

BEFORE THE  
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

TRUCK ESCORT SERVICE  
LEONARD LAGO, DBA  
(Petitioner-Respondent)

PRECEDENT  
TAX DECISION  
No. P-T-30  
Case No. T-68-42

DEPARTMENT OF EMPLOYMENT  
(Appellant)

The Department of Employment has appealed from that portion of Referee's Decision No. LA-T-1859 which granted the petition for reassessment with respect to the amount of penalties assessed. No appeal has been taken from the remainder of the referee's decision which otherwise denied the petition. In support of its appeal, the department has presented written argument to us.

STATEMENT OF FACTS

The assessment in question was made under the provisions of Unemployment Insurance Code section 1126. To the amount of contributions assessed, the department added a penalty equal to 10 percent of that amount. The referee upheld the assessment of contributions but removed the penalty.

The sole issue presented on appeal is whether the penalty may be removed if the assessment is upheld.

REASONS FOR DECISION

Unemployment Insurance Code section 1126 makes provision for the assessment of employer and worker contributions payable by an employing unit that has failed to make a return required by the code. It may be viewed in contrast with code section 1127 which makes provision for the assessment of deficiencies in contributions that have been reported in a return with which the director is not satisfied.

Code section 1126 provides that, in the case of a failure to make a return, the director:

" . . . shall compute and assess the amounts of employer and worker contributions payable by the employing unit, adding thereto a penalty of 10 percent of the amount of contributions."  
(Underscoring added.)

This section accords the director no discretion in regard to whether, after assessing contributions, he will or will not add the penalty prescribed. It contrasts with the penalty provision of code section 1127, which allows the director after assessing a deficiency in reported contributions to decide whether that deficiency was due to negligence or intentional disregard of the law, before adding a 10 percent penalty. For this reason, it is sometimes said flat the section 1126 penalty is mandatory and the section 1127 penalty is discretionary.

Code section 1134(a) provides that the referee in his decision on a petition for reassessment may decrease or increase the amount of the assessment. This provision, however, does not give the referee authority to do what the director himself could not have done in the first instance. Since the director could not have assessed contributions under code section 1126 without adding the prescribed penalty, the referee cannot uphold an assessment of contributions under that section without upholding the addition of the penalty.

DECISION

The decision of the referee is modified. The petition is denied in its entirety, including in respect to the amount of penalties added.

Sacramento, California, November 19, 1968.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

LOWELL NELSON

CLAUDE MINARD

JOHN B. WEISS

DONALD D. BLEWETT