OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **SABPLINC,** **dba Ananda Bhaven**	OTA Case No.: 240215329 CDTFA Case ID: 1-101-006

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, SABPLINC, dba Ananda Bhaven, (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 April 19, 2019.[2] The NOD is for tax of $85,251, plus applicable interest, for the period June 1, 2015, through June 30, 2018 (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]

[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 January 6, 2019, appellant signed the most recent in a series of waivers of the otherwise applicable three-year statute of limitations for the period June 1, 2015, through March 31, 2016, which allowed CDTFA until July 31, 2019, to issue an NOD. (R&TC, §§ 6487(a), 6488.)

[3] Although appellant ceased operations in April 2018, appellant filed on a quarterly basis; thus, the liability period is through June 30, 2018, which is the end of the second quarter of 2018 (2Q18).

[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 measures of unreported taxable sales are warranted.[5]

FACTUAL FINDINGS

1. Appellant, a corporation, operated a restaurant located in Pleasanton, California, selling Indian-style food. Appellant was open daily for breakfast, lunch and dinner. The restaurant had seating for over 70 people. Appellant was issued its seller's permit with an effective start date of June 1, 2015, and closed with an effective close-out date of April 21, 2018. Appellant had not been previously audited.
2. For the liability period, appellant reported on its sales and use tax returns (SUTRs) total sales of $1,158,549 claiming no deductions, which resulted in reported taxable sales of the same amount. Appellant also reported the taxable sales of fixtures and equipment of $12,450 at close-out of the business. In total, appellant reported taxable sales of $1,170,999 for the liability period. Appellant stated that reported sales were based on sales logs, which summarized point-of-sale (POS) sales reports by month. Appellant also stated that it excluded nontaxable sales and that its reported total sales represented only taxable sales.
3. For audit, appellant provided federal income tax returns (FITRs) for calendar years 2015 and 2016; monthly sales logs for June 2015 through April 2018; POS sales summaries for June 2015 through April 2018; advertising flyers; and proof of purchase for specialty to-go food containers. Based on discussions with appellant, analysis of recorded sales, information on Yelp.com, and the findings in audits performed on the seller's permits of related entities, CDTFA concluded that appellant 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.[6]
4. CDTFA compared taxable sales reported on the SUTRs to the corresponding gross receipts, excluding sales tax reimbursement (ex-tax), reported on the FITRs for 2015 and 2016, and noted material differences. However, CDTFA concluded the differences

[5] Unreported taxable sales were comprised of two audit items: unreported recorded taxable sales of $92,478 and unsupported recorded nontaxable sales of food products of $817,241.

[6] 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).)

would be mainly due to nontaxable sales appellant excluded from the SUTRs.

5. Using the monthly sales logs for June 2015 through April 2018, CDTFA compiled recorded taxable sales of $1,251,027, nontaxable sales of $968,695, and total sales of $2,219,722. CDTFA computed a taxable sales ratio of 56 percent ($1,251,027 - $2,219,722). Appellant stated that frozen food products to-go were sold through 2017. CDTFA concluded that the taxable sales ratio for appellant's type and size was questionable and further testing was warranted.
6. Using the monthly sales logs for June 2015 through April 2018, CDTFA compiled recorded credit card sales of $2,081,411 and computed a credit card sales ratio of 94 percent ($2,081,411 ÷ $2,219,722). CDTFA also compiled recorded credit card sales tips of $225,298 and computed a credit card sales tip ratio of 11 percent ($225,298 - $2,219,722) (rounded). CDTFA concluded that the recorded credit card sales ratio and credit card sales tip ratio for appellant's type and size was unreasonably high and further testing was warranted.
7. CDTFA compared recorded taxable sales of $1,251,027 to taxable sales reported on the SUTRs, which disclosed unreported recorded taxable sales of $92,478 ($1,251,027 - $1,158,549). (Audit item 1.)
8. Appellant did not provide source documentation to support nontaxable sales of frozen food to-go; however, based on its discussion with appellant, CDTFA concluded that an adjustment was warranted for 2016 and 2017. CDTFA decided that a 10 percent allowance of total sales would be a reasonable estimate for appellant's business. Using the monthly sales logs for January 2016 through November 2017, CDTFA compiled recorded total sales of $1,514,538 and computed audited nontaxable sales of frozen food to-go of $151,454.
9. CDTFA deducted the audited nontaxable sales of frozen food to-go of $151,454 from recorded nontaxable sales of $968,695 and computed unsupported recorded nontaxable sales of food products of $817,241. (Audit item 2.)
10. CDTFA issued the NOD to appellant on April 19, 2019, based on the above-mentioned audit, for a tax liability of $85,251 plus applicable interest.
11. Appellant filed a timely petition disputing the NOD.
12. CDTFA held an appeals conference with appellant and issued a Decision on March 23, 2023, denying appellant's petition for redetermination.

13. Appellant filed a Request for Reconsideration. In a Supplemental Decision issued on January 8, 2024, CDTFA continued to deny the petition for redetermination.
14. Appellant timely appealed to OTA.

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. (*H. J. Heinz Co. v. State Bd. of Equalization*, (1962) 209 Cal.App.2d 1, 4; *Appeal of Snowflake Factory LLC*, 2020-OTA-270P.)

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's preliminary analysis of the taxable sales ratio and credit card sales ratio suggested that appellant may have underreported its taxable sales. Under those circumstances, CDTFA's decision to investigate further was both reasonable and rational. CDTFA's determination is comprised of two audit items. Audit item 1 was based on differences between taxable sales reported on the SUTRs and taxable sales recorded in appellant's own monthly sales logs, a direct audit method.[7]

Audit item 2 was also based on appellant's own monthly sales logs but because appellant failed to provide source documentation to support recorded nontaxable sales of frozen food to-go, CDTFA concluded that these sales were subject to sales tax. However, rather than including the entire amount, CDTFA made an allowance for some nontaxable sales of frozen food to-go based on its discussion with appellant and experience in audits of similar businesses in appellant's area.

Therefore, OTA finds CDTFA used the best available evidence of sales, and OTA concludes that CDTFA has met its minimal initial burden to show that its determination was reasonable and rational. Accordingly, the burden shifts to appellant to show errors in the audit.

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 argues that CDTFA failed to independently and properly assess appellant's documentation and improperly rejected recorded nontaxable sales based on discussions with CDTFA's auditor for a related entity. 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

[7] 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.

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) 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 any source documentation to verify the monthly sales log or POS monthly sales reports and support that taxable sales and nontaxable sales of frozen food to-go were accurately recorded and reported. 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 CDTFA has not established that its sales fit within the 80-80 rule and CDTFA simply used a random 10 percent allowance as opposed to the actual nontaxable sales.

CDTFA concluded that appellant met the criteria of the 80-80 rule but made an estimate of nontaxable sales of frozen food to-go (based on the advertising flyers and purchases of specialty to-go containers) even though 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 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).) 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. OTA finds that without documentation, CDTFA was not even required to allow 10 percent for nontaxable sales of frozen food to-go but since this in appellant's favor, 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 (*Noland*).) 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 measures 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
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Suzanne B. Brown
Administrative Law Judge

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

Date Issued: 5/15/2026