

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
TD OIL & GAS, LLC,
dba Castro Valley Minimart

) OTA Case No.: 230914414
) CDTFA Case ID: 1-792-854
)
)
)
)
)
)

OPINION

Representing the Parties:

For Appellant: Betty J. Williams, Attorney

For Respondent: Jason Parker, Chief of Headquarters Ops.

N. RALSTON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, TD Oil & Gas, LLC (appellant) appeals a decision issued by the California Department of Tax and Fee Administration (respondent)¹ denying appellant’s timely petition for redetermination of a Notice of Determination (NOD) issued on June 26, 2020. The NOD is for tax of \$510,598, plus accrued interest, a 25 percent fraud penalty of \$37,474.43, and a 40 percent penalty of \$144,955 for failing to remit sales tax reimbursement collected from customers. The NOD is for the period January 1, 2010, through December 31, 2013 (liability period).

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).

ISSUE²

Whether there is clear and convincing evidence of fraud.

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 respondent. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to events that occurred before July 1, 2017, “respondent” shall refer to the board.

² Based on the record before OTA, appellant does not dispute the deficiency measure, and thus, the issue will not be discussed further.

FACTUAL FINDINGS

1. Appellant is a limited liability company, and franchisee of BP West Coast Products (BP). Appellant operates an Arco AM/PM gas station with mini mart in Castro Valley, California. D. Singh is appellant's sole member.
2. Respondent received appellant's wholesale gasoline purchases from BP. Respondent initiated an investigation of appellant and found that appellant's purchases of gasoline exceeded appellant's reported sales.
3. On February 20, 2014, respondent, with the assistance of California Highway Patrol officers, executed search warrants upon appellant's gas station location, D. Singh's residence, two banks, and BP's California agent's office. The seized items included hard copy Point-of-Sale (POS) records,³ state income tax returns for tax years 2010, 2011, and 2012,⁴ purchase invoices, bank statements,⁵ electronic POS sales journal with detail item sales (from BP), electronic purchase journals of gasoline purchases (from BP), and computers.
4. During the investigation, records showed the following: respondent received a seller's permit application for appellant on August 17, 2009, with a start date of November 1, 2009, which bore D. Singh's signature,⁶ appellant filed a paper sales and use tax return (SUTR), bearing the signature of D. Singh, with the title "manager," for the period January 1, 2010, through March 31, 2010; there were numerous phone

³ 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") 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 sales. Hard copy POS records included the periods August 1, 2011, through November 30, 2011; April 1, 2012, through October 31, 2012; January 1, 2013, through June 30, 2013; and October 1, 2013, through December 31, 2013.

⁴ The state income tax returns for tax years 2010 through 2012 were signed by D. Singh, and although the 2013 state income tax return was signed by appellant's tax preparer, the returns disclose that D. Singh maintained a 97 percent ownership interest in appellant's business for all of 2010 through 2013.

⁵ Bank statements were for January 1, 2010, through December 31, 2013, for appellant's accounts with Bank of America and Wells Fargo.

⁶ Upon the issuance of the seller's permit, D. Singh, on behalf of appellant, was provided the following Sales and Use Tax Regulations, Forms, and Publications (Pub.): Regulation section 1641, Credit Sales and Repossessions; Regulation section 1642, Bad Debts; Regulation section 1668, Sales for Resale; Reg. 1698, Business Records, Record Keeping and Record Retention; Regulation section 1700, Reimbursement for Sales Tax; Form BOE-519, Misuse of Resale Certificate; Form BOE-8, Getting it in Writing; Pub. 51, Guide to the Board of Equalization; Pub. 73, Seller's Permit; Pub. 74, Closing Out Your Seller's Permit; Pub. 109, Internet Sales; and Pub. 159, e-File Guide.

- communications between D. Singh and respondent regarding payments and account maintenance for appellant; D. Singh was listed as the managing member and stockholder of appellant on the Alcoholic Beverage Control license for selling beer and wine; BP records included amounts specifically for sales tax reimbursement collected from customers for gasoline sales; appellant claimed deductions for prepaid sales tax on gasoline sales included in reported total sales on its SUTRs for each quarter of the liability period; and, as documented in respondent's Automated Compliance Management System, D. Singh spoke with respondent on numerous occasions regarding appellant's sales and use tax matters throughout the liability period, including discussions about filing appellant's SUTRs and making payments on behalf of appellant.
5. During an interview with respondent on February 20, 2014, D. Singh confirmed that he prepared and filed the SUTRs for appellant. During an interview with respondent on February 20, 2014, B. Singh and T. Bhatia stated that D. Singh handled appellant's sales and use tax matters.⁷
 6. Respondent conducted an audit of appellant on an actual basis using BP's records. Respondent compared appellant's recorded taxable sales of \$35,549,000 (consisting of recorded gasoline taxable sales of \$33,363,676 and recorded mini-mart taxable sales of \$2,185,324) to total reported sales of \$24,939,729 and found unreported taxable sales of \$10,609,271 (\$35,549,000 - \$24,939,729) for the liability period.
 7. On March 12, 2015, respondent received appellant's amended SUTRs for second quarter of 2010 (2Q10) through 4Q10, which were signed by D. Singh. On April 7, 2015, respondent received additional amended SUTRs from appellant for 1Q11, 2Q11, 4Q11, 1Q12, 2Q12, and 4Q12, all of which were also signed by D. Singh. Because appellant was under audit for the liability period, respondent did not accept appellant's amended returns but observed that appellant's taxable sales reported on the amended returns closely matched the amounts recorded on the BP records. Appellant did not file amended SUTRs for 2013.
 8. Based on these audit findings, respondent issued the aforementioned June 26, 2020 NOD to appellant.

⁷ Respondent was unable to verify the identities and positions of B. Singh and T. Bhatia.

9. As part of its appeal with respondent (included herein), appellant provided two sets of Fuel Sales Tax Summary Reports Series reports (S2K)⁸ for 2010, 2011, and 2012, with one set printed on October 30, 2014, and the second set printed on June 24, 2015. The S2K reports disclosed recorded total taxable mini-mart sales of \$330,117.26 for 2010 and \$316,661.57 for 2011, while appellant reported total taxable mini-mart sales of \$83,430 and \$251,966 for 2010 and 2011, respectively.
10. Appellant also submitted a signed affidavit from T. Bhatia, dated December 23, 2021, in which he attests that BP recommended that appellant rely on the S2K reports generated by BP's Retailix POS software to prepare its SUTRs. Appellant also submitted a copy of a class action lawsuit filed by BP franchisees over issues with BP's Retailix POS software detailed in a California Court of Appeal opinion and a May 4, 2011 article from Reuters as evidence that the Retailix POS software (and thus the S2K reports) was inaccurate. In addition, appellant provided copies of emails between BP and appellant regarding franchise royalty information and issues with the S2K software, which show appellant opened a service request ticket with BP on October 30, 2014, and another ticket sometime prior to January 11, 2015.
11. In response, respondent provided a memorandum documenting its interview of BP Director of Technology, S. Carriger, that respondent conducted on February 27, 2014, in connection with the search of appellant's business, in which Mr. Carriger states that to his knowledge, he was unaware of franchisees receiving erroneous information or reports from the Retailix POS system.
12. Appellant then filed a petition for redetermination, which respondent denied in its supplemental decision issued June 13, 2023.⁹
13. This timely appeal followed.

⁸ The reports are labeled Fuel Sales Tax Summary Reports but are referred to as Series S2K (S2K) reports/software. According to appellant, BP provides S2K software to franchisees and advises them to use it for tax calculations.

⁹ In respondent's initial decision, respondent partially granted appellant's petition for redetermination. In its supplemental decision, respondent reversed its finding to a full denial.

DISCUSSION

As relevant here, except in cases of fraud, for taxpayers filing returns on other than an annual basis, an NOD must be mailed within three years after the last day of the calendar month following the quarterly period for which the amount is proposed to be determined or within three years after the return is filed, whichever period expires later. (R&TC, § 6487(a).) R&TC section 6487 only tolls the statute of limitations for reporting periods for which fraud has been shown. (*Appeal of Landeros*, 2024-OTA-655P.)

Fraud or intent to evade must be established by clear and convincing evidence. (*Appeal of ISIF Madfish Inc.*, 2019-OTA-292P.) 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.*) The express language of R&TC section 6485 makes it clear that a fraud penalty applies to the entire deficiency determination “if any part” of the NOD is due to fraud.

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 v. Commissioner* (9th Cir. 1986), 796 F.2d 303, 307; *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 30.)

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.)

On appeal, appellant contends that the statutory period of time for which respondent may assess addition to tax has expired because respondent has not met its burden of proof to

show fraud.¹⁰ Appellant argues that D. Singh was not involved with appellant's business after July 11, 2011, the date D. Singh purportedly transferred ownership of appellant to B. Singh and T. Bhatia, which included the responsibility of reporting and paying appellant's sales and use taxes.

Appellant also contends that BP recommended that appellant rely on the S2K reports generated by BP's Retalix POS software to prepare its SUTRs, contentions that T. Bhatia attests to in an affidavit dated December 23, 2021. However, due to system-wide inaccuracies in the Retalix POS software, appellant argues that the S2K information it used to file the SUTRs differed from both the BP records and the hard copy POS records. In support, appellant provided the aforementioned sets of S2K reports for 2010, 2011, and 2012.

Appellant further contends that the BP records do not prove that appellant possessed the intent to evade tax because BP engaged in the practice of artificially inflating gasoline sales by shipping gasoline in excess of the amount the gas station could hold, such that appellant would be charged for gas it could not physically store. Thus, appellant contends any discrepancies between appellant's reported sales and the BP records are not attributable to appellant's intent to evade taxes. In support, appellant cites a class action lawsuit filed by BP franchisees over issues with BP's Retalix POS software detailed in a California Court of Appeal opinion, and a May 4, 2011 article from Reuters. Thus, appellant contends that any discrepancies between the S2K reports and the BP records were a result of BP's system errors and not appellant's.

Here, there is no direct evidence of a specific intent to evade the tax. Nevertheless, there are a number of factors present which, when taken together, clearly and convincingly establish that all or a significant portion of the understatement was due to fraud. First, the amount of the underreporting is significant. The records show that appellant underreported taxable sales by \$10,609,271, resulting in an error rate of 42.54 percent. Nevertheless, appellant collected sales tax on all of its taxable sales.

In addition, appellant charged its customers sales tax reimbursement, filed quarterly SUTRs to report its sales, and claimed deductions for nontaxable sales of food and sales tax included in reported total gasoline sales, demonstrating significant knowledge of its reporting

¹⁰ Appellant also cites to various legal authorities for the proposition that fraud cannot be established by mere underreporting of tax; however, as there is no dispute that such evidence, in and of itself, is insufficient to support a finding of fraud, this argument is given no further consideration. These are the only arguments raised by appellant in its opening brief. However, appellant made several additional arguments in its appeal with respondent. Although appellant has not specifically raised these arguments in its opening brief, it is not clear that appellant abandoned these arguments. Therefore, out of an abundance of caution, OTA will address them.

and payment obligations. Furthermore, when appellant received its seller's permit, respondent provided appellant with more than 20 sales and use tax publications informing appellant how to report sales and use tax information, all of which were still with appellant and were seized during the warrant execution. Moreover, BP records did not disclose any errors in the application of the sales tax rates in effect throughout the liability period.

In addition, appellant communicated with respondent regarding appellant's sales and use tax obligations and account maintenance, and appellant understood its obligation to report its sales to respondent by filing SUTRs. Appellant asserts that it relied on the erroneous S2K records to file its return, which caused the errors on its returns, and appellant did not review the POS records. This argument is not persuasive. Following respondent's searches of the gas station and D. Singh's home, appellant filed amended SUTRs for 2Q10 through 4Q10 on March 12, 2015, and for 1Q11 through 4Q12 on April 7, 2015, which showed that appellant had access to the correct sales figures, as well as the requisite sales and use tax knowledge to file amended returns. Appellant also had the hard copy POS records and bank statements, both of which disclosed sales that greatly exceeded reported amounts. Further, the S2K reports also disclose significantly greater mini-mart sales for 2010 and 2011 than appellant reported on its SUTRs for those periods. Also, the total taxable mini-mart sales recorded in the S2K report for 2010 (\$330,117.26) closely match the amount of mini-mart sales recorded in the BP records for 2010 (\$319,798). While it is possible that the S2K records contained errors, appellant had access to information that would allow appellant to file correct returns.

As for appellant's argument that T. Bhatia and B. Singh (not D. Singh) were responsible for the business, this does not preclude a finding of fraud against appellant. The corporation is appellant and not any particular person or employee. Thus, OTA need not find that any particular owner, agent, or employee was guilty of fraud in order to find that the fraud penalty was properly imposed against the corporation. Further, D. Singh filed the SUTRs after July 2011, which directly contradicts this assertion. Specifically, D. Singh signed and filed amended SUTRs for 2010 through 2012 and signed appellant's state income tax returns for 2010 through 2012. In addition, the interviews respondent conducted with D. Singh, B. Singh, and T. Bhatia all reveal that D. Singh signed appellant's SUTRs.

In summary, based on all the above facts and circumstances, respondent has clearly and convincingly established fraud for the entirety of the liability period. Thus, the statute of limitations is tolled for the entire liability period, and the NOD was timely issued.¹¹

¹¹ There is no statute of limitations where fraud is present. (See R&TC, § 6487.)

HOLDING

Respondent has provided clear and convincing evidence of fraud.

DISPOSITION

Respondent's action in denying appellant's petition for redetermination is sustained.

Signed by:
Natasha Ralston
25F8FE08FF56478...

Natasha Ralston
Administrative Law Judge

We concur:

DocuSigned by:
Sheriene Anne Ridenour
87F043D83EF5647C...

Sheriene Anne Ridenour
Administrative Law Judge

DocuSigned by:
Steven Kim
5DD7EF644397430...

Steven Kim
Administrative Law Judge

Date Issued: 10/16/2025