OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **REGENCY USA INC.**	OTA Case No.: 240315729 CDTFA Case ID: 3-812-804

OPINION

Representing the Parties:

For Appellant: Shawn Zali, CPA

For Respondent: Jason Parker, Chief of Headquarters Ops.

For Office of Tax Appeals: Crystal Spratley, Business Taxes Specialist III

N. RALSTON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Regency USA Inc. (appellant) appeals a decision issued by the California Department of Tax and Fee Administration (respondent) denying appellant's timely petition for redetermination of a Notice of Determination (NOD) issued on April 20, 2022. The NOD is for tax of $424,261, plus applicable interest, and a negligence penalty of $42,426.11 for the period January 1, 2019, through December 31, 2020 (liability period).

Respondent performed a subsequent revised Field Billing Order (FBO),[1] as explained below. The revised FBO[2] dated November 23, 2022, reduced the tax by $8,414, from $424,261 to $415,847, and made corresponding reductions to interest and the 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).

[1] According to respondent, an FBO is a type of tax liability or refund recommendation used for various reasons, one being when an entire three-year period is not applicable or appropriate for a deficiency or a credit and are generally prepared in the same manner as a regular audit. (Respondent audit manual (AM) § 201.09, 213.01 (December 2021); AM § 702.00.) While the record does not contain a prior version of the Audit Manual, the definition of FBO is not in dispute or at issue in this appeal.

[2] A revised FBO is an FBO that, like a reaudit, has been posted and billed and for which an NOD has been issued. According to respondent, revised FBOs are prepared in accordance with the same procedures set forth for reaudits. (AM Chapter 7 § 702.05) The term reaudit is commonly used when referring to a revised FBO.

ISSUES

1. Whether adjustments are warranted to the tax liability as determined by respondent.
2. Whether respondent properly imposed the 10 percent negligence penalty and whether the penalty should be deleted.
3. Whether appellant is entitled to relief of interest.

FACTUAL FINDINGS

1. Appellant, a corporation, operated as a used car dealership selling used cars of various makes and models in Wilmington, California.
2. For the liability period, appellant reported on its sales and use tax returns (SUTRs), total sales of $5,728,761 and claimed deductions of $1,332,385 for nontaxable sales for resale and $297,365 for sales in interstate and foreign commerce, for a total of $1,629,750 in claimed deductions, resulting in reported taxable sales of $4,099,011 for the liability period.
3. Respondent obtained and reviewed Department of Motor Vehicles (DMV) data,[3] which respondent obtained from its internal sources. Using this data, respondent scheduled and totaled the estimated sales prices for the liability period to arrive at estimated total taxable sales of $8,842,144, using the vehicle license fee (VLF).[4] Respondent compared the total taxable sales per DMV records to the taxable sales reported on the SUTRs of $4,099,011 to arrive at underreported taxable sales of $4,743,133.
4. Respondent sent appellant a letter in March 2022 to inform appellant of respondent's analysis and provide appellant the opportunity to amend the SUTRs previously filed. Appellant failed to respond to the letter or to file amended SUTRs for the liability period.
5. Respondent issued an NOD to appellant dated April 20, 2022, with a tax liability of $424,261, plus applicable interest, and a 10 percent negligence penalty in the amount $42,426.11.

[3] The DMV data is obtained through respondent's Data Analysis Section (DAS), also referred to as DMV DAS data. This data includes the vehicle transactions made by the dealer and reported to the DMV.

[4] Respondent reports that the sales information obtained from DMV through respondent's internal sources included the Vehicle Identification Number, license plate number, year and make of the vehicle, vehicle sales date, and a two-letter VLF code designating a range of sales prices in $200 increments. Respondent used the VLF code to assign the lowest estimated sales price in the $200 range designated by a particular code. For example, VLF code "AA" designates that the sales price of the vehicle was between $13,000 and $13,200, and respondent would assign a sales price of $13,000 for sales involving VLF "AA."

6. Appellant filed a timely petition for determination dated May 11, 2022.
7. Respondent held an appeals conference on October 18, 2023, and subsequently issued a Decision on March 6, 2024, that ordered the liability be redetermined to decrease the taxable sales based on documentation provided by appellant in support of non-taxable sales, but otherwise denied the petition.
8. For the revised FBO, appellant provided documents including wholesale reports and bill of lading contracts. Respondent reviewed the documentation and allowed two transactions as nontaxable sales for resale in the amount of $37,400, and three transactions as nontaxable sales in interstate commerce in the amount of $54,170. In total, these adjustments reduced the measure of unreported taxable sales by $91,570 from $4,743,133 to $4,651,563. This reduced the proposed liability by $8,414 from $424,261 to $415,847. Respondent also made corresponding reductions to the interest and penalty.
9. This timely appeal to OTA followed. In its appeal to OTA, appellant asserts that it has additional documents to support its contentions on appeal, but appellant did not provide the documents to OTA. In an order dated September 4, 2025, OTA gave appellant the opportunity to provide any supporting documents or evidence. Appellant did not respond to OTA's order.

DISCUSSION

Issue 1: Whether adjustments are warranted to the tax liability as determined by respondent.

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 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*.) 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.) Furthermore, to the extent the taxpayer asserts entitlement to an exemption or exclusion from tax, the taxpayer has the burden of establishing entitlement to the exemption or exclusion claimed. (*Appeal of Snowflake Factory LLC,* 2020-OTA-270P.)

Appellant failed to respond to respondent, file amended SUTRs, or provide normal books of account, such as sales journals and purchase journals, or sales tax worksheets used in connection with the preparation of the SUTRs. In the absence of reliable records, OTA finds the use of an indirect audit method to compute appellant's sales to be reasonable. Respondent used DMV data as the basis for its determination, which is a verifiable source of third-party information. (See *Appeal of Las Playas #10, Inc.,* 2021-OTA-204P.) Respondent had no other records, other than the DMV records obtained internally, to use or rely upon to review in the analysis of the reported amounts. Given the absence of books and records, respondent rationally used the only available information (the DMV records) to project appellant's taxable sales and the result appears to be reasonable. Thus, the burden shifts to appellant to show that a reduction is warranted.

Claimed sales for resale

The burden of proving a sale of tangible personal property is not at retail is upon the seller, unless the seller timely takes, in good faith, a valid resale certificate. (R&TC, § 6091; Cal. Code Regs., tit. 18, § 1668(b)(1).) If the seller does not timely obtain a valid and complete resale certificate, the seller will be relieved of liability for the tax only where the seller shows that the property: (1) was in fact resold by the purchaser prior to an intervening used; or (2) is being held for purposes of resale by the purchaser and there has been no intervening use; or (3) was consumed by the purchaser and tax was reported by the purchaser directly to respondent on the purchaser's returns or in an audit of the purchaser. (Cal. Code Regs., tit. 18, § 1668(e).)

Appellant claimed that it made $1,332,385 in sales for resale during the liability period according to the SUTRs it filed. During respondent's internal appeals process, appellant provided limited records supporting its claim that certain vehicle sales were excluded from sales tax. Respondent reviewed these documents and accepted documentation for two vehicles as valid sales for resale, in the amount of $37,400.

Upon appeal to OTA, appellant did not provide any documentation or other records to support its contention that adjustments should be made with respect to sales for resale, despite being given the express opportunity to do so. Consequently, appellant has failed to meet its burden of proof. On this basis, OTA finds that further adjustment for claimed sales for resale is not warranted.

Claimed sales in interstate or foreign commerce

R&TC section 6396 provides an exemption from tax when, pursuant to the contract of sale, the property is required to be shipped and is in fact shipped to a point outside this state by the retailer by means of facilities operated by the retailer or delivery by the retailer to a carrier, customs broker, or forwarding agent for shipment out of state.[5] Bills of lading or other documentary evidence of the delivery of the property to a carrier, customs broker, or forwarding agent for shipment outside this state must be retailed by the retailer to support the claimed exemption. (Cal. Code Regs., tit. 18, § 1620(a)(3)(D).)

Appellant claimed that it made sales in interstate or foreign commerce totaling $297,365 for the liability period. Appellant provided limited records supporting its claim that certain vehicle sales were exempt. Respondent reviewed these documents and accepted documentation for three vehicles as valid sales for interstate commerce, in the amount of $54,170.

Upon appeal to OTA, appellant did not provide any documentation or other records to support its contention that adjustments should be made for disallowed claimed exempt sales in interstate commerce. Consequently, appellant has failed to meet its burden of proof. On this basis, OTA finds that further adjustments for out-of-state sales are not warranted.

[5] The implementing regulation clarifies that sales tax applies when the property is delivered to the purchaser or its representative in this state, regardless of whether the disclosed or undisclosed intention of the purchaser is to transport the property to a point outside this state, and regardless of whether the property is so transported. (Cal. Code Regs., tit. 18, § 1620(a)(3)(A).)

Issue 2: Whether respondent properly imposed the 10 percent negligence penalty and whether the penalty should be deleted.

Respondent imposed the negligence penalty because appellant failed to maintain and provide any books and records for review, and the FBO disclosed a substantial understatement of taxable sales.

R&TC section 6484 provides that, if any part of the deficiency for which a deficiency determination is made is due to negligence or intentional disregard of the law or authorized rules and regulations, a penalty of 10 percent of the amount of the determination shall be added thereto. Although the term “negligence” is not specifically defined in the Sales and Use Tax Law, it is a common legal concept and is generally defined as a failure to act as a ordinarily prudent person would have acted under similar circumstances. (*Acqua Vista Homeowners Assn. v. MWI, Inc.* (2017) 7 Cal.App.5th 1129, 1157.) Generally, a penalty for negligence or intentional disregard should not be added to a deficiency determination associated with the first audit of a taxpayer in the absence of evidence establishing that any bookkeeping and reporting errors cannot be attributed to the taxpayer’s good faith and reasonable belief that its bookkeeping and reporting practices were in substantial compliance with the requirements of the Sales and Use Tax Law or authorized regulations. (Cal. Code Regs., tit. 18, § 1703(c)(3)(A).)

A taxpayer must 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 the returns. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).) Such records include, but are not limited to, the following: 1) the 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; and 3) schedules or working papers used in connection with the preparation of the tax returns. (Cal. Code Regs., tit. 18, § 1698(b)(1).) Failure to maintain and provide accurate records is evidence of negligence and may result in imposition of a negligence penalty. (Cal. Code Regs., tit. 18, § 1698(k).) A negligence penalty also can be based on reporting errors. (*Independent Iron Works, Inc. v. State Bd. of Equalization* (1959) 167 Cal.App.2d 318, 321-323.)

Appellant failed to respond to respondent, file amended SUTRs, or provide normal books of account, or other business records. Appellant provided limited records in support of 16 vehicles that appellant claimed were non-taxable and should not be included in the liability. Appellant provided additional documentation which supported two additional vehicles that qualified as sales for resale and three vehicles that qualified as exempt in interstate commerce. Respondent revised the original FBO to adjust the liability for those transactions that were determined to have sufficient evidence or records to support an adjustment. Appellant has not provided additional documentation or records during its appeal to OTA.[6]

Regarding reporting errors, respondent projected unreported taxable sales of $4,743,133 which produced an error ratio of 115 percent;[7] this is persuasive evidence of at least negligent reporting. Moreover, the law clearly requires taxpayers 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)) and to prove their entitlement to claimed exclusions and exemptions (*Appeal of Snowflake Factory LLC, supra*.). To date, appellant has provided almost no books or records, which is also evidence of negligence. Appellant also has not provided any non-negligent explanation for its failure to provide books and records. Additionally, a comparison of unreported taxable sales to taxable sales reveals an error rate of 116 percent ($4,743,133 ÷ $4,099,011). As such, OTA finds that appellant could not have had a good faith and reasonable belief that its bookkeeping and reporting practices were in substantial compliance with the requirements of the Sales and Use Tax Law. Consequently, although this was appellant's first audit, OTA finds that respondent correctly imposed the negligence penalty.

<u>Issue 3: Whether appellant is entitled to relief of interest.</u>

The law provides that the amount of respondent's determination shall bear interest from the last day of the month following the quarterly period for which the amount should have been paid to the date of payment. (R&TC, § 6482.)

The amount of respondent's determination, exclusive of penalties, shall bear interest from the last day of the month following the quarterly period for which the amount should have been paid to the date of payment. (R&TC, § 6482.) Interest may be relieved in only limited circumstances. As relevant here, respondent in its discretion may relieve interest where the failure to pay the tax was due in whole or in part to an unreasonable error or delay by respondent's employee acting in his or her official capacity. (R&TC, § 6593.5(a)(1).) An error or delay shall be deemed to have occurred only if no significant aspect of the error or delay is

[6] In its opening brief to OTA, appellant stated that it would be providing documentation to support its claimed nontaxable sales. However, despite OTA's issuance of an order requesting those additional documents, appellant did not provide additional documents or records to OTA.

[7] Underreported taxable sales $4,743,133 ÷ reported taxable sales $4,099,011 = 1.1571;1.15 × 100 = 115.71 percent.

attributable to an act of, or failure to act by, the taxpayer. (R&TC, § 6593.5(b).) When reviewing respondent's denial of a taxpayer's request for interest relief, OTA applies an abuse of discretion standard. (*Appeal of Micelle Laboratories, Inc.,* 2020-OTA-290P.) To show an abuse of discretion, a taxpayer must establish that, in refusing to relieve interest, respondent exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law. (*Appeal of Eichler*, 2022-OTA-029P.)

Appellant has not alleged or offered any evidence to prove an unreasonable error or delay by an employee of respondent acting in their official capacity or that any other basis exists to relieve interest. Therefore, OTA finds that appellant is not entitled to relief of interest.

HOLDINGS

1. Additional adjustments are not warranted to the tax liability.
2. Respondent properly imposed the 10 percent negligence penalty and appellant is not entitled to deletion of the penalty.
3. Appellant is not entitled to relief of interest.

DISPOSITION

Respondent's action of reducing the tax by $8,414, from $424,261 to $415,847, with corresponding reductions to the interest and penalty, but otherwise denying the petition for redetermination, is sustained.

Signed by:
Natasha Ralston
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Natasha Ralston
Administrative Law Judge

We concur:

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K Long
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Keith T. Long
Administrative Law Judge

DocuSigned by:
Josh Aldrich
48745BB806914B4...
Josh Aldrich
Administrative Law Judge

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