

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
ROANJA PLANNING, INC.

) OTA Case No. 18011858
) CDTFA Case ID 597654
) CDTFA Account No. SR AS 018-741744
)
) Date Issued: June 7, 2019
)
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)
)

OPINION

Representing the Parties:

For Appellant:

Dennis L. Perez, Attorney
Howard Wizenberg, President

For Respondent:

Robert Tucker, Assistant Chief Counsel
Scott Lambert, Hearing Representative
Lisa Renati, Hearing Representative

For Office of Tax Appeals:

Lisa Burke, Business Taxes Specialist III

N. DANG, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 6561, Roanja Planning, 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, 1999, through December 31, 2008.

Office of Tax Appeals (OTA) Administrative Law Judges Nguyen Dang, Andrew J. Kwee, and Sara A. Hosey held an oral hearing for this matter in Los Angeles, California on February 21, 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 CDTFA has shown, by clear and convincing evidence, that all or part of the deficiency was due to fraud or the intent to evade the payment of tax.

3. Whether appellant has established that relief of the 40-percent penalty is warranted.
4. Whether appellant has established that relief of the amnesty double fraud penalty or the amnesty interest penalty is warranted.

FACTUAL FINDINGS

General Background

1. CDTFA issued to appellant a seller's permit effective March 1, 1991.
2. During the liability period, appellant operated a West Los Angeles location from which it made sales of building materials, such as doors, windows, skylights, moldings, frames, and hardware.
3. Over 90 percent of appellant's sales were to builders and construction contractors, roughly 5 percent were to walk-in customers, and the remaining sales were made in connection with appellant's performance of a construction contract (i.e., appellant sold and installed building materials).
4. Appellant charged and collected tax reimbursement from its customers for nearly all of its sales.
5. For the liability period, appellant reported on its returns only those sales to walk-in customers.
6. Appellant's sales and use tax returns for the liability period were prepared and signed by its sole shareholder and president, Howard Wizenberg.

CDTFA's Audit

7. CDTFA compared the sales tax accrued per appellant's accounting software to its reported tax, and found that appellant had underreported its taxable sales by \$12,576,993 for 2006 (audit item 1), and by \$20,451,613 for 2007 and 2008 (audit item 2).
8. CDTFA also discovered a substantial difference between appellant's gross receipts as reported on its federal income tax returns and the amount recorded in its accounting software. Using sampling, CDTFA computed taxable sales ratios from appellant's sales records which CDTFA applied to that difference to determine unreported taxable sales of \$867,900 for 2006 through 2008 (audit item 3), and \$69,126,195 for 1999 through 2005 (audit item 4).

9. For audit item 2, CDTFA imposed a 40-percent penalty based on its finding that appellant's unremitted tax reimbursement averaged more than \$1,000 per month and exceeded 5 percent of the total tax liability on a quarterly basis.
10. For audit items 1, 3, and 4, CDTFA imposed a 25-percent fraud penalty based on its determination that appellant's underreporting was due to fraud or the intent to evade the payment of tax.
11. A portion of the liability period at issue, for the period January 1, 1999, through December 31, 2002, falls within the provisions of the tax amnesty program provided by R&TC section 7071 (hereinafter the amnesty-eligible period). Appellant did not report an understatement of tax for the amnesty-eligible period, apply for amnesty, or pay the tax and interest due for the amnesty-eligible period by March 31, 2005, as required by R&TC section 7073(a). Therefore, in accordance with R&TC section 7073(c), CDTFA added a penalty of \$749,508.74 that doubled the fraud penalty for the amnesty-eligible quarters. Also, in accordance with R&TC section 7074, an amnesty interest penalty of \$508,239.05, representing 50 percent of the accrued interest as of March 31, 2005, for amnesty-eligible period, will be imposed when the liability becomes final.

Procedural History

12. On November 7, 2011, CDTFA issued an NOD to appellant for the period January 1, 1999, through December 31, 2008, in the amount of \$8,511,908.32 tax, plus applicable interest, the 40-percent penalty, 25-percent fraud penalty, and amnesty penalties discussed above.
13. By reaudit report dated March 25, 2014, CDTFA reduced the tax liability to \$8,499,373.06 to account for appellant's bad debt losses, with a corresponding reduction to the related penalties and interest.¹
14. Appellant filed a petition for redetermination disputing the entire liability. Thereafter, appellant conceded the tax liability as determined by CDTFA's audit, but continued to dispute the penalties included in the NOD.
15. CDTFA issued a decision denying appellant's petition, and this timely appeal followed.

¹ CDTFA also performed a second and third reaudit to correct for errors inadvertently introduced in the first reaudit relating to local tax allocation and penalties, which aren't at issue in this appeal.

DISCUSSION

Issue 1 - Whether the 40-percent penalty 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. CDTFA asserts that, as demonstrated by the legislative history, 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 the language of R&TC section 6597 or California Code of Regulations, title 18, section 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. Further, 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.) 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 indicate that it knowingly collected sales tax reimbursement, failed to timely remit that tax reimbursement, and that the

² While the foregoing is dispositive, we note that the legislative history contradicts CDTFA’s position. (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”)

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 CDTFA has shown, by clear and convincing evidence, that all or part of the deficiency was due to fraud or the intent to evade the payment of tax.

R&TC section 6485 provides that, if any part of the deficiency for which a deficiency determination is made is due to fraud or intent to evade the Sales and Use Tax Law or authorized rules and regulations, a penalty of 25 percent of the amount of the determination shall be added thereto. Fraud is intentional wrongdoing on the part of the taxpayer with the specific intent to avoid a tax known to be due. (*Bradford v. Comm’r* (9th Cir. 1986) 796 F.2d 303, 307.) Fraud may not be presumed, and it is CDTFA’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.)

During the 10-year liability period at issue, appellant failed to report roughly 95 percent of its taxable sales, resulting in \$103,022,701 of unreported taxable sales; needless to say, this is a *staggering amount*. And when examined on a quarterly basis, shows that appellant failed to report between 92 to 99 percent of its taxable sales for each quarter of the liability period (excepting the fourth quarter of 2008). While fraud may not be presumed from a mere understatement of tax, a pattern of consistent and substantial underreporting over a number of years, as shown here, is sufficient to support the imposition of the fraud penalty. (*Baumgardner v. Comm’r* (9th Cir. 1957) 251 F.2d 311, 322.)

Appellant does not dispute these amounts, but instead contends that its underreporting was the result of an honest mistake. Appellant explains that Mr. Wizenberg prepared appellant’s returns based on Mr. Wizenberg’s erroneous belief that only appellant’s sales to walk-in customers were taxable. Further, appellant asserts that due to Mr. Wizenberg’s financial inability, he was not significantly involved in appellant’s financial affairs and was unaware of appellant’s recorded taxable sales or the unremitted tax reimbursement it had collected from its customers.

It is undisputed that appellant charged and collected sales tax reimbursement with respect to nearly all of its sales. This is a fact which requires no special skill, training, or financial acumen to ascertain, and we believe should be apparent to any layperson operating the business for some time. Also, the roughly \$8.5 million in unremitted tax reimbursement collected by

appellant was notably reflected, to some degree or another, in appellant's accounting records, sales invoices, and bank statements. Given the abundance of readily available information indicating that appellant charged and collected tax on nearly all of its sales, it is nearly inconceivable that Mr. Wizenberg, as appellant's president and owner, could hold a bona fide belief that only appellant's sales to walk-in customers were taxable. Accordingly, we are not persuaded that Mr. Wizenberg's errors in reporting appellant's taxable sales were based on a good-faith misunderstanding of the law.

Appellant's remaining arguments concerning the deficiencies in CDTFA's decision, and the lack of other circumstantial evidence pertaining to fraud, do not offer any meaningful insight into the cause of appellant's underreporting, and thus, we find them to be moot.

In considering the overwhelming extent of appellant's underreporting and the implausibility of appellant's explanation in that regard, we conclude that CDTFA has supported its imposition of the fraud penalty by clear and convincing evidence.

Issue 3 – 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).)

"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).)

The standard for penalty relief described above requires that appellant provide a non-negligent reason for its failure to timely remit the sales tax reimbursement it collected. Because we find above in issue 2 that appellant's underreporting was due to fraud, we also find that relief of the 40-percent penalty is not warranted.

Issue 4 - Whether relief of the amnesty double fraud penalty and the amnesty interest penalty is warranted.

Under the provisions of R&TC section 6592(a), a taxpayer may be relieved of the amnesty penalties if the taxpayer's failure to participate in the amnesty program was due to reasonable cause or circumstances beyond its control, and occurred notwithstanding the exercise of ordinary care and in the absence of willful neglect.

In its request for relief of the amnesty penalties filed on April 8, 2015, appellant states that it was not aware that the amnesty program existed, and even if it had been aware of the program, it was not in a financial position to pay (or enter into an installment agreement to pay) the tax and interest liability for the amnesty period prior to June 30, 2006, as required by R&TC section 7073(b). Appellant also claims that prior to CDTFA's audit, it was unaware of the liability at issue, which prevented appellant from participating in the amnesty program.


The record in this appeal does not support appellant's contentions. In its decision, CDTFA stated that it mailed to all permit holders, including appellant, numerous letters which explained the Tax Amnesty Program and the due dates for participation. Appellant has provided no explanation or evidence indicating that it did not receive these letters. Further, appellant continued to operate, make sales and collect tax reimbursement during and after the time when amnesty payments would have been due, indicating that it had the means to arrange for payment of its tax liabilities for the amnesty-eligible period with CDTFA. Finally, we find above in issue 2 that appellant's underreporting was due to fraud, meaning that it was aware of its outstanding tax liabilities prior to CDTFA's audit. Based on the foregoing, we conclude that relief of the amnesty double fraud penalty and the amnesty interest penalty is not warranted.

HOLDINGS

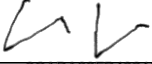
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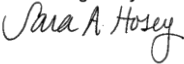
DISPOSITION

Appellant’s liability should be redetermined in accordance with CDTFA’s final reaudit. CDTFA’s decision on appellant’s petition is otherwise sustained.

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 Nguyen Dang
 Administrative Law Judge

We concur:

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 Andrew J. Kwee
 Administrative Law Judge

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 Sara A. Hosey
 Administrative Law Judge