

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 18063369
FINNISH LINE MOTORSPORTS, INC.)	CDTFA Acct. No. SR AP 097-572705
)	CDTFA Case ID 858023
dba Pasadena Yamaha)	Date Issued: May 14, 2019
)	
)	

OPINION

Representing the Parties:

For Appellant:	Vincent W. Davis, Attorney
For Respondent:	Robert Tucker, Assistant Chief Counsel Lisa Renati, Hearing Representative Scott Lambert, Hearing Representative

N. DANG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561,¹ Finnish Line Motorsports, Inc. (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA) on a timely petition for redetermination of a Notice of Determination (NOD) for the period January 1, 2010, through December 31, 2012.

Office of Tax Appeals (OTA) Administrative Law Judges Nguyen Dang, Kenneth Gast, and Linda Cheng held an oral hearing for this matter in Los Angeles, California, on February 19, 2019. Thereafter, the record was closed and this matter was submitted for decision.

ISSUES

1. Whether the R&TC section 6597 penalty (40-percent penalty) for failure to timely remit collected sales tax reimbursement was properly imposed.
2. Whether appellant has established that relief of the 40-percent penalty is warranted.

¹ Prior to July 1, 2017, CDTFA’s sales and use tax functions were administered by the State Board of Equalization (BOE). (See Gov. Code, § 15570.22.) Therefore, for ease of reference, when referring to acts or events that occurred prior to July 1, 2017, “CDTFA” shall refer to BOE.

FACTUAL FINDINGS

1. Appellant operates a Yamaha motorcycle, all-terrain vehicle, and utility vehicle dealership. During the liability period, appellant sold these items to consumers and other retailers, and offered repair services.
2. For the liability period, CDTFA found, based on a comparison between appellant's recorded and reported taxable sales, that appellant underreported its taxable sales by \$1,967,278. Appellant's sales records also indicate that it failed to remit, on an average monthly basis, between \$3,690 and \$9,223, and on a quarterly basis, 72.83 percent to 93.10 percent, of the tax reimbursement collected from its customers.
3. In a December 22, 2009 audit report for the period April 1, 2006, through March 31, 2009, CDTFA informed appellant that it had determined a \$407,100 deficiency measure for unreported taxable sales based on a comparison between its recorded and reported taxable sales.
4. Based on the above findings, CDTFA issued a timely NOD to appellant for \$185,099.09 tax, plus interest, and a 40-percent penalty of \$74,039.67, for the period January 1, 2010, through December 31, 2012.
5. Appellant filed a timely petition for redetermination disputing only the 40-percent penalty. CDTFA issued a decision denying appellant's petition, and this appeal followed.

DISCUSSION

Issue 1 – Whether the 40-percent penalty for failure to timely remit collected tax reimbursement was properly imposed.

Effective January 1, 2007, R&TC section 6597(a)(1), provides that “[a]ny person who knowingly collects sales tax reimbursement . . . and who fails to timely remit that sales tax reimbursement . . . shall be liable for a penalty of 40 percent of the amount not timely remitted.” The penalty does not apply if the person’s liability for unremitted sales tax reimbursement averages \$1,000 per month or less, or does not exceed 5 percent of the total amount of the tax liability for which the use tax or sales tax reimbursement was collected for the period in which the tax was due, whichever is greater. (R&TC, § 6597(a)(2)(A).)

As a preliminary matter, we find it necessary to address CDTFA’s argument regarding the requirements for imposing the 40-percent penalty. In its briefs, CDTFA asserts that

according to R&TC section 6597, California Code of Regulations, title 18, section (Regulation) 1703, and section 0509.65 of its Audit Manual, imposition of the 40-percent penalty requires a showing, by clear and convincing evidence, of fraud or intent to evade the payment of tax.

However, neither R&TC section 6597 or Regulation 1703 supports this position. The terms “fraud” or “evasion” are conspicuously absent here, and there is no requirement that the person “knowingly” or “willfully” fail to timely remit tax or tax reimbursement. In contrast, the inclusion of a relief provision based upon reasonable cause under R&TC section 6597(a)(2)(B), a mutually exclusive condition to fraud, suggests that imposition of the 40-percent penalty does not require a showing of fraud. Thus, it should be clear from the plain and unambiguous language of R&TC section 6597 that a showing of “fraud” is not required in order to impose the 40 percent penalty. And where the statutory language is clear and unambiguous, our inquiry is complete.² (*Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90, 98.)

Finally, we are not persuaded by any of the legal interpretations contained in CDTFA’s Audit Manual, which are merely conclusory statements regarding the imposition of the 40-percent penalty. Accordingly, for purposes of imposing the 40-percent penalty, we find that it is immaterial whether the failure to timely remit tax or tax reimbursement was due to fraud or intent to evade the payment of tax, and thus, we do not discuss the parties’ contentions relating to that issue.

The information contained in appellant’s sales records and returns indicate that it knowingly collected sales tax reimbursement, failed to timely remit that tax reimbursement, and that the threshold amounts specified in R&TC section 6597(a)(2)(A) have been met. Appellant does not dispute these facts. Therefore, we find that the 40-percent penalty was properly imposed.

Issue 2 – Whether appellant has established that relief of the 40-percent penalty is warranted.

If a person’s failure to make a timely remittance of sales tax reimbursement is due to reasonable cause or circumstances beyond the person’s control, and occurred notwithstanding the exercise of ordinary care and the absence of willful neglect, the person shall be relieved of the 40-percent penalty. (R&TC, § 6597(a)(2)(B).)

² While the foregoing is dispositive, we note that the legislative history supports a plain reading of the statute. (Analysis of Sen. Bill No. 1449 (2005-2005 Reg. Sess.) 3/29/2006, “This bill would not require [CDTFA] to demonstrate fraud or an intent to evade taxes”)

“Reasonable cause or circumstances beyond the person’s control” includes, but is not limited to, any of the following: (1) the occurrence of a death or serious illness of the person or the person’s next of kin that caused the person’s failure to make a timely remittance; (2) the occurrence of an emergency, as defined in Government Code section 8558, that caused the person’s failure to make a timely remittance; (3) a natural disaster or other catastrophe directly affected the business operations of the person that caused the person’s failure to make a timely remittance; (4) CDTFA failed to send returns or other information to the correct address of record, that caused the person’s failure to make a timely remittance; (5) the person’s failure to make a timely remittance occurred only once over a three-year period, or once during the period in which the person was engaged in business, whichever time period is shorter; or (6) the person voluntarily corrected errors in remitting tax or tax reimbursement that were made in previous reporting periods and remitted payment of the liability owed as a result of those errors prior to being contacted by CDTFA regarding possible errors or discrepancies. (R&TC, § 6597(b)(1)(A) – (F).)

Appellant asserts that for the liability period, it assigned the task of preparing its sales and use tax returns to Mrs. McIntee, its corporate secretary, who was solely responsible for unintentionally failing to report all of appellant’s taxable sales. Appellant explains that while Mrs. McIntee did not have sufficient knowledge or training to accurately prepare appellant’s returns, her performance in this regard was further hindered by a medical condition which affected her ability to “make rational decisions and think clearly.” Consequently, appellant argues that Mrs. McIntee’s illness warrants abatement of the 40-percent penalty.

The standard for penalty relief requires that appellant provide a non-negligent reason for its failure to timely remit the sales tax reimbursement it collected. However, appellant’s contention does not demonstrate that it exercised ordinary care in this regard. To the contrary, this contention only demonstrates that appellant acted negligently by assigning its sales and use tax compliance duties to Mrs. McIntee, who was, by appellant’s own admission, incapable of performing this function, and then allowing her to continue in this role unsupervised. In addition, prior to the liability period, appellant was informed in an audit report dated December 22, 2009, that it had failed to report all of its recorded taxable sales for the period April 1, 2006, through March 31, 2009. The exercise of ordinary care would imply that appellant take the necessary steps to reasonably prevent this reporting error from occurring again. Yet despite this

knowledge, appellant continued to underreport its recorded taxable sales for the current period to an even greater extent, which constitutes further evidence of negligence. (See *Independent Iron Works, Inc. v. State Bd. Of Equalization* (1959) 167 Cal.App.2d 318, 323 [consistency in underreporting over two successive audit periods demonstrates negligence].) Based on the foregoing, we find that appellant acted negligently in failing to timely remit the sales tax reimbursement it collected. Accordingly, we find that abatement of the 40-percent penalty is not warranted.

HOLDING

1. The 40-percent penalty was properly imposed.
2. Appellant has not established that relief of the 40-percent penalty is warranted.

DISPOSITION

CDTFA’s imposition of the 40-percent penalty is sustained.

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 Nguyen Dang
 Administrative Law Judge

We concur:

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 Kenneth Gast
 Administrative Law Judge

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 Linda C. Cheng
 Administrative Law Judge