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OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **S & K FOOD SERVICES INC.,** **dba Turkish Kitchen Mediterranean**	OTA Case No.: 241017679 CDTFA Case ID: 4-549-282

OPINION

Representing the Parties:

For Appellant: Nader Shahatit, Representative

For Respondent: Nalan Samarawickrema, Hearing Rep.
Christopher L. Brooks, Attorney
Jason Parker, Chief of Headquarters Ops.

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, S & K Food Services Inc., doing business as Turkish Kitchen Mediterranean (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA) denying, in part, appellant's timely petition for redetermination of a Notice of Determination (NOD) issued on January 19, 2023. The NOD is for tax of $41,852, plus applicable interest, and a negligence penalty of $4,185.16 for the period October 1, 2019, through September 30, 2022 (liability period).

CDTFA's Decision ordered reductions to the determined measure of tax, and a reaudit was prepared. Subsequently, CDTFA prepared a second reaudit. The second reaudit further reduced the measure of tax to $330,974 and the determined tax to $31,587 and will correspondingly reduce the penalty and interest.

Office of Tax Appeals (OTA) Panel Members Teresa A. Stanley, Steven Kim, and Kim Wilson held a virtual oral hearing for this matter on May 20, 2026. At the conclusion of the oral hearing, the record was closed, and this matter was submitted on the oral hearing record pursuant to California Code of Regulations, title 18, section 30209(b).

ISSUES

1. Are further adjustments to the measure of unreported taxable sales warranted?
2. Did CDTFA properly impose the negligence penalty?

FACTUAL FINDINGS

1. Appellant, a corporation, operated a restaurant located in Berkeley, California, selling Turkish-style cuisine. Appellant also made sales through third-party online order and delivery service companies. Appellant was issued a seller's permit with an effective start date of September 1, 2019. Appellant had not been previously audited.
2. Appellant reported on its sales and use tax returns (SUTRs) total sales of $473,948 and claimed deductions of $42,194 for sales tax reimbursement included in total sales. As a result, appellant reported taxable sales of $431,754 for the liability period.
3. CDTFA made multiple requests for books and records, but appellant failed to respond. As a result, CDTFA was unable to determine appellant's method for reporting sales on the SUTRs.
4. CDTFA obtained appellant's Form 1099-K[1] data for the period October 1, 2019, through December 31, 2021, and compiled credit card sales of $297,605 for sales at the restaurant, and $219,084 for sales (excluding sales tax reimbursement) through third-party service companies including Grubhub, Uber Eats, and DoorDash.
5. Due to the lack of books and records, CDTFA estimated an average credit card sales ratio of 70 percent and an average credit card tip ratio of 5 percent based on its experience auditing similar businesses in appellant's geographic area. For each quarterly period, CDTFA applied the 70 percent credit card sales ratio to reported credit card sales, excluding credit card tips, to compute audited taxable sales, excluding credit card tips and sales tax reimbursement, of $368,756 for October 1, 2019, through December 31, 2021. In total, CDTFA computed audited taxable sales of $587,840 ($368,756 + $219,084) for October 1, 2019, through December 31, 2021.
6. After subtracting reported taxable sales of $293,618, CDTFA calculated unreported taxable sales of $294,222 for October 1, 2019, through December 31, 2021.
7. CDTFA also computed percentages of error for each quarter and for the period October 1, 2019, through December 31, 2021, which it applied to corresponding taxable sales reported on the SUTRs for October 1, 2019, through December 31, 2021. For January 1, 2022, through September 1, 2022, CDTFA applied the average percentage of

[1] Form 1099-K is an IRS form titled, "Payment Card and Third Party Network Transactions," on which third-parties report monthly and annual amounts paid to a merchant during a given time period. Form 1099-K data includes payments made by electronic means, including, but not limited to, credit cards, debit cards, and PayPal.

error. In total, CDTFA computed unreported taxable sales of $432,651 for the liability period.

8. As a test of reasonableness, CDTFA obtained employee wage data and estimated that the total wages should represent 25 percent of sales. CDTFA compared the results to audited taxable sales based on the credit card sales ratio method, finding that audited taxable sales based on the credit card sales ratio were not overstated and were thus reasonable.
9. CDTFA issued the NOD to appellant on January 19, 2023, with a tax liability of $41,852, plus applicable interest, and a negligence penalty of $4,185.16.
10. Appellant filed a timely petition disputing the NOD.
11. CDTFA's Appeals Bureau held an appeals conference on February 22, 2024. Based on documentation provided by appellant at the conference, CDTFA concluded adjustments were warranted that would decrease the determined measure of tax. The Appeals Bureau examined the conceded adjustments and identified an error in the calculations.[2] CDTFA issued a Decision on June 27, 2024, ordering a reaudit to include Form 1099-K data for January 1, 2022, through September 30, 2022, which was not available at the time of the audit, and recalculate estimated DoorDash credit card sales for 2022 to exclude sales tax reimbursement, but otherwise denying appellant's petition for redetermination.
12. On September 4, 2024, CDTFA issued a reaudit report, which reduced the measure of unreported taxable sales by $85,846, from $432,651 to $346,805, which reduced the tax by $8,801, from $41,852 to $33,051.
13. Appellant timely appealed to OTA.
14. In its review on appeal, CDTFA determines that additional adjustments are warranted. CDTFA concedes to increase the credit card sales ratio for the second quarter of 2020 (2Q20) to 100 percent, and to 85 percent for 3Q20 and 4Q20, in consideration of the effects of the COVID-19 pandemic on restaurants. CDTFA prepared a second reaudit dated February 21, 2025, to reduce the measure of unreported taxable sales by an additional $15,834, from $346,808 to $330,974, which further reduced the tax by $1,464, from $33,051 to $31,587.

[2] CDTFA's computation of 2022 credit card sales for DoorDash was based on the average of 2021 credit card sales per Form 1099-K information, which included sales tax reimbursement for DoorDash sales.

DISCUSSION

Issue 1: Are further adjustments to the measure of unreported taxable sales 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*.) 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).)

Here, appellant failed to provide its books and records for audit; thus, CDTFA was unable to verify sales reported on appellant's SUTRs using a direct audit method (that is, compiling audited sales directly from appellant's records). Taxpayers are required to maintain and make available for examination on request by CDTFA 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 SUTRs. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).) Such records 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).) CDTFA's use of the credit card sales ratio method as the basis for its determination is a recognized and accepted accounting procedure. (See *Appeal of Amaya*, 2021-OTA-328P.) In the absence of documentation to compute a representative credit card sales ratio and credit card tip ratio, CDTFA estimated the 70 percent credit card ratio based on its experience auditing similar businesses and modified the ratio during the period for which COVID-19 pandemic restrictions limited cash payments to retailers. OTA finds that the estimated credit card sales ratio of 100 percent for 2Q20, 85 percent for 3Q20 and 4Q20, and 70 percent for the remainder of the liability period is rational. Similarly, without supporting books and records, CDTFA's use of a 5 percent tip ratio, which is based on experience with similar businesses in appellant's geographic area, is reasonable and rational. 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.) The Form 1099-K data that was reported to the IRS by appellant's credit card payment processors and third-party service companies summarized appellant's credit card sales, and because Forms 1099-K are third-party reports (payment processing entities) reporting to a government agency (the IRS), OTA finds it is a reliable source of data from which to establish audited sales. Therefore, OTA concludes that CDTFA has established that its determination is reasonable and rational, and accordingly, the burden shifts to appellant to show errors in the audit.

Appellant contends that no cash sales were made during the period of COVID-19 restrictions. Appellant argues that CDTFA's estimated credit card sales ratio of 70 percent did not accurately reflect the circumstances of the COVID-19 pandemic. Appellant asserts that during this period, 100 percent of its sales were paid by credit card. Appellant also argues that CDTFA did not account for nontaxable sales. Appellant contends it used its cash register receipts to report its taxable sales on the SUTRs, which reflect actual sales and should be accepted as filed.

OTA understands appellant's disagreement with the use of an estimated credit card sales ratio, which CDTFA based on its experience in audits of similar businesses in appellant's area. As noted previously, on appeal CDTFA conceded to increase the credit card sales ratio to 100 percent for 2Q20 and to 85 percent for 3Q20 and 4Q20 based on restrictions due to the COVID-19 pandemic. Appellant continues to argue for additional increases to the credit card sales ratio but does not provide any new documentation or other verifiable evidence to support

a credit card sales ratio greater than credit card ratios conceded by CDTFA on appeal or greater than 70 percent for the remaining periods. Accordingly, OTA has no basis on which to recommend further adjustments to the credit card sales ratio.

Appellant argues that CDTFA did not account for nontaxable sales. OTA notes that appellant did not claim deductions for nontaxable sales on its SUTRs. Appellant does not provide any new documentation or other verifiable evidence to support nontaxable sales. Accordingly, OTA has no basis on which to recommend adjustments for nontaxable sales.

Appellant contends that the SUTRs reflect the actual sales and should be accepted as filed. OTA notes that in the first reaudit, CDTFA compared credit card sales per Forms 1099-K to total sales reported on the corresponding SUTRs, which disclosed that the credit card sales ratios for 4Q19 to 4Q21 ranged from 109.59 percent to 403.3 percent. In other words, credit card sales alone exceeded reported total sales, and in particular, OTA notes that in two quarters, credit card sales were four times the total sales reported; 400.28 percent for 2Q20 and 403.3 percent for 3Q20. The credit card sales ratios for 1Q22 to 3Q22 ranged from 90.67 percent to 96.7 percent.[3] Appellant does not provide any new documentation or other verifiable evidence to support reported sales, nor does it provide a basis for adjustment. Accordingly, OTA finds that appellant's assertion that reported sales were accurate and reliable is not persuasive.

Appellant asserts that it was struggling financially and states that the business closed shortly after the audit. However, there is no provision in the Sales and Use Tax Law that allows OTA to relieve tax liability based on financial hardship. Although CDTFA has procedures available to taxpayers who seek adjustments based on financial hardship, it is not a matter that OTA can address here.[4]

OTA finds that CDTFA computed audited taxable sales based on the best-available evidence, which is a reasonable and rational method. Appellant has not identified any errors in CDTFA's computation of audited taxable sales or provided new documentation or other evidence in support of its contentions from which a more accurate determination could be made. As appellant bears the burden of proof, OTA concludes that no further adjustments to unreported taxable sales are warranted.

[3] CDTFA found that the credit card sales ratios were higher than expected and an indication that reported sales were also understated for these periods.

[4] Appellant may contact CDTFA directly to inquire into payment options or other programs related to financial hardship.

Issue 2: Did CDTFA properly impose the negligence penalty?

R&TC section 6484 provides that if any part of a 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 determination shall be added thereto. Negligence is generally defined as a failure to exercise such care that a reasonable and prudent person would exercise under similar circumstances. (*Appeal of HM Carpet, Inc.*, 2025-OTA-595P.) Generally, a penalty for negligence or intentional disregard should not be added to deficiency determinations 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 practice 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 shall maintain and make available for examination on request by CDTFA, 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 SUTRs. (R&TC, §§ 7053 7054; Cal. Code Regs, tit. 18, § 1698(b).) All records required to be retained under this regulation must be preserved for a period of not less than four years. (Cal. Code Regs, tit. 18, § 1698(i).) Failure to maintain and keep complete and accurate records will be considered evidence of negligence or intent to evade the tax and may result in penalties or other appropriate administrative action. (Cal. Code Regs, tit. 18, § 1698(k).)

Appellant contends it was not negligent because it reported sales from its cash register tapes, and it filed its SUTRs and paid taxes in a timely manner. However, appellant failed to provide *any* books and records for audit and only subsequently provided incomplete records to attempt to show error in CDTFA's determination. OTA finds that the failure to maintain and provide complete and accurate books and records supporting sales for audit is evidence of negligence.

Unreported taxable sales of $330,973 per the second reaudit, compared to reported taxable sales of $431,754 for the liability period, results in an error rate of 77 percent. OTA finds that the large amount of the understatement along with the large error ratio are evidence of negligence. Moreover, as noted previously, credit card sales per Forms 1099-K for 4Q19 through 4Q21 exceeded total sales reported by appellant on its SUTRs. Thus, appellant knew or should have known that reported sales were understated.

Considering the above, OTA finds that appellant did not have 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. OTA also finds that appellant did not exercise the care that a reasonable and prudent person would exercise under similar circumstances. (See *Appeal of HM Carpet, Inc.*, *supra*.) OTA finds that the negligence penalty was properly imposed.

HOLDINGS

1. Further adjustments to the measure of unreported taxable sales are not warranted.
2. Appellant was negligent, and the penalty was properly imposed.

DISPOSITION

As conceded on appeal, the measure of tax is reduced to $330,973, the tax is reduced to $31,587, and the penalty and interest are reduced accordingly. OTA otherwise sustains CDTFA's action denying appellant's petition for redetermination.

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Teresa A. Stanley
Administrative Law Judge

We concur:

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Steven Kim
Administrative Law Judge

Signed by:
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Kim Wilson
Hearing Officer

Date Issued: 7/31/2026