

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of:

**X. QU**) OTA Case No. 20116938  
) CDTFA Case ID: 001-315-882  
)  
)  
)  
)**OPINION**

Representing the Parties:

For Appellant:

X. Qu, Appellant

For Respondent:

Sunny Paley, Tax Counsel III  
Stephen Smith, Tax Counsel IV  
Kimberly Wilson, Hearing Representative

For Office of Tax Appeals:

Steven Kim, Tax Counsel III

N. RALSTON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561 and California Code of Regulations, title 18, section 35019, X. Qu (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (respondent) denying appellant's administrative protest<sup>1</sup> of the Notice of Determination (NOD) dated August 14, 2018, for \$9,456 in tax, plus applicable interest, for the period April 1, 2017, through September 30, 2017 (liability period).

Office of Tax Appeals (OTA) Administrative Law Judges Josh Aldrich, Josh Lambert, and Natasha Ralston held an oral hearing for this matter in Cerritos, California, on October 11, 2022. At the conclusion of the hearing, the record was closed and this matter was submitted for decision.<sup>2</sup>

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<sup>1</sup> Under regulations promulgated by respondent, and applicable at the time the administrative protest was filed, if a taxpayer files a petition for redetermination after the 30-day time period specified in R&TC section 6561, respondent may accept it as an administrative protest. (Cal. Code Regs., tit. 18, § 35019.)

<sup>2</sup> The English version of the Opinion will be the official published Opinion. Any differences between the official Opinion and the translated version are not binding on OTA or the parties. The differences, if any, shall have no legal effect. The translated version is provided as a courtesy only. If there are any questions related to the information contained in the translated version, refer to the official Opinion for clarification.

### ISSUES

1. Whether appellant has established that an adjustment to the measure of unreported purchases of counterfeit items subject to use tax is warranted.
2. Whether the finality penalty should be abated.

### FACTUAL FINDINGS

1. Appellant did not obtain a valid California seller's permit or certificate of registration for use tax, but sold accessories such as handbags, belts, wallets, emblems, and sunglasses in or around Los Angeles, California during the liability period.
2. Respondent obtained a report from Investigative Consultants (IC Report), a third-party investigation company, which stated that appellant sold counterfeit items to an investigator on two occasions. First, on June 24, 2017, appellant sold 124 items for \$740, with a manufacturer's suggested retail price (MSRP) of \$81,360 if the items were not counterfeit. Second, on August 30, 2017, appellant sold 90 items for \$540, with an MSRP of \$84,150 if the items were not counterfeit. The IC Report also indicates that the Los Angeles County Sheriff's Department seized from appellant 19,955 items with a MSRP of \$13,059,470 if they were not counterfeit.
3. Based on the investigator's purchases, respondent calculated a total MSRP of \$165,510 ( $\$81,360 + \$84,150$ ) and a total sales price of \$1,280 ( $\$740 + \$540$ ), for a total markdown of \$164,230 ( $\$165,510 - \$1,280$ ). Respondent determined a markdown percentage of 12,830.47 percent ( $\$164,230 \div \$1,280 \times 100$  percent). Respondent then calculated a markdown factor of 12,930.47 (100 percent + 12,830.47 percent) and applied it to the total MSRP of seized items to determine that appellant could have sold the seized items for \$100,998 ( $\$13,059,470 \div 12,930.47$  percent) (estimated street value).
4. On June 21, 2018, appellant was convicted of two counts of violating Penal Code section 350(a)(2), related to counterfeiting.
5. Respondent determined that appellant was a "convicted purchaser" as defined in R&TC section 6009.2(b), and that appellant's purchases of counterfeit items for purposes of resale were subject to use tax pursuant to R&TC section 6009.2(a). In an audit report dated July 17, 2018, respondent estimated the measure of appellant's unreported purchases of counterfeit items using the \$100,998 estimated street value of the seized

- items. Respondent issued the August 14, 2018 NOD, finding that appellant failed to pay use tax on his purchase of \$100,999 in counterfeit items.
6. Appellant failed to pay the NOD liability when it became final or timely file a petition for redetermination, and respondent imposed a 10-percent penalty of \$945.60 pursuant to R&TC section 6565 (finality penalty).
  7. Appellant submitted a letter dated March 15, 2019, disputing the NOD. Respondent accepted the untimely petition as an administrative protest.
  8. On November 2, 2020, respondent issued a decision denying appellant’s administrative protest.
  9. Appellant timely filed this appeal.

### DISCUSSION

#### Issue 1: Whether appellant has established that an adjustment to the measure of unreported purchases of counterfeit items subject to use tax is warranted.

California imposes a use tax on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer. (R&TC, § 6201.) Every person storing, using, or otherwise consuming in this state tangible personal property purchased from a retailer is liable for use tax; and his or her liability is not extinguished until the tax has been paid to the state, or unless the purchaser provides a valid receipt from an authorized retailer showing the tax was collected by the retailer. (R&TC, § 6202(a).) “Storage” and “use” each include any purchase by a convicted purchaser of tangible personal property with a counterfeit mark or a counterfeit label, regardless of whether the purchase is for resale in the regular course of business. (R&TC, § 6009.2(a).) A “convicted purchaser” is a person convicted of a counterfeiting offense, including a violation under Penal Code section 350 on or after the purchase date. (R&TC, § 6009.2(b).)

If respondent is not satisfied with the amount of tax reported by the taxpayer, or in the case of a failure to file a return, respondent 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, respondent has a minimal, initial burden of showing that its determination was reasonable and rational. (*Appeal of Talavera*, 2020-OTA-022P.) Once respondent has met its initial burden, the burden of proof shifts to the taxpayer to establish

that a result differing from respondent's determination is warranted. (*Ibid.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid.*) Further, a taxpayer's failure to provide evidence that is within his or her control gives rise to a presumption that such evidence is unfavorable to his or her case. (*Appeal of Bindley*, 2019-OTA-179P).

Here, appellant was convicted of two counts of violating Penal Code section 350(a)(2) on June 21, 2018, and is considered a "convicted purchaser" for purposes of the Sales and Use Tax Law. (R&TC, § 6009.2(b).) As such, any purchase of counterfeit items by appellant before the convictions constitutes a taxable "storage" or "use" of those items, and appellant is liable for use tax on the purchase price of those items, unless he provides a valid receipt from an authorized retailer showing the tax was paid to the retailer. Appellant has not provided any evidence showing he paid tax to any retailer for the seized items. Respondent estimated the deficiency measure based on the best available information, that is, the IC Report. The IC Report indicates that appellant sold counterfeit items to an investigator for a sales price representing a substantial markdown from the MSRP of those items if they were not counterfeit. The IC Report also notes that the Los Angeles County Sheriff's Department seized counterfeit items with an MSRP of \$13,059,470 if they were not counterfeit. Respondent calculated a markdown factor based on the investigator's purchases and applied the markdown factor to the MSRP of the seized items if they were not counterfeit to determine that appellant could have sold those seized items for \$100,998. Without any other records to rely on, respondent determined that the potential sales price of \$100,998 represented appellant's purchase price of the counterfeit items. While it is likely that the purchase price of counterfeit items was less than the selling price, the record is devoid of any evidence tending to show what that lesser amount might be, and given the illicit nature of appellant's business, there are no industry standards that could possibly be used for reference. Thus, in the absence of such evidence, we find respondent's deficiency measure is based on the best available information available. Therefore, OTA finds the audit was reasonable, and the burden of proof shifts to appellant to show that adjustments are warranted.

Appellant argues that respondent's estimate of his purchase price for the seized items is greatly exaggerated, and that appellant purchased the items online for approximately \$31,147, but appellant concedes that he does not have any purchase receipts for the seized items. Appellant's unsupported assertion that he purchased the seized items for a lower price, without

any evidence to support this claim fails to satisfy appellant's burden of proof. Accordingly, appellant has not established that respondent's deficiency measure is overstated.

Appellant further argues that he should not be liable for use tax on the seized items as he was unable to sell them; and thus, he never made any profit or income on the sale of those items. However, appellant incurred the use tax at the time that he purchased the items. (R&TC, § 6009.2). Therefore, use tax applies even though the items were seized before appellant could sell them.

Appellant also argues that he cannot afford to pay the liability. Respondent has statutory authority to settle disputed liabilities with the taxpayer and to compromise certain final liabilities. (R&TC, §§ 7093.5, 7093.6.)<sup>3</sup> OTA, on the other hand, has no statutory authority to settle a disputed tax liability or to compromise a tax liability. Further, OTA has no jurisdiction over respondent's settlement, installment agreement, or offer in compromise programs. OTA's function is to determine the correct amount of a taxpayer's California tax liability. (*Appeal of Robinson*, 2018-OTA-059P.) While OTA is cognizant that a taxpayer's financial situation may ultimately render a liability uncollectible, the question of ability to pay versus that of determining the correct amount of the tax liability are two separate and distinct concepts. OTA lacks authority to make discretionary adjustments to the amount of a tax assessment based on a taxpayer's ability to pay. (*Ibid.*)

Issue 2: Whether appellant has established that the finality penalty should be abated.

When a taxpayer does not file a petition for redetermination within 30 days after service of the NOD, the determined liability becomes final and thus, the tax becomes due and payable. (R&TC, § 6561). Respondent imposes a finality penalty, to determinations that are not paid when they become due and payable. (R&TC, § 6565). Respondent may grant relief of the finality penalty in cases where it determines that appellant's failure to make a timely payment is due to reasonable cause and circumstances beyond the taxpayer's control and occurred notwithstanding the exercise of ordinary care and the absence of willful neglect. (R&TC, § 6592; Cal. Code Regs., tit. 18 § 35048 see *Appeal of Davinder Singh Pabla, et al.* (SBE Memo.) 2005 WL 2377713.) However, appellant must file a statement under penalty of

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<sup>3</sup> At OTA's request respondent provided appellant with the phone number to respondent's Offer in Compromise program. This phone number, (916) 322-7931, has access to respondent's interpreter relay service.

perjury setting forth the facts upon which the appellant bases the claim for relief. (R&TC, § 6592(b), *Appeal of Pabla, supra.*)

Appellant did not file a timely petition for redetermination; thus, the tax became due and payable 30 days after service of the NOD. Appellant did not make specific arguments regarding abatement of the finality penalty but rather asserts the same arguments for his contentions that the tax liability is overstated. As appellant has not filed the requisite statement signed under penalty of perjury, OTA is unable to grant relief of the penalty even if OTA were to determine that reasonable cause exists for appellant's failure to timely pay the liability. Thus, OTA has no basis to relieve the finality penalty.

### HOLDINGS

1. Appellant has not established that an adjustment to the measure of unreported purchases of counterfeit items subject to use tax is warranted.
2. Appellant has not established that the finality penalty should be abated.

### DISPOSITION

Respondent's action denying appellant's administrative protest is sustained.

DocuSigned by:

*Natasha Ralston*

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Natasha Ralston

Administrative Law Judge

We concur:

DocuSigned by:

*Josh Aldrich*

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Josh Aldrich

Administrative Law Judge

DocuSigned by:

*Josh Lambert*

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Josh Lambert

Administrative Law Judge

Date Issued: 1/5/2023