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OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	)	OTA Case No. 220510324
	)	CDTFA Case ID 641-838
BAKE R US, INC.	)	
	)	
	)	
	)	

OPINION

Representing the Parties:

For Appellant: David Aframian, Vice President

For Respondent: Mari Guzman, Tax Counsel III
Chad Bacchus, Tax Counsel IV
Jason Parker, Chief of Headquarters Ops.

For Office of Tax Appeals: Oliver Pfost, Tax Counsel

E. LAM, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Bake R Us, Inc. (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)[1] denying in part appellant's petition for redetermination of a Notice of Determination (NOD) dated October 3, 2018. The NOD is for tax of $17,062.50, applicable interest, and a failure-to-file penalty of $1,706.25 for the period January 1, 2012, through December 31, 2012 (liability period).

Appellant elected to have this appeal determined pursuant to the procedures of the Small Case Program. Those procedures require the assignment of a single administrative law judge. (Cal. Code Regs., tit. 18, § 30209.1.)

Office of Tax Appeals (OTA) Administrative Law Judge Eddy Y.H. Lam held an oral hearing for this matter in Cerritos, California, on October 12, 2022. At the conclusion of the hearing, the record was closed, and this matter was submitted for an opinion.

[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.

ISSUES

1. Whether appellant has shown that relief from the failure-to-file penalty is warranted.
2. Whether appellant has shown that relief from interest is warranted.

FACTUAL FINDINGS

1. Appellant is a California corporation that manufactures food and confectionary products at its location in Gardena, California.
2. Appellant did not file a sales and use tax return for the liability period.
3. CDTFA received information from U.S. Customs and Border Protection (Customs) indicating appellant imported "machinery" from Italy into California in July 2012. A Customs Import Report indicated the value of the machinery was $195,000.
4. Based on the information received from Customs, CDTFA issued appellant a Statement of Proposed Liability (Statement) on August 30, 2018, requesting appellant to either pay use tax on the imported machinery or provide evidence showing no use tax was owed. The Statement identified purchases of $195,000.00 subject to use tax, and based on that measure of tax, identified use tax of $17,062.50, plus interest, and a failure-to-file penalty of $1,706.25. Appellant responded to the Statement by letter dated September 9, 2018, requesting CDTFA provide evidence in support of the proposed liability.
5. On October 20, 2018, CDTFA timely issued an NOD for use tax of $17,062.50, based on a measure of tax of $195,000.00, plus interest, and a failure-to-file penalty of $1,706.25.[2]
6. Appellant timely filed a petition for redetermination (Petition) of the NOD, and after CDTFA's Appeal Bureau held an appeals conference, appellant provided evidence the "machinery" was an industrial planetary mixer purchased from the Italian manufacturer Tonelli Group SpA (Tonelli). The evidence indicated the "base" price of the mixer was $146,864, and appellant purchased additional, optional "pieces" which brought the total sales price of the mixer to $171,260. Appellant also provided evidence it paid Tonelli $24,396 to have the mixer shipped to, and installed at, its Gardena location.[3]

[2] The NOD was timely because in the case of a failure to file a return, every NOD shall be mailed within eight years after the last day of the calendar month following the quarterly period for which the amount is proposed to be determined. (R&TC, § 6487(a).)

[3] Besides shipping and installation, appellant's evidence indicated Tonelli also charged appellant for the shipping container, customs clearance fees, trucking, rigging, unloading, positioning, and commissioning.

7. During CDTFA's post-conference review of the Petition, appellant agreed with the reduced measure of use tax, but submitted a request under penalty of perjury requesting relief of the failure-to-file penalty and interest.
8. On September 23, 2021, CDTFA issued a Decision ordering a reaudit to reduce the measure of use tax from $195,000.00 to $171,260.00, and adjust the failure-to-file penalty and interest in accordance with the reduced measure of tax, but otherwise denying the petition (Decision). In the reaudit, CDTFA reduced the use tax liability to $14,985.25 and the failure-to-file penalty to $1,498.52.
9. Appellant timely appealed CDTFA's Decision to OTA.

DISCUSSION

Issue 1: Whether appellant has shown that relief from the failure-to-file penalty is warranted.

If sales tax does not apply, such as when a sale occurs outside of California, then use tax applies to the storage, use, or other consumption in this state of tangible personal property (TPP) purchased from a retailer, measured by the sales price, unless that use is exempt or excluded by statute. (R&TC, §§ 6201, 6401.) The tax is generally owed by the person using, storing, or otherwise consuming the property. (R&TC, § 6202.) For purposes of the use tax, a return shall be filed by every person purchasing TPP, the storage, use, or other consumption of which is subject to the use tax, who has not paid the use tax due to a retailer required to collect the tax. (R&TC, § 6452(b).) If a person purchases property subject to use tax but fails to file a return, a failure-to-file penalty applies, equal to 10 percent of the use tax. (R&TC, § 6511.) Here, there is no dispute that the TPP or mixer was subject to use tax, and appellant agrees with the measure of tax. Appellant contends, however, relief from the failure-to-file penalty is warranted.

The failure-to-file penalty shall be relieved if a person's failure to file a timely return is due to reasonable cause and circumstances beyond the person's control, and occurred notwithstanding the exercise of ordinary care and in the absence of willful neglect. (R&TC, § 6592.) A person seeking relief from the failure-to-file penalty shall file a statement under penalty of perjury setting forth facts on which the person bases the claim for relief. (R&TC, § 6592(b).) Ignorance of the law is not reasonable cause warranting relief from a failure-to-file penalty because knowledge of the law is presumed. (See *Macfarlane v. Dept. of Alcoholic Beverage Control* (1958) 51 Cal.2d 84.) It is equally well-established that persons have a non-

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delegable legal obligation to file a return if a return is required by law, and reliance on an agent who fails to file a return on their behalf is not reasonable cause warranting penalty relief. (See *United States v. Boyle* (1985) 469 U.S. 241.)

Appellant provides two reasonable cause arguments why the failure-to-file penalty should be relieved. First, appellant argues it relied on Tonelli to pay the use tax. Second, appellant argues it agreed with the measure of use tax based on representations made by CDTFA that the failure-to-file penalty (and interest) would be relieved.

Concerning the first argument, appellant filed with CDTFA a statement signed under penalty of perjury requesting relief from the failure-to-file penalty, in compliance with R&TC section 6592(b). In that statement, appellant contends it had never been involved in the import or export of any goods and thus had no knowledge or experience with international transactions. At the oral hearing before OTA in this matter, appellant's vice president testified that he "requested Tonelli to be in charge of crediting, shipping, customs clearance, payments of all the fees and taxes at the U.S. Customs." Appellant's vice president further testified that Tonelli agreed to these terms, and appellant was therefore under the impression that Tonelli assumed responsibility for paying use tax, and that Tonelli had done so. In sum, appellant argues it acted reasonably in light of its inexperience by entrusting to Tonelli, a business with more international experience, the payment of taxes and fees, including use tax.

Here, CDTFA imposed a failure-to-file penalty for appellant's failure to file a return. It is not clear if appellant expected Tonelli to ascertain appellant's California filing requirement, file a return on its behalf, and pay use tax, or if appellant merely expected Tonelli to pay use tax without the filing of a return. Regardless, for purposes of the use tax, a return shall be filed by every person purchasing TPP, the storage, use, or other consumption of which is subject to the use tax, who has not paid the use tax due to a retailer required to collect the tax. (R&TC, § 6452(b).) Furthermore, persons have a non-delegable legal obligation to file a return if a return is required by law, and reliance on an agent who fails to file a return on their behalf is not reasonable cause. (See *United States v. Boyle*, *supra*.) Therefore, appellant's argument does not establish reasonable cause to warrant relief of the failure-to-file penalty.

Concerning appellant's second argument, it argues it relied on representations made by CDTFA that the failure-to-file penalty (and interest) would be relieved if appellant agreed with

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CDTFA's determination as to the measure of tax and use tax liability. Appellant points to the following statements made by CDTFA in an email:

> "In regards to [relief from interest and the failure-to-file penalty, CDTFA's Use Tax and Collections Bureau] request[s] that it be handled by the applicable department for review [and] determination. As for [CDTFA's Use Tax and Collection Bureau's] recommendation, it currently couldn't be considered as there is still a tax portion due. Once that is paid, relief *can be considered*. [CDTFA's Use Tax and Collection Bureau's] suggestion is that partial interest relief *may be warranted* and will be addressed further . . . by [an] applicable reviewer."

(Italics added.)

There is no indication in this email CDTFA represented to appellant the failure-to-file penalty would be relieved if appellant agreed with CDTFA's determination as to the measure of tax. The email expressly states CDTFA could not consider penalty relief at the time because a portion of the tax remained due. CDTFA states once appellant pays the tax, it would consider penalty relief. The evidence shows appellant paid the tax and CDTFA considered appellant's request for relief from the failure-to-file penalty, which it ultimately denied because appellant had not shown reasonable cause. OTA reviewed the other written communications between appellant and CDTFA in the record of this appeal, and it finds no evidence CDTFA represented to appellant the failure-to-file penalty would be relieved. Nonetheless, there is no provision in the Sales and Use Tax Law that would warrant relief of the failure-to-file penalty based on this argument.

Based on the foregoing, appellant has not shown relief of the failure-to-file penalty is warranted.

Issue 2: Whether appellant has shown that relief from interest is warranted.

The imposition of interest is mandatory. (R&TC, § 6482.) There is no statutory right to interest relief. (*Appeal of Micelle Laboratories, Inc.*, 2020-OTA-290P.) In its discretion, CDTFA may relieve interest only under limited circumstances, such as: where the failure to pay the tax was due to a disaster (R&TC, § 6593); or where the failure to pay the tax was due to an unreasonable error or delay by an employee of CDTFA (R&TC, § 6593.5); or where the failure to pay the tax was due to reasonable reliance on written advice received from CDTFA (R&TC,

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§ 6596). The standard of review of a denial by CDTFA of a request for interest relief is for abuse of discretion. (*Appeal of Micelle Laboratories, Inc.*, *supra*.)

Appellant has not identified a basis under which interest relief may be granted; appellant does not contend its failure to pay use tax was due to a disaster or an unreasonable error or delay by an employee of CDTFA. In addition, appellant has not argued that its failure to pay the use tax at issue was due to reliance on written advice from CDTFA. Although appellant appears to rely on the email cited in Issue 1 as a basis for interest relief, OTA notes that CDTFA stated partial interest relief may be warranted, but CDTFA does not provide the basis for this statement. OTA notes that it appears CDTFA meant interest would be reduced commensurate with the reduction in the use tax liability. Nonetheless, this email does not establish that there was an unreasonable error or delay by a CDTFA employee or that appellant failed to pay the use tax in reliance of the email because the email was sent after appellant's use tax obligation was due.

In sum, appellant has not established that CDTFA abused its discretion in denying interest relief.

HOLDINGS

1. Appellant has not shown that relief from the failure-to-file penalty is warranted.
2. Appellant has not shown that relief from interest is warranted.

DISPOSITION

CDTFA's action in reducing the measure of tax to $171,260 and otherwise denying the petition is sustained.

DocuSigned by:
Eddy Y.H. Lam
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Eddy Y.H. Lam
Administrative Law Judge

Date Issued: 12/20/2022