STATE BOARD OF EQUALIZATION
SALES AND USE TAX APPEAL

CALIFORNIA STATE BOARD OF EQUALIZATION

APPEALS DIVISION BOARD HEARING SUMMARY

In the Matter of the Petition for Redetermination Under the Sales and Use Tax Law of:	
ACE SERVICE CENTERS	Account Number SR Y FH 100-988696 Case ID 625359
Petitioner	Poway, San Diego County

Type of Business: Automobile repair shop with sales of parts

Audit period: 01/01/08 – 06/30/11

Item	Disputed Amount
Penalty for failure to timely remit sales tax reimbursement collected from customers	$106,524

	Tax	Penalty
As determined and proposed to be redetermined	$269,745.20	$106,523.72
Less concurred	- 269,745.20	00.00
Balance, protested	$ 00.00	$106,523.72

Proposed tax redetermination	$269,745.20
Interest through 02/28/15	74,962.40
Penalty for failure to timely remit sales tax reimbursement collected	106,523.72[1]
Total tax, interest, and penalty	$451,231.32
Payments	- 84,000.00
Balance Due	$367,231.32
Monthly interest beginning 03/01/15	$ 928.73

A Notice of Appeals Conference was mailed to petitioner's two addresses of record, and neither notice was returned by the Post Office. Petitioner did not respond to either notice or appear at the appeals conference, which was held as scheduled. We thereafter sent petitioner a letter offering it the opportunity to provide any additional arguments and evidence in writing it wished us to consider, but it did not respond.

[1] The penalty for failure to timely remit sales tax reimbursement collected from customers is 40 percent of the amount collected but not remitted, which is $266,304 in this case. Applying 40 percent to that amount, we compute a penalty of $106,521.60; the slight difference of $2.12 is due to rounding in the computations of the penalty, by quarter.

UNRESOLVED ISSUE

Issue: Whether the 40 percent penalty for failure to timely remit sales tax reimbursement collected from customers is supported by clear and convincing evidence.[2] We find that it is.

Petitioner has operated as a retailer of automobile parts and tires and as an automobile repair shop since October 2007. During the audit period, petitioner operated four locations in San Diego. For audit, petitioner provided monthly sales reports generated from a point-of-sale (POS) software program, SHOPpro; profit and loss (P&L) statements generated from the software program, QuickBooks; sales and use tax returns; federal income tax returns for 2008 through 2010; sales and purchase invoices for December 2010 and January 2011; and resale certificates.

The Sales and Use Tax Department (Department) found that the sales recorded in QuickBooks reconciled with the amounts reported on petitioner's sales and use tax returns. However, the sales of $11,339,400 and sales tax reimbursement of $623,961 recorded under SHOPpro significantly exceeded the $4,182,872 and $357,657, respectively, that petitioner had reported. The Department conducted various audit tests, using the sales invoices for December 2010 and January 2011, and determined that the sales and sales tax reimbursement recorded in SHOPpro were accurate for the audit period. In contrast, the Department concluded that the amounts recorded in QuickBooks were understated because it was unable to reconcile petitioner's QuickBooks records to any source documents. Using the amount of sales tax reimbursement recorded in SHOPpro, the Department established that petitioner had collected tax reimbursement of $266,304 from customers that it had not remitted with its sales and use tax returns. Also, the Department applied the 40 percent penalty for failure to timely remit sales tax reimbursement collected from customers. (Rev. & Tax. Code, § 6597.)

Petitioner concedes that its reported taxable sales were understated, in the amounts established by the Department, but asserts that it believed SHOPpro was incorrectly calculating the amount of sales tax to be remitted. Petitioner states that, based on this belief, it manually computed its taxable

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[2] Without regard to whether the finding of fraud is upheld, the Notice of Determination was timely issued for the period July 1, 2008, through June 30, 2011, under the 3-year statute of limitations, as extended by waivers signed by petitioner (Rev. and Tax. Code §§ 6487, subd. (a), 6488). Absent a finding of fraud, the determination would not have been timely for the period January 1, 2008, through June 30, 2008.

sales and sales tax and reported the manually-calculated amounts on its sales and use tax returns. On that basis, petitioner contends that the 40 percent penalty is not warranted because it did not intentionally fail to remit the sales tax reimbursement that it collected from customers. Petitioner also notes that it had not been audited previously, and claims that there is no evidence of fraud or intent to evade the tax, although it concedes there may be evidence of negligence.

Petitioner's sales invoices and records, generated from its POS system, SHOPpro, reflect that petitioner added sales tax reimbursement as a separate charge on its taxable sales. Since petitioner relied on SHOPpro to calculate $623,961 in sales tax reimbursement over the audit period, and actually charged that amount to its customers, we find petitioner knowingly collected sales tax reimbursement of that amount. However, petitioner reported and remitted only $357,657 in sales tax. Thus, we find petitioner knowingly failed to remit sales tax reimbursement of $266,304 ($623,961 - $357,657) that it had collected from its customers.

SHOPpro is a commercial POS system designed specifically for use in the automotive repair industry, which petitioner used to generate its sales invoices and daily and monthly sales reports. Moreover, the Department examined the recording procedures under SHOPpro and found that the program correctly differentiated between taxable and nontaxable transactions and accurately calculated and recorded the sales tax. Petitioner has not demonstrated any errors with the amounts of taxable sales or sales tax reimbursement recorded by the SHOPpro program or explained why, during a period of three-and-a-half years, it never contacted the providers of the SHOPpro program if it suspected errors. Instead of attempting to correct any alleged errors, petitioner kept a second set of records in QuickBooks in which it recorded manually-computed amounts of taxable sales and sales tax reimbursement that were lower than the amounts recorded in SHOPpro. Petitioner has not been able to explain those manual computations or to show why it believed the manually-computed figures were more accurate. Moreover, petitioner actually collected from its customers the amounts recorded in SHOPpro, rather than the lower manually-computed amounts.

The fact that petitioner maintained two conflicting sets of records for the audit period and reported taxes using the set of records with figures that were not supported by source documents is strong evidence of an intent to evade the payment of tax. Also, petitioner failed to remit 42.68 percent

($266,304 ÷ $623,961) of the tax reimbursement it collected over the audit period, and the unremitted tax reimbursement represented from 15.26 to 56.01 percent of the total tax reimbursement collected for each quarter of the audit period. Clearly, petitioner consistently failed to remit a high percentage of the tax reimbursement it collected and recorded. We find that the foregoing evidence clearly and convincingly establishes that petitioner acted with the intent to evade payment of tax. Furthermore, the amount of unremitted sales tax reimbursement collected averaged more than $1,000 per month for each quarter of the audit period (the lowest monthly average was $3,264, for the first quarter of 2008), and the percentage of unremitted tax reimbursement exceeded five percent of the total amount collected for each quarter of the audit period (the lowest percentage was 15.26 percent for the second quarter of 2011). Thus, the requirements for imposition of the 40-percent penalty, pursuant to section 6597, have been met.

Consequently, we find that the 40-percent penalty was properly applied. We are not persuaded otherwise by petitioner's assertion that there is only evidence of negligence or its assertions that the fraud penalty should be deleted because petitioner had not been audited before, and it immediately agreed to the audited understatement of reported taxable sales. None of these arguments explains why petitioner collected sales tax reimbursement, recorded the amounts actually collected in its SHOPpro accounts, maintained two sets of records, and consistently reported amounts of sales tax lower than the amounts of tax reimbursement collected.

OTHER MATTERS

None.

Summary prepared by Deborah A. Cumins, Business Taxes Specialist III