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OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 19075095
	CDTFA Case IDs 146-074, 146-076
DELCO ENTERPRISES, INC., dba Del Taco	

OPINION

Representing the Parties:

For Appellant: David Dunlap Jones, Attorney

For Respondent: Sunny Paley, Attorney

For Office of Tax Appeals: Corin Saxton, Attorney

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) sections 6561 and 6901, Delco Enterprises, Inc. dba Del Taco (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)[1] denying appellant's petition for redetermination of a Notice of Determination (NOD) dated September 1, 2017, and claim for refund for payments made towards this NOD. The NOD is for $77,860.86 in tax, a 25 percent fraud penalty of $5,726.42,[2] a 40 percent penalty of $21,982.11 for failing to remit sales tax reimbursement collected from customers (the 40 percent penalty),[3] and applicable interest, for the period May 6, 2006, through June 30, 2008 (liability period).[4]

[1] Sales taxes were formerly administered by the State Board of Equalization (BOE). In 2017, functions of BOE relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) For ease of reference, when referring to acts or events that occurred before July 1, 2017, "CDTFA" shall refer to BOE.

[2] The fraud penalty was imposed for the period May 6, 2006, through December 31, 2006.

[3] The 40 percent penalty was imposed for the period January 1, 2007, through June 30, 2008.

[4] The NOD states that it was issued for the period May 6, 2006, through December 31, 2009; however, CDTFA accepted appellant's reported taxable sales for the period July 1, 2008, through December 31, 2009, despite CDTFA identifying unreported taxable sales of $54,513 for this period. CDTFA's workpapers state that the differences were immaterial for that period and that using reported taxable sales is in appellant's favor.

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

ISSUES

1. Whether CDTFA has provided clear and convincing evidence of fraud.
2. Whether adjustments are warranted to the tax liability as determined by CDTFA.
3. Whether the payment of restitution satisfies any remaining civil liability.
4. Whether CDTFA properly imposed the 40 percent penalty and whether appellant is entitled to relief of the penalty.
5. Whether appellant is entitled to relief of interest.

FACTUAL FINDINGS

1. Appellant, a California corporation, operated Del Taco restaurants in Fontana and Santa Fe Springs. Appellant's president, A. Beri, and appellant's vice president, R. Luthra, are also the president and vice president, respectively, of a related entity, B&L Diners, Inc., which operated four Denny's restaurants in Southern California during the liability period.[5] A. Beri is also the president of Ajay Beri Corporation (ABC), which operated Subway sandwich restaurants in Los Angeles County during the liability period.[6] Appellant's bookkeeper, A. Avina, prepared the sales and use tax returns (SUTRs) for appellant, B&L Diners, Inc., and ABC.
2. Appellant operated its Del Taco restaurants under a franchise agreement with franchisor Del Taco, Inc., which required franchisees to use an automated point of sale (POS) system[7] that tracked sales data and transmitted this data to the franchisor.
3. On January 19, 2011, in response to CDTFA's determination that ABC consistently underreported taxable sales, CDTFA began a fraud investigation of appellant, B&L Diners, Inc., and ABC. On June 23, 2011, CDTFA and the California Highway

[5] Appellant's seller's permit and B&L Diners, Inc.'s seller's permit were both closed effective December 31, 2009, when the businesses were transferred to B&L Group, LLC.

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

[7] A POS system typically includes one or more terminals, which are the modern equivalent of cash registers. Depending on the equipment and software, POS systems can generate reports (sometimes referred to as "Z-tapes") which 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.

Patrol executed search warrants on locations including A. Beri's residence and office, the office of appellant's accountant, the residence A. Avina, and a storage unit containing business records.[8] As a result of these search warrants, CDTFA obtained computers, a cell phone belonging to A. Beri, and over 400 boxes of records.

4. On August 1, 2011, CDTFA and the California Highway Patrol executed a search warrant on appellant's franchisor, Del Taco, Inc., and, as a result of this search warrant, CDTFA obtained weekly sales reports (WSRs) for the liability period.[9] The WSRs provide details regarding all sales entered on the POS systems for each of appellant's stores on a weekly basis.

5. CDTFA's forensic examination of the seized computers revealed that appellant maintained two sets of records of sales for the first quarter of 2008 (1Q08): one set listing sales tax of $32,839.50 and another set, with "mod" in the file name,[10] listing a modified sales tax of $22,987.65. Appellant reported tax of $22,987 for 1Q08. The sales listed on the WSRs are equivalent to the sales listed on the unmodified 1Q08 sales records.

6. Furthermore, CDTFA determined that the tax amounts listed in the 1Q08 modified records were calculated by applying the tax rate to 70 percent of the taxable sales. In its Investigations Statement of Facts, CDTFA states that the files were seized at R. Luthra's residence and his business office, and that similar files were also found in the computers seized from A. Beri.

7. Appellant asserts that the tax listed on its modified 1Q08 sales records represent a minimum tax threshold calculated to ensure sales tax compliance. In a CDTFA interview with R. Casey, an employee of A. Beri, the minimum threshold percentage for taxable sales was twice the soda sales, or approximately 18 percent, and R. Casey believed it was required to report a percentage of taxable sales that were greater than or equal to the

[8] While executing the first search warrant, A. Avina informed CDTFA of the storage unit, and a supplemental search warrant was obtained to search the storage unit and A. Avina's residence.

[9] These documents are titled "Del Taco, Inc. Franchise Sales List Sub Total By Week." CDTFA obtained sales reports beginning May 3, 2006, for the Fontana location, and sales reports beginning August 9, 2006, for the Santa Fe Springs location.

[10] Files for different quarters were included the word "mod" in the file name. For 1Q18, files names include the words "Delco", "Delco mod", and "aDelco [sic] modified taxable". The record includes only the contends of the 1Q18 "Delco" and "Delco mod" files.

minimum threshold percentage. R. Casey stated that he would compute the minimum threshold on the worksheets and that the "[t]hreshold was added on about 10 years ago",[11] and that A. Beri "originally did the same analysis" and "[f]rom time to time [A. Beri] would tell him the new threshold." R. Casey also stated that he "provided by accident the Modified sheets" for tax preparation.[12]

8. In a CDTFA interview with A. Avina, he described the threshold analysis as a regular occurrence, that A. Beri would review the threshold analysis before filing the SUTRs, and that the threshold percentage would sometimes change. A. Avina stated in his declaration that the SUTRs for all the entities were based on his documentation, including his worksheets which calculated the minimum threshold percentage. He stated that he may have used a second worksheet in error to input the data into the SUTR.

9. CDTFA's forensic examination of A. Beri's cell phone revealed text messages from A. Beri to employees, such as A. Avina, instructing them to make purchases, as customers, of nontaxable items during an observation test CDTFA performed in its audit of ABC (for the period January 1, 2006, through December 31, 2009),[13] as well as text messages showing that A. Beri monitored the ratio of nontaxable sales made during the observation test, with the intention of inflating it.[14]

10. The California Attorney General's office filed a 66-count criminal complaint against A. Beri, appellant, several Beri entities, and others.[15] 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

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[11] The interview with R. Casey was conducted in 2012, so ten years prior to that would be 2002.

[12] The record includes Memorandums of Interview for R. Casey and A. Avina.

[13] For example, A. Beri sent the following text to multiple employees, including A. Avina, on February 22, 2010: "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."

[14] For example, on February 23, 2010, A. Beri texted, "Let me know when you get done with your people . . . I'm monitoring numbers to make sure we are within the range."

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

A. Beri on more than one occasion to discuss underreporting, but A. Beri dismissed his concerns.[16]

11. 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.[17]

12. 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.

13. 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.

14. During and for the purposes of the criminal proceedings, CDTFA established that the criminal defendants, including appellant, owed a total of $3,021,059 in tax for the period January 1, 2003, through December 31, 2010.[18] The court ordered A. Beri to serve 270 days confinement on home monitoring on the misdemeanor count and to pay restitution to CDTFA 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.

[16] 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 A. Beri. A. Beri provided some sort of a response like, 'trust me, everyone does it this way,' and that was on more than one occasion."

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

[18] The $3,021,059 in restitution consists of: (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.

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

16. On September 1, 2017, CDTFA issued the above-mentioned NOD to appellant for the liability period, based on an audit establishing a deficiency measure of $983,751 for unreported taxable sales. CDTFA established audited taxable sales of $3,672,874 by applying the sales tax rate to sales listed in the WSRs obtained from Del Taco, Inc, and comparing the amount to reported taxable sales of $2,689,123.[19] Appellant petitioned the NOD and filed a claim for refund for payments made towards the NOD and requested relief of interest.[20]

17. On June 7, 2019, appellant submitted to CDTFA a request for relief of penalties including a collection cost recovery fee (CCRF). However, CDTFA did not impose a CCRF on appellant.[21]

18. CDTFA issued a decision denying appellant's petition and claim for refund and its request for relief of penalties. CDTFA also determined that appellant did not show that interest should be relieved.

19. This timely appeal followed.

DISCUSSION

Issue 1: Whether CDTFA has provided clear and convincing evidence of fraud.

CDTFA imposed a 25 percent fraud penalty pursuant to R&TC section 6485. Under R&TC section 6485, if any part of the deficiency for which a deficiency determination is made is due to fraud or an intent to evade the law or authorized rules and regulations, a penalty of

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[19] The WSRs do not explicitly state that the sales listed therein constitute taxable sales. However, a comparison of the WSRs to the unmodified 1Q08 sales records indicates that the sales amounts listed on the WSRs constitute taxable sales. The sales listed on the WSRs are equivalent to the sales listed on the unmodified 1Q08 sales records, and because the tax amounts listed on the unmodified 1Q08 sales records are equivalent to the tax rate as applied to the sales amount, it appears that the sales listed on the unmodified 1Q08 sales records constitute taxable sales. Therefore, because the WSRs list sales that are identical to the sales listed on the unmodified 1Q08 sale records, and because the 1Q08 sales records list taxable sales, it is apparent that the WSR sales amounts represent taxable sales.

[20] Effective October 30, 2017, restitution payments totaling $77,860.86 were applied to this NOD, leaving only the penalties and interest unpaid.

[21] The request for relief did not include a request for relief of interest; however, appellant previously requested relief of interest.

25 percent of the amount of the determination shall be added thereto. The NOD 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. (R&TC, § 6487(a); *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.) However, this does not mean that CDTFA must prove every contested fact by clear and convincing evidence. (*Appeals of Jafari and Corona Motors, Inc.*, 2023-OTA-401P.) Rather, the Office of Tax Appeals (OTA) looks to the totality of the evidence to determine whether CDTFA 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, 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.)

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 likelihood that a deficiency is due to intent to evade increases in direct proportion to the error ratio, which is the understatement divided by the reported amount); 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 and consistent, substantial understatements of income. (*Bradford*, *supra*, 796 F.2d at p. 307; *Powell v. Granquist* (9th Cir. 1958) 252 F.2d 56, 60.)

CDTFA argues that appellant knowingly and consistently understated its taxable sales, and that the understatement was significant, as demonstrated by an error rate of 36.58 percent.[22] CDTFA also asserts that appellant maintained two separate sets of records, with one set containing tax amounts that match those provided by the franchisor, and one with lower tax amounts that were reported to CDTFA.

CDTFA contends that A. Beri and R. Luthra knew the correct amounts of gross receipts and tax reimbursement collected but chose to report a fraction of the reimbursement collected. CDTFA asserts that A. Beri and R. Luthra controlled appellant's business operations and maintained accounts of its assets and revenues,[23] and that A. Beri filed SUTRs for all entities he owned and operated, including appellant, and remitted payments of sales tax to CDTFA. CDTFA contends that A. Beri understood the sales tax reporting requirements[24] and notes that it provides all relevant laws and regulations to each permitholder at the time the permit is issued, and that it also issues quarterly Tax Bulletins and special industry mailings. CDTFA contends that A. Beri and R. Luthra operated numerous Subway and Denny's locations with similar or greater underreporting. CDTFA also contends that A. Beri's and ABC's guilty pleas demonstrate fraud.

Appellant argues that the tax listed on its modified 1Q08 sales records represent a minimum tax threshold calculated to ensure sales tax compliance, and that its bookkeeper mistakenly reported the minimum tax threshold amounts. In support, appellant provides a declaration from its bookkeeper stating that he mistakenly used the second set of data. Appellant also points to a CDTFA interview with R. Casey where he stated that the threshold showed the minimum tax required to collect from the customers and was calculated as twice the soda sales.

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[22] Specifically, CDTFA asserts that it found recorded taxable sales of $3,672,774 in the sales reports from the franchisor's POS system for the liability period, but appellant reported taxable sales of only $2,689,023 for that period, resulting in unreported taxable sales of $983,751, an underpayment of $77,861 in tax, and an error rate of 36.58 percent ($983,751 ÷ $2,689,023) for the period May 6, 2006, through June 30, 2008. For purposes of determining the error ratio, CDTFA removed from the deficiency measure audited taxable sales of $11,660 for the period May 3, 2006, through May 5, 2006.

[23] CDTFA asserts that this is evidenced by documents obtained from the search warrant, including charts listing business locations, percentage of ownership in each business entity, a detailed personal financial statement listing business locations, real properties, loans, and an income and expense analysis by location.

[24] CDTFA contends that taxable food sales and nontaxable food sales were segregated on the SUTRs and sales tax reimbursement was charged, including applicable district taxes on retail sales, evidencing A. Beri's knowledge of the requirements of the Sales and Use Tax Law concerning sales tax reimbursement.

OTA finds appellant's arguments to be unpersuasive. A. Beri and R. Luthra had access to the correct tax information via the POS system.[25] Nevertheless, appellant consistently and significantly underreported, as demonstrated by the error rate of 36 percent for the liability period.[26] Given the size and consistency of the underreporting, it is unlikely that the "minimum threshold" would be mistakenly confused with appellant's sales tax obligations.

Appellant asserts that the 1Q08 modified sales records were not found on A. Beri's computer, and because A. Beri signed the SUTRs, the documents lack probative value. However, the maintenance of a double set of records is compelling evidence that taxable sales were intentionally underreported.[27]

Appellant also argues that the modified sales records do not support a finding of fraud for periods other than 1Q08. However, appellant and its employees assert that the same minimum threshold calculation was performed for other quarters in other worksheets, and that the data from the worksheets was used in completing their SUTRs. Appellant states that the franchisees "used this minimum sales tax percentage to assess whether they were properly charging sales tax…." In an interview with CDTFA, R. Casey stated that he would compute the minimum threshold on the worksheets and that the "[t]hreshold was added on about 10 years ago", and that A. Beri "originally did the same analysis" and "[f]rom time to time [A. Beri] would tell him the new threshold." R. Casey also stated that he "provided by accident the Modified sheets" for use in preparing SUTRs.[28]

In an interview with CDTFA, A. Avina described the threshold analysis as a regular occurrence, and that A. Beri would review the threshold analysis before filing the SUTRs, and that the threshold percentage would sometimes change. A. Avina stated in his declaration that the SUTRs for all the entities were based on his worksheets, including those which calculated the minimum threshold percentage. He states that he may have used a second worksheet in error to input the data into the SUTRs. Therefore, while appellant asserts that the 1Q18 worksheets do

[25] In addition, the sales amounts in appellant's worksheets for 1Q18 correspond to the correct sales amounts in the WSRs.

[26] Though, in and of itself, this error ratio is not indicative of fraud.

[27] The documents were found on R. Luthra's computer, who also controlled appellant's business operations.

[28] Appellant also states that R. Casey testified that he accidentally gave A. Avina the wrong worksheet that was used to prepare the sales tax returns.

not establish fraud beyond that period, the evidence shows that appellant consistently made the same calculation in modified records for other quarters and that the calculation was used in computing the underreporting tax for the SUTRs in the liability period.

In addition, A. Beri admitted in his plea that he filed fraudulent 2010 SUTRs for other entities, with deficiencies determined based on the same kind of evidence presented in this appeal. The record shows that A. Beri was engaged in a pattern of conduct with the intent to evade tax. The court transcript indicates that R. Luthra approached A. Beri on more than one occasion to discuss underreporting, but A. Beri dismissed his concerns. Finally, the evidence shows that A. Beri intentionally interfered with CDTFA's investigation by creating fraudulent data that he hoped CDTFA would consider in its observation test. Therefore, when considered along with A. Beri's fraudulent conduct in the audit of ABC, it stands to reason that the modified records were completed with intent to underreport, and that the error rate was the result of this intent.

Appellant asserts that the charges of tax evasion filed against appellant were dropped, which indicates that appellant did not commit fraud. However, A. Beri's plea 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 the plea and provided no such evidence.

Appellant argues that records obtained from appellant's franchisor through a search warrant have no foundation and are inadmissible. However, 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)).[29] OTA finds the data obtained from the franchisor to be relevant evidence that may be considered.

[29] In addition, OTA does not have the jurisdiction to decide whether a taxpayer is entitled to a remedy for CDTFA'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).)

When considered together, the foregoing evidence constitutes clear and convincing proof of fraud for the entirety of the liability period. Thus, the NOD was timely issued, and the fraud penalty was properly imposed.

Issue 2: Whether adjustments are warranted to the tax liability as determined by CDTFA.

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).)

When CDTFA is not satisfied with the amount of tax reported by the taxpayer, or in the case of a failure to file a return, CDTFA 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, 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 relied on sales tax data provided by appellant to its franchisor, an independent third party. Therefore, CDTFA used appellant's own record of sales tax reimbursement collected from customers. OTA finds that CDTFA's use of the sales data listed on the WSRs obtained from appellant's franchisor was reasonable and rational.[30] Accordingly, the burden of proof shifts to appellant to establish that a result different from CDTFA's determination is warranted.

[30] OTA notes that CDTFA's calculation of audited taxable sales includes sales totaling $11,660.27 for the Fontana location for the period May 3, 2006, through May 5, 2006. Because this period precedes the May 6, 2006 start date for the liability period (as listed on the NOD), an adjustment to the deficiency measure would typically be warranted on this basis. However, given that CDTFA accepted reported taxable sales for period July 1, 2008, through December 31, 2009 - despite identifying unreported taxable sales of $54,513 for this period - OTA finds that CDTFA's audit was reasonable and rational despite the inclusion of sales for the period May 3, 2006, through May 5, 2006.

Appellant argues that the WSRs, upon which the deficiency measure is based, are inadmissible because it is unclear how these records were obtained, because CDTFA has not provided a copy of these records, and because there is no declaration from a custodian of record authenticating the WSRs.[31] However, CDTFA obtained the WSRs via a search warrant executed on appellant's franchisor, and the WSRs are included in Exhibit F of CDTFA's April 16, 2020 submission. CDTFA may compute and determine the tax required to be paid upon the basis of the facts contained in the taxpayer's sales and use tax returns or upon the basis of any information within CDTFA's possession or that may come into its possession. (R&TC, § 6481.) Consequently, the purported absence of a chain of authentication does not preclude use of WSR data.[32] Moreover, given that the WSRs were obtained by a search warrant executed on appellant's franchisor, the authenticity of these documents is not in doubt, and the absence of a custodial authentication is of no consequence.

Appellant has not articulated a different method for verifying taxable sales, and appellant's criticisms of CDTFA's audit methodology lack merit. Based on the foregoing, appellant has not met its burden of proof to establish that adjustments to the deficiency measures are warranted.[33]

Issue 3: Whether the payment of restitution satisfies any remaining civil liability.

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 CDTFA is precluded from asserting civil tax deficiencies in excess of the court-ordered restitution of $3,021,059 paid by A. Beri. Appellant contends that R&TC

[31] Appellant also argues that it was never audited; however, appellant was in fact audited.

[32] And as noted above, 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, and generally, all relevant evidence is admissible. (Cal. Code Regs., tit. 18, § 30214(f) & (f)(1).)

[33] R&TC section 7157(c) bars refunds or credits for amounts paid or payments applied pursuant to a restitution order. However, even if appellant's claim for refund was not barred pursuant to R&TC section 7157(c), OTA would deny the claim for refund on the basis that adjustments to the deficiency measure are not warranted.

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.[34] Appellant also argues that *Delgado* is distinguishable because it involves the Cigarette and Tobacco Products Tax Law.

Delgado sets forth that a taxpayer's criminal restitution payment to CDTFA is separate and distinct from the taxpayer's civil liabilities for tax and penalties. *Delgado* does not limit this principle to cigarette and tobacco products tax, and the premise applies equally to sales and use tax determinations. Therefore, *Delgado* is not distinguishable from this matter on the basis that it involved the Cigarette and Tobacco Products Tax Law.

Appellant argues that *Delgado* improperly relied on *Vigilant* because it did not involve a government entity and concerned nonmonetary damages. Furthermore, appellant argues that *Vigilant* and *Delgado* are distinguishable from this matter because appellant does not "rely" on California Penal Code section 1202.4.

OTA finds these distinctions inconsequential. The restitution payments at issue here, as in *Vigilant*, were made pursuant to California Penal Code section 1202.4, and the principle set forth in *Vigilant* is not limited to the characteristics of the civil action at issue in that case. The plain language of California Penal Code section 1202.4(j) - which states that restitution shall be credited to any other judgments - indicates that restitution payments made pursuant to California Penal Code section 1202.4 do not absolve civil liability.

The payment of restitution to CDTFA has been credited against appellant's civil tax liability, but it does not eliminate or absolve the remaining penalties and interest. Accordingly, appellant remains liable for the remaining unpaid civil liability.

Issue 4: Whether CDTFA properly imposed the 40 percent penalty and whether appellant is entitled to relief of the 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

[34] 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 [CDTFA]." The subdivision's reference to the finality of a restitution order confirms that the restitution amount is immediately collectible and does not preclude CDTFA from issuing determinations for tax and penalties in excess of a restitution payment.

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 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.[35] 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 the 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. In addition, the amount of sales tax collected but not remitted exceeds the minimum thresholds set forth in R&TC section 6597(a)(2). In Issue 1, OTA rejected all of appellant's arguments that it unknowingly underreported. Therefore, OTA finds that CDTFA correctly imposed the 40 percent penalty. The next question is whether relief of the penalty is warranted.

Appellant argues that CDTFA cannot impose the penalty because the determination is barred by the statute of limitations and CDTFA has not proven fraud. However, OTA determined in Issue 1 that CDTFA has shown fraud, and thus the determination is not barred by the statute of limitations. Therefore, OTA finds that CDTFA correctly imposed the 40 percent

[35] 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.

penalty. In addition, appellant does not argue, and the record does not show, that the penalty should be relieved.

Issue 5: Whether appellant is entitled to relief of interest.

There is no statutory right to interest relief. The law allows CDTFA, 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 in certain circumstances, including where the failure to pay the tax was due to a disaster, where the failure to pay the tax was due in whole or in part to an unreasonable error or delay by an employee of CDTFA acting in their official capacity, and where the failure to pay the tax was due to erroneous advice received from CDTFA. (R&TC, §§ 20, 6593, 6593.5(a)(1), 6596.) Any person requesting interest relief must include a statement under penalty of perjury setting forth the facts on which the request is based. (R&TC, §§ 6593(b), 6593.5(c), 6596(c)(2).) CDTFA determined that appellant did not show that interest could be relieved.

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 CDTFA acting in their official capacity or that any other basis exists to relieve interest. Therefore, OTA finds that appellant is not entitled to relief of interest.

HOLDINGS

1. CDTFA has provided clear and convincing evidence of fraud.
2. Adjustments are not warranted to the tax deficiencies.
3. Restitution payments do not satisfy any remaining civil liability.
4. CDTFA properly imposed the 40 percent penalty and appellant is not entitled to relief of the penalty.
5. Appellant is not entitled to relief of interest.

DISPOSITION

CDTFA's denial of the petition for redetermination and claim for refund is sustained.

DocuSigned by:
Josh Lambert
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Josh Lambert
Administrative Law Judge

We concur:

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

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

Date Issued: 5/3/2024