



**STATE BOARD OF EQUALIZATION
STAFF LEGISLATIVE BILL ANALYSIS**

DRAFT

Date Introduced:	02/23/06	Bill No:	AB 2441
Tax:	Sales and Use	Author:	Klehs
Related Bills:	SB 1449 (Migden)		

BILL SUMMARY

This bill would impose a 40 percent penalty upon a person who knowingly collected sales tax reimbursement and failed to timely remit that tax to the Board, except as specified.

ANALYSIS

Current Law

Under California’s Sales and Use Tax Law, sales tax is imposed on all retailers for the privilege of selling tangible personal property in this state. Under Section 1656.1 of the Civil Code, whether a retailer may add sales tax reimbursement to the sales price of the tangible personal property sold at retail to a purchaser depends solely upon the terms of the agreement of sale. The law presumes that the parties agreed to the addition of sales tax reimbursement to the sales price of tangible personal property sold at retail to a purchaser if:

- (1) The agreement of sale expressly provides for such addition of sales tax reimbursement;
- (2) Sales tax reimbursement is shown on the sales check or other proof of sale; or
- (3) The retailer posts in his or her premises in a location visible to purchasers, or includes on a price tag or in an advertisement or other printed material directed to purchasers, a notice to the effect that reimbursement for sales tax will be added to the sales price of all items or certain items, whichever is applicable.

The Sales and Use Tax Law provides for a variety of penalties. However, the law does not provide for a specific penalty attributable to situations in which a taxpayer knowingly collects sales tax reimbursement and fails to remit the tax.

Under the law, there are penalties that are mandatory and imposed automatically, such as those imposed because payments are made late or returns are filed after the due date, and there are others that are discretionary and that may be assessed by auditors as a result of their audits. The main penalties that are imposed are summarized as follows:

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Nature of Penalty	Rate	Section
Failure to file a return	10%	6511
Negligence or intentional disregard of the laws or regulations	10%	6484
Fraud or intent to evade the law or regulations	25%	6485
Knowingly not obtaining a valid permit in order to avoid the tax	50%	7155
Improper use of a resale certificate for personal gain or to evade the tax	*	6072; 6094.5
Registration of vehicle, vessel, or aircraft out-of-state to evade the tax	50%	6485.1; 6514.1
Failure to obtain evidence that operator of catering truck holds valid seller's permit	\$500	6074
Failure of retail florist to obtain permit	\$500 **	6077

* 10% of the tax due or \$500 whichever is greater

**Plus any other applicable penalty

Proposed Law

This bill would add Section 6591.7 to the Sales and Use Tax Law to provide that any person who knowingly collects sales tax reimbursement and who fails to timely remit that sales tax reimbursement to the Board, shall be liable for a penalty of 40 percent of the amount not timely remitted.

The bill would specify that the proposed penalty shall not apply if either the unremitted sales tax reimbursement averages \$1,000 or less per month, or does not exceed 5 percent of the total amount of sales tax reimbursement collected for the period in which the tax was due.

The bill further provides relief from the proposed penalty if the person certifies under penalty of perjury to the Board that the person's failure to remit the tax was due to reasonable cause.

The bill would become operative January 1, 2007.

Background

During the 2005 Legislative Session, a similar measure, SB 323 (Migden), was vetoed by the Governor. That measure would have imposed a 50 percent penalty for a person's failure to timely remit sales tax reimbursement. In his veto message, the Governor stated the following:

"This bill creates a rigid and overly severe punishment for the failure to remit sales taxes which have been collected. I strongly support tough laws to punish and discourage scofflaws who knowingly evade taxes. However, this measure provides no flexibility for errors made by individuals with no intent to evade taxes or defraud the state. Moreover, the Board of Equalization does not contend that this bill would result in a specific level of increased compliance. For these reasons, I cannot support this bill."

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COMMENTS

1. **Sponsor and purpose.** This bill is sponsored by the author. According to the author's office, the purpose of the bill is to enhance the penalty in cases where a retailer collects sales tax reimbursement from customers and fails to timely remit the tax to the state.
2. **Customers entrust retailers to remit the tax to the State.** Proponents note that sales tax reimbursement is generally regarded by customers as "fiduciary taxes" or "trust taxes." The customers perceive the tax reimbursement they pay to retailers as the State's money, not the retailers'. While the true liability for the tax falls on a retailer, customers who pay sales tax reimbursement to the retailer trust and expect the retailer to send it to the state; otherwise, they would have no obligation to reimburse the retailer. When sales tax reimbursement is collected from a customer, the customers' perception is that the business is, in effect, acting as the agent for the state or local government, collecting the government's money from the customer and then paying it over to the government on a periodic basis. A failure of the business to do so should be subjected to enhanced penalties.
3. **Technical issues:**
 - **It is recommended that the proposed penalty also apply to use tax collected and not timely remitted.** The proposed penalty only applies to taxpayers that have collected but have not timely remitted sales tax reimbursement, and does not apply to out-of-state retailers that have collected but have failed to remit the use tax. The following language is suggested:

On page 2, lines 4, 8, 11, and 13, after "reimbursement" insert "or use tax"
 - **It is recommended that the taxpayer have the opportunity to request relief of the penalty through the appeals process.** To address this issue, the proposed statute should be renumbered under Article 2 of Chapter 5 (commencing with Section 6481) of Part 1 of Division 2, and the following language is recommended:

On page 2, strike lines 15 through 17, and insert, "If a person's failure to make a timely remittance under this section is due to reasonable cause."
4. **Related legislation.** A similar bill (SB 1449, Migden) has been introduced to provide a 50 percent penalty for a person's failure to timely remit sales tax reimbursement or use tax collected.

COST ESTIMATE

Enactment of this bill could increase the Board's workload attributable to an increase in billings for the new penalty and processing requests for relief. However, the increase in workload would likely be offset by the increase in compliance and the increase in revenues attributable to the 40 percent penalty.

REVENUE ESTIMATE

Enactment of this bill could increase compliance with the Sales and Use Tax Law, thereby increasing revenues. However, the magnitude of this increase is unknown.

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