

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18042570
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ADOLFO REYES DELGADO) Date Issued: December 20, 2018
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OPINION

Representing the Parties:

For Appellant: Adolfo Reyes Delgado
Ralph Del Castillo, Representative

For Respondent: Pamela Bergin, Tax Counsel III
Kimberly Wilson, Business Tax Specialist II
Robert Tucker, Assistant Chief Counsel

J. ANGEJA, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 30261,¹ Adolfo Reyes Delgado (appellant) appeals an action by the California Department of Tax and Fee Administration (CDTFA or respondent) on appellant’s petition for redetermination of respondent’s Notice of Determination, which assessed a liability under the California Cigarette and Tobacco Products Tax Law consisting of a \$32,195 tax liability, an \$8,048.75 fraud penalty, an \$8,049 failure-to-secure-license penalty, a \$3,219.50 penalty for failure to file tax returns, and a \$950 collection cost recovery fee (CCRF), for the period April 1, 2013 through April 30, 2013.

Office of Tax Appeals (OTA) Administrative Law Judges Jeffrey G. Angeja, Kenneth Gast, and Michael F. Geary held an oral hearing in this matter in Los Angeles, California, on October 22, 2018.² When the hearing concluded, OTA closed the record and took the matter under submission.

¹ Unless otherwise indicated, all further statutory (“section” or “§”) references are to sections of the California Revenue and Taxation Code for the tax year at issue.

² OTA provided a certified Spanish interpreter as appellant requested.

ISSUES

1. Whether appellant is liable for tax on unreported distributions of 740,120 unstamped cigarettes in California.
2. Whether appellant's payment of court-ordered restitution satisfies any remaining civil liability.
3. Whether the fraud penalty is supported by clear and convincing evidence.
4. Whether appellant has established reasonable cause to relieve the failure-to-secure-license penalty, the failure-to-file penalty, and the collection cost recovery fee.

FACTUAL FINDINGS

1. On or before April 8, 2013, appellant rented two storage units located in Los Angeles, California.
2. Appellant purchased unstamped, untaxed cigarettes and stored them at the two rented storage units.
3. Appellant held no distributor's license during the liability period April 1, 2013 through April 30, 2013, and filed no distributor's tax returns for this period.
4. On April 8, 2013, the Los Angeles County Sheriff's Department (Sheriff's Department) executed a search warrant for the storage units. The Sheriff's Department located and seized over 3,698 cartons and 18 loose packs of unstamped cigarettes (approximately 740,120 total cigarettes) and approximately \$39,569 in cash from the storage units.
5. On September 23, 2013, appellant pleaded *nolo contendere* (no contest) to one criminal count of possession of untaxed cigarettes under section 30474(a), a misdemeanor. In addition, appellant admitted the special allegation that he possessed cigarettes with the intent to evade an aggregate amount of tax liability in excess of \$25,000, which caused the offense to be punishable as a felony pursuant to section 30480.
6. On November 5, 2013, appellant was sentenced and ordered to pay restitution to respondent, pursuant to Penal Code section 1202.4, in the amount of \$32,195. The court further ordered that the restitution amount be taken from the cash that had been seized, and that the remaining funds be distributed to respondent and the Sheriff's Department.
7. On December 16, 2015, respondent issued a Notice of Determination (NOD) to appellant for the period April 1, 2013 through April 30, 2013, in the amount of \$32,195 in tax, plus

applicable interest, a 25 percent fraud penalty of \$8,048.75, a 25 percent failure-to-secure-license penalty of \$8,049, and a 10 percent failure-to-file penalty of \$3,219.50. The NOD was based on respondent's determination that appellant made unreported taxable distributions of 740,120 sticks of unstamped cigarettes.

8. On December 29, 2015, respondent issued a Demand for Immediate Payment (Demand) that notified appellant that a CCRF would be imposed on appellant's liability if it remained unpaid for more than 90 days. On March 29, 2016, Respondent issued a Notice of Collection Fee imposing a \$950 CCRF because appellant's balance remained unpaid for more than 90 days from the date of the Demand.
9. On February 1, 2017, the court issued an order to the Sheriff's Department to pay \$35,882 to respondent.³
10. On July 17, 2017, the Sheriff's Department conducted a physical recount of the cigarettes, counting a total of 3,698 cartons and 18 loose packs of cigarettes for a total of 739,960 unstamped cigarettes.
11. In a Decision issued on December 12, 2017, respondent's Appeals Bureau ordered the tax reduced to \$32,188.26, based on the number of unstamped cigarettes determined by the Sheriff's Department's recount. The Appeals Bureau further ordered that the penalties be reduced commensurately.⁴ This timely appeal followed.

DISCUSSION

Issue 1 - Whether appellant is liable for tax on unreported distributions of 739,960 unstamped cigarettes in California.

The Cigarette and Tobacco Products Tax Law (Law) requires every person desiring to engage in the sale of cigarettes or tobacco products to apply with respondent for a distributor's license. (§ 30140.) The Law additionally imposes upon every distributor a tax, based on the wholesale cost of the cigarettes, upon the distribution of the cigarettes. (§§ 30101, 30123, 30131.2.) "Distributor" includes every person who distributes tobacco products, or who sells or accepts orders for tobacco products that are to be transported from a point outside this state to a

³This amount includes \$32,195 and an additional \$3,687, which was respondent's share of the remaining balance.

⁴The fraud and failure-to-secure-license penalties were each reduced to \$8,047; the failure-to-file penalty was reduced to \$3,218.82, and the CCRF was reduced to \$570.

consumer within this state. (§ 30011.) The term “distribution” includes (1) the sale of untaxed cigarettes or tobacco products in this state, (2) the “use or consumption” of untaxed cigarettes or tobacco products in this state, and (3) the placing in this state of untaxed cigarettes or tobacco products in a vending machine or in a retail stock for the purpose of selling the products to consumers. (§ 30008.) “Use or consumption” includes the exercise of any right or power over tobacco products incident to the ownership thereof, other than the sale of the tobacco products or the keeping or retention thereof by a licensed distributor for the purpose of sale. (§ 30009.) Unless the contrary is established, it shall be presumed that all tobacco products acquired by a distributor are untaxed tobacco products, and that all tobacco products manufactured in this state or transported to this state, and no longer in the possession of the distributor, have been distributed. (§ 30109.)

Here, it is undisputed that appellant did not possess a cigarette and tobacco products distributor’s license, and that the cigarettes found in his possession were unstamped, untaxed cigarettes. As an unlicensed person, appellant’s storage of the unstamped cigarettes in this state qualifies as a distribution that is subject to tax. Appellant disputes the quantity of cigarettes at issue, but the July 17, 2017 recount performed at the Sheriff’s Department clearly establishes that the number of untaxed cigarettes at issue is 739,960. Appellant has provided no evidence to support his contention that he possessed fewer than the number of cigarettes determined by the Sheriff’s Department. Accordingly, we conclude that appellant made taxable distributions of 739,960 cigarettes.

Issue 2 - Whether appellant’s payment of court-ordered restitution satisfies any remaining civil liability.

An order of restitution under California Penal Code section 1202.4(f) is separate and distinct from the victim’s right to pursue a civil remedy. (*Vigilant Ins. Co. v. Chiu* (2009) 175 Cal.App.4th 438, 444.) A restitution order is *not* a civil judgment and does *not* resolve civil liability. (*Id.* at pp. 444-445.) A victim can recover through both restitution and civil judgment (*id.* at p. 445), subject to the condition that the restitution amount shall be credited against the civil liability (Pen. Code, § 1202.4(j)).

In light of the foregoing authorities, appellant’s restitution payment to respondent is separate and distinct from his civil liabilities for tax and penalties. Appellant’s payment of restitution to respondent has been credited against his civil tax liability, but does not eliminate or

absolve the remaining balance. Accordingly, we conclude that appellant remains liable for the remaining unpaid civil liability.

Issue 3 - Whether the fraud penalty is supported by clear and convincing evidence.

Section 30224 provides for the imposition of a 25-percent penalty if any part of a deficiency determination is due to fraud or intent to evade the law. Fraud is intentional wrongdoing on the part of the taxpayer with the specific intent to avoid a tax known to be due. (*Bradford v. Commissioner* (9th Cir. 1986) 796 F.2d 303, 307 (*Bradford*).

It is respondent's burden to establish fraud by clear and convincing evidence. (*State Bd. of Equalization v. Renovizor's Inc.* (9th Cir. 2002) 282 F.3d 1233, 1241; *Marchica v. State Bd. of Equalization* (1951) 107 Cal.App.2d 501, 508.) Although fraud may not be presumed, it is rare to find direct evidence that fraud has occurred and thus it is often necessary to make the determination based on circumstantial evidence. (*Bradford, supra*, 796 F.2d at p. 307.) Relevant circumstantial evidence includes understatement of income, inadequate records, failure to file tax returns, implausible or inconsistent explanations of behavior, concealing assets, and failure to cooperate with tax authorities. (*Ibid.*)

In support of its position that the fraud penalty is warranted, respondent primarily asserts that appellant pleaded no contest to a *felony* criminal count of possession of untaxed cigarettes, pursuant to section 30480, as noted by the criminal court. Respondent argues that appellant's plea is an admission of his fraudulent intent to evade the tax.

In general, a plea of no contest in misdemeanor prosecutions may not be used against the defendant as an admission in any civil proceeding based upon or growing out of the act on which the criminal prosecution is based. (Pen. Code § 1016(3).) However, a plea of no contest to an offense *punishable as a felony*, regardless of whether it is ultimately so punished, is admissible as a party admission in a civil action based upon or growing out of the act on which the criminal prosecution is based. (*Rusheen v. Drews* (2002) 99 Cal.App.4th 279, 288; Pen. Code, § 1016(3).)

Here, appellant pleaded no contest to a criminal charge under section 30474, which is not a felony, but instead is a misdemeanor that is *punishable as a felony* under section 30480.⁵ Therefore, appellant's no contest plea is admissible in this proceeding, and we find that appellant's specific admission that he possessed the cigarettes with the intent to evade the tax is clear and convincing evidence of fraud. Accordingly, we conclude that respondent has met its burden of proof, and that the fraud penalty was properly imposed.

Issue 4 - Whether appellant has established reasonable cause to relieve the failure-to-secure-license penalty, the failure-to-file penalty, and the CCRF.

By operation of law, section 30211 automatically imposes a 25 percent failure-to-secure-license penalty where, as here, a taxpayer distributes cigarettes without a distributor's license. Similarly, section 30221 imposes a 10-percent penalty on a person who, like appellant, fails to file a cigarette and tobacco products tax return.

Section 30354.7(a) provides that a CCRF shall be imposed on any person that fails to pay an amount of tax, interest, penalty, or other amount due and payable under the Law. The CCRF shall be imposed only if respondent has mailed a demand notice to that person for payment, advising that continued failure to pay the amount due may result in collection action, including the imposition of a CCRF. (*Ibid.*) On December 29, 2015, respondent mailed a Demand to appellant advising that a CCRF would be imposed on appellant's liability if it remained unpaid for more than 90 days. Accordingly, respondent properly imposed the CCRF.

Each of the foregoing penalties, as well as the CCRF, may be relieved if appellant establishes that his failures to secure a license, file tax returns, or timely pay the remaining liability, were due to reasonable cause and circumstances beyond his control, and occurred notwithstanding the exercise of ordinary care. (§§ 30211, 30282(a), & 30354.7(d), respectively.)

⁵The express language of section 30480 strongly suggests that it is not a separate offense but merely an increase in the penalty for violating one of the existing misdemeanor statutes (section 30474), when the amount of tax involved exceeds \$25,000 in any 12-consecutive-month period. It refers to violating "*this part*," a reference to other offenses in Part 13. (§ 30480, italics added.) It does not specify any precise conduct that is mandated or proscribed or identify any particular substantive crime, but simply elevates certain existing crimes from misdemeanors to felonies. (See *People v. Vasilyan* (2009) 174 Cal.App.4th 443, 448; Pen. Code, § 15.) It focuses on one element of the commission of the crime, the amount of the tax evaded, which is not present in all such crimes, and which justifies an increased penalty. (*People v. Muhammad* (2007) 157 Cal.App.4th 484, 492-493.) Therefore, we conclude that section 30480 is a penalty provision, not a substantive offense. Thus, appellant pleaded no contest to a misdemeanor, rather than a felony.


Here, appellant has provided no evidence or argument regarding these penalties. Therefore, we conclude that appellant has failed to establish reasonable cause for relief.

HOLDINGS


1. Appellant is liable for tax on unreported distributions of 739,960 unstamped cigarettes in California.
2. Appellant’s payment of court-ordered restitution does not satisfy appellant’s remaining civil liability.
3. The fraud penalty is supported by clear and convincing evidence.
4. Appellant has failed to establish reasonable cause to relieve the failure-to-secure-license penalty, the failure-to-file penalty, and the CCRF.


DISPOSITION

Respondent’s action in reducing the tax liability to \$32,188.26, the fraud and failure-to-secure-license penalties to \$8,047, the failure-to-file penalty to \$3,218.82, and the CCRF to \$570, is sustained.

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 Jeffrey G. Angeja
 Administrative Law Judge

We concur:

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 Kenneth Gast
 Administrative Law Judge

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 Michael F. Geary
 Administrative Law Judge