

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 221212038
PRESTIGE AUTO SALES GROUP, INC.)	CDTFA Case ID: 3-382-260
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)	
)	

OPINION

Representing the Parties:

For Appellant: Shawn Zali, Representative

For Respondent: Vanessa Bedford, Attorney

For Office of Tax Appeals: Steven Kim, Attorney

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Prestige Auto Sales Group, Inc. (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)¹ denying appellant’s timely petition for redetermination of a Notice of Determination (NOD) issued on December 15, 2021. The NOD is for a tax liability of \$245,871, plus applicable interest, and a 40 percent penalty of \$95,988 pursuant to R&TC section 6597 for the period January 1, 2017, through December 31, 2019 (liability period).²

Appellant waived the right to an oral hearing; therefore, the matter is being decided based on the written record.

ISSUE

Whether appellant is entitled to relief of the 40 percent penalty.

¹ Sales and use taxes were formerly administered by the State Board of Equalization (board). In 2017, functions of the board relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to events that occurred before July 1, 2017, “CDTFA” shall refer to the board.

² The NOD was timely issued because on June 22, 2021, appellant signed the last in a series of waivers of the otherwise applicable three-year statute of limitations, which allowed CDTFA until January 1, 2022, to issue an NOD for the liability period. (R&TC, §§ 6487(a), 6488.)

FACTUAL FINDINGS

1. Appellant operated a used car dealership in Stevenson Ranch, California, during the liability period.
2. For the liability period, appellant reported total sales of \$1,393,142 and claimed no deductions.
3. CDTFA audited appellant for the liability period. Appellant provided the following books and records: a sales report for the liability period; two retail installment sales contracts; and some dealer jackets. Furthermore, CDTFA obtained Department of Motor Vehicles (DMV) Report of Sale form data for the liability period (DMV sales data), auction house purchase data for the first quarter of 2017 (1Q17) through 4Q18, and federal income tax returns for 2017 and 2018.
4. CDTFA noted large discrepancies between appellant's reported taxable sales (\$1,393,142) for the liability period, appellant's taxable sales based on the DMV sales data (\$3,954,000), and appellant's recorded taxable sales (\$4,183,626).
5. CDTFA compared appellant's recorded taxable sales (\$4,183,626) and reported taxable sales (\$1,393,142) and determined that appellant had unreported taxable sales of \$2,790,484.
6. CDTFA also noted that appellant's sales report for the liability period showed appellant collected \$364,667 of sales tax reimbursement but did not remit \$239,970 of the collected sales tax reimbursement to CDTFA. Specifically, from 1Q17 to 4Q19, appellant collected, but failed to remit, quarterly amounts ranging from \$15,278 to \$34,072.
7. According to CDTFA's workpapers, appellant's president stated to CDTFA that appellant understated its reported taxable sales as a means to keep the business running and used a portion of sales tax that was collected to pay appellant's other liabilities.
8. CDTFA imposed a 40 percent penalty of \$95,988 for failure to remit sales tax reimbursement.
9. CDTFA timely issued the above-mentioned NOD to appellant.
10. Appellant timely filed a petition for redetermination with CDTFA disputing the NOD. By email dated September 8, 2022, appellant asserted that it was only disputing the 40 percent penalty.

11. On November 29, 2022, CDTFA issued a decision denying the petition for redetermination.
12. This timely appeal followed.

DISCUSSION

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).) The penalty does not apply if the person's liability for unremitted sales 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 CDTFA's imposition of the 40 percent penalty, CDTFA 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 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.³ OTA interprets R&TC section 6597 to require the taxpayer or its designee to request relief and prove a factual basis for the request.

The evidence shows that, in every quarter within that period to which CDTFA applied the penalty, appellant knowingly collected sales tax reimbursement and failed to timely remit the sales tax for which it collected the reimbursement. Appellant provided a sales report for the

³ R&TC section 6592 establishes a procedure for requesting relief of some penalties when an untimely return or 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 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.

liability period, which shows that appellant collected \$364,667 of sales tax reimbursement from its customers, but only remitted \$124,697 to CDTFA, resulting in \$239,970 of sales tax reimbursement that appellant collected but failed to timely remit to CDTFA.⁴ Additionally, according to CDTFA's workpapers, appellant's president stated to CDTFA that appellant understated its reported taxable sales to keep the business running and used a portion of the collected sales tax reimbursement to pay appellant's other liabilities. Also, appellant does not dispute that it made the \$2,780,684 in unreported taxable sales as determined by CDTFA. In addition, the amount of sales tax collected but not remitted exceeds the minimum thresholds set forth in R&TC section 6597(a)(2) because unremitted sales tax reimbursement of \$239,970, on average, is more than \$1,000 per month, and is also more than 5 percent of the recorded collected sales tax reimbursement of \$364,667.

Appellant contends that it had no intention to withhold sales tax from CDTFA. However, for purposes of the 40 percent penalty, it is immaterial whether appellant knowingly, willfully, or otherwise intentionally failed to timely remit tax or tax reimbursement. (See *Appeal of Finnish Line Motorsports, Inc.*, 2019-OTA-138P.)

Appellant also asserts that it has additional supporting documentation to show that the penalty is not warranted, but appellant has not submitted any additional evidence. During CDTFA's appeals process, appellant argued that the 40 percent penalty should not be imposed because its president was not involved in the day-to-day business and an unnamed manager, accountant, and controller were responsible for appellant's sales tax reporting obligations. However, appellant's sales reports, which showed appellant collected and failed to remit sales tax reimbursement, would presumably be available to appellant's president. And, as previously noted, appellant's president stated that appellant understated its reported taxable sales to keep the business running; it used a portion of collected sales tax reimbursement to pay appellant's other liabilities. Appellant's contention that other individuals were responsible for the underreporting does not establish reasonable cause or circumstances beyond its control, or that appellant exercised ordinary care and the absence of willful neglect. Based on the foregoing, relief of the 40 percent penalty is not warranted.

⁴ Throughout the liability period, appellant knowingly collected, but failed to remit, significant amounts of sales tax reimbursement—quarterly amounts ranging from \$15,278 to as high as \$34,072—which demonstrates a consistent pattern of appellant knowingly collecting sales tax reimbursement and failing to remit the sales tax to CDTFA.

HOLDING

Appellant is not entitled to relief of the 40 percent penalty.

DISPOSITION

CDTFA's action in denying the petition for redetermination is sustained.

Signed by:

Josh Lambert

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Josh Lambert
Administrative Law Judge

We concur:

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Andrew Wong

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Andrew Wong
Administrative Law Judge

DocuSigned by:

Josh Aldrich

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Josh Aldrich
Administrative Law Judge

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