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OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **L. LIVOLSI,** **dba Characters**	OTA Case No.: 250923152 CDTFA Case ID: 6-085-629

OPINION

Representing the Parties:

For Appellant: Susan Haskins, Representative

For Respondent: Jason Parker, Chief of Headquarters Ops.

K. WILSON, Hearing Officer: Pursuant to Revenue and Taxation Code (R&TC) section 6901, L. Livolsi, dba Characters, (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)[1] denying in part appellant's claim for refund of one dollar, or other such amounts, for payments made against the Notice of Determination (NOD) dated October 26, 2020.[2] The NOD was for tax of $86,181, applicable interest, and a negligence penalty of $8,618.15 for the period October 4, 2016, through September 30, 2019 (liability period).

CDTFA subsequently prepared a reaudit reducing the tax by $8,332, with corresponding reductions to the interest and negligence penalty, for a total reduction of $10,486.09.

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] 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 June 29, 2020, appellant signed the most recent in a series of waivers of the otherwise applicable three-year statute of limitations for the period October 4, 2016, through September 30, 2017, which allowed CDTFA until October 31, 2020, to issue an NOD. (R&TC, §§ 6487(a), 6488.)

ISSUES[3]

1. Whether appellant's claim for refund is barred by the statute of limitations.
2. Whether further adjustments to the audit liability are warranted.

FACTUAL FINDINGS

1. Appellant, a sole proprietor, operates a dive sports bar, Characters, in Pomona, California. Appellant operated seven days a week and had the following schedule: 11:30 a.m. to 1:30 a.m.; happy hour from 2:00 p.m. to 6:00 p.m.; and live entertainment on Friday, Saturday, and Sunday nights for five hours per night. Appellant sells draft, bottled and canned beers and distilled spirits but does not sell food. Appellant uses a cloud-based point-of-sale (POS) system,[4] Talech. Appellant opened a seller's permit effective October 4, 2016. This was appellant's first audit.
2. On his sales and use tax returns (SUTRs), appellant reported gross sales of $1,153,086, with a deduction for sales tax included in gross receipts of $92,597, resulting in taxable sales of $1,060,489.
3. Upon audit, appellant provided federal income tax returns (FITRs) for 2016 through 2019, bank statements for the liability period, profit and loss (P&L) statements for fourth quarter 2016 (4Q16) through 2Q19, and purchase invoices for 3Q18.
4. CDTFA compared the gross receipts appellant reported on his FITRs with the gross sales appellant reported on his SUTRs and found differences that warranted further investigation. CDTFA calculated book markups for 2016 through 2019 using FITR gross receipts and cost of goods sold of 83.92 percent, 66.91 percent, 122.62 percent, and 91 percent, respectively,[5] resulting in an average book markup of 90.29 percent for the

[3] In his appeal to CDTFA, appellant disputed the negligence penalty, finality penalty, and the collection cost recovery fee, and requested relief of interest. On appeal to OTA, appellant has not raised any contentions or disputed these items, and they will not be discussed further.

[4] A POS system typically includes 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 included breakdowns of sales by type and amount, including product or service, credit or cash, and taxable or nontaxable.

[5] "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.

years combined. CDTFA expected markups for a sports bar in Los Angeles County to be between 300 to 450 percent. Since markups were lower than expected, CDTFA conducted further testing.

5. Based on purchases for 3Q18, CDTFA calculated that draft beer was 13.58 percent of alcohol purchases, can and bottle beer was 60.18 percent of alcohol purchases, and liquor was 26.23 percent of alcohol purchases. CDTFA determined that alcohol sales were 97.79 percent of total purchases.
6. CDTFA conducted a shelf test using 3Q18 purchases and sales to determine the markup percentage for each category of sales.[6] CDTFA calculated the weighted average markups: distilled spirits 366.47 percent, bottles and cans of beer 269.05 percent, and draft beer 193.40 percent. CDTFA calculated the overall weighted markup on alcohol to be 284.33 percent.
7. Next, CDTFA calculated audited taxable sales of $1,806,662 based on the markup on cost of alcohol purchases from the FITRs for 4Q16, 2017, and 2018, and the P&L statements for 1Q19 and 2Q19, while allowing a 2 percent adjustment for pilferage.
8. CDTFA compared audited taxable sales to reported taxable sales to calculate a percentage of error (POE)[7] for each period: 100.25 percent for 4Q16, 120.66 percent for 2017, 58.91 percent for 2018, 74.55 percent for 1Q19 and 2Q19, and an average POE of 87.92 percent for the liability period.
9. CDTFA applied the POEs to reported taxable sales to determine additional taxable sales of $919,095.
10. On October 23, 2020, CDTFA issued the NOD for $86,181 in tax, plus applicable interest, and a $8,618.15 negligence penalty.
11. On November 25, 2020, when appellant did not file a petition for redetermination, the NOD became final and CDTFA added a finality penalty of $7,319.82 pursuant to R&TC section 6565.
12. On November 30, 2020, CDTFA sent a Demand for Immediate Payment informing appellant that a collection cost recovery fee (CCRF) would apply if the NOD remained unpaid for more than 90 days. On March 2, 2021, CDTFA imposed the CCRF of $950 pursuant to R&TC section 6833(a) for failure to pay or timely enter into an installment plan to pay the NOD.

[6] A shelf test is a comparison of known costs and associated selling prices used to compute markups.

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

13. On May 18, 2023, appellant filed an untimely petition for redetermination which CDTFA did not accept.
14. On May 24, 2023, appellant entered into a payment plan with CDTFA; thereafter, appellant made payments between June 13, 2023, and October 16, 2023, of $24,001.15, and November 17, 2023, and July 11, 2025, of $95,855.19, totaling $119,856.34 towards the audit liability.
15. On September 5, 2023, appellant submitted additional documentation in support of adjustments to the audit liability. Specifically, appellant provided invoices from Garvey Wholesale for October and November 2016, all of 2017 and 2018, and 1Q19 through 3Q19 related to supplies. Appellant also provided purchases related to supplies from other vendors.
16. CDTFA reviewed appellant's submission and prepared a reaudit to remove supply items from the recorded purchases in the P&L statements to determine audited alcohol purchases, adjusted for mixers and delivery charges, pilferage, and self-consumption, to arrive at audited taxable sales of $1,719,755 based on markup on cost of alcohol purchases. Self-consumption of $9,323 was separately assessed. CDTFA then calculated adjusted POEs for each period: 87.78 percent for 4Q16, 108.75 percent for 2017, 54.63 percent for 2018, 63.70 percent for 1Q19 and 2Q19, and an average POE of 78.88 percent for the liability period. CDTFA applied the POEs to reported taxable sales to arrive at additional taxable sales of $821,447. The reaudit adjustments reduced the taxable measure by $88,325 from $919,095 to $830,770. This reduced the tax by $8,332, with corresponding reductions to interest and the negligence penalty, for a total reduction of $10,486.09.
17. On April 26, 2024, appellant filed a claim for refund. CDTFA accepted the claim for refund of $1 or more. However, CDTFA determined the amount of the claim for refund to be $95,855.19 due to the statute of limitations being six months from the date of the payments. CDTFA concluded that the remaining payments totaling $24,001.15 were outside of the statute of limitations.
18. On January 16, 2025, CDTFA held an appeals conference with appellant. Following the appeals conference, CDTFA requested additional information regarding appellant's contentions and additional records if any. CDTFA also provided appellant form CDTFA-735 *Request for Relief from Penalty, Collection Cost Recovery Fee, and/or Interest*.
19. On February 20, 2025, appellant submitted form CDTFA-735 to request relief of penalties, interest, and the CCRF.

20. On May 12, 2025, CDTFA notified appellant that the evidence gathering period was closed and that a Decision would be issued.
21. On August 4, 2025, CDTFA issued a Decision granting in part appellant's claim for refund in the amount of $10,486.09 but otherwise denying a refund of the remaining amounts.[8]
22. This timely appeal follows.

DISCUSSION

Issue 1: Whether appellant's claim for refund is barred by the statute of limitations.

R&TC section 6901 provides that CDTFA may refund any amount, penalty, or interest that has been paid more than once or that has been erroneously or illegally collected or computed. In order to obtain a refund of an overpayment, a taxpayer must file a timely claim for refund. (R&TC, § 6902(a).) A claim for refund is timely if filed within 3 years from the last day of the month following the close of the quarterly periods for which the overpayment was made, or if filed within 6 months after the date a determination becomes final if the overpayment was made pursuant to that determination, or within 6 months from the date of overpayment. (R&TC, § 6902(a).) CDTFA may also grant a refund for any period for which a waiver is given under R&TC section 6488. (R&TC, § 6902(b).) Failure to file a claim for refund within the applicable time limits constitutes a waiver of any demand against the state for the overpayment. (R&TC, § 6905.) Every claim for refund must be in writing, state the specific grounds or reasons upon which the claim is founded, be signed by the taxpayer, and identify the reporting period in which the overpayment occurred, the amount of the refund being claimed, and the contact information of the taxpayer or the taxpayer's representative. (R&TC, § 6904; Cal. Code Regs., tit. 18, § 35036.)

Here, appellant filed a claim for refund on April 26, 2024, for payments made towards the audit liability totaling $119,856.34. Appellant's payments made between June 13, 2023, and October 16, 2023, totaled $24,001.15. Additionally, appellant's payments made between November 17, 2023, and July 11, 2025, totaled $95,855.19. Appellant does not make any specific arguments regarding the claim for refund and the statute of limitations other than requesting adjustments to the audit liability.

As relevant here, the claim for refund is timely if filed within 6 months from the date of the overpayment. (R&TC, § 6902(a).) In other words, payments made 6 months prior to the

[8] The Decision states the refund is per CDTFA's recommended adjustments in the reaudit results letter dated August 14, 2024. The adjustments are $10,486.09, as shown in Factual Finding 16.

claim for refund date of April 26, 2024, are outside of the statute of limitations. Therefore, refunds of payments of $24,001.15 are barred by the statute of limitations. Appellant's payments made after October 26, 2023, are within the statute of limitations. OTA finds that CDTFA properly denied a refund of payments made prior to October 26, 2023.

Issue 2: Whether further adjustments to the audit liability are warranted.

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, 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.) 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*.)

Here, appellant provided limited books and records for audit. CDTFA found differences between appellant's gross receipts on FITRs and gross sales on SUTRs that prompted further investigation. CDTFA also found that appellant's book markups of 83.92 percent for 2016, 66.91 percent for 2017, 122.62 percent for 2018, and 91 percent for 2019 were significantly lower than CDTFA's expected markup of 300 to 450 percent, which indicated possible underreporting. After conducting a shelf test using 3Q18 purchases and sales, CDTFA calculated the overall weighted markup on alcohol of 284.33 percent. CDTFA calculated audited taxable sales based on the markup on cost of alcohol purchases from the FITRs for 4Q16, 2017, and 2018, and the P&L statements for 1Q19 and 2Q19 while adjusting for mixers and delivery charges, pilferage, and self-consumption. The markup method is a recognized and accepted accounting procedure. (*Appeal of Amaya,* 2021-OTA-328P.) OTA finds that CDTFA's use of the markup method to compute appellant's taxable sales was appropriate. Accordingly,

OTA finds that CDTFA has met its initial burden to show that its determination was reasonable and rational, and the burden of proof shifts to appellant to establish to show that adjustments are warranted.

On appeal, appellant contends that he had invoices that were not alcohol related. Additionally, appellant asserts that CDTFA's calculations were unrealistic because he has very competitive pricing and there is a lot of competition close by.

CDTFA may compute and determine the amount required to be paid upon the basis of any information within its possession or that may come into its possession. (R&TC, § 6481) It is appellant's burden to show error in the determination, and appellant must point to an error in the determination and provide proof of the error. (*Appeal of Amaya, supra*.) Appellant has not provided any evidence to support his arguments. The markup audit method is a well-established audit method that has been shown effective and reliable if it is based on sufficient information to establish a reasonable markup and cost of taxable merchandise sold. (*Ibid*.) In this case, CDTFA possessed sufficient information to utilize the markup method, such as appellant's own books and records, including purchase invoices, FITRs and P&L statements. As appellant has not provided any basis for adjustments, OTA concludes that appellant has failed to meet his burden of establishing that an adjustment to the measure of unreported taxable sales is warranted.

HOLDINGS

1. Appellant's claim for refund for payments of $24,001.15 between June 13, 2023, and October 16, 2023, is barred by the statute of limitations.
2. Further adjustments to the audit liability are not warranted.

DISPOSITION

CDTFA's actions granting the claim for refund in accordance with the reaudit findings but otherwise denying the claim for refund 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

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Keith T. Long
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Keith T. Long
Administrative Law Judge

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