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OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeals of:	) OTA Case No. 18012044) CDTFA Case ID 487673
M. ATAYA, **DBA, ATAYA'S AUTO SALES**	)
	) OTA Case No. 18011868
H. ATAYA **DBA, ATAYA'S MOTORS**	) CDTFA Case ID 812248

OPINION

Representing the Parties:

For Appellant: Gary Kimzey, Representative

For Respondent: Pamela Bergin, Tax Counsel III

For Office of Tax Appeals: Lisa Burke, Business Taxes Specialist III

K. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, M. Ataya and H. Ataya (appellants, collectively) appeal decisions issued by respondent California Department of Tax and Fee Administration (CDTFA)[1] denying petitions for redetermination of Notices of Determination (NODs) for separate audit periods.[2]

M. Ataya appeals a decision by CDTFA denying his petition for redetermination of an NOD for $259,166.43 tax, a 25 percent fraud penalty of $64,791.76, [3] and applicable interest for the period October 1, 2003, through September 30, 2006.

[1] Sales 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 referring to acts or events that occurred before July 1, 2017, "CDTFA" shall refer to the board; and when referring to acts or events that occurred on or after July 1, 2017, "CDTFA" shall refer to CDTFA.

[2] These appeals were consolidated without objection in accordance to California Code of Regulations, title 18, section 30312(a).

[3] CDTFA issued an NOD to M. Ataya on February 18, 2009, for $100,814.98, plus accrued interest, and a negligence penalty of $1,468.14 for the period October 1, 2003, through September 30, 2006. M. Ataya filed a timely petition for redetermination, disputing the NOD in its entirety. After the NOD was issued but before CDTFA issued its decision, CDTFA issued a Notice of Increase dated April 23, 2014, which increased the tax liability to $259,166.43, plus accrued interest, and a penalty of $64,791.76. Thus, the amount addressed in CDTFA's decision is a tax liability of $259,166.43, plus accrued interest, and a fraud penalty of $64,791.76.

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H. Ataya appeals a decision issued by CDTFA denying his petition for redetermination of an NOD for $391,147.32 tax, a 25 percent fraud penalty of $31,454.97, a 40 percent penalty of $106,131.08 for failure to timely remit sales tax reimbursement collected from customers, and accrued interest for the period May 1, 2006, through June 30, 2008.

Office of Tax Appeals (OTA) Administrative Law Judges Natasha Ralston, Andrew J. Kwee, and Keith T. Long held an oral hearing for this matter on December 17, 2020.[4] At the conclusion of the hearing, the record was held open, allowing CDTFA time to submit a list of transactions that it now agrees should be removed from the measures of unreported taxable sales. Thereafter, the record was closed, and this matter was submitted for decision.

ISSUES

1. Whether appellants have established that any additional reductions to the measures of unreported taxable sales are warranted.
2. Whether CDTFA has established with clear and convincing evidence that the understatements were due to fraud or an intent to evade the payment of tax.
3. Whether CDTFA has established a basis for imposing the 40 percent penalty to H. Ataya's liability.

FACTUAL FINDINGS

Audit of M. Ataya (October 1, 2003, through September 30, 2006)

1. M. Ataya obtained a seller's permit with CDTFA and operated a used car dealership business known as Ataya's Auto Sales at various locations in and around Sacramento, California, beginning on July 1, 1992. During the audit period, M. Ataya reported total sales of $3,178,710, claimed nontaxable sales of $2,391,564, and taxable sales of $787,146.
2. CDTFA previously audited M. Ataya's business for the periods January 1, 1996, through December 31, 1998 (first audit), and October 1, 2000, through September 30, 2003 (second audit). In the first audit, CDTFA estimated the taxable measure based on a markup of purchase costs, because no books or records were

[4] The oral hearing was noticed for Sacramento, California, but conducted electronically due to Covid-19.

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provided. During the second audit, CDTFA received some books and records and estimated the measure of unreported taxable sales based on a percentage of error calculation.

3. For the audit period at issue here (October 1, 2003, through September 30, 2006),[5] M. Ataya did not provide a complete set of books and records. Instead, M. Ataya provided the following: federal income tax returns; an incomplete set of dealer jackets with sales contracts; and some California Department of Motor Vehicles (DMV) Report of Sale (ROS) forms. CDTFA also obtained information from several auto auction houses regarding vehicles that M. Ataya had either purchased or sold at auction.
4. CDTFA prepared an audit of M. Ataya by scheduling the auto auction information and applying the markup rate from the first audit. Using this method, CDTFA calculated unreported taxable sales of $1,300,838.
5. CDTFA issued an NOD to M. Ataya on February 18, 2009. M. Ataya timely filed a petition for redetermination disputing the NOD in its entirety.
6. At approximately the same timeframe, the California Department of Justice (DOJ) investigated M. Ataya's brother, H. Ataya. On June 4, 2008, the DOJ served a search warrant on H. Ataya and located books and records for *M. Ataya's business*, including contracts, ROS forms, and DMV Vehicle/Vessel Transfer and Reassignment Forms.
7. CDTFA used the seized books and records to conduct a reaudit of M. Ataya. CDTFA scheduled the sales recorded in M. Ataya's sales contracts and ROS forms on an actual basis and found recorded taxable sales of $4,151,367. CDTFA compared the recorded taxable sales to the taxable sales reported on M. Ataya's sales and use tax returns and found unreported taxable sales of $3,364,221.
8. On April 23, 2014, CDTFA issued a Notice of Increase to M. Ataya, which increased the measure of unreported taxable sales to $3,364,221. CDTFA also replaced the 10 percent negligence penalty with a 25 percent penalty for fraud based on its finding that M. Ataya's substantial understatement of reported taxable sales was not due to negligence, but instead was due to fraud or an intent to evade the payment of tax. On January 3, 2017, CDTFA denied M. Ataya's petition for redetermination. This appeal to OTA followed.

[5] Depending on the context, we use the term audit period to refer to the period October 1, 2003, through September 30, 2006, when referring to M. Ataya, and to refer to the period May 1, 2006, through June 30, 2008, when referring to H. Ataya.

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9. On appeal to OTA, M. Ataya provided additional documentation to support his contention that a reduction of the taxable measure is warranted for uncollectible bad debts and vehicle sales that were not completed because the intended buyer failed to obtain financing. In post-hearing correspondence dated January 5, 2021, CDTFA now agrees that a reduction of $72,176 to the amount of unreported taxable sales is warranted, from $3,364,221 to $3,292,045.

10. Additionally, during this appeal, M. Ataya conceded to all but twelve disputed sales totaling $62,842. As such, the unreported taxable sales in dispute is $62,842.[6]

Audit of H. Ataya (May 1, 2006, through June 30, 2008)

11. H. Ataya obtained a seller's permit and operated a used car dealership at various locations in and around the Sacramento area beginning on May 1, 2006. Prior to operating his own business, H. Ataya worked as a salesperson at M. Ataya's business.

12. For the period May 1, 2006, through June 30, 2008, H. Ataya reported total sales of $2,538,540, claimed nontaxable sales for resale $1,686,720, and reported taxable sales of $851,820.

13. On June 4, 2008, DOJ served a search warrant on H. Ataya at his place of business and seized his books and records, including the following: sales contracts; ROS forms; and DMV Vehicle/Vessel Transfer and Reassignment Forms.

14. For the period May 1, 2006, through December 31, 2006, CDTFA compared the taxable sales recorded in H. Ataya's sales contracts to the amounts reported on his sales and use tax returns and found unreported taxable sales of $1,457,398.

15. For the period January 1, 2007, through June 30, 2008, CDTFA compared the taxable sales recorded in H. Ataya's sales contracts to the amounts reported on his sales and use tax returns and found unreported taxable sales for the period January 1, 2007, through June 30, 2008, of $3,562,817. CDTFA divided the unreported taxable sales for this period into the following categories: (1) sales of $3,444,187, on which H. Ataya collected sales tax reimbursement that he failed to remit to CDTFA; and (2) sales of $118,630, on which H. Ataya did not collect sales tax reimbursement.

[6] This amount includes some transactions for which CDTFA has made partial adjustments. With respect to these transactions, M. Ataya states that he agrees with the adjustments and does not have evidence to support any further deductions. However, M. Ataya has not specifically conceded to the adjusted amount of unreported taxable sales. Therefore, we will consider whether any further reductions are warranted with respect to these transactions.

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16. Additionally, CDTFA found that H. Ataya collected excess sales tax reimbursement totaling $4,345 during the period May 1, 2006, through June 30, 2008. CDTFA divided $4,345 by the applicable tax rate for each quarter to establish additional unreported taxable sales measuring $59,455. In total, CDTFA established unreported taxable sales of $5,079,669 ($1,457,398 + $3,562,816 + $59,455).

17. CDTFA issued an NOD to H. Ataya on April 28, 2014, based on unreported taxable sales of $5,079,669. The NOD also included a 40 percent penalty for failure to timely remit sales tax reimbursement collected on taxable sales of $3,444,187 for the period January 1, 2007, through June 30, 2008, and a 25 percent penalty for fraud on the remainder of the period covered by the NOD. H. Ataya filed a petition for redetermination, which CDTFA denied. This appeal to OTA followed.

18. On appeal to OTA, H. Ataya provided additional documentation primarily to support his contention that some of the documentation that CDTFA relied on to establish audited taxable sales showed sales that never were consummated because the intended buyers failed to obtain financing, or sales of vehicles that later were repossessed. CDTFA agrees that a reduction of $60,866 to the amount of unreported taxable sales is warranted, from $5,079,669 to $5,018,803.

19. Additionally, during this appeal, H. Ataya conceded to all but 15 disputed sales totaling $137,547. As such, the amount of unreported taxable sales in dispute is $137,547. [7]

DISCUSSION

Issue 1: Whether appellants have established that any additional reduction to the amount of unreported taxable sales in one or both liabilities is warranted.

California imposes sales tax on a retailer's gross receipts from the retail sale of tangible personal property in this state 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

[7] This amount includes some transactions for which CDTFA has made partial adjustments. With respect to these transactions, H. Ataya states that he agrees with the adjustments and does not have evidence to support any further deductions. However, H. Ataya has not specifically conceded to the adjusted amount of unreported taxable sales. Therefore, we will consider whether any further reductions are warranted with respect to these transactions.

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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).)

When CDTFA is not satisfied with the amount of tax reported by the taxpayer, or in the case of a failure to file a return, 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, 6511.) 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, M. Ataya concedes to all but 12 of the remaining sales in the measure of audited taxable sales, totaling $62,842. Similarly, H. Ataya concedes to all but 15 of the remaining sales in the taxable measure, totaling $137,547. For both audits, CDTFA scheduled appellant's sales contracts and found discrepancies between reported and recorded taxable sales. In each case, CDTFA provided support in the form of corresponding ROS forms,[8] which are contemporaneous business records that appellants filed with the DMV. CDTFA's use of appellants' own books and records (i.e., sales contracts and ROS forms) is reasonable and rational. Therefore, the burden of proof shifts to appellants to establish with documentation or other evidence that reductions to the audited amounts of unreported taxable sales are warranted. (*Appeal of Talavera*, *supra*.)

Appellants' Contentions

Although CDTFA performed separate audits for each appellant, appellants offer the same (or similar) assertions regarding the remaining transactions in dispute. Appellants' assertions for each disputed transaction fall into one of the following three categories: (1) sales that did not

[8] At the oral hearing, CDTFA argued that CDTFA Audit Manual section 0607.30 finds that the filing of a report of sale with the DMV is presumptive evidence that the dealer who filed the report made the sale. CDTFA's Audit Manual summarizes CDTFA's audit policies and procedures. It is a useful resource that OTA may look to for guidance in interpreting the law; however, the Audit Manual is not binding legal authority, and should not be cited as such. As such, OTA will exercise its own independent judgement in determining the proper weight, if any, to afford CDTFA's construction of the law, as set forth in the Audit Manual. (See *Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal. 4th 1, 25.)

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occur; (2) sales of vehnicles that were later returned with no consideration received by appellants;[9] and (3) sales for which CDTFA included the wrong sales amount in the taxable measure.

Appellants assert that some of the sales included in the measures of audited taxable sales did not occur. Specifically, appellants argue that it was their habit to prepare sales contracts and reports of sale prior to the sales' completion. Appellants argue that a customer is more likely to make a purchase if they know the paperwork is completed. In each case, appellants acknowledge that CDTFA based its determination on some combination of sales contract or DMV documents, but appellants assert that there is insufficient evidence of a sale because CDTFA did not provide DMV-issued vehicle registration documents.

Next, appellants argue that some of the sales included in the measures of audited taxable sales were returned and payments were refunded. Appellants do not dispute that a transaction occurred, and that the customer took possession of a vehicle. However, appellants argue that there was no taxable sale because they did not receive consideration and the vehicle was returned (i.e., repossessed). Appellants argue that they did not receive consideration for one of several reasons, including: the customer's down payment check was returned for insufficient funds; the customer was unable to obtain financing; the customer failed to make subsequent payments; or the customer simply changed their mind about the purchase.

Finally, H. Ataya asserts that CDTFA used an incorrect sales price for one of its taxable sales.

Audit of M. Ataya

M. Ataya disputes 12 sales included in the measure of audited taxable sales. M. Ataya has only provided evidence with respect to two sales (discussed below). The 10 remaining sales include sales that M. Ataya alleges did not actually occur, and sales that were returned with payments refunded.

Regarding the disputed sales for which M. Ataya has provided no supporting evidence, M. Ataya asserts that CDTFA did not provide DMV registration documents to show the sales that he reported to DMV on the ROS forms actually occurred. However, CDTFA may determine the amount required to be paid on the basis of any information which is in its possession or may

[9] This category includes sales in which a customer took possession of the vehicle, but the down payment check was returned for insufficient funds, the customer failed to obtain financing, or the customer failed to make subsequent payments.

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come into its possession. (R&TC, §§ 6481, 6511.) We have already found that CDTFA's use of sales contracts and ROS forms is a reasonable and rational method of determining the taxable measure. As such, the burden of proof falls on M. Ataya (*Appeal of Talavera*, *supra*) and CDTFA need not provide DMV registration information to prove that a sale occurred.[10] M. Ataya has not provided any evidence, such as a voided sales contract, to show that a sale did not occur. Accordingly, M. Ataya has not met his burden of proof.

Similarly, M. Ataya has not provided any documentation to show the amount of any refunds given for returned or repossessed vehicles. Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Talavera*, *supra*.) Accordingly, M. Ataya has not met his burden of proof. Therefore, we find that no reduction to the measure of audited taxable sales is warranted for the ten sales for which M. Ataya has presented no evidence.

We now turn our attention to the two sales for which M. Ataya has provided evidence in support of his contentions. M. Ataya provided a loan application rejection letter (loan denial) for one sale that allegedly did not occur. M. Ataya argues that this is evidence that a sale "may not have taken place." We agree. However, this evidence is insufficient to meet the burden of proof. Although the loan denial is evidence that a sale *may* not have taken place, it is not enough to overcome the fact that there is both a signed sales contract and signed ROS form indicating that a sale *did* take place. The customer in that sale may have obtained a loan from another lender. Indeed, there is evidence that M. Ataya provided his own financing when other lenders would not. As such, the loan denial only proves that one lender would not provide financing. M. Ataya has not provided a voided sales contract, or any other evidence that the sale was cancelled or did not occur. Consequently, M. Ataya has not met his burden of proof with respect to this sale. Accordingly, no reduction to the taxable measure is warranted for this sale.

Finally, M. Ataya provided a "Certificate of Repossession Security Interest" (Certificate) in support of the contention that one sale was returned for a refund. We first note that the Certificate is incomplete. Specifically, the Certificate is undated, it is not signed under penalty

[10] We note that during this appeal, CDTFA did provide registration information for several disputed transactions. Upon receipt of this information, appellant conceded to those sales. However, registration information was not available from/retained by DMV for all of the transactions.

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of perjury,[11] and it is missing a page.[12] The Certificate also does not include the dollar amount that was refunded to the customer, if any. In this case, M. Ataya had to retrieve the vehicle from a tow yard. It is unlikely that any business would refund a vehicle down payment in full if fees were incurred from that vehicle's repossession. Even if M. Ataya did refund the full down payment, we cannot come to that conclusion from the Certificate alone. Therefore, we find that M. Ataya has not met his burden of proof with respect to this sale.

Audit of H. Ataya

H. Ataya concedes to all but 15 of the remaining sales in the taxable measure, totaling $137,547. Despite H. Ataya's contention that the taxable measure should exclude 15 sales, he has only provided evidence in support of one transaction. As discussed in detail above, appellants bear the burden of showing that the audited taxable measure is incorrect. (*Appeal of Talavera*, *supra*.) Appellants (both M. Ataya and H. Ataya) assert that they cannot provide documentary evidence because the businesses' books and records were seized by CDTFA. However, we note that some records must remain available to them. For example, appellants could have provided bank statements showing amounts refunded to customers that returned vehicles. We also note that appellants have each provided evidence throughout this appeals process and CDTFA recommended adjustments when warranted. Appellants have not provided any explanation as to why some documents were available and others were not. Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid*.) As H. Ataya has not provided any evidence with respect to these sales, he has not met the burden of proof.

Regarding the one disputed transaction for which H. Ataya did provide evidence, H. Ataya asserts that CDTFA recorded an incorrect amount in the taxable measure. In this instance, H. Ataya provided a signed and dated sales contract for less than the amount included in the audited taxable measure. H. Ataya concedes that there is a second sales contract, which contains the sales price that CDTFA used in its audit. H. Ataya also concedes that he does not have any additional evidence to show that the second sales contract is correct. Given the conflicting sales contracts, H. Ataya asks to see DMV documents showing the correct price.

[11] We note that the Certificate is stamped with the business' name rather than an individual's signature.

[12] The Certificate is labeled Side A. Side B is missing. We have no way of knowing what information, if any, is contained on Side B of the Certificate.

Here, there is no dispute that there are two sales contracts documenting the same transaction at different prices. In each case the sales contract appears complete and is signed by the customer. We note that CDTFA's determination with respect to this sale is supported by a Vehicle/Vessel Transfer and Reassignment form, which is also signed by H. Ataya and the customer. Thus, while H. Ataya has provided conflicting evidence, it has not shown that the sales price included in the audit is incorrect. H. Ataya has not provided any additional evidence to support the lowered sales price. Accordingly, H. Ataya has not met his burden of proof. (*Appeal of Talavera*, *supra*.)

Based on the foregoing, we find that no further adjustments to the measure of unreported taxable sales are warranted with respect to the audits of M. Ataya or H. Ataya.

Issue 2: Whether CDTFA has established with clear and convincing evidence that the understatements were due to fraud or an intent to evade the payment of tax.

In the case of a deficiency determination, a penalty of 25 percent of the amount of the determination applies if any part of the deficiency is due to fraud or an intent to evade the law or any authorized rules or regulations. (R&TC, § 6485.) Fraud or intent to evade must be established by clear and convincing evidence. (Cal. Code Regs, tit. 18, § 1703(c)(3)(C); see, e.g., *In re Renovizor's Inc. v. BOE* (9th Cir. 2002) 282 F.3d 1233, 1241.) The express language of R&TC section 6485 makes it clear that a fraud penalty shall be imposed on the entire deficiency "if any part" of that deficiency determination is due to fraud.

The R&TC does not define fraud, but there are many federal precedents that we may look to for guidance. (*Appeal of ISIF Madfish*, 2019-OTA-292P.) Fraud can be proven by circumstantial evidence. (*Bradford v. Commissioner* (9th Cir. 1986) 796 F.2d 303, 307.) Badges of fraud may include the understatement of income, inadequate records, failure to file tax returns, implausible or inconsistent explanations of behavior, concealment of assets, failure to cooperate with tax authorities, and lack of credibility in the taxpayer's testimony. (*Ibid*.) Federal courts have also concluded that the mere omission of reportable income is not in itself sufficient to warrant a finding of fraud, but repeated understatements in successive years, coupled with other circumstances showing intent to conceal or misstate taxable income, present a basis for a finding of fraud. (*Rau's Estate v. Commissioner* (9th Cir. 1962) 301 F.2d 51, 54-55.)

On appeal, appellants offer the same assertions. Appellants concede that they were negligent in recordkeeping. However, appellants assert that they did not attempt to evade the

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payment of tax. Appellants argue that any understatement of taxable sales is the result of inexperience in bookkeeping and accounting matters, as well as the failure to keep records. Appellants also assert that they did not employ any staff who had knowledge of the business's tax reporting obligations. Finally, appellants assert that CDTFA imposed the penalty based on circumstantial evidence and that there is no direct evidence of fraud.

Fraud Penalty Imposed on M. Ataya

Initially, we note that that M. Ataya obtained his seller's permit in 1992, more than 10 years before the current audit period, and this was his third audit. During the first audit, M. Ataya did not provide any books or records. However, he did provide partial books and records for the second audit. Thus, by virtue of the two prior audits, M. Ataya was experienced in sales and use tax matters and aware of the recordkeeping requirement. Accordingly, we find M. Ataya's contention that he did not have experience in bookkeeping and accounting matters to lack credibility.[13]

Next, M. Ataya did not fully cooperate with CDTFA by providing a complete set of books and records for the current audit. We note that the books and records were available for the audit because CDTFA ultimately obtained them from the execution of a search warrant of H. Ataya's business. M. Ataya has not provided any explanation for why he failed to provide the books and records that were available. Indeed, M. Ataya has not even explained why his books and records were located at a different (albeit, related) business. Thus, we can only conclude from the fact that books and records were not provided voluntarily that M. Ataya was attempting to conceal them. We consider the failure to cooperate with CDTFA and concealment of books and records to be strong evidence of fraud.

Finally, M. Ataya failed to report taxable sales of $3,292,045.[14] When compared to reported taxable sales of $787,146, the unreported taxable sales represent a 418 percent error

[13] At the appeals hearing, we noted that this was M. Ataya's third audit and CDTFA asked whether he or someone else was responsible for working with CDTFA during those audits. M. Ataya's representative stated that it was the same inexperienced bookkeeping staff throughout each of the audits. Thus, the extent of M. Ataya's involvement in those audits is unclear. Nevertheless as a sole proprietor, M. Ataya was aware of the tax deficiencies found in both audits. In addition, we note that CDTFA imposed a 10 percent negligence penalty on M. Ataya for his failure to keep books and records during the first audit period (January 1, 1996 through December 31, 1998). Therefore, M. Ataya must have known of the recordkeeping requirement.

[14] This amount takes into account CDTFA's recommended reductions to the measure of unreported taxable sales.

rate. We find M. Ataya's failure to report more than $3,000,000 of taxable sales to be egregious. Additionally, when compared to CDTFA's prior two audits of M. Ataya, we note that the reporting error rate has increased more than 300 percent from the first audit and more than 400 percent from the second audit. The consistency with which M. Ataya failed to report his taxable sales, and the magnitude of the reporting error in this case can only be attributed to a conscious effort to evade reporting and remitting the tax to the State of California. Thus, based on the foregoing we find that CDTFA has established with clear and convincing evidence that M. Ataya's understatement of taxable sales was due to fraud or an attempt to evade the tax.

Penalty Imposed on H. Ataya

Here, H. Ataya began operating his business on May 1, 2006. Prior to that, H. Ataya worked as a car salesperson at M. Ataya's business. Thus, H. Ataya was experienced in the automotive industry. H. Ataya's sales contracts indicate that he collected sales tax reimbursement on his vehicle sales. H Ataya also reported taxable sales to CDTFA and retained a set of sales contracts and ROS forms. Therefore, H. Ataya had knowledge of the recordkeeping and reporting requirements. Accordingly, we find that H. Ataya's assertions that he did not have knowledge and experience to lack credibility.

H. Ataya maintained complete sales records but did not provide them voluntarily to CDTFA. The records only became available as a result of the DOJ's search warrant. The books and records clearly show taxable sales in excess of amounts reported on H. Ataya's returns. Thus, we find that H. Ataya's refusal to provide books and records voluntarily is evidence of the intention to conceal the true amounts of sales.

During the audit period H. Ataya failed to report taxable sales of $5,018,803.[15] When compared to reported taxable sales of $851,820, the unreported taxable sales represents a 589 percent error rate. This substantial understatement is strong evidence of fraud. Further, H. Ataya's books and records show the collection of sales tax reimbursement from customers totaling $436,006.75[16] while he only reported tax of $66,020. The unreported tax of

[15] This amount takes into account CDTFA's recommended reductions to the measure of unreported taxable sales. Although this is the full measure of unreported taxable sales, the 25 percent penalty for fraud is only applied to unreported taxable sales measuring $1,515,758. CDTFA applied a 40 percent penalty for Ataya's Motors' failure to remit sales tax reimbursement collected on the remaining taxable measure.

[16] This amount reflects the audited sales tax less reductions recommended by CDTFA.

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$369,986.75, which H. Ataya collected, represents an error rate of 560 percent, which is also egregious. Indeed, H. Ataya failed to report the correct amount of tax due in every quarter of the audit period, with understatements ranging from $10,398 in tax for the second quarter of 2008 to $70,029 in tax for the third quarter of 2007. Thus, we find that the consistency and the magnitude of the reporting errors cannot be attributed to honest mistakes or to mere negligence and must be attributed to a willful intent to evade the payment of tax.

As a result of the attempt to evade payment of tax, H. Ataya enriched himself by collecting and keeping tax that was properly due to the State of California. Therefore, we conclude that CDTFA has established with clear and convincing evidence that H. Ataya's understatement of taxable sales was due to fraud.

Issue 3: Whether CDTFA has established a basis for imposing the 40 percent penalty in H. Ataya's Motors' liability.

The Revenue and Taxation Code provides in pertinent part that, operative January 1, 2007, any person who knowingly collects sales tax reimbursement and who fails to timely remit it to the State shall be liable for a penalty of 40 percent of the amount not timely remitted. (R&TC, § 6597(a)(1).) The penalty does not apply if the person's liability for unremitted sales tax reimbursement averages $1,000 or less per month or does not exceed 5 percent of the total amount of the tax liability for which the sales tax reimbursement was collected for the period in which the tax was due, whichever is greater. (R&TC, § 6597(a)(2)(A).) Thus, in order to impose the 40 percent penalty, CDTFA must first establish, by a preponderance of the evidence, that three requirements are met: (1) appellant knowingly collected sales tax reimbursement; (2) appellant failed to timely remit the collected sales tax reimbursement to the State; and (3) the amount of sales tax reimbursement collected and not remitted exceeds the requisite threshold. (*Appeal of ISIF Madfish, Inc.*, *supra*; R&TC, § 6597(a)(1)-(2).) The law provides for relief of the 40 percent penalty for reasonable cause. (R&TC, § 6597(a)(2)(B).)

Here, H. Ataya's sales contracts show that he added sales tax reimbursement as a separate charge to the taxable selling price of each vehicle. Therefore, we find that H. Ataya knowingly collected sales tax reimbursement. The sales tax reimbursement shown in the sales contracts for the period January 1, 2007, through June 30, 2008, totaled $321,408, which exceeds H. Ataya's reported and remitted tax of $54,980 for the same period by $266,428. Although CDTFA has

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agreed that a reduction to that liability is warranted, the evidence clearly shows that H. Ataya failed to timely remit a substantial portion of the sales tax reimbursement he collected.

Before adjustments, CDTFA calculated that for the period January 1, 2007, through June 30, 2008, the amount of unremitted sales tax reimbursement collected averaged $14,802 per month, with the lowest monthly average being $3,466 for the months in 2Q08. In addition, for each quarter in that period, the amount of unremitted sales tax reimbursement collected exceeded 5 percent of the total amount of the tax liability, with the lowest quarterly percentage being 62.79 percent for 2Q08. Although CDTFA's adjustments result in reductions to the monthly amounts and the quarterly percentages of unremitted sales tax reimbursement collected, the amount of unremitted sales tax reimbursement collected still exceeds $1,000 per month and five percent of the total amount of the tax liability.

We find that CDTFA has established, by a preponderance of the evidence, that the three requirements provided by R&TC section 6597 were met: (1) H. Ataya knowingly collected sales tax reimbursement; (2) H. Ataya failed to timely remit the collected sales tax reimbursement to the State; (3) the amount of sales tax reimbursement collected and not remitted exceeds the requisite threshold. Therefore, we conclude that the 40 percent penalty was properly applied. H. Ataya has provided neither argument nor evidence that the penalty should be relieved for reasonable cause, and we find that no relief is warranted.

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HOLDINGS

1. Appellants have not established that any additional reductions to the amounts of unreported taxable sales in one or both liabilities are warranted.
2. CDTFA has established with clear and convincing evidence that the understatements in both liabilities were due to fraud or an intent to evade the payment of tax.
3. CDTFA has established a basis for imposing the 40 percent penalty in H. Ataya's liability.

DISPOSITION

Reduce the measure of unreported taxable sales for M. Ataya to $3,292,045. Reduce the measure of unreported taxable sales for H. Ataya to $5,018,803. Adjust the penalties accordingly. CDTFA's actions otherwise denying the appeals are sustained.

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Keith T. Long
Administrative Law Judge

We concur:

DocuSigned by:
715CE19AD48041B...
Andrew J. Kwee
Administrative Law Judge

DocuSigned by:
Natasha Ralston
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Natasha Ralston
Administrative Law Judge

Date Issued: 2/24/2021