OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **B. SENEHI** **dba Barefoot Café**	OTA Case Nos.: 18011836, 18011949 CDTFA Case IDs: 864543, 889461

OPINION

Representing the Parties:

For Appellant:	James Bourbeau, Attorney B. Senehi, Appellant Dan Field, M.D., Witness Bahiram "Tony" Senehi, Witness
For Respondent:	Randy Suazo, Hearing Representative Christopher Brooks, Tax Counsel IV Jason Parker, Chief of Headquarters Ops.
For Office of Tax Appeals:	Casey Green, Tax Counsel III

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) sections 6561 and 6901, B. Senehi (appellant) appeals a Decision and Recommendation (Decision) issued by respondent California Department of Tax and Fee Administration (respondent)[1] denying appellant's petition for redetermination of the Notice of Determination (NOD) dated February 25, 2015.[2] The NOD was for $220,945.79[3] in tax, applicable interest, and

[1] Prior to July 1, 2017, sales and use taxes (and other business taxes and fees) were administered by respondent's predecessor, the State Board of Equalization (BOE). When this Opinion refers to events that occurred before July 1, 2017, "respondent" refers to BOE.

[2] Appellant made payments towards the determined liability and filed a protective claim for refund to recover the amounts paid.

[3] This amount is net of two payments totaling $7,000 that had been made against the asserted liability by the time respondent issued the NOD. There have been additional payments since issuance.

a 40 percent penalty of $87,636.97[4] for the period July 1, 2007, through December 31, 2013 (liability period).[5]

Office of Tax Appeals (OTA) Administrative Law Judges Andrea L.H. Long, Michael F. Geary, and Josh Lambert held an oral hearing for this matter in Sacramento, California, on October 19 and 25, 2022. At the conclusion of the hearing, the parties submitted the matter and OTA closed the record.

ISSUES[6]

1. Is an adjustment to either measure of unreported taxable sales warranted?[7]
2. Is relief of the 40 percent penalty warranted?
3. Is any part of respondent's determination barred by the statute of limitations?[8]

FACTUAL FINDINGS

1. At all relevant times, appellant owned a full-service restaurant in Marin County as a sole proprietor doing business as Barefoot Café and held a seller's permit with an effective start date of June 1, 2006.
2. While appellant's brother functioned as head chef and on-site manager, appellant was at all times responsible for the financial management of the business and compliance with the Sales and Use Tax Law.
3. In approximately January 2014, respondent began an audit of appellant for the period

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[4] Respondent imposed the 40 percent penalty pursuant to R&TC section 6597, which states, in part, that any person who knowingly collects sales tax reimbursement from a customer and who fails to timely remit that sales tax reimbursement to the board shall be liable for a penalty of 40 percent of the amount not timely remitted.

[5] The NOD was based on an audit that determined a deficiency measure of $2,627,804, which consisted of the following: (1) a $666,692 difference between recorded and reported sales for the period January 1, 2011, through December 31, 2013; (2) tax accrued in error on sales in the amount of $23,623; and (3) a $1,937,219 difference between recorded and report sales for the period July 1, 2007, through December 31, 2010.

[6] The phrasing of the issues has been modified for simplicity and to correct inaccuracies in the issues previously identified. Regarding Issue 1, there are two measures at issue. Issue 2 is substantively identical to the corresponding issue identified at the hearing. Finally, the possible tolling referred to in Issue 3 is not solely for the period July 1, 2007, through December 31, 2010, as indicated by the previously described issues; it also includes all of 2011.

[7] As indicated above in footnote 5, there are two separate measures of unreported taxable sales.

[8] Appellant argues that all liabilities for the periods prior to January 1, 2012, including some of audit item 2, are barred by the statute of limitations.

January 1, 2011, through December 31, 2013 (original audit period). For the audit, appellant provided federal income tax returns (FITRs) for 2011 and 2012, and bank statements, Forms 1099-K (1099-Ks),[9] and sales and use tax returns (SUTRs) for the original audit period. In addition, appellant provided monthly point-of-sale (POS) reports for January 2014 and February 2014, and sales data for the period May 2007 through February 2011.[10]

4. The POS system data provide detailed information about each sale, including a consecutive numerical reference, an order ID, a dine-in table ID when applicable, the sales tax rate, the total amount due, the sales tax amount due, the net amount (ex-tax) due, the mandatory gratuity percentage when applicable, and the discount amount when applicable.

5. When there were questions about or problems with the POS system, appellant was the person who typically communicated with the company that provided technical support. Records provided by that company document 89 requests for assistance between August 7, 2007 and December 18, 2013. The number of calls per year were as follows:

Year	Number of Calls
2007	1
2008	0
2009	5
2010	4
2011	32
2012	16
2013	31

The vast majority of these calls appear to be routine inquiries about how to do certain things with the POS system. On only five days during the entire period covered by the records are there references to “Code 91” or “Code 3251,” which appellant alleges were indications of a system crash or a virus.

[9] Form 1099-K is an Internal Revenue Service form which shows amounts paid to a merchant by customers using some type of payment card (i.e., credit card or debit card) or third-party network (e.g., PayPal).

[10] Appellant provided the POS data on a flash drive, explaining that he had downloaded it from the POS system.

6. On SUTRs for the original audit period, appellant reported total sales of $1,985,866, exempt sales of $141,021, taxable sales of $1,844,845 and sales tax due of $158,784.[11] For this same period, appellant's POS system recorded taxable sales of $2,511,807 and sales tax reimbursement collected of $215,976. Respondent subtracted reported taxable sales from recorded taxable sales to calculate unreported taxable sales of $666,962, which is audit item 1. Appellant concedes those unreported sales and that he failed to remit $57,192 in sales tax reimbursement collected from his customers.
7. 1099-Ks issued by American Express, Chase Bank, and Bank of America show that during 2011 through 2013 appellant made credit card sales[12] (excluding tips)[13] of $2,109,646, which is $264,801 more than reported taxable sales. Because credit card sales recorded in the POS system matched credit card deposit amounts reported on appellant's 1099-Ks, respondent accepted the POS sales data as accurate.
8. On his 2011 and 2012 FITRs, appellant reported gross receipts of $683,618 and $782,414, respectively, or $101,547 and $162,860 more, respectively, than appellant reported on his SUTRs for those same periods.
9. Respondent's analysis of appellant's bank deposits showed that appellant's cash deposits accounted for less than 1 percent of total deposits for the period January 1, 2011, through December 31, 2012, and just over 4.5 percent of total deposits in 2013.
10. Based on the above findings, and on appellant's failure to provide what respondent considered to be a reasonable explanation for the substantial discrepancy between recorded and reported taxable sales, respondent concluded that appellant intentionally attempted to evade the payment of tax, and, on that basis, it extended the audit examination to include the period July 1, 2007, through December 31, 2010 (extended audit period).

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[11] Appellant reported "exempt" sales in every quarter, in the $3,000 to $4,000 range through the second quarter of 2010, then suddenly increasing to the $12,000 to $15,000 range per quarter for the remainder of the liability period. There is no evidence of exempt sales and appellant has not argued otherwise. While sales of cold food to go are generally exempt, appellant's sales of cold food to go were subject to tax pursuant to the "80-80 rule." (Cal. Code Regs., tit.18, § 1603(c).)

[12] When this Opinion refers to "credit card sales," it is referring to sales for which payment is made by credit card, debit card, PayPal, Apple Pay, and other similar third-party payment networks and mobile payment systems.

[13] Respondent estimated tips at 10 percent.

11. On its SUTRs for the extended audit period, appellant reported total sales of $617,151, exempt sales of $47,688, taxable sales of $569,463, and sales tax due of $47,690. For this same period, appellant's POS system recorded taxable sales of $2,506,682 and sales tax reimbursement collected of $209,498. Respondent deducted reported taxable sales from recorded taxable sales to compute unreported taxable sales of $1,937,219, which is audit item 3.[14] The difference between sales tax reimbursement recorded as collected from customers and sales tax reimbursement reported and remitted to the state is $161,498.
12. According to respondent's September 16, 2014 memorandum wherein audit staff recommends the imposition of the 40 percent penalty, the total tax reimbursement collected for each quarter of the liability period was less than $20,000 with the exception of the fourth quarter of 2013 (4Q13) when appellant collected $20,870 in tax reimbursement;[15] the average monthly unremitted tax for those periods (other than 4Q13) was between $1,360 (for 2Q11) and $4,386 (for 4Q10); and for 4Q13, appellant failed to remit $5,215.
13. On February 25, 2015, respondent issued the NOD to appellant.
14. Appellant filed a petition for redetermination, wherein he disputed the penalty and all liability for periods prior to January 1, 2011.
15. The parties participated in respondent's internal appeals process, and on May 10, 2017, respondent issued its Decision denying appellant's petition for redetermination. This timely appeal followed.
16. On appeal, appellant concedes that he failed to report $666,962 in taxable sales made during the period January 1, 2011, through December 31, 2013, and respondent concedes that, absent a finding of fraud or intent to evade the payments of taxes, the February 25, 2015 NOD is timely only for periods after December 31, 2011.

[14] As previously stated, appellant does not dispute unreported taxable gratuities, measured by $23,623, which is audit item 2.

[15] The other 25 quarters were between $11,865 (for 1Q09) and $18,894 (for 3Q13), with a $16,184 (rounded) average collected per quarter.

DISCUSSION

Issue 1: Is an adjustment to either measure of unreported taxable sales warranted?

California imposes sales tax on a retailer's retail sale of tangible personal property in this state, measured by the gross receipts therefrom, the 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.) Although gross receipts from the sale of "food products" are generally exempt from the sales tax, sales of hot food to go and sales of all (hot and cold) food served in a restaurant are subject to tax. (R&TC, § 6359(a), (d)(1), (2) & (7).)

It is the retailer's 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 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*.) The applicable burden of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c); *Appeal of Estate of Gillespie*, 2018-OTA-052P.) That is, a party must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Talavera*, *supra*.)

Appellant contests the determined measure of tax for the extended audit period on the grounds that the taxable sales recorded by the POS system are inaccurate.

Here, respondent used a direct audit approach by utilizing appellant's detailed and extensive POS data to determine the amount of audited taxable sales on an actual basis. By simply comparing recorded taxable sales to reported taxable sales, respondent determined the two measures at issue: $1,937,219 for the original audit period and $666,962 for the extended audit period. The evidence thus establishes that respondent's methodology was both reasonable and rational, and that the results of the audit fairly reflect the difference between appellant's recorded and reported taxable sales. Consequently, the burden of proof shifts to appellant to show error and establish a more accurate measure of tax.

As noted above, appellant concedes that he failed to report $666,962 in taxable sales for the period of January 1, 2011, through December 31, 2013 (audit item 1). While appellant disputes the additional measure of $1,937,219 for the earlier period (audit item 3), nothing in the record proves that respondent erred in its analysis. Appellant did not challenge even a single transaction record, and the suggestion that taxable sales are overstated because the POS system did not accurately record the relevant sales data is not borne out by the evidence.[16] In short, appellant has failed to carry the burden of proof, and on that basis, OTA finds that the evidence does not establish that an adjustment is warranted to either of the measures of unreported taxable sales (audit items 1 and 3).

Issue 2: Is relief of the 40 percent penalty warranted?

Any person who knowingly collects sales tax reimbursement and fails to timely remit it to the state is liable for a penalty of 40 percent of the amount not timely remitted if the failure to remit exceeds certain thresholds. (R&TC, § 6597(a)(1).) The penalty does not apply if the person's liability for unremitted sale 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).) In order for OTA to sustain respondent's imposition of the 40 percent penalty, respondent must establish that: (1) appellant knowingly collected sales tax reimbursement from its customer(s); (2) appellant failed to timely remit the sales tax for which it collected the reimbursement; and (3) the amount of sales tax collected but not remitted exceeds the applicable threshold. (R&TC, § 6597(a)(1)-(2).) The applicable standard of proof is by a preponderance of the evidence. (*Appeal of ISIF Madfish, Inc.*, 2019-OTA-292P.)

The law provides for relief of the 40 percent penalty if the taxpayer establishes that its actions were due to a reasonable cause or circumstances beyond the taxpayer's control and

[16] Given appellant's testimony that employees were required to manually enter sales data for periods when the POS system was not working correctly, it seems more likely that the recorded sales may not include all taxable sales.

occurred notwithstanding the taxpayer's exercise of ordinary care and the absence of his or her willful neglect. (R&TC, § 6597(a)(2)(B).) R&TC section 6597 provides six examples of reasonable cause, one of which is relevant to the facts under consideration. It states that reasonable cause or circumstances beyond the taxpayer's control includes a death or serious illness of the taxpayer or the taxpayer's next of kin that caused the person's failure to make a timely remittance. (R&TC, § 6597(b)(1)(A).)

The evidence shows that all requirements for imposition of the 40 percent penalty have been met. Regarding the first requirement, the evidence clearly shows that appellant knowingly collected sales tax reimbursement from his customers. Appellant does not dispute the $57,192 in sales tax reimbursement collected from customers but not remitted for the original audit period. While he disputes the $161,498 in sales tax reimbursement collected from customers but not remitted for the extended audit period, that dispute appears to be more about whether the determination for that period (and for 2011) is barred by the statute of limitations than about whether appellant collected but failed to remit that amount. And, as already found above, the evidence shows that appellant did collect but failed to remit that amount. Finally, there is no question that the amounts collected but not remitted exceed the thresholds stated in R&TC section 6597(a)(2)(A). The average monthly unremitted amounts far exceeded the applicable threshold for every month of the liability period. The $1,000 threshold applies to all periods at issue with the exception of 4Q13 because the total tax reimbursement collected for those reportable periods was less than $20,000.[17] The average monthly unremitted tax for those periods (other than 4Q13) was between $1,360 (for 2Q11) and $4,386 (for 4Q10). For 4Q13, for which the threshold was approximately $1,044, or 5 percent of the $20,870 total tax liability for that quarter, appellant failed to remit $5,215.[18] On the basis of the foregoing, OTA concludes that respondent correctly imposed the 40 percent penalty. The next question is whether appellant has established grounds for relief of the penalty.

[17] The $1,000 threshold will be higher than the 5 percent threshold until the total amount of the tax liability for which the sales tax reimbursement was collected for the period in which the tax was due exceeds $20,000.

[18] It appears that respondent has mistakenly used "total tax reported", rather than total tax liability to calculate the 5 percent threshold shown in the tables contained in the September 16, 2014 memorandum recommending the 40 percent penalty. This Opinion correctly uses the total tax liability for which the sales tax reimbursement was collected for the period in which the tax was due, which in this case is equal to the total tax reimbursement collected.

Appellant contends that his failure to remit all sales tax for which he collected reimbursement from customers was due to reasonable cause and to circumstances beyond his control and that the failure occurred notwithstanding appellant's exercise of ordinary care and the absence of willful neglect. Appellant asserts that he reported what he thought was accurate information on his SUTRs. Specifically, appellant argues that his failure to report and pay the taxes he collected from his customers arose as a consequence of a faulty POS system, which made it difficult for appellant to calculate taxable sales, and his poor physical and mental health, which made it nearly impossible for him to function at times. In support of the first claim regarding the problematic POS system, appellant has provided a declaration and records that purport to show the numerous times appellant required technical support from the entity that provided such services for the POS system, and testimony from appellant and appellant's brother, who has served as its head chef and on-site manager since before the periods at issue here.

In support of the claim regarding appellant's health, appellant has provided information from appellant's primary care physician, a written report from and the testimony of Dr. Dan Field, appellant's designated expert witness for the medical and related issues, a list of medications purportedly prescribed to appellant during at least some of the years at issue, the testimony of appellant's brother, and appellant's testimony.

The evidence simply does not support appellant's claim that his failure to accurately report and remit all taxes that were due was caused by a malfunctioning POS system. The evidence contains reports produced by that POS system. In fact, according to the audit work papers, appellant had downloaded these reports to a flash drive and provided them to respondent. The reports are detailed, and while it cannot be determined with certainty that all taxable sales are shown on the report, respondent based its determinations on the difference between sales recorded on these reports and taxable sales reported by appellant on his SUTRs. There is nothing in the reports to even suggest that the data contained therein is inaccurate or the result of a problem with the POS system. Literally, all that was required of appellant was that he generate a report after the end of each quarter and transfer the amounts from the report to the SUTR for that quarter.

The technical assistance calls documented by the service provider do not support appellant's claim. According to the evidence, there were 89 calls for technical assistance over a period of six years, four months, and 10 days, far fewer than appellant's brother described in his testimony.[19] Almost all of these appear to have been routine. There was only one call in 2007, none in 2008, five in 2009, and four in 2010. On only one day in that three and one-half year period did appellant make inquiries about what he claims was a crash or virus code.[20] There were 32 calls on 24 different days in 2011, but only two of those involved alleged crash or virus codes. There were 16 calls on 11 different days in 2012 and 31 calls on 26 different days in 2013, but only one in each of those years involved an alleged crash or virus code. Furthermore, there is nothing in the documentary evidence to suggest that the technical support consisted of more than a phone call and a quick fix. Most of the inquiries appear to be routine (e.g., "How do you back up a database?" or "How can I get the reports info from restaunt [sic] to home office?" or "How do I void an order?") Finally, the evidence shows that many of the support requests were more likely due to errors by, or lack of training of, appellant or appellant's employees rather than due to problems with the POS system itself. OTA finds that appellant's difficulties with the POS system do not constitute circumstances beyond appellant's control or reasonable cause for his failure to accurately report and pay the taxes collected from customers in connection with sales totaling $2,604,181.

Appellant's claim that he should be relieved of the penalty because his failure to accurately report and fully pay taxes was due to problems with his physical and mental health is also unpersuasive for a number of reasons. First, there is insufficient medical evidence of a disabling condition. None of the physical maladies described by appellant appear to have prevented him from accurately reporting and remitting the tax reimbursement collected from customers. While the records showing the many psychotropic medications prescribed to appellant are consistent with appellant's argument, those records alone are minimal and not sufficiently persuasive.

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[19] Appellant's brother testified that the POS system crashed "maybe over 100 times" a year.

[20] Appellant testified to what he understood the codes to mean. There is no independent evidence, such as a troubleshooting guide or an owner's manual, to support that testimony.

The minimal information provided by appellant's primary care physician, who is not a psychiatrist and did not diagnose any of the conditions for which the medications were prescribed, adds little.[21] There is no evidence that the doctor knows anything about why the medications were prescribed, whether appellant took the medications as directed, or how the medications or the conditions the medications were intended to treat actually affected appellant's ability to function. It is also important that the doctor's statements are not under oath, and he was not presented as a witness at the hearing where the foundations for his opinions could have been more fully explored.

Dr. Field's report and testimony, when viewed in the context of the other evidence, does not prove that appellant was so impaired during the relevant period that he should not be held responsible for failing to report and remit tax on over 75 percent of his taxable sales. Dr. Field is not a psychiatrist. His specialty is emergency medicine. He did not interview or examine appellant. In his report and testimony, he demonstrated no particular knowledge or insight regarding what appellant was able to accomplish in the management of the business or what was required of appellant to accurately report and remit the sales tax reimbursement collected from customers. According to his report, Dr. Field reviewed the following documents: appellant's opening brief that was filed in this appeal, which included the list of medications dispensed to appellant between June 19, 2007, and November 26, 2011; respondent's supplemental brief; and appellant's primary care physician's written responses to the questions posed by appellant's attorney.

According to Dr. Field's written report, appellant hired him to "opine . . . whether there is evidence of significant potential mental or medical impairment, *which may have affected* Mr. Senehi's cognition, mental capacity, and functioning during the period at issue." (Emphasis added.) In essence, on the basis of a list of medications prescribed to appellant by a psychiatrist that appellant had not seen in over ten years, Dr. Field opined that appellant probably exhibited symptoms of the conditions for which such medications are typically prescribed and that the conditions, the medications, or both could have interfered with appellant's ability to accurately report his tax liability. However, Dr. Field was careful to admit that he cannot state more than

[21] Responding to written questions posed by appellant's attorney, the doctor states that at least one of the prescriptions indicates that appellant suffers from some form of psychosis, that the doctor believes appellant also suffers from depression, anxiety, and attention deficit hyperactivity disorder, and that these conditions can impair the patient's ability to handle complex financial matters.

that it is possible, or in some respects "very possible," that appellant's illnesses affected his ability to comply with the sales and use tax law. The question here, though, is not about possibilities. The question for Dr. Field is whether it is more likely than not that appellant's failure to report and remit tax on approximately 77 percent of his sales was due to his mental impairment and not simply due to appellant's neglect, willful or otherwise. He did not and clearly, he cannot answer that question.

In summary, the credible evidence does not paint a picture of a person crippled by mental and physical illness and incapable of accurately reporting taxable sales and remitting sales tax reimbursement collected from customers. Rather, it paints a picture of a successful restaurant owner who knowingly collected sales tax reimbursement from customers but failed to pay the taxes for which that reimbursement was purportedly collected. Appellant is not entitled to relief of the 40 percent penalty.

Issue 3: Is any part of respondent's determination barred by the statute of limitations?

As relevant here, R&TC section 6487(a) provides that except in the case of fraud or intent to evade, every NOD shall be mailed within three years after the last day of the calendar month following the quarterly period for which the amount is proposed to be determined or within three years after the return is filed, whichever period expires the later.[22] The plain language of this statute indicates that the three-year statute of limitations applies to each reporting period covered by a determination. It is undisputed that the NOD that is the subject of this appeal was not filed within the three-year statute of limitations insofar as it determined liabilities for the period July 1, 2007, through December 31, 2011, which encompasses 18 quarterly reporting periods. Thus, in order for the NOD to be deemed timely for those reporting periods, respondent must prove that appellant intended to defraud the state or evade the payment of tax for at least some portion of each quarterly reporting period from 3Q07 through 4Q11.

[22] Appellant filed quarterly. R&TC section 6487(b) contains a similar limitations period for taxpayers who file annually.

Respondent has not argued otherwise.[23] Although respondent did not impose a fraud penalty here (see *Appeal of ISIF Madfish, Inc.*, *supra*), the three-year statute of limitations is tolled for the period July 1, 2007, through December 31, 2011, only if clear and convincing evidence establishes appellant's fraud or intent to evade for each quarter covered by the NOD. (Cal. Code Regs., tit. 18, § 1703(c)(3)(C); see also *State Bd. of Equalization v. Renovizor's Inc.* (9th Cir. 2002) 282 F.3d 1233, 1240-1241.)

Direct evidence of a taxpayer's fraudulent intent or intent to evade the payment of taxes due is rarely available and is not required. (*Rau's Estate v. Commissioner* (9th Cir. 1962) 301 F.2d 51, 54-55.)[24] The required intent can be proved through circumstantial evidence. (*Bradford v. Commissioner* (9th Cir. 1986) 796 F.2d 303, 307.) An understatement alone may not be sufficient to warrant finding of fraud, but repeated understatements in successive years, combined with other circumstances showing intent to conceal or misstate taxable income, provides a sufficient basis for a finding of fraud. (*Appeal of ISIF Madfish, Inc.*, *supra*, citing *Rau's Estate v. Commissioner*, *supra*.) Other indications of fraud include inadequate records, failure to file SUTRs, implausible or inconsistent explanations of behavior, concealment of assets, failure to cooperate with tax authorities, and a taxpayer's lack of credibility. (*Appeal of ISIF Madfish, Inc.*, *supra*.)

Appellant denies that he ever intended to defraud the state or evade the payment of taxes. Appellant's arguments regarding the alleged fraud are the same as those already discussed in connection with the Issue 2, above. Appellant asserts that he reported and paid the tax that he believed was due; and that underpayments, if any, were due to a malfunctioning POS system, appellant's physical and mental illnesses, and possibly negligence, but not due to intent to evade or defraud. Citing *Hollman v. Commissioner* (1962) 38 T.C. 251, 258, appellant argues that he

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[23] While the above interpretation may appear to conflict with R&TC section 6485, which requires imposition of a fraud penalty if *any part* of the deficiency for which a deficiency determination is made is due to fraud or an intent to evade, there is no real conflict. Section 6485 clearly contemplates imposition of a fraud penalty calculated on an entire deficiency on the basis of a finding of fraud or intent to evade the payment of tax for any reporting period within the longer period for which an NOD is issued. R&TC section 6487 clearly contemplates tolling of the three-year statute of limitations only for the reporting periods for which fraud or evasion has been shown. Section 6485 deals with the imposition of the fraud penalty, not with the tolling of the statute of limitations. Respondent usually issues NODs covering multiple reporting periods. To allow the statute of limitations to be tolled for an entire period for which a deficiency determination is made on the basis of fraud or evasion occurring at any time within that period would subvert the policies served by the statute of limitations.

[24] Because there are few cases that discuss R&TC section 6485, OTA considers, by analogy, the standards that apply under Internal Revenue Code section 6633, the federal income tax fraud penalty.

cannot be found to have had fraudulent intent or an intent to evade the payment of taxes due because at all times in question, appellant suffered from severe mental illness, including psychosis, which caused or substantially contributed to the cause of his failures to accurately report taxes due.

This Opinion will not reiterate here its findings and conclusions regarding appellant's POS system and appellant's physical and mental health. Those arguments were rejected above, concluding that appellant's failure to report most of his taxable sales was not due to reasonable cause or circumstances beyond appellant's control, and those failures did not occur notwithstanding appellant's exercise of ordinary care and the absence of his willful neglect. The question that remains is whether fraud or intent to evade taxes for any of the periods at issue has been established by clear and convincing evidence.

Appellant is a successful restauranteur. Appellant's restaurant has remained in business since June 2007, over 16 years, surviving both the Great Recession of 2007 through 2009 and the recent COVID-19 pandemic. This shows that appellant has a level of business acumen that belies his claim that physical and mental disabilities substantially interfered with his financial management skills.[25] The evidence shows that appellant understood his obligation to accurately report taxable sales, that he had the required information readily available in his POS system, and that, despite the ease with which appellant could have accurately reported his tax due, appellant could not provide a credible explanation of how he completed his SUTRs or how he consistently and substantially underreported taxable sales.

Appellant's POS system produced detailed reports that contained the information appellant needed to accurately report taxable sales. It contained the information about sales tax reimbursement collected from customers. Little more was required of appellant than report the totals that would appear on the POS reports. If appellant was having difficulties with sales and use tax reporting, OTA would expect to find customer support inquiries about that. None of the 91 customer support calls appellant made for assistance with the POS system inquired about producing reports to assist with sales and use tax reporting or about tax reporting at all.

It is also important to note that appellant did not deposit into the business bank account most of the cash receipts from sales. While appellant testified that cash receipts were "minimal,"

[25] It is unlikely that the purported disabilities would have interfered only with appellant's ability to accurately report and pay taxes.

that testimony is not credible. The ratio of appellant's cash sales to total sales likely would have been at least twenty times that revealed by appellant's bank deposits in 2011 and 2012, when cash deposits made up less than 1 percent of the receipts deposited, and four to five times the ratio shown by the bank deposits for 2013. And these were the years during which appellant's average quarterly unreported measures were less than 42 percent of what they were during the extended audit period.[26] While appellant admits that he might have used a small amount of cash receipts to pay operating expenses, the evidence indicates that appellant did not deposit significant cash receipts and, in all likelihood, did not include them in reported taxable sales.[27]

In addition, appellant's underreporting was substantial: over $2.6 million for the liability period. Appellant failed to report $1,937,219 in taxable sales and failed to remit over $160,000 in sales tax reimbursement that he collected from his customers for the extended audit period. Appellant reported less than 23 percent of taxable sales for that period. While there was a sudden and significant drop in unreported measures during 2011,[28] the measures were not de minimis, with $68,050 in sales tax reimbursement collected from customers in 2011 but only $49,365 reported.[29] In other words, appellant failed to report and remit $18,685 in sales tax reimbursement collected from customers in 2011. There also was underreporting in every quarter at issue, between $112,887 (1Q09) and $166,539 (3Q07) during the extended audit period, and between $48,159 (2Q11) and $66,374 (4Q11) during 2011.

On the basis of the clear and convincing evidence of appellant's fraud or intent to evade the payment of tax, OTA finds that no part of respondent determination is barred by the statute of limitations.

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[26] The evidence does not contain bank records for the extended audit period.

[27] Appellant also did not include all credit card sales in reported taxable sales.

[28] The 2011 tax year was the first year for which the IRS required merchant service entities to provide 1099-Ks to report their merchants' payment card transactions.

[29] The evidence does not explain this precipitous drop, which persisted through the remainder of the liability period.

HOLDINGS

1. No adjustment to either measure of unreported taxable sales is warranted.
2. Relief of the 40 percent penalty is not warranted.
3. No part of respondent's determination is barred by the statute of limitations.

DISPOSITION

Respondent's action denying appellant's petition for redetermination is sustained.

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Michael F. Geary
Administrative Law Judge

We concur:

DocuSigned by:
Josh Lambert
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Josh Lambert
Administrative Law Judge

DocuSigned by:
272945E7B372445...
Andrea L.H. Long
Administrative Law Judge

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