OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 19105325
B & L DINERS, INC.	CDTFA Case IDs: 062-162, 062-164, 062-165, 062-168, 062-167

OPINION

Representing the Parties:

For Appellant: David Dunlap Jones, Attorney

For Respondent: Sunny Paley, Attorney

For Office of Tax Appeals: Corin Saxton, Attorney

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) sections 6561 and 6901, B & L Diners, Inc. (appellant) appeals a September 4, 2019 Revised Decision (Decision) issued by the California Department of Tax and Fee Administration (respondent)[1] denying appellant's petitions for redetermination of five Notices of Determination (NODs) and appellant's claims for refund for payments made towards these NODs. Listed in the order in which they were issued, these NODs consist of: (1) a June 29, 2009 NOD for the period October 1, 2005, through September 30, 2008 (liability period 2[2]), for $353,011 tax, a 10 percent negligence penalty of $35,301, and accrued interest;[3] (2) a September 13, 2017 NOD for the period October 1, 2008, through December 31, 2009 (liability period 3), for $32,729 tax, a

[1] Sales and use taxes (and other business taxes and fees) were formerly administered by the State Board of Equalization (board). In 2017, the California Legislature transferred most of the board's administrative (i.e., non-adjudicatory) functions to respondent effective July 1, 2017. (Gov. Code, § 15570.22.) When this Opinion refers to events that occurred before July 1, 2017, "respondent" refers to the board.

[2] This period is identified as liability period 2 because it is the second liability period in time, chronologically. As explained later in this Opinion, the relevant periods are: July 1, 2002, through September 30, 2005 (liability period 1); October 1, 2005, through September 30, 2008 (liability period 2), which respondent later broke down to two periods (2a and 2b); October 1, 2005, through December 31, 2006 (liability period 2a); January 1, 2007, through September 30, 2008 (liability period 2b); and October 1, 2008, through December 31, 2009 (liability period 3).

[3] Amounts are rounded to the nearest dollar, which results in insignificant differences in some totals.

40 percent penalty of $13,091 for failing to remit sales tax reimbursement collected from customers (40 percent penalty), and accrued interest;[4] (3) a December 8, 2017 NOD for the period July 1, 2002, through September 30, 2005 (liability period 1), for $372,898 tax, a 25 percent fraud penalty of $93,225, an amnesty double fraud penalty of $5,171, and accrued interest;[5] (4) a January 16, 2018 NOD for the period October 1, 2005, through December 31, 2006, (liability period 2a), which deleted the negligence penalty for that period (see above) and instead imposed a fraud penalty, thus increasing the penalty amount by approximately $1,742; and (5) a January 16, 2018 NOD for the period January 1, 2007, through September 30, 2009 (liability period 2b), which deleted the negligence penalty for that period (see above) and instead imposed a 40 percent penalty of $75,022, thus increasing the penalty by approximately $56,267.[6]

Appellant did not timely appeal the NODs issued on January 16, 2018. On March 2, 2018, respondent sent appellant a Demand for Immediate Payment (Demand), which notified appellant that respondent would impose a collection cost recovery fee (CCRF) if appellant failed to pay the liability. When appellant did not pay the determined liability in full, respondent imposed a $950 CCRF.

This matter was scheduled for a virtual hearing before the Office of Tax Appeals (OTA) on September 30, 2022. The parties appeared for the hearing; however, at the start of the hearing, appellant waived its right to an oral hearing, and the parties agreed to submit the matter to OTA on the basis of the written record.

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[4] Respondent determined the deficiency and imposed the penalty for the fourth quarter of 2008 only.

[5] California established a tax amnesty program in 2004. (See R&TC §§ 7070, et seq.) As relevant here, the program allowed taxpayers to avoid penalties and possible criminal liability by coming forward during February or March 2005 to voluntarily report (and pay or agree to pay within 60 days) previously unreported taxes due for periods prior to January 1, 2003. Respondent sent multiple notices regarding the amnesty program to all seller's permit holders prior to the application window.

[6] The January 16, 2018 NODs are based on a reaudit that reduced the deficiency measure for liability period 2a from $4,554,985 to $4,331,997. However, as discussed below, appellant's tax liability for this period was satisfied by a July 29, 2009 escrow payment. Therefore, the January 16, 2018 NODs reflect offsets stemming from the July 29, 2009 escrow payment: A payment of $1,742.31 was applied to the liability period 2a (satisfying this liability in full), and a payment of $18,847.75 was applied to the liability period 2b, reducing this liability to $56,174.65.

ISSUES[7]

1. Does the evidence establish appellant's fraud or intent to evade the Sales and Use Tax Law and regulations[8] by clear and convincing evidence for each of the reporting periods for which respondent determined a deficiency but did not timely issue an NOD?[9]
2. Are adjustments to the determined liabilities warranted?[10]
3. Does A. Beri's restitution payment bar the liabilities at issue?[11]
4. Is appellant entitled to relief of the 40 percent penalty?
5. Is appellant entitled to relief of the amnesty double fraud penalty?
6. Is appellant entitled to relief of interest?
7. Is appellant entitled to relief from the CCRF?

FACTUAL FINDINGS

1. Appellant, a California corporation, operated four Denny's restaurants in Southern California during the liability periods at issue.
2. For the liability periods at issue, appellant reported gross or total sales of $26,569,716 and claimed deductions for nontaxable food sales of $8,019,144 and sales tax reimbursement included in total sales of $1,334,262, leaving taxable sales of $17,216,910. Total sales excluding sales tax reimbursement was $25,235,454.
3. Appellant's president, A. Beri, and appellant's vice president, R. Luthra, are also the president and vice president, respectively, of a related entity, Delco Enterprises, Inc.,

[7] During the prehearing conference (PHC), OTA and the parties identified Issues 1, 2, 3, and 5 only. While the PHC Minutes and Orders (M&O) did not identify Issues 4 6, or 7, above, those issues were addressed in respondent's Decision. OTA will address them in this Opinion out of an abundance of caution given that appellant has not expressly waived those issues.

[8] Hereinafter, this Opinion will use "fraud" to refer to "fraud or an intent to evade the Sales and Use Tax Law and regulations."

[9] The June 29, 2009 NOD was timely issued because appellant signed a waiver of the otherwise applicable three-year statute of limitations, which allowed respondent until July 31, 2009, to file an NOD for the period October 1, 2005, through March 31, 2006. The other four NODs will be barred in their entirety, absent clear and convincing evidence of fraud.

[10] The PHC M&O identify Issue 2 as follows: "Whether any adjustments are warranted to the determined measure of tax." While measure is a meaningful term when unreported taxable sales are at issue, it is an unnecessary and sometimes artificial complication when excess sales tax is at issue. The language used here for Issue 2 allows for a more specific analysis of the various components of the asserted liability.

[11] A. Beri was the majority owner and manager of appellant.

which operated two Del Taco restaurants in Southern California during the liability periods at issue.[12] A. Beri was also the president of A. Beri Corporation (ABC), which operated five Subway sandwich restaurants in southern California during the liability periods at issue.[13]

4. Appellant's bookkeeper prepared the sales and use tax returns (SUTRs) for appellant, Delco Enterprises, Inc., and ABC.
5. Appellant operated its Denny's restaurants under a franchise agreement with franchisor Denny's Inc., which required its franchisees, including appellant, to use an automated point of sale (POS) system, which tracked sales and tax data and automatically transmitted this data to the franchisor in weekly sales reports (WSRs).[14]
6. Respondent began an audit of appellant in late 2008 for liability period 2. According to the Decision, appellant denied respondent access to its books and records and failed to provide supporting documentation to substantiate $4,554,985 in claimed nontaxable food sales.[15] As a result, respondent issued a January 21, 2009 audit report that disallowed all claimed nontaxable food sales for liability period 2 and imposed a 10 percent negligence penalty.
7. On June 29, 2009, respondent issued a timely NOD to appellant for the liability disclosed by the audit for liability period 2, plus applicable interest.
8. Appellant filed a timely petition for redetermination of the June 29, 2009 NOD.
9. By July 31, 2009, appellant's liability for liability period 2 was paid in full, and shortly thereafter appellant filed a timely claim for refund of the payments made for liability period 2.
10. In the course of a sales and use tax audit of a related entity controlled by A. Beri, respondent discovered what it suspected to be fraudulent sales tax reporting. Thus, what

[12] Appellant's seller's permit and Delco Enterprises, Inc.'s seller's permit were closed effective December 31, 2009, when the owners transferred the businesses to B&L Group, LLC.

[13] ABC held a seller's permit for the period December 1, 2002, through December 31, 2016.

[14] A point-of-sale system typically includes one or more terminals, which are the modern equivalent of a cash register. Depending on the equipment and software, POS systems can generate reports that summarize sales activity for the period of time selected by the operator. These reports can include breakdowns of sales by type and amount, including product or service, credit or cash, and taxable or nontaxable.

[15] Appellant's claimed nontaxable food sales constituted 32.22 percent of reported total sales.

began as a routine business tax audit became, at least for respondent, a criminal investigation involving multiple entities. That investigation widened to include multiple entities owned (at least in part) and controlled by A. Beri (Beri entities). Appellant was one of those entities.

11. On or about January 19, 2011, respondent began its fraud investigation of appellant and other Beri entities. On June 23, 2011, respondent and the California Highway Patrol executed search warrants and seized computers, a cell phone belonging to A. Beri, and over 400 boxes of records.[16]

12. On August 1, 2011, as a result of the execution of a search warrant at an office of appellant's franchisor, Denny's, Inc., respondent seized appellant's WSRs for the period October 1, 2002, through December 31, 2009.

13. Respondent's forensic examination of the seized computers disclosed appellant's detailed financial statements, including appellant's fourth quarter 2008 (4Q08) internal sales reports, which indicated appellant had collected sales tax reimbursement during that quarter totaling $93,713. In its SUTRs for that quarter, appellant reported sales tax totaling $68,458.

14. Respondent's forensic examination of A. Beri's cell phone revealed text messages evidencing A. Beri's attempts, with the assistance his employees, including appellant's bookkeeper, to interfere with and distort the results of an observation test being conducted by respondent for an audit of ABC. These texts show that A. Beri instructed ABC employees to pretend to be regular customers and make purchases of nontaxable items.[17] The text messages indicate that A. Beri monitored the ratio of nontaxable sales made during the observation test, with the intention of artificially inflating it.

[16] The search warrants authorized searches at A. Beri's residence and office; the office of appellant's accountant; the residence of appellant's bookkeeper; and a storage unit, which the bookkeeper disclosed during the search of the bookkeeper's home.

[17] For example, A. Berri sent the following text to multiple employees, including appellant's bookkeeper: "Just want to give you another advance notice on observation for Subway on Rosecrans and La Mirada. It will be tomorrow night (5pm-10pm) and Thursday (9am to 5 pm) can you personally line up 7 different people for each day. I will be coordinating the whole thing. Please call me or text me if you got any questions." During the same time frame, he texted: "Let me know when you get done with your people . . . I'm monitoring numbers to make sure we are within the range."

15. The California Attorney General's office filed a 66-count criminal complaint against A. Beri, appellant, several Beri entities, and others.[18] On November 30, 2015, a preliminary hearing concluded in the matter of *The People of the State of California vs. A. Beri, et al.*, Orange County Superior Court Case No. 16CF1378. According to the court transcript, R. Luthra testified during the preliminary hearing that he approached A. Beri on more than one occasion to discuss underreporting, but A. Beri dismissed his concerns.[19] The court transcript also shows that R. Luthra testified that he was aware that the corporate entities denied respondent access to records.[20]

16. On November 1, 2016, A. Beri, as an individual, and ABC executed a plea agreement with the California Attorney General's office. A. Beri and ABC both agreed to plead guilty to tax evasion (Count 63) for filing false SUTRs for the period January 1, 2010, through December 31, 2010, with the intent to defeat or evade the tax due. This charge was punishable as a felony or misdemeanor.[21]

17. As part of the same plea agreement, A. Beri also pled guilty to felony tax evasion as charged in Count 65, unlawfully filing false or fraudulent SUTRs for the period January 1, 2010, through December 31, 2010, with the intent to defeat or evade the tax due, in the amount of $25,000 or more.

18. A. Beri signed the plea agreement and related forms under penalty of perjury, declaring his understanding that the signed and filed forms constituted conclusive evidence of the guilty plea.

19. During and for the purposes of the criminal proceedings, respondent established that the criminal defendants, including appellant, owed a total of $3,021,059 in tax for the period

[18] As relevant here, the criminal complaint charged the defendants with tax evasion in violation of R&TC section 7153.5.

[19] The court stated during the hearing that "Mr. Luthra testified that when he realized there was under reporting or there was something fishy going on with the books regarding the company he was involved with, he did approach Mr. Beri. Mr. Beri provided some sort of a response like, 'trust me, everyone does it this way,' and that was on more than one occasion."

[20] The court stated during the hearing that "[R. Luthra] testified that he was aware that the corporate entities were telling the Board of Equalization the documents the Board was requesting didn't exist when he, in fact, knew and the company—we can infer that the company knew that those documents did, in fact, exist."

[21] A. Beri pled guilty to a misdemeanor, and ABC pled guilty to a felony.

January 1, 2003, through December 31, 2010.[22] The court ordered A. Beri serve 270 days confinement on home monitoring on the misdemeanor count and to pay restitution to respondent on all counts in the amount of $3,021,059 "even if any of these counts have been dismissed as part of a plea agreement." The plea agreement included provisions for delayed sentencing on the felony tax evasion guilty plea and dismissal of the felony tax evasion count upon payment of the restitution in full within 18 months of the plea. The court froze A. Beri's assets pending payment of the criminal restitution in full.

20. A. Beri timely paid the $3,021,059 in restitution, and the felony count against him was dismissed.

21. On September 13, 2017, respondent issued the second NOD to appellant for $32,729 in tax, a 40 percent penalty of $13,091, and interest for liability period 3. The NOD was based on a deficiency measure of $414,062 for unreported taxable sales during 4Q08 only, based on the difference between recorded taxable sales and reported taxable sales. Respondent identified recorded taxable sales by capitalizing the sales tax reimbursement collected according to the WSRs obtained from Denny's, Inc. Respondent deducted the $869,340 in taxable sales appellant reported on its SUTRs from recorded taxable sales of $1,283,402 to calculate the measure.

22. According to the audit workpapers, for periods beginning January 1, 2009, and continuing thereafter for the remainder of liability period 3, respondent's calculation of taxable sales based on the WSRs that appellant sent to the franchisor showed reported taxable sales in excess of taxable sales recorded on the WSRs.[23] Respondent did not allow appellant a credit for those amounts. A comment contained in respondent's workpapers indicate that respondent believed that the increased reporting was a response to the audit that began months earlier, and that a credit was not allowed because "the available records in this audit do not show how reported sales and tax were compiled."

[22] The restitution was as follows: (1) ABC, $1,842,078; (2) B&L Diners, Inc. dba Denny's, $229,670; (3) Beri Restaurants Group, Inc., dba Subway, $760,281; (4) Beri Foods Group, Inc., dba Subway, $153,693; and (5) Delco Enterprises, Inc., dba Del Taco $35,337.

[23] The differences for 1Q09, 2Q09, 3Q09, and 4Q09 were $8,142, $8,529, $4,864, and $25,954, respectively.

23. Appellant petitioned the NOD and filed a claim for refund for payments made towards the NOD.[24]

24. On December 8, 2017, respondent issued the third NOD to appellant for $372,898 in tax, a 25 percent fraud penalty of $93,224, an amnesty double fraud penalty of $5,171, and applicable interest for liability period 1, based on a deficiency measure of $4,811,586 for unreported taxable sales. Respondent established the measure by deducting reported taxable sales of $8,328,981 from recorded taxable sales of $13,140,568, which it determined by capitalizing the sales tax listed in the WSRs obtained from Denny's Inc. (for the period October 1, 2002, through September 30, 2005) and the sales tax shown in data taken from R. Luthra's computer (for 3Q02).[25]

25. Appellant petitioned the NOD and filed a claim for refund for payments made towards the NOD.[26]

26. On January 16, 2018, respondent issued the fourth and fifth NODs to appellant. Respondent redetermined the measure of unreported taxable sales for liability period 2 totaling $4,331,997 by deducting reported taxable sales of $8,892,328 from taxable sales recorded in the WSRs (determined by capitalizing recorded sales tax reimbursement collected) totaling $13,224,325.[27] Respondent deleted the previously imposed negligence penalty and split liability period 2 into two liability periods: liability period 2a, for which respondent imposed a 25 percent fraud penalty in lieu of the negligence penalty; and liability period 2b, for which respondent imposed a 40 percent penalty in lieu of the negligence penalty.

27. Appellant did not timely petition these NODs, but respondent accepted a June 22, 2018 letter from appellant as an administrative protest. The January 16, 2018 NODs went final on February 15, 2018. On March 2, 2018, respondent issued a Demand , and on

[24] As of July 18, 2017, restitution payments totaling $32,729 were applied to this NOD, leaving only the penalty and interest unpaid.

[25] Respondent used the sales tax shown in data taken from R. Luthra's computer for 3Q02 because Denny's, Inc. did not provide WSRs for 3Q02.

[26] Between July 18, 2017, and October 30, 2017, restitution payments totaling $372,897.98 were applied to this NOD, leaving only the penalties and interest unpaid.

[27] This redetermination resulted in a reduction to the tax liability established in the original audit, but the resulting reduction of tax was more than offset by the increase in the penalty amounts, some of which remain unpaid.

August 2, 2018, respondent imposed a $950 CCRF due to appellant's failure to pay the January 16, 2018 NOD for liability period 2a within the time frame set forth in respondent's Demand.

28. On April 5, 2019, the parties participated in an appeals conference as part of respondent's internal appeals process.

29. On June 7, 2019, appellant submitted to respondent a request for relief of penalties and the CCRF.

30. On September 4, 2019, respondent issued the Decision denying, as relevant here, appellant's appeals, its claims for refund, and its request for penalty relief.

DISCUSSION

Issue 1: Does the evidence establish appellant's fraud by clear and convincing evidence for each of the reporting periods for which respondent determined a deficiency but did not timely issue an NOD?[28]

Only the first NOD (for liability period 2) was issued timely. The others will be barred by the three-year statute of limitations unless clear and convincing evidence establishes fraud in at least some portion of every reporting period that would otherwise be barred. (*Appeal of Senehi*, 2023-OTA-446P.) Fraud is intentional wrongdoing on the part of the taxpayer with the specific intent to avoid a tax known to be owed. (*Bradford v. Commissioner* (9th Cir. 1986) (*Bradford*) 796 F.2d 303, 307.) Fraud must be established by clear and convincing evidence. (Cal. Code Regs., tit. 18, § 1703(c)(3)(C); *State Bd. of Equalization v. Renovizor's Inc.* (9th Cir. 2002) 282 F.3d 1233, 1241; *Marchica v. State Bd. of Equalization* (1951) 107 Cal.App.2d 501, 508.) However, this does not mean that respondent must prove every contested fact by clear and convincing evidence. (*Appeals of Jafari and Corona Motors, Inc.*, 2023-OTA-401P.) Rather, OTA looks to the totality of the evidence to determine whether respondent has met its burden. (*Ibid.*)

Although fraud may not be presumed, it is rare to find direct evidence that fraud has occurred, and thus it is often necessary to make the determination based on circumstantial evidence. (*Bradford, supra*, 796 F.2d at p. 307; *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18,

[28] OTA addresses the fraud issue first because it is potentially dispositive of the bulk of the appeal, and because many of the arguments appellant makes in connection with other issues are also made in connection with the fraud issue.

30.) Where there is a substantial deficiency that cannot be explained satisfactorily as being due to an honest mistake or to negligence and where the only reasonable explanation is a willful attempt to evade the payment of tax, the penalty for fraud or intent to evade the tax should apply. (*Bradford*, *supra*, 796 F.2d at p. 307.)

Certain facts or actions are by nature evidence of a deliberate attempt to evade the payment of tax, including falsified records and failure to follow the requirements of the law, the knowledge of which is evidenced by permits or licenses held by the taxpayer in prior periods. (*Bradford*, *supra*, 796 F.2d at p. 307.) Circumstantial evidence of intent to evade taxation includes, but is not limited to: substantial discrepancies between recorded amounts and reported amounts which cannot be explained (the indication that a deficiency is due to intent to evade increases in direct proportion to the ratio of the understatement); tax or tax reimbursement properly charged, evidencing knowledge of the requirements of the law, but not reported; inadequate records; failure to cooperate with tax authorities (*Bradford*, *supra*, 796 F.2d at p. 307); and consistent, substantial understatements of income (*Powell v. Granquist* (9th Cir. 1958) 252 F.2d 56, 60).

Respondent's position is that appellant was just one player in a massive tax fraud orchestrated by A. Beri, with the assistance of others. It contends that A. Beri, with the assistance of employees and others, caused appellant and other Beri entities to consistently underreport taxable sales by substantial amounts. In support of its assertions, respondent relies principally on business records obtained from the franchisors of the businesses operated by appellant and other Beri entities. These records evidence taxable sales far in excess of those reported by appellant and the other entities. Here, respondent also relies on other circumstances or events, which respondent contends further evidence fraud, including:

- Internal sales reports for 4Q08, which also evidence underreporting;
- Appellant's refusal to provide business records for audit;
- A. Beri's and ABC's guilty pleas;
- R. Luthra's testimony and other statements regarding his conversations with A. Beri about possible underreporting;
- Recorded versus reported differences; and
- A. Beri's efforts to interfere with and distort the results of respondent's observation tests.

Appellant argues that OTA should not consider the WSRs or the 4Q08 internal sales reports because these documents lack adequate evidentiary foundation, including authentication, and were obtained by respondent through an illegal search and seizure and in violation of R&TC section 19504.7 and respondent's "operations manual."[29] It contends that the WSRs are unreliable evidence of taxable sales, as suggested by an email from the Subway Restaurants franchisor, which states, in part, that "the data must be interpreted with caution. . . . the columns headed 'POS Sales' and 'Sales Tax' are less accurate, as some weeks may not be represented fully with a data upload from the stores."[30] Appellant asserts that it did not refuse to provide business records for audit and asserts that it did provide records, including actual to-go receipts showing that many of the transactions at issue – ones that respondent claims were taxable – were, in fact, nontaxable sales to go.

Appellant alleges that, regardless of what A. Beri or ABC did in connection with the criminal matter, appellant did not plead guilty to any criminal charges, and the pleas by other criminal defendants have no bearing on this appeal and are not admissible as admissions against this appellant's interests. Appellant argues that the fact that the criminal charges lodged against it were dismissed is evidence that it did not commit fraud, and that the felony charge against A. Beri should not be considered for any purpose because it, too, was ultimately dismissed.[31] It also contends that the restitution payment bars respondent from asserting any additional liability pursuant to R&TC section 7157(a)(2).

In addition, appellant argues that respondent conducted an observation test of one of its locations but prematurely ended the test when it could not find a "smoking gun." Appellant asserts that respondent "cherry-picked" business records that supported its alleged deficiency while ignoring others that showed appellant accurately reported its sales tax due. It contends that

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[29] Appellant cites to what purports to be page 10 from Operations Memo No. 1162 dated November 17, 2010, which states, in part, "The auditor may not remove records from the taxpayer's or representative's premises without permission from the taxpayer or designee."

[30] Respondent determined deficiencies for other Beri entities on the basis of reports made to the Subway franchisor.

[31] The dismissals of the charges against appellant and the felony charge against A. Beri are immaterial. They reflect opinions, the bases for which are not shown by the evidence in the record. A. Beri's plea, on the other hand, is in evidence and constitutes an admission against interest, which is clearly relevant to the issues presented in this appeal. (See *Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd.* (1962) 58 C.2d 601, 605.) Appellant had an opportunity to provide evidence for OTA to consider when deciding the weight to give to that plea. It provided no such evidence.

unlike the Subways, the franchisor data for all periods show daily sales but not sales tax collected.

Appellant also asserts that at the time the taxes at issue were reported, it and the other Beri entities used what appellant refers to as a "minimum threshold percentage" for taxable sales. Appellant offers a declaration from its bookkeeper to explain. The declaration refers to worksheets created to verify the tax collected was above a "minimum threshold percentage," but the declaration does not explain to what the quoted term refers. However, the evidence also includes a Memorandum of Interview (MOI) of R. Casey, an employee of A. Beri, which purports to be summary of a statement made to respondent's investigators. According to the MOI, R. Casey held various positions including manager and training manager, and R. Casey's managerial duties included working on various financial documents. The MOI indicates that the minimum threshold percentage for taxable sales was twice the soda sales, or approximately 18 percent. Appellant argues that it believed it was required to report a percentage of taxable sales that were greater than or equal to the minimum threshold percentage and that appellant's underreporting was the result of an innocent and good faith attempt to comply with that requirement. The underreporting, it claims, was the result of accounting staff mistakes, not fraud. Finally, appellant argues that respondent assumed in its Decision that all of appellant's sales were subject to tax and on the basis of that incorrect assumption concluded that any evidence of nontaxable sales was evidence of fraud.

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.) To establish the deficiencies at issue, respondent relied on sales tax reimbursement data provided by appellant to its franchisor, an independent third party who had a direct interest in and demanded accuracy in connection with appellant's reporting of the data. In other words, respondent used a direct audit methodology based on appellant's own record of sales tax reimbursement collected from customers. A direct audit methodology is one that enables respondent to determine taxable sales directly from the taxpayer's business records without estimates or extrapolation, such as by simple tabulation of taxable sales evidenced by sales invoices, cash register tapes, or, as in this instance, recorded sales tax reimbursement collected. A direct audit approach based on complete and accurate business records is generally

expected to be the most accurate. OTA finds that the WSRs provided by Denny's, Inc. constitute clear and convincing evidence of the sales tax reimbursement appellant collected from its customers.

When an amount represented by a retailer to a customer as constituting reimbursement for sales taxes due is computed upon an amount that is not taxable or is in excess of the taxable amount and is actually paid by the customer to the retailer, the amount so paid is excess tax reimbursement. (R&TC, § 6901.5; Cal. Code Regs., tit. 18, § 1700(b)(1).) Excess tax reimbursement is charged when reimbursement is computed on a transaction which is not subject to tax, when tax reimbursement is computed on an amount in excess of the amount subject to tax, when tax reimbursement is computed using a rate higher than the rate imposed by law, and when mathematical or clerical errors result in an overstatement of the tax reimbursement on a billing. (Cal. Code Regs., tit. 18, § 1700(b)(1).) Generally, the retailer will be afforded an opportunity to refund the excess tax to the customers from whom it collected the excess tax reimbursement, at least when such refund can, as a practical matter, be accomplished. (Cal. Code Regs., tit. 18, § 1700(b)(2).) When the retailer does not refund the excess sales tax to the customers who paid it, the retailer must pay the excess tax reimbursement to the state. (R&TC, § 6901.5; Cal. Code Regs., tit. 18, § 1700(b)(1).)

Examining the audit periods in chronological order (as opposed to the order in which respondent issued NODs), respondent's comparison of WSR data to taxable sales actually reported by appellant reveals that for liability period 1,[32] appellant failed to report $373,286 in sales tax reimbursement collected from customers. Respondent calculated that appellant substantially underreported sales tax reimbursement collected from customers for every reporting period in liability period 1, with the lowest underreported amount being $8,147 (the equivalent being taxable sales of $100,115) for 4Q02 and the highest underreported amount being $42,264 (the equivalent being taxable sales of $545,350) for 3Q03. The evidence is also compelling for liability period 2,[33] when appellant continued to underreport substantial sales tax reimbursement (totaling $335,725) collected from its customers for every reporting period, the lowest amount being $106,008 for 2Q08 and the highest being $528,272 for 1Q08. The underreporting

[32] As a reminder, liability period 1 is July 1, 2002, through September 30, 2005.

[33] Liability period 2 is October 1, 2005, through September 30, 2008.

continued for 4Q08, the first reporting period in liability period 3,[34] for which appellant's reports to the franchisor indicated sales tax reimbursement collected of $101,187,[35] but appellant reported to respondent that it collected sales tax reimbursement of only $68,458, a difference of $32,729.[36]

The results of respondent's analysis constitute clear and convincing evidence of appellant's consistent and substantial underreporting for all reporting periods for which respondent determined a liability. For six and a half years (July 1, 2002, through December 31, 2008), appellant consistently reported to its franchisor the amount of sales tax reimbursement it collected from its customers on a weekly basis. Approximately every three months, appellant reported far lesser amounts to respondent, in effect keeping for itself money that should have been paid to the state, either because it was sales tax due on taxable sales that appellant failed to report or because it was excess sale tax that could not, as a practical matter, be returned to appellant's customers. Appellant underreported for every quarter from 3Q02 through 4Q08. That underreporting totaled $9,557,645, for a quarterly average of $367,602. This pattern of consistent and substantial underreporting did not change until appellant's SUTRs came under scrutiny in the initial audit. Using the same analysis that it used to determine the deficiency, respondent found that, beginning with its SUTR for 1Q09, appellant began reporting more in taxable sales than it reported to the franchisor: $8,142 for 1Q09, $8,529 for 2Q09, $4,864 for 3Q09, and $25,954 for 4Q09. This evidence indicates that appellant adjusted its reporting practices because of that scrutiny. Appellant has not provided an adequate explanation regarding how it reported taxes due. A. Beri did not testify, and OTA finds that the declarations of appellant's bookkeeper and other purported witnesses are not persuasive because they lack sufficient detail and supporting documentation.

In addition to the consistent and substantial underreporting that appears to have been intentional, A. Beri admitted in his plea that he filed fraudulent SUTRs for 2010. The deficiencies for the 2010 reporting periods were based on the same kind of evidence that has been presented in this appeal, albeit from a different franchisor. The evidence shows that A. Beri

[34] Liability period 3 is October 1, 2008, through December 31, 2009.

[35] Financial reports on R. Luthra's computer indicated sales tax reimbursement collected of $93,713.

[36] Respondent accepted appellant's reported taxable amounts for 1Q09 through 4Q09. Consequently, there is no liability for 2009.

was engaged in a pattern of conduct that was intended to enable all the Beri entities, and through them, A. Beri himself, to keep millions of dollars that rightfully belonged to the State of California. R. Luthra, one of A. Beri's partners, was concerned about appellant's underreporting, which he could see from records on his computer, and appellant's refusal to provide documents to respondent in the initial audit. When he asked A. Beri about these matters, A. Beri deflected the inquiry. Finally, there is the matter of A. Beri's intentional interference with respondent's investigation by creating fraudulent data that A. Beri hoped respondent would consider in its observation test.

Appellant's argument that it was unreasonable for respondent to rely on the records that were discovered as a result of the searches and seizures conducted during the criminal investigation of the Beri entities is unpersuasive. The validity of the search warrants was a matter for the criminal court, not OTA. OTA is not a court. (Gov. Code, § 15672(b).) It is an administrative tribunal whose jurisdiction is specifically delineated by statute and regulation. OTA's primary responsibilities are to process and decide taxpayers' administrative appeals. (Govt. Code, §§ 15672(a), 15674.) It does not have the jurisdiction to decide whether a taxpayer is entitled to a remedy for respondent's actual or alleged violation of any substantive or procedural right to due process under the law, unless the violation affects the adequacy of a notice, the validity of an action from which a timely appeal was made, or the amount at issue in the appeal. (Cal. Code Regs., tit. 18, § 30104(e).)

Regarding appellant's objection that the documents relied upon by respondent, including appellant's financial reports covering 4Q08 and the data obtained from the franchisor, lack adequate evidentiary foundation, including authentication, rules relating to evidence and witnesses contained in the California Evidence Code and California Code of Civil Procedure do not apply to proceedings before OTA. (Cal. Code Regs., tit. 18, § 30214(f).) Generally, all relevant evidence is admissible (Cal. Code Regs., tit. 18, § 30214(f)(1)), though the panel may use the rules of evidence to determine the weight to be given to evidence (Cal. Code Regs., tit. 18, § 30214(f)(4)). OTA finds that appellant's financial reports covering 4Q08 and the data obtained from the franchisor is relevant evidence and is properly considered by the panel.

OTA also finds that appellant's objection that the seized records were obtained in violation of R&TC section 19504.7 and respondent's Operations Memo No. 1162 are unfounded. Section 19504.7 does not apply to respondent; it applies to the Franchise Tax Board. Also, it is

clear, even from the single page provided by appellant, that Operations Memo 1162, which states that an auditor may not remove records from the taxpayer's or representative's premises without permission from the taxpayer or designee, does not apply to those authorized by search warrants to search for, seize, and examine evidence of a possible crime.

Appellant's argument that the franchisor records are unreliable is also unpersuasive. Reliability of evidence is also something that goes to the weight to be given to evidence, not its admissibility. The email that appellant relies upon to challenge the reliability of the franchisor report is not from Denny's, Inc. It is from the Subway franchisor, and its relevance to this appeal is questionable; but even if the evidence is deemed relevant, OTA does not read the email to indicate that the sales tax records – they are identified as weekly inventory and sales reports in the appeals involving Subway restaurants – were unreliable for the purpose for which respondent used them. The email states, in part, that "POS Sales and Sales Tax are less accurate as some weeks may not be represented fully with a data upload from the stores." This appears to indicate that the records might *understate*, not overstate, sales tax reimbursement collected by the franchisee.

There is no credible evidence in the record that supports appellant's assertion that it did not refuse to provide business records for audit but instead provided records, including actual to-go receipts showing that many of the transactions at issue were, in fact, nontaxable sales to go. If such evidence exists, appellant should have provided it to OTA.

Appellant's assertion that respondent conducted an observation test of one of its locations but prematurely ended the test when it could not find a "smoking gun," and its claim that respondent has given OTA only business records that support its alleged deficiency while ignoring others that showed appellant accurately reported its sales tax due are also not supported by the record. If such exculpatory evidence exists, appellant should have provided it.

OTA rejects appellant's argument that its underreporting was the result of an innocent and good faith effort to comply with what it understood to be an acceptable method of reporting sales. There is nothing in the Sales and Use Tax Law that condones such a reporting methodology; and in any event, the argument fails to account for the fact that respondent calculated the deficiencies using sales tax reimbursement amounts collected from customers according to appellant's reports to its franchisor.

Appellant's argument that the franchisor data from Denny's, Inc. did not include sales tax reimbursement collected by the franchisees is not supported by the evidence, which shows that the WSRs included total sales and sales tax reimbursement collected. Finally, appellant's argument that respondent assumes all of appellant's sales were taxable sales suggests that appellant does not understand the data and respondent's conclusions. As stated above, appellant's reports to the franchisor indicated that appellant collected sales tax reimbursement on over 98 percent of its sales. That does not mean that respondent found that over 98 percent of appellant's sales were taxable. A reasonable conclusion from this evidence is that some of the "unreported" sales tax reimbursement represents sales tax that was actually due on unreported taxable sales and some represents excess sales tax.[37]

OTA finds that the evidence as a whole establishes appellant's fraud by clear and convincing evidence for each of the reporting periods at issue, including all for which respondent determined a deficiency but did not timely issue an NOD. Therefore, all NODs were timely issued and the fraud penalties were correctly imposed.

Issue 2: Are adjustments to the determined liabilities 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 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).) A taxpayer bears the burden of proving entitlement to an exemption or exclusion. (*Appeal of Owens-Brockway Glass Container, Inc.*, 2019-OTA-158P; *Standard Oil Co. v. State Bd. of Equalization* (1974) 39 Cal.App.3d 765, 769.)

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. (R&TC, § 6597(a)(1).) The penalty does not apply if the person's liability for unremitted sale tax

[37] A retailer is not required to report sales tax reimbursement collected from customers except to the extent that the retailer claims a deduction, on line 9 of the SUTR, for sales tax included in reported total sales; but a retailer is required to report excess sales tax. (See, e.g., Form CDTFA-401-EZ, which is a SUTR form available on respondent's website.)

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).) This is not a fraud penalty. (*Appeal of ISIF Madfish, Inc.*, 2019-OTA-292P.) Respondent need only establish by a preponderance of the evidence that its imposition of the 40 percent penalty was warranted.

Normally, in an appeal to OTA, 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.[38] (*Ibid*.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid*.)

This Opinion has already explained how respondent made its determinations. OTA finds that respondent's decision to rely on sales tax reimbursement data that appellant provided to the franchisor and that respondent obtained from the franchisor was reasonable and rational. From the evidence, it appears to OTA that respondent correctly applied a direct audit methodology to calculate sales tax reimbursement collected by appellant and to either convert that sales tax reimbursement to unreported taxable measure or treat it as excess sales tax. Consequently, OTA also finds that the amount of the determined sales tax reimbursement collected by appellant in excess of the amount that was due in connection with reported taxable sales was either tax due on unreported taxable sales or excess sales tax reimbursement. On the basis of the evidence and considering the burden of proving entitlement to exclusions or exemptions rests with the taxpayer, OTA finds that respondent's conclusion that the sales tax reimbursement collected by appellant represented either taxable sales or excess sales tax was also reasonable and rational. OTA thus concludes that respondent has carried its burden of proof and that the burden therefore shifts to appellant to show error and establish a more accurate liability. (*Appeal of AMG Care Collective*, 2020-OTA-173P.)

OTA has already addressed in Issue 1 the arguments made by appellant that can be reasonably interpreted as applying to this Issue 2.[39] All fail here for the reasons discussed above.

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[38] While this shifting of the burden may seem contrary to the requirement that respondent prove fraud by clear and convincing evidence, it is not. OTA has already addressed the fraud issue, above, in Issue 1.

[39] Appellant had an opportunity to argue that respondent erred when it refused to allow an offset for apparent overreporting for 2009. It did not make those arguments, and OTA finds inadequate support for that argument in the record.

Based on the foregoing, OTA concludes that appellant has not shown that respondent erred in its analysis, and it has not established a more accurate liability. Consequently, there is no basis for adjustment.

Issue 3: Does A. Beri's restitution payment bar the liabilities at issue?

When a person is convicted of a crime, the court is required to order the defendant to make restitution to the victim(s) for economic loss suffered as a result of the defendant's conduct. (Pen. Code, § 1202.4(f).) An order of restitution under California Penal Code section 1202.4(f) does not bar a subsequent civil action based on the same facts. (*Vigilant Ins. Co. v. Chiu* (2009) 175 Cal.App.4th 438, 444 (*Vigilant*); *Appeal of Delgado*, 2018-OTA-200P (*Delgado*).)

Appellant argues that respondent is precluded from asserting civil tax deficiencies in excess of the court-ordered restitution of $3,021,059 paid by A. Beri. Appellant states that it relies on R&TC section 7157(a)(2), not on Penal Code section 1202.4, and it argues that section 7157(a)(2) precludes the imposition of additional tax, interest, and penalties because the amount imposed by a court as an order for restitution is treated as "final."[40] Appellant attempts to distinguish *Delgado* on the basis that it involved liability under the Cigarette and Tobacco Products Tax Law; and it attempts to distinguish *Vigilant* (and is critical of OTA's reliance on that case in *Delgado*) on the basis that *Vigilant* involved a private citizen, not a governmental entity, and because the plaintiff in *Vigilant* sought "nonmonetary damages." Furthermore, appellant argues that *Vigilant* and *Delgado* are distinguishable from this appeal because appellant does not "rely" on California Penal Code section 1202.4. Finally, appellant also argues that A. Beri entered his guilty plea under the belief that the restitution payments would satisfy all liabilities with respondent.

Respondent is empowered to collect unpaid taxes, but it is also required to add interest and to impose penalties when circumstances warrant. (R&TC, §§ 6481, 6485, 6591, 6597.) The evidence shows that the criminal court ordered restitution for unpaid taxes only. The law is clear: court ordered restitution does not bar other civil remedies. Appellant's arguments to the contrary are unpersuasive, and its reliance on R&TC section 7157(a)(2) is misplaced. That

[40] R&TC section 7157(a)(2) states, "Amounts imposed by a court of competent jurisdiction as an order of restitution for criminal offenses shall be treated as final and due and payable to the State of California on the date that amount is established on the records of [respondent]."

subdivision's reference to the finality of a restitution order confirms that the restitution amount is immediately collectible. Also, while appellant may choose to ignore Penal Code section 1202.4, OTA cannot ignore controlling statutes or case law.

Appellant's attempts to distinguish *Delgado* and *Vigilant* also fail. It is immaterial that *Delgado* involved liability under the Cigarette and Tobacco Products Tax Law and that *Vigilant* involved a private citizen, and appellant has cited no authority to support its argument that *Vigilant's* authority is dependent on the type of damages (i.e., monetary or nonmonetary) involved. As noted by the court in *Vigilant*, restitution orders are limited to economic losses, but a victim can recover both economic and noneconomic damages in a civil action, subject to a credit for restitution payments. (*Vigilant*, *supra*, 175 Cal.App.4th, at pp. 445-446.)

Finally, regarding appellant's argument that respondent cannot be allowed to pursue its civil remedies against appellant because A. Beri believed the restitution payments would satisfy all liabilities known and unknown, there is nothing in the record to show what A. Beri believed and, in any event, his beliefs regarding the effect of the restitution order is immaterial. It is the law that controls here.

Based on the foregoing, OTA finds that A. Beri's restitution payment does not bar the liabilities at issue.

Issue 4: Is appellant entitled to relief of the 40 percent penalty?

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.*, *supra*.)

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 occurred notwithstanding the taxpayer's exercise of ordinary care and the absence of their willful neglect. (R&TC, § 6597(a)(2)(B).) R&TC section 6597 provides six examples of reasonable cause, none of which is relevant to the facts under consideration. R&TC section 6597 does not establish a procedure for requesting relief.[41] OTA interprets R&TC section 6597 to require the taxpayer or its designee to request relief and prove a factual basis for the request.

Respondent applied the 40 percent penalty to the excess sales tax collected for 1Q07 through 4Q08.[42] The evidence shows that appellant knowingly collected the excess sales, which exceeded the minimum thresholds set forth in R&TC section 6597(a)(2), in every quarter within that period to which respondent applied the penalty. OTA rejected all of appellant's arguments that it unknowingly underreported. Consequently, OTA finds that respondent correctly imposed the 40 percent penalty. The next question is whether relief of the penalty is warranted.

In its request for relief of penalties and the CCRF, appellant makes a single argument. It asserts that respondent never assessed tax liability, interest, or penalties prior to March 31, 2005, and that appellant would have had no way of knowing about the amnesty program at that time. This argument is relevant to the amnesty double fraud penalty, discussed below, but it has no application to the 40 percent penalty. The only other argument that can be construed as applicable to this request for relief is appellant's assertion that the underreporting was the result of an innocent and good faith attempt to comply with the minimum threshold percentages discussed under Issue 1. OTA has already rejected that argument, above. Based on the evidence, OTA finds that appellant is not entitled to relief of the 40 percent penalty.

[41] R&TC section 6592 establishes a procedure for requesting relief of some penalties when an untimely return of 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. Taxpayers requesting relief under R&TC section 6592 are required to by file a statement under penalty of perjury setting forth the facts upon which the person bases the claim for relief. (R&TC, § 6592(b).) The 40 percent penalty is not one of the penalties covered by R&TC section 6592.

[42] Respondent accepted amounts reported for the four quarters of 2009.

Issue 5: Is appellant entitled to relief of the amnesty double fraud penalty?

If a taxpayer was eligible for, but failed to participate in, respondent's amnesty program for liability periods prior to January 1, 2003 (see footnote 5, above), respondent was required to impose penalties for the amnesty-eligible periods at twice the normally applicable rate. Thus, in the NOD issued on December 8, 2017, for liability period 1, respondent doubled the fraud penalty (from 25 percent to 50 percent) for the period July 1, 2002, through December 31, 2002. The amnesty double fraud penalty is $5,171. Under the provisions of R&TC section 6592(a), a taxpayer may be relieved of the amnesty penalties if the taxpayer's failure to participate in the amnesty program was due to reasonable cause or circumstances beyond its control and occurred notwithstanding the exercise of ordinary care and in the absence of willful neglect.

Appellant submitted a request for relief of penalties long before filing the appeal to OTA, but it did not clearly state the facts upon which the request was based. In its brief dated April 21, 2021, appellant asserts that appellant was unaware of the reporting errors until well after the amnesty application window was closed and therefore would have had no reason to apply for amnesty in February or March 2005. It also contends that taxpayers who were under criminal investigation or who had civil tax court proceedings initiated against them were ineligible to apply for respondent's tax amnesty program, apparently at least implying that appellant was such a taxpayer.

Appellant has not established its entitlement to such relief. The evidence shows that A. Beri knew about the underreporting while it was occurring. The Beri entities would have received notice of the amnesty program. Also, there is no evidence that any of the Beri entities were under investigation, or even under audit, when the application window was open.[43] Therefore, OTA finds that appellant is not entitled to relief of the amnesty double fraud penalty.

Issue 6: Is appellant entitled to relief of interest?

There is no statutory right to interest relief. The law allows respondent, in its discretion, to grant relief of all or any part of the interest imposed on a person under the Sales and Use Tax Law where the failure to pay the tax is due in whole or in part to an unreasonable error or delay by an employee of respondent acting in their official capacity. (R&TC, §§ 20, 6593.5(a)(1).)

[43] Appellant cites to R&TC section 19732(b). That statute applies to California franchise and income tax administered by the Franchise Tax Board. It does not apply to sales and use tax administered by respondent.

Such an error or delay shall be deemed to have occurred only if no significant aspect of the error or delay is attributable to an act of, or failure to act by, the taxpayer. (R&TC, § 6593.5(b).) Any person requesting interest relief must include a statement under penalty of perjury setting forth the facts on which the request is based.[44] (R&TC, § 6593.5(c).)

Appellant's request for relief does not request relief of interest. Even if it did, appellant makes the same arguments in support of its request for interest relief that it makes in support of its request for relief of the penalties. Appellant has not alleged or offered any evidence to prove an unreasonable error or delay by an employee of respondent acting in their official capacity. On that basis, OTA finds that appellant is not entitled to relief of interest.

Issue 7: Is appellant entitled to relief from the CCRF?

Respondent imposes a CCRF when a taxpayer fails to pay any amount due and payable after respondent has mailed to the taxpayer a Demand that advises that continued failure to pay the amount due may result in collection action, including the imposition of a collection cost recovery fee. (R&TC, § 6833(a).) Relief of the fee is available if the taxpayer files a request and statement under penalty of perjury setting forth facts that establish that the failure to pay was 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, § 6833(d).)

Here, respondent served the required Demand on appellant and imposed the CCRF. Appellant requests relief, relying on the same arguments identified and rejected above. Appellant has not established that its failure to pay was due to reasonable cause and circumstances beyond appellant's control and occurred notwithstanding its exercise of ordinary care and the absence of willful neglect. Consequently, appellant is not entitled to relief from the CCRF.

[44] California Code of Regulations, title 18, section 1703 restates, without adding further clarification to, the requirements for interest relief within the meaning of R&TC section 6593.5. (See Cal. Code Regs., tit. 18, § 1703(b)(1)(E).)

HOLDINGS

1. The evidence establishes appellant's fraud by clear and convincing evidence for each of the reporting periods for which respondent determined a deficiency but did not timely issue an NOD.
2. Adjustments to the determined liabilities are not warranted.
3. A. Beri's restitution payment does not bar the liabilities at issue.
4. Appellant is not entitled to relief of the 40 percent penalty.
5. Appellant is not entitled to relief of the amnesty double fraud penalty.
6. Appellant is not entitled to relief of interest.
7. Appellant is not entitled to relief of the CCRF.

DISPOSITION

Respondent's denials of the petitions for redetermination, claims for refund, and request for relief of the amnesty double fraud penalty are sustained.

DocuSigned by:
Michael F. Geary
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Michael F. Geary
Administrative Law Judge

We concur:

DocuSigned by:
Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

DocuSigned by:
Josh Lambert
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Josh Lambert
Administrative Law Judge

Date Issued: 2/27/2024