OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 230212509
G. FIORENTINO	CDFTA Case ID: 1-482-403

OPINION

Representing the Parties:

For Appellant:	G. Fiorentino
For Respondent:	Sunny Paley, Attorney Cary Huxsoll, Attorney Jason Parker, Chief of Headquarters Ops.
For Office of Tax Appeals:	Daniel Cho, Attorney

A. WONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, G. Fiorentino (appellant) appeals respondent California Department of Tax and Fee Administration's (CDTFA's) decision denying appellant's petition for redetermination of a Notice of Determination (NOD) dated September 3, 2019. The NOD is for tax of $3,663.58, plus applicable interest, and a failure-to-file penalty of $366.36 for the period January 1, 2018, through December 31, 2018.

Office of Tax Appeals (OTA) Administrative Law Judges Andrew Wong, Lauren Katagihara, and Josh Aldrich held an electronic oral hearing for this matter on May 22, 2024. At the conclusion of the hearing, the record was closed and this matter was submitted for an Opinion.

ISSUES

1. Whether appellant is liable for use tax on the purchase of a watch from Europe and its storage, use, or other consumption in California.
2. Whether appellant has established reasonable cause for failing to file a sales and use tax return.

FACTUAL FINDINGS

1. On June 2, 2018, appellant ordered a Patek Philippe Calatrava Pilot Travel Time wristwatch (watch) from a seller in Riga, Latvia, for $47,968. The transaction occurred via chrono24.com, an online marketplace for luxury watches. Appellant used his personal credit card to pay for the watch, and used his name and residential address in Tustin, California, for the watch's shipping address.
2. On June 6, 2018, the watch entered California from Europe.
3. Appellant picked up the watch from a courier company's office in Huntington Beach, California, where he signed for its delivery. Appellant immediately took the watch to an authorized Patek Philippe dealer in Costa Mesa, California, where it was authenticated.
4. On June 11, 2018, $47,968 was debited from the business checking account of The James J. Fiorentino Foundation (Foundation) and sent to appellant's credit card company.[1] Appellant was the Foundation's president and a board member; at this time, he was also the only person who had access to any of the Foundation's finances.
5. On June 23, 2018, appellant flew to Minnesota.
6. On December 7, 2018, appellant was removed as an officer and board member of the Foundation.[2]
7. Subsequently, CDTFA obtained information from the United States Customs and Border Protection Agency (Customs) that a watch was imported from outside of California and appellant was the ultimate consignee. Based on this information, in March and June 2019, CDTFA contacted appellant and requested that he file a sales and use tax return to report the purchase and use of the watch in California. CDTFA also requested that appellant file a return, claim an exemption, and provide supporting documentation if he believed that use tax was not due.
8. In July and August 2019, appellant responded, claiming that he purchased the watch on behalf of the Foundation, which had a clock museum in Minneapolis, Minnesota.[3]

[1] James J. Fiorentino was either appellant's uncle or great uncle. He passed away on September 30 ,2017.

[2] According to an excerpt from an undated Form 990-PF (*Return of Private Foundation*) that the Foundation filed with the IRS, a court deemed the Foundation's removal of appellant as an officer/trustee proper after the Foundation commenced litigation against him. The court also imposed a constructive trust on appellant to return Foundation assets, monies, and records.

Appellant explained that the watch was only shipped to his personal residence in California because he operated and managed the museum from California, and he wanted to ensure that the watch was safely delivered. According to appellant, once he received the watch and had it authenticated, he took the watch to Minnesota, where it became part of the Foundation museum's collection. Appellant thus argued that he was not liable for any use tax on the purchase of the watch and that the use tax was inapplicable because the watch was not used in California. Ultimately, appellant never filed a sales and use tax return with respect to the watch.

9. CDTFA did not accept appellant's arguments and issued the September 3, 2019 NOD.
10. On October 2, 2019, appellant filed a timely petition for redetermination and disputed the entire liability, reiterating his arguments that he did not purchase the watch and that the watch was transported out of California.
11. On March 3, 2020, the Foundation sold the watch to a jeweler in Minneapolis, Minnesota, for $26,300.[4]
12. On August 5, 2022, appellant submitted to CDTFA a request for relief of the failure-to-file penalty along with a statement signed under penalty of perjury stating that he did not purchase the watch for himself but on behalf of the Foundation and for the Foundation's collection.
13. By Decision dated December 27, 2022, CDTFA denied appellant's petition for redetermination.
14. This timely appeal followed.

[3] According to an undated online news article in the evidentiary record, the museum's collection included German cuckoo clocks, mantel clocks, and grandfather clocks, mostly from the mid-1800s to the early 1900s, as well as vintage record players, organs, polished rocks, and other knickknacks. The article did not mention any luxury Swiss wristwatches in the museum's collection.

[4] According to an undated Form 4720 (*Return of Certain Excise Taxes Under Chapters 41 and 42 of the Internal Revenue Code*) filed with the IRS, the Foundation reported an excise tax liability for appellant's "self-dealing" (i.e., reimbursing himself for non-Foundation expenses in June 2018). The Foundation noted that it had recovered assets appellant had purchased and personally used, and subsequently sold these assets to recover part of the Foundation's funds that appellant had expended.

DISCUSSION

Issue 1: Whether appellant is liable for use tax on the purchase of a watch from Europe and its storage, use, or other consumption in California.

The storage, use, or other consumption in this state of tangible personal property purchased from any retailer for storage, use, or other consumption in this state is subject to use tax. (R&TC, § 6201.) Generally, the person storing, using, or otherwise consuming in this state tangible personal property purchased from a retailer is liable for the use tax. (R&TC, § 6202(a).) For the proper administration of the Sales and Use Tax Law and to prevent evasion of the use tax, it is presumed that tangible personal property sold by any person for delivery in this state is sold for storage, use, or other consumption in this state until the contrary is established. (R&TC, § 6241.)

"Storage" includes any keeping or retention in this state for any purpose except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased from a retailer. (R&TC, § 6008.) "Use" includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it does not include the sale of that property in the regular course of business. (R&TC, § 6009.) "Storage" and "use" do not include the keeping, retaining, or exercising any right or power over tangible personal property for the purpose of subsequently transporting it outside the state for use thereafter solely outside the state. (R&TC, § 6009.1; Cal. Code Regs., tit. 18, § 1620(b)(9).)

If any person fails to make a return, CDTFA will estimate the amount of the total sales price of tangible personal property purchased by the person, the storage, use, or other consumption of which in this state is subject to the use tax. (R&TC, § 6511.) The estimate will be based upon any information which is in CDTFA's possession or may come in its possession. (*Ibid.*) Upon the basis of this estimate, CDTFA will compute and determine the amount of tax or other amount required to be paid to the state. (*Ibid.*)

In the case of an appeal, CDTFA has a minimal, initial burden of showing that its determination was reasonable and rational. (*Appeal of Talavera,* 2020-OTA-022P.) Once CDTFA has met its initial burden, the burden of proof shifts to the taxpayer to establish that a result differing from CDTFA's determination is warranted. (*Ibid.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid.*)

Here, CDTFA obtained information from Customs that a watch was purchased from a European seller and imported into California. According to this information, appellant was listed as the purchaser of the watch. As a result, CDTFA issued its determination to appellant, which OTA finds is both reasonable and rational. Therefore, the burden of proof shifts to appellant to establish that he does not owe use tax on the purchase of the watch.

On appeal, appellant continues to argue that he purchased the watch on behalf of the Foundation for which he served as president. In support of this argument, appellant provided a bank statement from the Foundation's business checking account, which showed that a payment from the Foundation was made to appellant's personal credit card for the same amount as the purchase price of the watch. In addition, appellant provided legal documents from a court action in which the Foundation had sued appellant to recover assets that appellant took from the Foundation. The watch was listed as one of the items that the Foundation recovered from appellant and subsequently sold.

Although appellant argues that the Foundation was the actual purchaser of the watch, documents in the evidentiary record establish that appellant purchased the watch and used his personal credit card to pay for it. The fact that appellant used the Foundation's money to pay for appellant's credit card debt does not automatically establish that the Foundation was the true purchaser of the watch, especially because appellant was the president of the Foundation and was solely in control of its finances. Further, appellant's allegation that he purchased the watch on the Foundation's behalf is not supported by any documentary evidence. There is no documentation such as board meeting minutes indicating that the Foundation authorized such a transaction, nor is there a written contract between appellant and the Foundation describing this transaction. Similarly, there is no written correspondence between appellant and any other Foundation representative indicating that such authorization or agreement existed. Lastly, there is no record that the Foundation issued a receipt or some other record that would support a finding that appellant and the Foundation had a pre-existing agreement.

Regarding the court documents, they do not establish that the Foundation was the purchaser of the watch on June 2, 2018. Instead, it appears that the Foundation was seeking all available remedies for appellant's personal use of the Foundation's monies. Thus, this documentation suggests that appellant purchased the watch for his personal use but relinquished ownership of the watch when the Foundation was trying to recover its funds. This subsequent action between appellant and the Foundation does not retroactively recharacterize the prior sale and purchase of the watch, which was between a Latvian seller and appellant. Therefore, contrary to appellant's argument on appeal, OTA concludes that appellant purchased the watch.

Appellant also contends that use tax is not owed on the purchase of the watch because the watch was only stored in California for the purpose of subsequently transporting it to Minneapolis, Minnesota, for use solely outside of California. In support of this argument, appellant provided documentation showing that shortly after the watch entered California on June 6, 2018, he took a trip to Minneapolis, Minnesota, on June 23, 2018. Appellant claims that the purpose of the trip was to transport the watch to the Foundation's museum. However, after appellant picked up the watch from a courier company's office in Huntington Beach, California, appellant immediately took it to an authorized Patek Philippe dealer in Costa Mesa, California, to have it authenticated. In so doing, appellant exercised a right or power over the watch, but such use was not for the purpose of subsequently transporting it outside California, which appellant alleges occurred on June 23, 2018. In other words, authenticating the watch was not a use related to transporting it outside of California and thus was a taxable use. Further, although appellant testified that he transported the watch from California to Minneapolis, Minnesota, on or about June 23, 2018, there is no documentary evidence in the record to corroborate appellant's testimony that the watch left California at that time (e.g., a receipt from the Foundation indicating that it had received the watch). Accordingly, OTA finds that appellant has not overcome the presumption that the watch was sold for storage, use, or other consumption in this state. (See R&TC, § 6241.) OTA concludes that appellant purchased the watch, took possession of it in California, and then made taxable use of it here.

Based on the foregoing, OTA finds that appellant is liable for the use tax on the purchase and subsequent use of the watch in California.

Issue 2: Whether appellant has established reasonable cause for failing to file a sales and use tax return.

If a person fails to make a return, CDTFA will estimate the tax required to be paid to the state, adding to the sum thus arrived at a penalty equal to 10 percent thereof (commonly known as a failure-to-file penalty). (R&TC, § 6511.) Relief of the failure-to-file penalty may be granted where a person's failure to file a return was due to reasonable cause and circumstances beyond the person's control and occurred notwithstanding the exercise of ordinary care and in the absence of willful neglect. (R&TC, § 6592(a).) A person seeking to be relieved of such a penalty must file with CDTFA a statement signed under penalty of perjury setting forth the facts upon which the request for relief is based. (R&TC, § 6592(b).)

Here, appellant submitted a statement signed under penalty of perjury reiterating his contentions that he did not purchase the watch for himself, but on behalf of the Foundation, for its collection. Based on these arguments, appellant believes that he should be relieved of the failure-to-file penalty. However, as determined above, OTA rejected these arguments with respect to the underlying issue, and OTA finds no basis that these arguments would constitute reasonable cause for appellant's failure to file a sales and use tax return.

HOLDINGS

1. Appellant is liable for use tax on the purchase of the watch from Europe and its use in California.
2. Appellant has not established reasonable cause for his failure to file a sales and use tax return.

DISPOSITION

CDTFA's action is sustained.

DocuSigned by:
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Andrew Wong
Administrative Law Judge

We concur:

DocuSigned by:
43E5DCA21D8D46B...
Lauren Katagihara
Administrative Law Judge

For

DocuSigned by:
48745BB806914B4...
Joshua Aldrich
Administrative Law Judge

Date Issued: 7/24/2024