are warranted.

DISPOSITION

CDTFA's action in denying appellant's petition for redetermination is sustained.

Signed by:
Kim Wilson
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Kim Wilson
Hearing Officer

We concur:

Signed by:
Suzanne B. Brown
47F45ABE89E34D0...
Suzanne B. Brown
Administrative Law Judge

DocuSigned by:
Sara A Hosey
6D3FE4A0CA514E7...
Sara A. Hosey
Administrative Law Judge

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