

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

**TEALEAF CORPORATION,
dba Ding Tea**) OTA Case No.: 231114661
) CDTFA Case ID: 3-800-359
)
)
)
)**OPINION**

Representing the Parties:

For Appellant:

Wendy Huynh, Representative

For Respondent:

Jason Parker, Chief of Headquarters Ops.

For Office of Tax Appeals:

William J. Stafford, Attorney

K. WILSON, Hearing Officer: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Tealeaf Corporation dba Ding Tea (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA) denying appellant's administrative protest of a Notice of Determination (NOD) issued on April 6, 2022.¹ The NOD is for tax of \$13,082, a 40 percent unremitted tax collected (UTC) penalty of \$5,232.80, plus applicable interest for the period October 15, 2018, through March 31, 2019 (liability period).² Pursuant to R&TC section 6565 an additional 10 percent penalty of \$1,308.20 was added to the NOD for appellant's failure to timely pay the NOD before it became final (finality penalty).

Appellant waived the right to an oral hearing; therefore, the matter was submitted to the Office of Tax Appeals (OTA) on the written record pursuant to California Code of Regulations, title 18, (Regulation) section 30209(a).

¹ If a taxpayer files a petition for redetermination after the 30-day period authorized in R&TC section 6561 expires, CDTFA may accept it as an administrative (i.e., late) protest; however, such an appeal does not qualify as a valid petition for redetermination. (Cal. Code Regs, tit. 18, § 35019.)

² The NOD was timely issued because appellant signed a waiver of the otherwise applicable three-year statute of limitations for the period October 15, 2018, through March 31, 2019, which allowed respondent until April 30, 2022, to issue an NOD. (R&TC, §§ 6487(a), 6488.)

ISSUE³

Whether appellant has established a basis for relief of the UTC penalty.

FACTUAL FINDINGS

1. Appellant, a California corporation, operated a boba tea restaurant in El Monte, California.
2. During the liability period, appellant reported total sales of \$72,216 and claimed the same amount of deductions for nontaxable food products.⁴ Thus, appellant reported zero taxable sales and remitted zero sales tax reimbursement for the liability period.
3. Upon audit, appellant provided point of sale (POS) reports for the fourth quarter of 2018 (4Q18) through 1Q19 (appellant's POS reports)⁵ showing sales including tax of \$72,917 and sales tax collected of \$6,548.
4. Through an inter-agency inquiry, CDTFA obtained appellant's Form 1099-K merchant statements⁶ for 4Q18 through 1Q19. CDTFA also obtained POS monthly sales reports directly from Clover, which contained additional information for 4Q18 through 1Q19 (Clover reports).
5. CDTFA compared tax included gross receipts from appellant's POS reports (\$72,917) and gross receipts recorded in the Clover reports (\$137,276) and found a difference of \$64,359. CDTFA deemed appellant's POS reports unreliable because of the large difference, the transaction numbers for some of the sales were missing, and the transaction numbers were not in order.
6. CDTFA compared appellant's reported total sales from appellant's POS reports to the 1099-K data to compute a credit card sales ratio of 81.66, which it considered high for this type of business.

³ On appeal, appellant only disputes the UTC penalty. Appellant makes no arguments regarding the tax, interest, or finality penalty; therefore, these items will not be addressed further.

⁴ For 4Q18, appellant claimed a deduction for sales for resale equal to total sales reported. CDTFA treated the claimed deduction as nontaxable food products because CDTFA consider it unlikely that these were sales for resale and appellant claimed nontaxable food products on its first quarter 2019 (1Q19) return.

⁵ Clover is the POS system used by appellant.

⁶ Form 1099-K is an IRS Form titled, "Payment Card and Third Party Network Transactions," which shows the monthly and annual amounts paid to a merchant (here, appellant) by a bank, credit card company, or third party network, during a given time period. Form 1099-K includes payments made by any electronic means, including, but not limited to, credit cards, debit cards, and PayPal.

7. Based on the Clover reports, CDTFA computed a two percent tip ratio by comparing tips to sales for the liability period. CDTFA used the two percent tip ratio and the 9.5 percent tax rate to remove tips of \$1,292 and tax of \$5,602 from the 1099-K data to establish 1099-K sales excluding tax and tip of \$58,975. Using the Clover reports, CDTFA computed a credit card sales ratio of 45 percent (compared to 81.66 percent based on appellant's POS reports), which CDTFA considered reasonable for this type of business.
8. CDTFA compared recorded gross sales of \$130,470, in the Clover reports, to reported gross sales of \$72,216 to determine a difference of \$58,254. Using the same reports, CDTFA compared recorded sales tax reimbursement collected of \$13,082 to zero remitted sales tax reimbursement collected, which is a difference of \$13,082.
9. On April 6, 2022, CDTFA timely issued the NOD to appellant for \$13,082 in tax, plus accrued interest, and a 40 percent UTC penalty of \$5,232.80.
10. Appellant failed to pay or petition the NOD within 30 days, and the NOD became final on May 6, 2022, incurring the 10 percent finality penalty of \$1,308.20.
11. On May 9, 2022, CDTFA issued a Demand for Immediate Payment.
12. Subsequently, CDTFA issued a Notice of Collection Fee dated August 9, 2022, wherein CDTFA assessed a collection cost recovery fee of \$570 pursuant to R&TC section 30354.7(a) because the liability remained unpaid.
13. On May 12, 2022, appellant filed an untimely petition for redetermination, disputing the NOD in its entirety, which CDTFA accepted as an administrative protest.
14. On September 27, 2023, CDTFA issued its decision denying the administrative protest without adjustment.
15. Appellant filed this timely appeal.

DISCUSSION

California imposes sales tax on a retailer's retail sales of tangible personal property sold in this state measured by the retailer's gross receipts, 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).)

If 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.*)

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 sales tax reimbursement averages \$1,000 or less per month or does not exceed five 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).)⁷ In order for OTA to sustain CDTFA's imposition of the 40 percent UTC 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 to the state; 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 UTC 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 his or her willful neglect. (R&TC, § 6597(a)(2)(B).) R&TC section 6597(b)(1) provides that reasonable cause or circumstances beyond the person's control includes, as relevant to appellant's arguments, a natural disaster or other catastrophe directly affecting the business operations of the person that caused the person's failure to make a timely remittance.

The evidence shows that all requirements for imposition of the 40 percent UTC penalty under R&TC section 6597(a) have been met. Appellant separately stated tax reimbursement on its sales receipts during the liability period. Furthermore, although ultimately rejected as understated and unreliable, appellant's POS reports show appellant collected sales tax reimbursement on boba drinks. Additionally, Clover reports obtained by CDTFA show appellant

⁷ The thresholds for R&TC section 6597 were revised by Senate Bill 1449 (Stats. 2006, Ch. 252) effective January 1, 2025.

collected sales tax reimbursement. Therefore, appellant knowingly collected sales tax reimbursement from its customers. (See R&TC, § 6597(a)(1).) Appellant did not report or remit the recorded sales tax reimbursement that it collected. (*Ibid.*) Finally, the unremitted sales tax reimbursement averages more than \$1,000 per month during the penalty period and is more than five percent of the recorded collected sales tax reimbursement. (See R&TC, § 6597(a)(2)(A).) Therefore, the requirements for imposition of the 40 percent UTC penalty under R&TC section 6597(a) have been met since the amount of sales tax reimbursement collected but not remitted exceeds both the \$1,000 threshold and the five percent threshold described in R&TC section 6597(a)(2)(A). Accordingly, CDTFA correctly imposed the 40 percent UTC penalty.

Appellant contends that it is entitled to relief from the 40 percent UTC penalty due to reasonable cause or circumstances beyond its control. Appellant asserts that it should be relieved of the penalty because it did not know how to operate the Clover POS system with two stores. Specifically, appellant did not intend to charge sales tax but instead intended to charge a service fee. In addition, appellant asserts that due to the COVID-19 pandemic, appellant had trouble hiring honest employees and managers that could properly report sales tax data.

As indicated above, appellant collected sales tax reimbursement from its customers during the liability period but did not report or remit any sales tax reimbursement to CDTFA. Even if appellant intended to collect a service fee, instead of sales tax reimbursement from its customers, the evidence in the appeal record shows that appellant collected sales tax reimbursement. Assuming, *arguendo*, that appellant's sales were not subject to tax, as appellant alleges, sales tax reimbursement was collected from appellant's customers, and the amounts collected would constitute excess tax reimbursement.⁸ Additionally, the evidence in the appeal record does not establish how appellant's alleged difficulties (including the COVID-19 pandemic) impacted appellant's obligations to properly remit the sales tax reimbursement that it recorded and collected. The appeal record supports a finding that appellant failed to exercise ordinary care and prudence, as evidenced by the fact that appellant incorrectly reported collecting zero sales tax reimbursement during the liability period. Appellant's

⁸ Excess tax reimbursement is an amount represented by a retailer to a customer as constituting reimbursement for sales tax, 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. (Cal. Code Regs., tit. 18, § 1700(b)(1).) Whenever CDTFA ascertains that a person has collected excess tax reimbursement, the person will be afforded an opportunity to refund the excess collections to the customers from whom they were collected. (Cal. Code Regs., tit. 18, § 1700(b)(2).) In the event of failure or refusal of the person to make such refunds, CDTFA will make a determination against the person for the amount of the excess tax reimbursement collected and not previously paid to the state, plus applicable interest and penalty. (*Ibid.*)

arguments on appeal do not demonstrate that such an error occurred notwithstanding appellant's exercise of ordinary care and in the absence of appellant's willful neglect. Accordingly, appellant is not entitled to relief of the 40 percent UTC penalty.

HOLDING

Appellant has not established a basis for relief of the UTC penalty.

DISPOSITION

CDTFA's action denying appellant's administrative protest is sustained.

Signed by:

Kim Wilson

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Kim Wilson
Hearing Officer

We concur:

Signed by:

Greg Turner

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Greg Turner
Administrative Law Judge

DocuSigned by:

Steven Kim

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Steven Kim
Administrative Law Judge

Date Issued: 4/8/2025