OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **BRAINBOX LLC,** **dba Brainbox Cameras**	OTA Case No. 21098577 CDTFA Case ID 1-695-439

OPINION

Representing the Parties:

For Appellant: Rebecca Stadtner, Tax Appeals Assistance Program

For Respondent: Courtney Daniels, Tax Counsel III

For Office of Tax Appeals: Steven Kim, Tax Counsel III

S. RIDENOUR, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Brainbox LLC, dba Brainbox Cameras (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)[1] denying appellant's petition for redetermination of the Notice of Determination (NOD) dated November 22, 2019. The NOD is for tax of $7,452.00, applicable interest, and a failure-to-file penalty of $745.20, for the period January 1, 2018, through December 31, 2018 (liability period).

Appellant waived the right to an oral hearing; therefore, the matter is being decided based on the written record.

ISSUES

1. Whether appellant has established that use tax is inapplicable to its foreign purchases of tangible personal property for shipment to California.
2. Whether appellant has established that the failure-to-file penalty should be relieved.

[1] Sales and use taxes were formerly administered by the State Board of Equalization (BOE). In 2017, functions of BOE relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to acts or events that occurred before July 1, 2017, "CDTFA" shall refer to BOE; and when this Opinion refers to acts or events that occurred on or after July 1, 2017, "CDTFA" shall refer to CDTFA.

FACTUAL FINDINGS

1. Appellant is a California limited liability company (LLC) operating a business renting film production equipment, located in Culver City, California. Appellant did not have a valid seller's permit or certificate of registration for use tax during the liability period. Appellant did not report or pay any use tax to CDTFA for the transactions at issue.
2. According to documents provided to CDTFA by the United States Customs and Border Protection (U.S. Customs), appellant imported two shipments with total declared value of $78,441 into the United States from abroad: (1) property with a declared value of $69,160 on July 22, 2018; and (2) property with a declared value of $9,281, on December 12, 2018.
3. With respect to the first shipment, a U.S. Customs Entry Summary dated August 3, 2018, states that a package containing a "PLM MOUNT" and "OTHER OBJECTIVE LENSES: PHO" with a total declared value of $69,160 (first shipment) was imported into the United States from Germany on July 22, 2018, with "Brainbox Cameras" in California listed as the ultimate consignee.[2]
4. In support of the first shipment, a pro forma invoice[3] dated July 19, 2018, from P+S TECHNIK GmbH (P+S) in Germany and addressed to Brainbox Cameras and T. MacRitchie[4] at a California address, lists four purchased items ("Evolution 2x" camera lenses with different focal lengths) for a total purchase price of $69,160.[5] Another invoice for this same transaction was dated July 19, 2018 (final invoice), which appears to be addressed solely to T. MacRitchie, indicates a payment received date of July 18, 2018, and a date of delivery of July 19, 2018. Both invoices state that 25 percent

[2] According to guidance provided by U.S. Customs, the ultimate consignee at the time of entry or release is defined as the party in the United States to whom the overseas shipper sold the imported merchandise. (U.S. Customs, Customs Directive No. 3550-079A; https://www.cbp.gov/sites/default/files/documents/3550_079a_3.pdf, last modified 11/26/18.)

[3] A pro forma invoice is a preliminary bill of sale describing a shipment of goods before its delivery.

[4] T. MacRitchie was appellant's managing member during the liability period.

[5] The supporting invoice is listed in Euro (€59,600). CDTFA calculated the measure of tax for this transaction based on the seller's declared value of $69,160 on the U.S. Customs document.

of the payment was due with the placement of the order, and 75 percent was due on completion of the order.

5. An invoice dated September 18, 2018,[6] indicates that T. MacRitchie sold a "Kowa Anamorphic 4 Lens Set" (matching the serial numbers of the four items purchased from P+S) to 4th Dimension Studios, and shipped the items from Bend, Oregon, to Jacksonville, Florida.
6. With respect to the second shipment, a December 10, 2018 invoice from Heden Group (Heden), a company located in Sweden, states appellant purchased two "Heden YMER 1-motor Kit with M21VE-L" for a total purchase price of $9,281.
7. In support of the second shipment, a U.S. Customs Entry Summary dated December 27, 2018, states that a package containing "WIRELESS FOLLOW FOCUS PARTS FOR CINE. CAMERAS" with a total declared value of $9,281 (second shipment) was imported into the United States from Sweden on December 12, 2018, with "Brainbox LLC" in California listed as the ultimate consignee.
8. According to an undated letter bearing Heden letterhead and signed by the CEO of Heden, a shipment of "three Follow Focus systems" sent to appellant on December 11 (no stated year), "was a return of products after repair" and not the sale of new products to appellant.
9. CDTFA issued appellant a Statement of Proposed Liability requesting that appellant pay use tax for the $78,441 in imported items or prove that it does not owe any tax.
10. In response, T. MacRitchie filed a return with CDTFA claiming that all the customs imports were exempt from tax.[7]
11. CDTFA issued appellant a letter dated September 20, 2019, requesting additional documentation to support the claimed exemptions. When CDTFA did not receive any additional documentation, it issued the November 22, 2019 NOD, determining that tax applies to the total purchase price for both imports ($78,441). Appellant filed a petition for redetermination with CDTFA.
12. CDTFA issued a decision dated July 27, 2021, denying the petition for redetermination.
13. This timely appeal followed.

[6] Appellant also submitted another nearly identical invoice dated April 16, 2019.

[7] The record does not contain a copy of the return filed with CDTFA.

DISCUSSION

Issue 1: Whether appellant has established that use tax is inapplicable to its foreign purchases of tangible personal property for shipment to California.

The storage, use, or other consumption in this state of tangible personal property purchased from any retailer for storage, use, or other consumption in this state is subject to use tax, unless otherwise exempt or excluded. (R&TC, § 6201.) Generally, the person storing, using, or otherwise consuming tangible personal property in this state is liable for the use tax. (R&TC, § 6202(a).) Storage and use do not include the keeping, retaining, or exercising any right or power over tangible personal property for the purpose of subsequently transporting it outside the state for use thereafter solely outside the state. (R&TC, § 6009.1.)

When CDTFA is not satisfied with the amount of tax reported by a taxpayer, or in the case of a failure to file a return, CDTFA may determine the amount required to be paid based on 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*.)

First Shipment – P+S

Regarding the first shipment, a U.S. Customs Entry Summary records that equipment was imported into the United States from Germany. The Entry Summary identified Brainbox Cameras as the ultimate consignee. The July 19, 2018 invoice from P+S is addressed to both Brainbox Cameras and T. MacRitchie at a California address. Appellant does not dispute that the first shipment was delivered to it at its then current California business address. Appellant operates a business renting film production equipment. Based on the foregoing, the Office of Tax Appeals (OTA) finds CDTFA's determination, that appellant purchased the equipment from P+S for use in California, to be reasonable and rational. Accordingly, CDTFA has satisfied its initial burden and appellant must establish that it did not purchase the equipment for use in California.

Appellant contends that it did not purchase the equipment in the first shipment for use in California. Appellant asserts that its managing member, T. MacRitchie, was the actual purchaser of the equipment, not appellant. In support, appellant provides T. MacRitchie's credit card statement showing a July 18, 2018 payment of $41,868.88 (€35,976.00 x (EUR/USD exchange rate at the time of 1.166579942)) to "PSTECHNIKGM".[8]

While the final invoice appears to be addressed solely to T. MacRitchie, both Brainbox Cameras and T. MacRitchie were listed as the purchasers on the July 19, 2018 invoice from P+S, and Brainbox Cameras was identified as the ultimate consignee on the U.S. Customs Entry Summary. Furthermore, the package was delivered to appellant's then current California business address. Additionally, OTA does not find it unusual that appellant's managing member is also named on the invoice. Every manager is an agent of the LLC for the purpose of its business or affairs. (Corp. Code, § 17703.01(b)(2).) The act of any manager, including the execution in the name of the LLC of any instrument for apparently carrying on in the usual way the business or affairs of the LLC, binds the LLC, unless the manager so acting has, in fact, no authority to act for the LLC in the particular matter and the person with whom the manager is dealing has actual knowledge that the manager has no such authority. (*Ibid*.) Therefore, it is not uncommon for an LLC's managing member to personally conduct transactions related to the LLC's business. Furthermore, although T. MacRitchie's credit card statement shows a payment of €35,976 made to "PSTECHNIKGM" on July 18, 2018 (the date payment was received according to the final invoice), that payment does not appear to be related to the transaction at issue. The total purchase price of the equipment in the first shipment was €59,600, and the invoices indicate that 25 percent of the payment (i.e., €14,900) was due with the placement of the order and 75 percent (i.e., €44,700) was due on competition of the order. Appellant has not provided any explanation for the inconsistent payment amount of €35,976. Based on the evidence presented, OTA finds that appellant, and not T. MacRitchie, was the purchaser of the equipment in the first shipment.

Appellant also contends that T. MacRitchie stored the first shipment equipment in California for five days for the sole purpose of subsequently transporting the equipment outside

[8] According to OTA's calculation, (€35,976.00 x (EUR/USD exchange rate at the time of 1.166579942) = $41,968.879.00. While it is unclear why the amount billed by the credit card is $41,868.88, OTA finds that the $100.00 difference does not impact this Opinion's analysis and therefore will not be discussed further.

of California for use solely outside of California, and, therefore, the purchase is excluded from use tax. (See R&TC, § 6009.1.) Appellant argues that, although the equipment was delivered to California (following its entry into the United States on July 22, 2018), the package remained unopened until T. MacRitchie took the package to Oregon (where he owns a residence) where he first used the equipment for a film project. Appellant asserts that T. MacRitchie shipped the equipment to California rather than Oregon for security purposes because he did not want the package delivered to an empty residence while he was away from Oregon. Appellant claims that the equipment remained in Oregon until T. MacRitchie sold it to a buyer in Florida. In support of its contentions, appellant provides documentation, including the following: (1) an email confirmation showing T. MacRitchie purchased a ticket for a July 27, 2018 flight from Los Angeles, California, to Redmond, Oregon; (2) a letter from S. MacRitchie[9] stating that she witnessed T. MacRitchie bring a new and sealed box (containing the equipment at issue) to Oregon, where he opened the box and used the equipment for the first time; (3) and an invoice indicating that T. MacRitchie, from an Oregon address, sold and shipped the equipment to a buyer in Florida either on September 18, 2018, or April 16, 2019, depending on which version of the sales invoice is used.[10]

Here, the only evidence to support appellant's assertion that the equipment was stored in California for the sole purpose of transporting it outside of California is a letter from S. MacRitchie, who states that she saw T. MacRitchie open a sealed package containing new equipment while he was in Oregon. However, even if the package contained the product at issue and it was first opened in Oregon, that does not substantiate that any storage of the equipment in California was for the sole purpose of transporting the equipment outside of California. Storage and use do not include the keeping, retaining, or exercising any right or power over tangible personal property for the purpose of subsequently transporting it outside the state for use thereafter solely outside the state. (R&TC, § 6009.1.) While a sealed box suggests that the equipment contained within was not used, it certainly does *not* support a finding that the equipment must have been stored for the *sole* purpose of transporting it outside of California. If it did, *any* tangible personal property imported into California then kept in storage before being

[9] S. MacRitchie is identified as T. MacRitchie's family member.

[10] OTA notes that the file contains two similar invoices bearing the same invoice number (#041619), one dated September 18, 2018, and the other dated April 16, 2019. Appellant did not provide an explanation for the discrepancy.

shipped outside of California could arguably be excluded from tax, regardless of the actual purpose for storage in this this state, as long as the item was in a sealed and unopened box. Such a result is not supported by the Sales and Use Tax laws. Appellant bears the burden of proof that a result differing from CDTFA's determination is warranted (*Appeal of Talavera*, *supra*), and the evidence provided is insufficient to meet that burden.

Moreover, OTA finds it highly unlikely that T. MacRitchie would receive an international shipment of delicate camera lenses worth €59,600 and not inspect the package for damage and to verify its contents during the 2 to 9-month period it was in California, before taking the package for use on an upcoming film project, especially considering appellant's assertion that T. MacRitchie took the equipment to Oregon in his carry-on luggage because he did not want to risk damaging the equipment. Furthermore, OTA does not find a generic statement that T. MacRitchie brought a sealed box of equipment to Oregon sufficient to establish that the property in the sealed box was the camera lenses at issue in this appeal.

Regarding appellant's assertion that T. MacRitchie sold and shipped the equipment from Oregon to a buyer in Florida, appellant provides a self-generated invoice but no supporting documentation such as a shipping receipt or tracking information. Furthermore, the record contains two different invoices purporting to document the sale, one dated September 18, 2018, while the other is dated on April 16, 2019. Therefore, OTA finds that the invoices are not reliable evidence. More importantly, OTA finds that when T. MacRitchie subsequently sold the equipment and where he shipped it from has no bearing on the use tax analysis, as any taxable use or storage of the equipment in California had already occurred by the subsequent sale.

OTA finds that appellant has failed to establish that the equipment in the first shipment was not purchased for use, storage, or consumption in California.

Second Shipment - Heden

For the second shipment, a U.S. Customs Entry Summary shows that equipment was imported into the United States from Sweden. The Entry Summary identified Brainbox LLC as the ultimate consignee. The December 10, 2018 invoice from Heden addressed to appellant is for the purchase of two "Heden YMER 1-motor Kit with M21VE-L" for the total price of $9,281. Appellant does not dispute that it was the intended recipient, and received, the equipment. Based on the foregoing, OTA finds CDTFA's determination, that appellant purchased the equipment from Heden for use in California, to be reasonable and rational.

Accordingly, CDTFA has satisfied its initial burden, and appellant must establish that it did not purchase the equipment for use in California.

Appellant contends the second shipment was not a sale and purchase because no transfer of title occurred.[11] Appellant argues that the second shipment contained previously-owned equipment that had simply been repaired and upgraded using new components to match the new standard. Specifically, appellant argues that it sent previously purchased equipment to Heden for repair, but because the equipment was using an outdated standard (CARAT), Heden required appellant to upgrade to the new standard (YMER).

However, there is no indication on the invoice that any repair services were provided, nor that the items in the second shipment were repaired equipment rather than new equipment. Appellant has not provided any evidence that it requested a repair of previously-owned equipment under the CARAT standard, or that it shipped any equipment to Heden for such repair. Appellant provides a letter from Heden stating that a shipment of three items was a return of products after repair. However, the letter indicates that three items (as opposed to two items, as indicated on the December 10, 2018 invoice) were returned, it does not specify which items were repaired, and it not does not reference the December 10, 2018 invoice, nor the items itemized on the invoice. Furthermore, according to printouts from Heden's website: 1) a product description page for a CARAT kit states that the CARAT standard had reached its "end of life" and was replaced with the YMER standard; 2) a product description page for the YMER 1-motor kit with M21VE-L (the same equipment that was included in the second shipment) clearly shows that the item is a completely distinct and separate product from the CARAT kit; and 3) the YMER 1-motor kit appears to be larger than the CARAT kit.[12] Appellant has not provided any evidence to support its assertion that the CARAT kit could simply be upgraded to a YMER-1 motor kit through "repair." In addition, the December 10, 2018 invoice states that appellant paid $4,990 per item, which is the price listed for a new item on the YMER 1-motor kit

[11] A "sale" and "purchase" means and includes any transfer of title or possession, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. (R&TC, §§ 6006(a); 6010(a).)

[12] The YMER-1 transmitter's dimensions are 152 millimeters (mm) by 37 mm by 76 mm, while the CARAT kit transmitter's dimensions are 128 mm by 30 mm by 81 mm. The YMER-1 receiver's dimensions are 100 mm by 26 mm by 54 mm, while the CARAT kit receiver's dimensions are 70 mm by 30.5 mm by 60 mm.

with M21VE-L product description page. OTA finds that appellant has failed to prove that the second shipment was a return of repaired items and not a purchase and sale.

Based on the foregoing, OTA finds that appellant has failed to establish that no use tax is due.

Issue 2: Whether appellant has established that the failure-to-file penalty should be relieved.

If any person fails to make a return, CDTFA will estimate the tax the person is required to pay and add a 10 percent penalty, commonly known as a failure-to-file penalty. (R&TC, § 6511.) The failure-to-file penalty may be relieved if the person's failure to make a timely return or payment is due to reasonable cause and circumstances beyond the person's control, and occurred notwithstanding the exercise of ordinary care and the absence of willful neglect. (R&TC, § 6592(a).)

Here, appellant failed to file a return for the liability period. Appellant disputes the failure-to-file penalty but did not provide any specific arguments on appeal for why the penalty should be abated. During CDTFA's appeals process, appellant requested relief of the failure-to-file penalty based on its contentions that the equipment in the first shipment was not used in California, and the second shipment was a return of previously owned equipment sent in for repairs, and thus, not subject to tax. As discussed above, OTA finds that appellant made a taxable storage, use or consumption of the tangible personal property in California. Accordingly, OTA finds that appellant has failed to establish that the failure-to-file penalty should be relieved.

HOLDINGS

1. Appellant has failed to establish that use tax is inapplicable to its foreign purchases of tangible personal property for shipment to California.
2. Appellant has failed to establish that the failure-to-file penalty should be relieved.

DISPOSITION

CDTFA's action in denying appellant's petition for redetermination is sustained.

DocuSigned by:
Sheriene Anne Ridenour
67F043D83EF547C...

Sheriene Anne Ridenour
Administrative Law Judge

We concur:

DocuSigned by:
DC88A60D8C3E442...

Keith T. Long
Administrative Law Judge

DocuSigned by:
Natasha Ralston
25F8FE08FF56478...

Natasha Ralston
Administrative Law Judge

Date Issued: 10/17/2022