OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **J. SWAIN,** **dba Bamboo 2-U**	OTA Case No.: 250218820 CDTFA Case ID: 4-611-791

OPINION

Representing the Parties:

For Appellant: J. Swain

For Respondent: Jason Parker, Chief of Headquarters Ops.

For Office of Tax Appeals: Marius Dragan, Business Taxes Specialist

A. WONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, J. Swain, dba Bamboo 2-U, (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 January 25, 2023. The NOD is for tax of $28,326, plus applicable interest, and a negligence penalty of $2,832.56 for the period January 1, 2019, through March 31, 2022 (liability period).[1] CDTFA based the tax liability on unreported taxable sales of $365,076.

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 the amount of unreported taxable sales should be reduced.

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

FACTUAL FINDINGS

1. Appellant operates a retail store specializing in bamboo and beach furniture.
2. From May 2022 through January 2023, CDTFA audited appellant for the liability period. Appellant did not produce any books and records for the audit. Ultimately, CDTFA determined that appellant underreported taxable sales by $365,076.[2]
3. In making this determination, CDTFA used the amounts appellant's credit card payment processers paid to appellant from 2019 through 2021 (as reported on IRS Forms 1099- K[3]) less sales tax reimbursement (ex-tax), divided by a 90 percent credit card sales ratio, to estimate appellant's taxable sales ex-tax for this period.[4] CDTFA then compared the estimated taxable sales ex-tax to reported taxable sales, resulting in unreported taxable sales of $346,100.
4. During the audit, CDTFA could not obtain appellant's Form 1099-K for the first quarter of 2022 (1Q22). Consequently, CDTFA used an error ratio based on the unreported differences for 2019 through 2021 to estimate appellant's taxable sales for 1Q22,[5] resulting in $18,976 in unreported taxable sales for this quarter.[6]
5. CDTFA subsequently issued the NOD to appellant based on unreported taxable sales of $365,076 ($346,100 + $18,976).
6. On February 23, 2023, appellant timely petitioned CDTFA for redetermination.
7. CDTFA then issued a decision denying appellant's petition for redetermination.
8. This timely appeal followed.

[2] CDTFA also determined that appellant underreported her district taxes and that appellant's underreporting for the liability period was due to negligence, which are determinations that appellant does not dispute.

[3] 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 includes payments made by any electronic means, including, but not limited to, credit cards, debit cards, and PayPal.

[4] CDTFA determined that a 90 percent credit card sales ratio was reasonable due to expected higher credit card usage during the COVID-19 pandemic, which coincided with the liability period.

[5] The "error ratio" is the percentage of unreported taxable sales to reported taxable sales.

[6] CDTFA states that it now has appellant's Form 1099-K for 1Q22 but did not adjust unreported taxable sales for this quarter because using the payment information in this form would increase appellant's tax liability.

DISCUSSION

California imposes upon all retailers a sales tax measured by the retailer's gross receipts from the retail sale of tangible personal property in this state, 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, it is presumed 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 tax returns or the amount of tax required to be paid to the state by any person, CDTFA may compute and determine the amount required to be paid on the basis of any information within its possession or that may come into its possession. (R&TC, § 6481.)

In the case of an appeal, CDTFA has a minimal, initial burden of showing that its determination was reasonable and rational. (*Appeal of Las Playas #10, Inc.*, 2021-OTA-204P.) If CDTFA's determination is not reasonable and rational, then the determination should be rejected. (*Appeal of Landeros*, 2024-OTA-655P.) If CDTFA's determination is reasonable and rational, then the determination is presumed correct, and the burden of overcoming this presumption is on the taxpayer. (*Ibid*.)

Generally, the taxpayer bears the burden of proof as to all issues of fact. (Cal. Code Regs., tit. 18, § 30219(a).) The standard of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(b).) That is, a taxpayer must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Appeal of AMG Care Collective*, 2020-OTA-173P.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Las Playas #10, Inc.*, *supra*.) To satisfy its burden of proof, a taxpayer must prove both that the tax assessment is incorrect and what the proper amount of tax should be. (*Appeal of AMG Care Collective*, *supra*.)

The evidence shows that CDTFA has met its minimal, initial burden. Because appellant did not provide any books and records upon audit, CDTFA resorted to an indirect audit method, the credit card sales ratio method. CDTFA's use of the credit card sales ratio method as the basis for its determination is a recognized and accepted audit method. (See *Appeal of Amaya*, 2021-OTA-328P.) In addition, appellant does not dispute the accuracy of the amounts reported on the Form 1099-Ks or the 90 percent credit card sales ratio used by CDTFA to reconstruct her taxable sales. Therefore, OTA concludes that CDTFA has established that its determination is reasonable and rational, and, accordingly, the burden shifts to appellant to show error in the audit.

On appeal, appellant argues that many of the transactions reported on her Form 1099-Ks are payments relating to nontaxable sales made during “Botox parties” hosted by appellant one to three times a month and rent payments related to residential leases of a portion of her business premises, which was a mixed-use residential/commercial property. Appellant provides a self-prepared payment schedule covering January 2020 through April 2022, which allegedly shows cash and credit card payments received by appellant for Botox, rent, and utilities, as well as photos of the property, which show several bedrooms and studios located on the premises. Appellant also provides two emails from separate individuals, who state that they rented a studio from appellant during the liability period for $1,800 a month plus utilities and that they made partial rent payments to appellant using a credit card “most of the time.”

The evidence provided by appellant is insufficient to establish that CDTFA’s proposed deficiency should be reduced. Taken as a whole, the issue with this evidence is that it is incomplete, non-contemporaneous with the claimed nontaxable transactions, and uncorroborated by source documents, and, thus, it lacks sufficient credibility to show the amount, if any, of appellant’s nontaxable transactions included in credit card sales. Appellant appears to recognize the insufficiency of the evidence provided, asserting that, although she kept source documents for these alleged nontaxable transactions, a flood damaged and/or destroyed them in January 2024. Even assuming that it was impossible for appellant to substantiate her claimed nontaxable sales, the “impossibility of proving a material fact upon which the right to relief depends simply leaves the claimant upon whom the burden rests with an unenforceable claim….” (See *Burnet v. Houston* (1931) 283 U.S. 223, 228 [impossibility of establishing the basis of property sold does not relieve a taxpayer of the burden of proving entitlement to a deductible loss].) In other words, the loss of any source documents pertaining to appellant’s alleged nontaxable sales in this case does not entitle appellant to a reduction in the proposed deficiency. Accordingly, OTA concludes that appellant has not shown that unreported taxable sales of $365,076 should be reduced.

HOLDING

The amount of unreported taxable sales should not be reduced.

DISPOSITION

CDTFA's denial of appellant's petition for redetermination is sustained.

DocuSigned by:
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Andrew Wong
Administrative Law Judge

We concur:

Signed by:
Kim Wilson
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Kim Wilson
Hearing Officer

DocuSigned by:
Steven Kim
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Steven Kim
Administrative Law Judge

Date Issued: 5/22/2026