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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **JOSEPH BOUDAMES,** **Defendant and Appellant.**	**A110355** **(San Francisco County Super. Ct. No. 181987)**

Joseph Boudames appeals his conviction by jury verdict of two counts of failing to pay sales taxes (Rev. & Tax. Code, § 7153.5) and one count of bribery (Pen. Code, § 67.5, subd. (b)). He contends the bribery conviction must be reversed because it was the result of entrapment, there is insufficient evidence to support the failure-to-pay convictions, and the restitution order incorrectly includes statutory penalties. In the published portion of our opinion, we address whether a penalty assessment imposed under Penal Code section 1202.4, subdivision (a)(2) or a penalty imposed under Revenue and Taxation Code 6591 may be included in victim restitution ordered pursuant to Penal Code section 1202.4, subdivision (f).[1]

BACKGROUND

I. *Overview*

Appellant was the president of a retail computer store in San Francisco. When an auditor from the California Board of Equalization (Board), conducting a sales and use tax

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of sections II, III, and IV of Background and sections I, II, and III of Discussion.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

audit of the business, informed appellant he had a possible sales tax arrearage of $160,000, appellant implicitly offered the auditor a bribe if he would submit an audit report showing a substantially lower arrearage. Under a clandestine investigation supervised by the Department of Justice, the auditor ultimately agreed with appellant to submit a bogus audit showing a $7,000 arrearage, in exchange for personally receiving a payment of $10,000. Following the exchange, appellant's offices were searched, numerous records were seized, and he was charged with and found guilty of bribery and two felony counts of underreported taxes of more than $25,000 for a consecutive 12-month period: April 1997 to March 1998 and April 1998 to March 1999.

II. *Audit of Appellant's Business*

Appellant was president of Boudames Business Machines, doing business as Bay Area Computers (BAC), a retail computer store. He also had a computer business in Lebanon and traveled there frequently.

In February 1998, Jaime Barragan, a business tax specialist employed by the Board, was assigned to conduct a "regular sales and use tax" audit of BAC for the years 1996 to 1997.[2] A retailer selling personal property in California is required to impose a sales tax on all gross receipts and to file sales tax returns four times per year with the Board. The return is due 30 days after the end of each quarter. (Rev. & Tax Code, § 6451.) Generally, for the quarter at issue, the return lists the retailer's total gross sales, taxable and nontaxable; purchases subject to use tax, i.e., goods purchased out of state and brought into California; and allowable deductions. Taxable sales are calculated by adding gross sales plus goods subject to use taxes and subtracting allowable deductions. The primary purpose of an audit is to determine an accurate sales tax and compare it to the sales tax reported by the retailer.[3] For a business such as BAC, Barragan expected to

[2] Although this case has its genesis in Barragan's audit for 1996-1997, the two counts of failure to pay sales taxes are based on evidence discovered during the course of that audit for the periods of April 1997 to March 1998 and April 1998 to March 1999.

[3] The record does not specifically disclose why the Board decided to conduct this audit of BAC. However, Kenneth Horton, a Board business tax specialist, testified there

find as source documents for the audit a "pretty formal set of books and records," which would include such items as sales invoices, purchase invoices, a sales journal summarizing the sales invoices, a general ledger, financial statements, and income tax returns.

Barragan arranged to meet with appellant on May 12, 1998, at the BAC store. After Barragan reviewed with appellant the nature of BAC's business, appellant showed him monthly stacks of paper sales invoices. He explained that they were his only records for purposes of an audit. He further explained that his bookkeeper prepared the quarterly returns by adding the invoices on an adding machine and that the adding machine tapes were then destroyed.

Using his own adding machine, Barragan added up BAC's first quarter 1996 taxable sales invoices. He could not reconcile his addition with the figures in the first quarter return for 1996. Because, as he informed appellant, the invoices were inadequate records for conducting the audit, he developed a spreadsheet to capture the data from the invoices: sales date, customer, amount of sale, taxable or exempt sale, etc. He entered the information from the first quarter of 1996 into the spreadsheet, and requested appellant do likewise with the invoices for the remaining audit period, April 1996 to March 1998, and to send him the results on a floppy disc. They agreed to resume the audit after appellant completed Barragan's request. Appellant provided Barragan the sales summary spreadsheets a few at a time over several months. When Barragan received a summary, he verified the calculations. The information regarding total sales, taxable subtotals, etc. was consistent between the invoices themselves and the spreadsheets appellant prepared.

Subsequent to his May 1998 meeting with appellant, Barragan requested BAC's 1996 and 1997 income tax returns and bank statements from January 1996 to March 1998. The total sales reported on the income tax returns for the years 1996 and 1997 were $1,786,375 greater than the sales reported on the sales tax returns for the same

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had been two previous audits. His testimony implies that Barragan's audit was provoked by the earlier audits.

period. There was also a discrepancy of approximately $1,000,000 between the January 1996 through March 1998 bank deposits and the sales reported on the sales tax returns for that period.

Barragan and appellant met again on September 3, 1998. He requested appellant to provide support for all transactions over $200 for the audit period that were not assessed a sales tax. He also asked appellant to identify the differences between the bank deposits and the amounts reported on sales tax returns.

They met again on December 2, 1998. Appellant provided some documentation to support exempt sales. After Barragan deducted deposits exempt from sales tax from the bank statements, the bank deposits for the two year audit period were $1,889,269 greater than the sales reported on the sales tax returns for the same period. If the discrepancy between the bank deposits and the sales tax returns remained unexplained, the outstanding assessed taxes would be approximately $160,000. In Barragan's opinion, a discrepancy of that size was unusual for a company the size of BAC. In his experience, discrepancies were normally resolved either because they were satisfactorily explained or because the taxpayer agreed to pay the taxes on the unreported sales. If the taxpayer disagreed, the matter was forwarded to the Board's appeals process.

As with personal income taxes, the greater the number of allowable exemptions and deductions, the lesser the amount of sales tax owed. During their December 2 meeting, Barragan discussed non-taxable exemptions with appellant and the ways he could produce documents to support such exemptions. He used the analogy of the transfer of a car as illustrative of the nature of exemptions and deductions. His purpose of the illustration was to explain to appellant that "one little fact in [the] whole scenario could change the exemption as being taxable or exempt." As he explained to appellant, when the purchaser of a car registers the car with the Department of Motor Vehicles (DMV) as its new owner, the purchaser has to pay a use tax, which is based on the amount the purchaser paid the seller. However, as Barragan's illustration continued, the situation is altered if the person receives the car as a gift. In that case the person will not

pay any tax when he registers the car with the DMV as its new owner because the value to the new owner is zero.

Appellant responded to Barragan's car transfer illustration by making a statement to the effect that if Barragan "took care of the audit, a gift of a car would be in order for" him. Barragan replied indignantly, " 'Hey, don't say that even if you are kidding.' " Appellant commented that Barragan took the matter seriously, but it was not that serious to him. He then left the room where he and Barragan had been working, leaving Barragan to work alone.

At the end of the December 2 work day, Barragan met with appellant to give him a progress report and discuss the plans for their work the following day, December 3. Appellant informed Barragan he had additional documentation to support additional non-sales deposits. Jokingly he added, " 'Now, Jaime, I want you to consider everything I have given you, be fair. . . . Why don't you make me an amount that I can pay? I'll be happy. You will be happy. And everybody is happy.' " In view of appellant's earlier remarks about the gift of a car and his own earlier advisement to take the matter seriously, Barragan perceived the last remark as a thinly veiled offer of a bribe. As of December 1998, Barragan had worked for the Board for approximately 16 years; he had never before been offered a bribe.

After leaving the BAC office that evening, Barragan telephoned his supervisor and informed him about the attempted bribe. On his supervisor's advice, he then telephoned the Board's Internal Security Division and was told to postpone the BAC audit.

On December 14, 1998, David Doidge, a special agent with the California Department of Justice, contacted Barragan. Doidge asked if he "was willing to participate in an investigation to see if in fact down the line the evidence could be gathered that would support a bribery situation." He explained that Barragan was not to "lead anything. Just respond to him [i.e., appellant]." Barragan agreed. For purposes of the bribery investigation, Barragan was directed by his supervisor to follow the instructions of Doidge and the Department of Justice personnel.

Barragan arranged to meet appellant on February 3, 1999, to receive additional documentation. He did not anticipate having discussions with appellant that day; rather, he planned only to review the documents appellant would be providing and to make adjustments. At the February 3 meeting, Barragan told appellant there remained "quite a material amount that needed to be reconciled" between BAC's sales as shown on the income tax returns and the sales as shown on the sales tax returns. He asked for appellant's authorization to contact appellant's accountant to learn how the BAC income tax returns were prepared, because doing so might shed light on the differences between the income tax and sales tax returns. That evening after his meeting with appellant, Barragan met with Agent Doidge. They discussed entrapment, and Doidge specifically instructed him not to initiate the subject of bribery. Rather, Doidge instructed Barragan to react to appellant's statements, discussing the specifics of bribery freely if appellant brought up the subject.

Early in the morning of February 4, 1999, Doidge notified Barragan that the monitoring operation had been cancelled. Barragan had made some specific plans that he needed to conduct on the BAC premises that day, so, pursuant to his Board training and guidelines, he returned to the BAC office on February 4 to continue his review of its records. He found appellant upset with his accountant and blaming the accountant and former colleagues for causing his problems. Appellant also remarked that he wished Barragan would concentrate on the sales invoices he had provided and not pay attention to the bank deposit reconciliation. Barragan brought up the work schedule he and appellant had discussed in December, when Barragan had given appellant a worksheet on which to set out data for non-sales deposits. As of February 4, appellant had not yet prepared the worksheet. Barragan agreed to provide him additional time to do so if he signed a statute of limitations waiver. Appellant signed the waiver letter.

During their February 4 discussions appellant stated, "Well, Jaime, you need to help me with this problem. I need to get it behind me so I can concentrate on making money." Barragan thought he was already doing everything possible to help appellant resolve the audit. He continued to emphasize to appellant the importance of gathering all

documentation to support exemptions, which would provide an explanation for the discrepancy between the bank deposits and the sales tax returns. Appellant again asked for Barragan's help. Barragan asked the nature of the help he wanted. Appellant replied that he was willing to pay a smaller amount, and Barragan could assist him in preparing an audit report that reflected a much smaller amount than they had previously discussed. Barragan responded, "Are we talking about the same thing?" Appellant replied, "Yes." He looked Barragan "straight in the eyes," and said, " 'Hey, Jaime, don't screw me. We need to trust each other.' " Appellant commented how officials were bribed in Lebanon and that he was used to taking care of problems with the government "by doing that." He indicated that he knew the rules were different in the United States and that he was afraid. Barragan told him not to worry, said he "would think about it," and would "get back to him." Later in the day, appellant came to the desk where Barragan was working and said something about " 'Green is beautiful,' " referring to money. When Barragan left the BAC office at the end of the day, appellant said, " 'Jaime, you really need to help me.' " Barragan did not reply but gave him an encouraging look that he might do so.

Also on February 4, Barragan met Maurice Carron, appellant's accountant. Carron explained that he had prepared the BAC income tax returns based on the BAC bank deposits.

At Agent Doidge's instructions, Barragan prepared and sent to Doidge a detailed report of his February 4 dealings with appellant. On February 18, 1999, at Doidge's instructions, Barragan left a message with appellant that he would like to schedule an appointment. They spoke by telephone on February 19. Barragan told appellant he had "decided to help him." He then told appellant he needed to know how much appellant was willing to pay. When appellant sounded nervous and said he did not want to discuss the matter on the telephone, Barragan asked, "Do you know what G's are?" Appellant said, "yes," Barragan asked, "how many," and appellant replied, "10." Barragan replied the figure sounded "awfully low," and asked "subject to negotiations?" When appellant replied, "yes," Barragan explained he would make plans to meet again in several days. Barragan considered the February 19 telephone discussion a continuation of the February

4 conversation at which they discussed the subject of the bribe, when Barragan said he would "get back" to appellant on the matter.

Pursuant to a plan devised with Doidge, Barragan arranged to meet appellant at the BAC offices on February 26, 1999, to continue the audit. He met with Doidge and other law enforcement personnel on February 25 to get instruction on the monitoring equipment and technique. He was also instructed that, to preclude entrapment, he was to avoid leading conversations with appellant regarding the bribe and instead respond to appellant's lead.

Barragan began the February 26 meeting with appellant by discussing the various outstanding discrepancies between the sales tax returns and the bank deposits and income tax returns. He told appellant that his exposure was potentially $160,000. Appellant replied that there were still adjustments to be made that would reduce the amount to $80,000. He added that he could probably enter into an agreement with the Board to pay less. Barragan asked how much he wanted to pay the Board; he replied, "6,000." He and Barragan ended up agreeing that appellant would pay Barragan $12,000. When Barragan asked if he "had the money" in the office, appellant asked, "Well, where is my letter," referring to a bogus audit report. They agreed that appellant would pay $6,000 that day, and $6,000 when he received the bogus audit. Appellant went to a back room, returned, and said he had only $3,000. Barragan replied he would owe $9,000 when Barragan provided the audit. Appellant gave Barragan $3,000 in cash. After agreeing to meet at a later date to provide the bogus audit report, Barragan left the BAC office. He gave the cash to Doidge at the Department of Justice offices.

On March 13, 1999, Barragan telephoned appellant to say the bogus audit report would be delayed because he had jury duty.

On March 24, 1999, appellant called him to get a status report; he appeared satisfied with Barragan's reply that he was still working on the audit.

Pursuant to Doidge's subsequent instructions, Barragan, in a recorded telephone conversation, arranged to meet appellant on April 6, 1999, to deliver the bogus report, and ascertained that appellant had "the rest of the money."

On April 6, Barragan gave appellant the bogus report at the BAC office. Appellant complained that the $7,000 amount of back taxes listed as owed was higher than the $6,000 amount to which he had originally agreed. Barragan replied that he had to make the amount look realistic in order not to raise suspicions, and, in the "interests of getting this done," proposed reducing the outstanding amount of the bribe from $9,000 to $8,000. He agreed to appellant's $7,000 counteroffer, reassured appellant that no one at the Board knew of their arrangement, and told appellant he would submit the bogus report to the Board for review and ultimate billing. Appellant then gave Barragan $7,000 in cash. Barragan departed and gave the cash to Doidge.[4]

On June 3, 1999, appellant left a telephone message with Barragan asking him to call. Pursuant to Doidge's instructions, Barragan recorded his June 8, 1999 return call. During their telephone conversation appellant told Barragan that several agents had conducted a search of the BAC office and his house on June 1, 1999, pursuant to a search warrant. He assured Barragan that the subject of the bribe had not arisen during the searches.

Asked at trial what he would have done had appellant not raised the subject of a bribe, Barragan replied that he would have conducted the audit as he usually did, and "eventually cranked out an audit report reflecting my findings." He received no rewards or incentives for participating in the bribery investigation.

III. *Seizure of BAC Records*

On June 3, 1999, the BAC offices were searched pursuant to a search warrant. The officers seized numerous boxes of records and a point-of-sale computer system. The records included a single daily sales journal for the first quarter of 1999. Jeffrey Benbrook, a forensic computer specialist and a senior investigator with the Board who participated in the search, made digital duplicates of the data contained in the computer

[4] The April 6, 1999 conversation was recorded. The tape of it and the earlier recorded telephone conversation between Barragan and appellant were played for the jury, which also received transcripts of the tapes.

hard drives. He copied the invoice database onto an electronic spreadsheet and printed the individual sales invoices from the point-of-sale hard drives.

IV. *Horton Testimony*

Kenneth Horton is a business tax specialist with the Board, who qualified as an expert in sales tax documentation and auditing. Following the seizure of the BAC records, he conducted a sales tax fraud investigative audit of two 12-month periods, April 1997 through March 1998, and April 1998 through March 1999. He examined the BAC income tax returns, bank deposits, and sales tax returns for these periods.

Horton observed that the total gross sales reported to the Board on the quarterly returns for these two audit periods was substantially lower than the sales reported on the income tax returns and the bank deposits. He concurred with Barragan's analysis that there was no explanation for the discrepancies between the reported gross sales in the sales tax returns and the reported income and bank account deposits. In his experience with the hundreds of audits he has performed, there are usually differences between the reported gross sales in the sales tax return and the income reported on the income tax return, but the difference is generally not large, or, if large, can be explained.

To conduct his audit, Horton compared the paper sales invoices that appellant had provided Barragan with the sales recorded on the BAC point-of-sale computer system. He understood from investigator Benbrook that the point-of-sale computer system captures the sales data immediately at the time of the sale; consequently the information stored on the computer system's hard drive reflects the transaction most accurately. Horton observed a "night and day" difference between some of the paper invoice sales and the sales as recorded in the computer. For example, one paper invoice number listed "Labor $10"; the computer record of the same invoice number listed "Sale of notebook computer for 3,000." The sales tax on the latter invoice would be considerably more than the sales tax, if any, on the former. He also observed that some paper invoices on which "void" had been written, appearing to indicate the return of merchandise, did not have an appropriate credit entry in the computer records.

Horton explained there are intermediate steps in determining how a stack of paper invoices relates to the information reported on a sales tax return. The intermediate steps are generally some type of summary record and constitute an "audit trail." Horton was unable to determine where the paper invoices "flowed into gross sales and ultimately the sales tax figures" shown on the sales tax returns.

Given the "really peculiar differences" Horton had noted between some of the paper and computer-recorded invoices, he conducted a test by comparing the paper invoices and the computer-recorded invoices for January, February, and May 1998.[5]

[5] Horton explained that he "jumped ahead" from February to May to eliminate seasonality issues and to see if the problem recurred in months subsequent to the first quarter, i.e., January to March.

Examples of the discrepancies between the paper and computer-generated invoices discovered by Horton in the three-month test period were admitted into evidence.

Paper invoice number 56518 for January 8, 1998 showed a nontaxable sale of $195. The computer-recorded invoice of the same number and date showed taxable merchandise of $3,224, plus sales tax of $274. "IK" was the salesperson on one invoice and "AH" was the salesperson on the other.

Paper invoice number 56939 for February 4, 1998 showed an $87 nontaxable sale of an internet device and a cable. The computer-recorded invoice of the same date and number showed a total sales amount of $3,417.50, plus sales tax of $267.50. The customer's copy of the invoice for the same number and date was the same amount as the computer-recorded invoice.

Paper invoice 56519 for January 8, 1998 showed a nontaxable sale of $185. The computer-recorded invoice of the same number and date was for an HP Laserjet and another item and showed a total sale of $2,211.23, plus sales tax of $173.23. The customer's copy of the invoice for the same number and date was for merchandise totaling $2,038, plus sales tax of $173.23.

Paper invoice 57085 for February 11, 1998 showed a nontaxable sale of $18. The computer-recorded invoice and the customer's copy of the invoice of the same number and date was for $475, plus sales tax of $40.38.

Paper invoice 57230, dated February 19, 1998, showed a nontaxable sale of $175. The computer-recorded and the customer's copy of the invoice of the same number and date show a merchandise sale of $2,898, plus sales tax of $246.33.

Paper invoice 56656, dated January 19, 1998, showed a nontaxable sale of $145. The computer-recorded invoice and the customer's copy of the invoice was for $2,206.89, plus sales tax of $172.89.

When the amount in the computer system invoice differed from the amount on the paper invoice, Horton attempted to contact the customer to verify the sale. If a customer verified that a piece of merchandise had been returned, if the computer record did not list a payment for a "void" paper invoice, or if there was other verification of a returned item, such as a MasterCard credit, Horton gave BAC a credit for the amount toward sales tax owed.

Based on the credits and other corrections Horton "allowed for" in the three-month test period, such as voided sales and returned items that were not entered into the computer, he determined that appellant was entitled to a "favorable adjustment" of 14.01 percent from the amount of computer-recorded sales tax for those three months, i.e., a 14.01 percent reduction of the sales tax captured on the computer. Horton applied the 14.01 percent adjustment to the computer-recorded taxes for the entire audit period. The result of this calculation was the amount of sales tax Horton believed appellant actually owed on taxable sales. The amount of taxes actually owed, minus the amount of sales tax reported on the BAC tax returns, was the amount of underreported sales taxes. Under Horton's formula, the underreported amount for April 1997 to March 1998 was $56,982. The underreported amount for April 1998 to March 1999[6] was $32,272.

Horton further tested the reasonableness of the underreported taxes by comparing the computer-recorded gross sales with the gross sales reported on the BAC income tax returns. The computer-recorded sales were $107,000 greater than the income tax return sales, a 3.6 percent downward adjustment on the income tax returns. Horton opined that the 3.6 percent represented credits from returned merchandise and voided receipts. He considered this formula "probably a more accurate way" of calculating the percentage of error, but, out of "an abundance of caution," he chose the more favorable 14.01 percent in determining the underpaid taxes.

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[6] An underreported tax liability of more than $25,000 over a consecutive 12-month period is a felony. (Rev. & Tax. Code, § 7153.5.) April 1997 to March 1998 was the one-year period that was the basis of count 2. April 1998 to March 1999 was the basis of count 1.

During the search, Horton seized a daily sales journal for the first quarter of 1999, January to March. No other comparable daily sales journals for other periods were found during the search. The sales journal listed invoice number, amount, and form of payment for individual sales, and the total sales for each day. In Horton's opinion, such daily sales journals are helpful in establishing an audit trail. Appellant testified that this sales ledger showed that sales should be discounted by 28 percent rather than the 14.01 percent Horton and the Board had applied to this quarter. Horton had not used the ledger to determine his discount figure of 14.01 percent because the ledger, unlike the computer-recorded invoices, did not "break out" the sales tax. In his opinion the ledger was not reliable for determining sales taxes because it did not list the customer or the amount of sales tax collected, which are important factors in determining taxability. He did not understand from the entries in the ledger how appellant had calculated the 28 percent discount, which he classified as an unreliable figure.

DISCUSSION

I. *Entrapment*

Appellant does not dispute there is substantial evidence to support the bribery charge, but he contends his conviction must be reversed because he was entrapped as a matter of law.

The test for entrapment is whether the conduct of the law enforcement agent was likely to induce a normally law-abiding person to commit the offense. (*People v. Barraza* (1979) 23 Cal.3d 675, 689-690 (*Barraza*).) Official conduct that does no more than offer the suspect the opportunity to act unlawfully--a decoy program, for example--is permissible, but badgering, cajoling, importuning, or other affirmative acts that are likely to induce commission of the offense are not permissible. (*Id.* at p. 690.)

What constitutes impermissible conduct is determined on a case-by-case basis, but one or two guiding principles are generally applicable. (*Barraza*, *supra*, 23 Cal.3d at p. 690.) First, did the law enforcement agent's actions generate in a normally law-abiding person a motive for the crime other than ordinary criminal intent? An example is an appeal by the law enforcement agent that would induce the person to commit the act

out of friendship or sympathy, as opposed to the person's desire for personal gain or other typical criminal purpose. Second, did the affirmative conduct of the law enforcement agent make commission of the crime unusually attractive? An example is a guarantee that the act is not illegal or will not be detected. (*Ibid*.)

Although an inquiry into entrapment must focus primarily on the conduct of the law enforcement agent, the agent's conduct is not to be viewed in a vacuum. (*Barraza, supra,* 23 Cal.3d at p. 690.) The conduct should be judged by the effect it would have on a normally law-abiding person situated in the circumstances at hand. (*Ibid*.) Relevant circumstances may be the transactions preceding the offense, the suspect's response to the agent's inducements, the gravity of the offense, and the difficulty of detecting the crime's commission. (*Ibid*.) However, the suspect's character, his predisposition to commit the offense, and his subjective intent are not relevant to the inquiry. (*Id.* at pp. 690-691.)

Entrapment is generally a question for the trier of fact. (*Barraza, supra*, 23 Cal.3d at p. 691, fn. 6.) The defendant has the burden of proving entrapment by a preponderance of the evidence. (*People v. McIntyre* (1990) 222 Cal.App.3d 229, 232.) "An appellate court will only find entrapment as a matter of law where 'the evidence is so compelling and uncontradicted the jury could draw no other reasonable inference.' [Citation.]" (*People v. Lee* (1990) 219 Cal.App.3d 829, 836.)

Appellant contends there was entrapment as a matter of law because agent Barragan knew appellant was joking about giving him a car at their December 2, 1998 meeting; there was no evidence that appellant pursued the bribery until Barragan importuned him to commit it by taking the lead in the bribery discussions at their February 19 and 26, 1999 meetings; and Barragan reassured him the Board would not detect the bribery.

Appellant's contention fails because there was no compelling, uncontradicted evidence that he was induced to make and consummate the bribe for any motive other than his personal gain: avoiding a potentially onerous bill for delinquent, underpaid sales taxes. Appellant initiated the idea of a bribe on December 2, 1998, after Barragan, who

was trying to conduct a fair and accurate audit of BAC in the face of incomplete records, estimated an outstanding tax liability of $160,000. Barragan's response at the time was the opposite of an inducement; he warned appellant against even joking about the subject. Despite the admonition, appellant told Barragan at the end of the day to "just make an amount that I can pay" and "everybody will be happy."

When they next met on February 4, 1999, appellant again indirectly raised the subject by saying he would do "almost anything" to make the tax problem go away, asking for Barragan's help, and suggesting Barragan could help him prepare an audit report that reflected "a much smaller amount" than they had previously discussed. When Barragan asked, "Are we talking about the same thing?" Appellant answered "yes," and talked about how he was used to taking care of problems with the government in Lebanon by offering and paying bribes. During the course of the day he told Barragan not to "screw" him, that they needed to trust each other, that "green is beautiful," and he reiterated his request for "help." Barragan offered no responses on February 4 that could reasonably be construed as badgering or urging a bribe. His comments were no more than, at most, permissible, restrained steps in presenting an opportunity to act unlawfully. (See *Barraza*, *supra*, 23 Cal.3d at p. 690.)

While Barragan may have impliedly been the first to raise the subject of a bribe during a February 19, 1999 telephone conversation when he told appellant that he had "decided to help him," this and his other comments during their conversation must be taken in the context of their preceding meetings. Barragan's remarks, such as "Do you know what G's are," "how many [G's]," ten G's "sounds awfully low," and was appellant's offer "subject to negotiations" cannot reasonably be deemed conduct that was likely to have caused a normally law-abiding person to participate in a bribery, given the prior conversations of appellant and Barragan. As outlined, *supra*, it was appellant who had initiated the subject of bribery during the several earlier occasions because he did not want to pay the entire amount of the outstanding BAC sales taxes. Barragan's February 19 remarks were not insistent and repeated requests to engage in criminal activity. They were simply a follow-up to the earlier discussions that enabled appellant to act unlawfully

by fleshing out the details of his earlier apparent bribes. (*Barraza, supra*, 23 Cal.3d at p. 690.)

Likewise, although the transcript of the recorded in-person February 26, 1999 meeting at which the deal was struck is not wholly intelligible, it does not suggest overbearing conduct by Barragan. He made neutral, noncommittal remarks such as "I wanted to kind of get an idea of what the deal was, so that I could decide," and "I wanted . . . to give you an idea . . . what the maximum amount is and then what I get." When Barragan told appellant that his tax exposure "if we're not going to do this" was approximately $160,000, appellant offered a lengthy explanation that adjustments could reduce the outstanding sum to $80,000, that the Board would probably agree to a $40,000 payment, but that the deal with Barragan had to cost him less than $20,000. Barragan then asked appellant how much he wanted to pay the Board and how much he wanted to pay Barragan. Appellant wanted to pay the Board $6,000, and after negotiation, agreed to pay Barragan $12,000. The unmistakable tone of the February 26 meeting is of appellant's willing participation in the bribery to enable him to reduce his tax liability dramatically, without Barragan's having to employ any aggressive encouragement in the plan. Furthermore, the transcript of the meeting demonstrated that Barragan did not need to induce the bribe by promising that the Board would not detect it. (See *Barraza*, *supra*, 23 Cal.3d at p. 690: inducement by guarantee that offense will go undetected may constitute entrapment.) Appellant obviously knew that the "deal" had to be structured in such a way that the Board would not detect it when he asked what figure Barragan would submit to the Board "to do it safe."

On this record the jury could readily find that appellant failed to prove entrapment.

II. *Prosecutorial Misconduct*

Appellant contends the prosecutor committed prejudicial misconduct when he argued in closing that appellant was not entrapped because the manner in which he conducted his affairs showed that he was not "a normally law-abiding person as required in the CALJIC instruction" and repeated this point at least twice more when summarizing

his view of appellant's misdeeds.[7] Appellant argues these remarks misstated the law because entrapment is measured by the objective test of the law enforcement official's conduct on a normally law-abiding person, not the subjective analysis of the defendant's character.

As appellant acknowledges, his attorney did not object to the prosecutor's comments. Generally, this failure would constitute a waiver of the issue on appeal, particularly when, as appears on this record, an admonition would have cured any potential harm from the comments. (See *People v. Mayfield* (1993) 5 Cal.4th 142, 178.) Nevertheless, we address the issue in response to appellant's secondary claim that the failure to object constituted ineffective assistance of counsel. (*Ibid*.)

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[7] Referring to the clandestinely taped conversations between Barragan and appellant, the prosecutor stated: "[Y]ou heard his voice. He's not a person that is stressed out, he is not a person that's intimidated, he is not a person who's being cowed, he is not a person shrinking from anything. He is a person in control. He's laughing, he's lighthearted about it, and he's not overly--you judge his demeanor by the voice on that tape, and you will see that this is the voice of a person who is used to being in control and . . . felt that he was in control of that situation. [¶] *He's not a normally law-abiding person as required in the CALJIC instruction.* He ordered different handling for cash transactions. That's not something that is normally done by law-abiding retailers. He didn't record those transactions in the sales system. He kept cash in the safe, and took it out when he got to. Kept it off the records. Kept it off the books. [¶] This business on the tape about shipping Hitachi computers to Lebanon. I am not going to belabor that, but he said, 'These things say, "For Sale in the U.S. and Canada Only and I ship them to Lebanon." ' Is that a *normal, law-abiding person*?

"He gave false invoices to Jaime Barragan during the audit. Now, if you have any questions about whether *he's a normal, law-abiding person* at all up to that point, that should solve it. That should answer that question completely. [¶] He destroyed records. He concealed records. He gave instructions and fraudulent figures to [BAC sales manager] Ara Harmandarian to be used on the sales tax returns. Told Barragan that he bribed officials in Lebanon. He brought up the bribe. *He's not a normal, law-abiding* person. He's not entitled to entrapment. [¶] . . . [¶] The Defendant always remained in control of every aspect of that negotiation [with Barragan.] There was nothing about Jaime Barragan's conduct after the bribe was offered, after the deal was struck, in particular, that was unusually attractive to a normal, law-abiding person." (Emphasis added.)

The prosecutor's statement that appellant "[i]s not a normally law-abiding person as required in the CALJIC instruction" was a reference to CALJIC No. 4.61, which the court had given the jury before the prosecutor began his closing argument. (See fn. 8.) This statement and the prosecutor's subsequent frequent references to appellant as "not a normally law-abiding person" arguably overstep the bounds of permissible argument because they can be construed as shifting what should be the primary objective focus of an entrapment inquiry--the law enforcement agent's conduct--to an impermissible primary subjective focus on appellant's character and predisposition to commit the offense of bribery. However, even assuming these comments regarding "normal, law-abiding person" constitute misconduct by impermissibly suggesting appellant was not a man of law-abiding character, the misconduct was not prejudicial.

The jury was correctly instructed on the principles of entrapment. *Barraza* instructs that, in applying an objective test, the fact finder shall consider the effect of the law enforcement officer's challenged conduct on the normal law-abiding person in the context of the circumstances of the particular case. (*Barraza, supra*, 23 Cal.3d at p. 690.) CALJIC No. 4.61, which, as noted, was given to the jury before the prosecutor's closing argument, mirrors *Barraza's* language,[8] and the prosecutor began his argument regarding

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[8] CALJIC No. 4.61 states: "In deciding whether this defense [of entrapment] has been established, guidance will generally be found in the application of one or both of two principles. First, if the actions of the law enforcement agent would generate in a normally law-abiding person a motive for the crime other than ordinary criminal intent, entrapment will be established. An example of this type of conduct would be an appeal by the police that would induce a normally law-abiding person to commit the act because of friendship or sympathy, instead of a desire for personal gain or other typical criminal purpose. Second, affirmative police conduct that would make commission of the crime unusually attractive to a normally law-abiding person will likewise constitute entrapment. This conduct would include, for example, a guarantee that the act is not illegal or the crime will go undetected, an offer of exorbitant consideration, or any similar enticement. [¶] Finally, while the inquiry must focus primarily on the conduct of the law enforcement agent, that conduct is not to be viewed in a vacuum; it should also be judged by the effect it would have on a normally law-abiding person situated in the circumstances of the case at hand. Among the circumstances that may be relevant for this purpose, for example, are the transactions preceding the crime, the suspect's response to the inducements of the officer, the gravity of the crime, and the difficulty of detecting instances of its

entrapment by correctly stating that CALJIC No. 4.61 "sets forth the objective test for entrapment." The evidence that appellant, not Barragan, initiated, pursued, and negotiated the bribe was very strong. Under the circumstances at hand, appellant had an obvious motive for making the bribe--avoiding a large sales tax payment--independent of any promise, enticement, or appeal to sympathy from Barragan, and there was no evidence that Barragan acted in an overbearing manner. On this record it is not reasonably probable appellant would have obtained a more favorable result absent the prosecutor's comments. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

III. *Sufficiency of Evidence for Counts 1 and 2*

Appellant contends there was insufficient evidence to support the two convictions of intentionally underreporting sales taxes. He argues that the expert testimony of Kenneth Holton, on which the prosecution relied to establish the amount of unreported taxes, was speculative opinion testimony that lacked a proper foundation and therefore did not constitute substantial evidence.

a. Standard of Review

When a defendant claims insufficient evidence to support a conviction, the reviewing court determines whether, on the entire record, a rational trier of fact could have found the defendant guilty of the charge beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-577.) There must be substantial evidence of each essential element of the charge. (*Id*. at p. 577.) To be substantial, evidence must be " 'of ponderable legal significance . . . reasonable in nature, credible, and of solid value.' " (*Id*. at p. 576.)

b. Sales and Use Tax Law

"For the privilege of selling tangible personal property at retail a tax is . . . imposed upon all retailers at [a specified percentage] of the gross receipts of any retailer from the sale of all tangible personal property sold at retail" in California, unless the

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commission. [¶] Matters such as the character of the defendant, his predisposition to commit the crime, and his subjective intent are not relevant to the determination of the question of whether entrapment occurred."

property is exempt from sales tax. (Rev. & Tax Code, § 6051.) "Gross receipts" are defined as the total amount of the sale, lease, or rental price of the retail sales of retailers, valued in money, whether received in money or otherwise, without any deductions. (Rev. & Tax Code, § 6012.) For the purpose of the proper administration of the Sales and Use Tax Law, "it shall be presumed that all gross receipts are subject to the tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale unless he takes from the purchaser a certificate to the effect that the property is purchased for resale." (Rev. & Tax Code, §§ 6001, 6091.)

Any person who violates the Sales and Use Tax Law "with intent to defeat or evade the reporting, assessment, or payment of a tax or an amount due required by law to be made is guilty of a felony when the amount of unreported tax liability aggregates twenty-five thousand dollars ($25,000) or more in any 12-consecutive-month period." (Rev. & Tax. Code, § 7153.5.)

As discussed more fully under Background, *supra*, in "IV. *Horton Testimony*," Board business tax specialist Horton determined the amount of underpaid sales tax for the two 12-month periods at issue by (1) reducing the total gross sales shown on the BAC computer-recorded invoices for those two periods by 14.01 percent, (2) calculating the applicable sales tax on those reduced figures, and (3) subtracting from his calculation the amount of tax reported on the BAC sales tax returns filed for the period. According to Horton's formula and calculations, appellant underpaid $56,982 for the first 12-month period and $32,272 for the second 12-month period.

Appellant argues that Horton's evidence is not substantial because he analyzed only three months of invoices, January, February, and May 1997, to arrive at the discount rate of 14.01 percent, which he then applied to all eight quarters, i.e., 24 months, April 1997 to March 1999, at issue. Furthermore, appellant argues, Horton acknowledged that he did not know whether a higher or lower discount figure should be applied to the 21 months he did not analyze, and appellant himself testified that the ledger book he

maintained for January to March 1999 indicated a 28 percent discount was appropriate for that quarter.

Horton testified without objection as an expert in the field of sales tax documentation and auditing. The opinion testimony of an expert witness is limited to opinions that are (a) related to subjects sufficiently beyond common experience, so that the expert opinion will assist the trier of fact, and (b) based on matter perceived by or personally known to the witness or made known to him before trial. (Evid. Code, § 801.) The matter may include the witness's special knowledge, skill, experience, training and education. (*Ibid*.) On objection, the court shall exclude opinion testimony based in whole or in significant part on matter that is not a proper basis for the opinion. (Evid. Code, § 803.) Otherwise admissible opinion testimony is not objectionable because it embraces the ultimate issue to be decided by the trier of fact. (Evid. Code, § 805.)

Although appellant identifies his claim of error as lack of substantial evidence to support the verdict, it is more accurately characterized as a claim that Horton's opinion as to the amount of underpaid sales taxes for the two 12-month periods at issue was inadmissible because it was based on improper matter: the 14.01 percent discount rate Horton arrived at after analyzing the January, February, and May 1997 invoices. Appellant does not appear to challenge Horton's conclusions regarding underpaid taxes as to those three months by application of the 14.01 percent discount rate. Rather, he effectually asserts that the 14.01 percent discount rate cannot be used to calculate the underpaid taxes of the other 21 months because the discount rate does not derive from a specific analysis of the invoices for those 21 months.

A fundamental rule of appeal is that a verdict shall not be set aside nor judgment based thereon reversed due to erroneously admitted evidence unless the record contains a timely made and clearly and specifically grounded objection or motion to exclude or strike the evidence, the reviewing court concludes the admitted evidence should have been excluded on the stated ground, and the error resulted in a miscarriage of justice. (Evid. Code, § 353; see also Cal. Const., art. VI, § 13.) Appellant did not object to the methodology Horton used to form his opinion that appellant underpaid the first 12-month

period sales tax by $56,982 and the second 12-month period sales tax by $32,272. Consequently, he cannot now complain of the basis of that opinion.

In any case, had appellant challenged the bases of Horton's opinions, the court would have been well within its discretion to overrule the challenge. Horton has a bachelor's degree in accountancy, has passed the certified public accountant's examination, and has taken continuing education courses in auditing, investigating, and interviewing witnesses. As of the trial date, he had been a business tax specialist for seven years, before which he had been a regular sales tax auditor for five years. He had conducted more than 300 business tax audits and had participated in approximately 30 investigations involving allegations of sales tax fraud. His practice in criminal audits when there was more than one method to determine the accurate sales tax was to employ the method most favorable to the defendant. He performed two tests to test his findings of the underreported sales taxes using the 14.01 percent discount rate. In the first test he compared the computer-recorded gross sales for 1997 with the 1997 income tax return gross sales. In that comparison, the computer gross sales were $107,000 higher than the listed income tax sales, a difference of 3.6 percent. He attributed the 3.6 percent difference to the percentage of returned and voided receipts he would expect in a business such as BAC. Based on his training and experience, he expects to see a difference of three to five percent between gross sales and adjusted sales in mid-sized computer supply retailers. Because his practice is to give the taxpayer the most favorable legitimate calculation, he elected to use the 14.01 percent adjustment rate.

In the second test, he compared the sales reported on the income tax return with the sales reported in the sales tax returns for the same period. The sales figures in the income tax return "tie[d]" to the computer-recorded daily sales summaries. They were also "in line" with the (presumably deductible) purchases claimed on the income tax return, so, as Horton testified, for "[appellant] to say that the income tax returns are overstated, he would also have to say his purchases were overstated." Given appellant's computer gross sales/income tax return sales and his income tax return sales/Board sales

tax return sales, Horton concluded his 14.01 percent discount adjustment was "extraordinarily reasonable."

Asked what was "wrong with just adding up the" paper invoices that appellant had provided to determine the accurate tax, Horton explained that because there was no "audit trail," an auditor could not "trace to see where the errors came from" simply by adding up all the paper invoices. "More importantly," he continued, he discovered fabricated, and thus inherently unreliable, records, and the purportedly maintained daily sales journals were "nowhere to be found."

When asked why his sample comparison test of paper invoices to computer-recorded invoices was for only three months, rather than all eight quarters, Horton testified that such a sample test period is a standard the Board instructs him to use, and that his test sample went through several layers of review at the Board.

In light of Horton's professional background and his testimony, the court would not have abused its discretion in concluding he had a proper basis for his opinion that the 14.01 percent adjustment discount he derived from his analysis of the January, February, and May 1997 BAC sales records could be applied to the computer-reported gross sales of all eight quarters at issue in this case to determine the accurate amount of taxable sales for those quarters, and by extension, the amount of underreported sales tax. Because there was admissible matter to support his opinions, his opinions constituted substantial evidence of the underreported amount of sales tax, and thus, substantial evidence that appellant committed a felony by underreporting an amount greater than $25,000 for each of the two audit periods.

IV. *Victim Restitution*

Appellant contends the amount he was ordered to pay as victim restitution is erroneous because the amount includes statutory penalties.

a. Sentence

According to the "victim's statement" in the pre-sentence report, the Board submitted "restitution" consisting of, inter alia, "$173,821.40--(tax, interest, and penalties) to date for Criminal audit period," i.e., the two 12-month periods that

constituted the bases of counts one and two.[9] The $173,821.40 figure was not further broken down into the amounts of the outstanding taxes themselves, interest, and penalties. The pre-sentence report recommended that appellant, "pursuant to Section 1202.4 of the Penal Code," pay a $600 restitution fine to the Restitution Fund and restitution to the victim of the entire amount of victim restitution claimed by the Board. (See fn. 9.) The pre-sentence report did not identify the statutory basis of the "penalties."

At sentencing the court ordered appellant to pay $600 to the Restitution Fund and $173,821.40 "in tax, interest and penalties" to the Board. It ordered a hearing regarding the Board's claimed investigative costs because appellant challenged these costs, after which it would issue a separate order with respect to reimbursement for those costs.[10]

The abstract of judgment, "per PC 1202.4(f)," imposes a $600 "restitution fine" to the Restitution Fund and "restitution to [the Board] for $173,821.40 plus 10 percent administrative fee."

b. Statutory Scheme

Section 1202.4, subdivision (a)(1) states: "It is the intent of the Legislature that a victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant convicted of that crime." Section 1202.4 further provides that a convicted defendant shall pay a fine in the form of a penalty assessment, in accordance with section 1464 (§ 1202.4, subd.(a)(2))[11]; a

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[9] The full amount of restitution submitted by the Board to the Probation Department was $1,693,119.50. It consisted of $1,609,299.50 to the Board ($185,102.50 in investigative costs, $1,250,375.64 in tax, interest, and penalties to date for the civil audit period, and $173,821.40 to date for the criminal audit period) and $83,820.00 to the Department of Justice for investigative costs. At sentencing the People acknowledged that the amounts for the civil audit period were not part of the criminal case.

[10] Assuming it eventually issued, the court's order regarding the investigative fees is not in the instant appellate record.

[11] Section 1464, subdivision (a) provides that "there shall be levied a state penalty, in an amount equal to [$10.00] for every [$10.00] or fraction thereof, upon every fine, penalty or forfeiture imposed and collected by the courts for criminal offenses. . . ." After the court determines the amount due, the clerk of the court shall collect the penalty and submit it to the county treasury. A portion shall be deposited in appropriate county

restitution fine between $200 and $10,000, payable to the Restitution Fund in the State Treasury (§ 1202.4, subds. (a)(3)(A)), (b)-(e); and restitution to the victim (§ 1202.4, subds. (a)(3)(B), (f)).

Section 1202.4, subdivision (f) states: "[I]n every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim . . . in an amount established by court order, based on the amount of loss claimed by the victim. . . ." It further provides that, to the extent possible, "the restitution order shall be prepared by the sentencing court, shall identify each victim and each loss to which it pertains, and shall be of a dollar amount that is sufficient to fully reimburse the victim . . . for every determined economic loss incurred as the result of the defendant's criminal conduct, including, but not limited to. . . . (A) Full or partial payment for the value of stolen or damaged property . . . [¶] . . . [¶] (G) Interest, at the rate of 10 percent per annum, that accrues as of the date of sentencing or loss, as determined by the court."

Neither a restitution fine, imposed under section 1202.4, subdivisions (a)(3)(A) and (b)-(e), nor victim restitution, imposed under section 1202.4, subdivisions (a)(3)(B) and (f), can serve as the underlying fine upon which a penalty assessment can be imposed under section 1202.4, subdivision (a)(2) and section 1464. (See, respectively, *People v. Allen* (2001) 88 Cal.App.4th 986, 988; *People v. Dorsey* (1999) 75 Cal.App.4th 729, 731.)

c. Analysis

Appellant does not dispute that his unpaid taxes and interest thereon constitute economic losses to the Board, for which it may be compensated in a victim restitution order pursuant to section 1202.4, subdivision (f).[12] He argues that victim restitution is

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funds and a portion shall be transmitted to the state treasury, to be deposited in the state penalty fund. (§ 1464, subd. (e).)

[12] Appellant also does not dispute the imposition of a $600 restitution fine to be paid to the state Restitution Fund, even though the abstract of judgment incorrectly

different from and does not encompass any statutory monetary penalties to which a defendant may be subject. We agree.

Statutes are to be interpreted by ascertaining the Legislature's intent in enacting them. (*People v. McHenry* (2000) 77 Cal.App.4th 730, 732.) The first step in making this determination is to scrutinize the statute's actual words, giving them their plain and commonsense meaning. (*Id*. at pp. 732, 733.) If the language is clear and unambiguous, there is no need for construction. (*Ibid*.)

Section 1202.4 could not set forth its intent regarding victim restitution any more specifically or plainly: crime victims who incur "any economic loss" as a result of the crime shall receive restitution for that loss from the defendant. (Subds. (a)(1), (f).) Subdivision (f) "include[s] but [is] not limited to" 11 itemized economic losses for which restitution is available. "Penalties" are not included among the specified enumerated economic losses.

Section 1202.4, subdivision (f)'s catch-all phrase "but not limited to," when read in conjunction with the statute as a whole, does not manifest a legislative intent that penalties are a recognizable item of victim restitution. As we explain, penalties are addressed separately from a victim's "economic loss." Words of a statute are to be construed in context; different provisions relating to the same subject matter are to be harmonized if possible. (*People v. McHenry, supra*, 77 Cal.App.4th at p. 733.) Section 1202.4 specifically provides elsewhere, in subdivision (a)(2), for the payment of penalties following conviction. The enactment of discrete subdivisions for the payment of a fine in the form of a penalty assessment to the county treasurer (§ 1202.4, subd. (a)(2) & § 1464) and the payment of restitution directly to the victim (§ 1202.4, subd. (f)) readily manifests a legislative intent to segregate and distinguish a "penalty assessment" from "victim restitution."

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identifies section 1202.4, subdivision (f) as the authority for the fine, rather than subdivisions (a)(3)(A) and (b)-(e).

Additionally, to deem a "penalty" an item of a crime victim's economic loss is contrary to the plain meanings of "penalty," "economic loss," and "restitution" and contravenes our obligation to read statutes in a commonsense fashion. (*People v. Dorsey*, *supra*, 75 Cal.4th at pp. 736-737.) A penalty is commonly understood as "the suffering, in person, rights, or property, that is annexed by law or judicial decision to the commission of a crime or public offense." (Merriam-Webster's 11th Collegiate Dict. (2004) p. 915.) It is imposed as punishment on a wrongdoer for the wrongful act, and it is suffered by the wrongdoer. On the other hand, the economic loss to which section 1202.4, subdivision (f) refers is suffered by the victim. It is the monetary value placed on the thing or things the victim had, e.g., personal goods, or anticipated having, e.g., future wages, when the wrongful act occurred and of which he or she was deprived as a result of the wrongdoer's act. Because the victim did not possess, or expect to possess, a penalty at the time of the wrongful act, he or she could not have lost it as a result of the act. Restitution is commonly understood as "an act of restoring or a condition of being restored . . . (a) a restoration of something to its rightful owner (b) a making good of or giving an equivalent for some injury." (Merriam-Webster's 11th Collegiate Dict., *supra*, at p. 1062.) It obligates the defendant wrongdoer to restore to the victim the value of those things he or she was deprived of by the wrongful act. Therefore, in making restitution to the victim, i.e., restoring the monetary value of the things the victim lost, the defendant is not restoring a penalty to the victim.

Citing language in *People v. Crow* (1993) 6 Cal.4th 952, 957, and subsequent cases that describes restitution as having a deterrent and rehabilitative objective, respondent argues the court did not err in awarding restitution for statutory penalties. These cases are inapposite. At issue in *Crow* was whether a county department of social services was entitled to victim restitution for welfare fraud even though it was not a natural person. (*Id*. at pp. 954, 956-957.) In holding that a government agency was so entitled, *Crow* observed that " 'the concept of restitution embodies not only the notion that people who suffer loss as a result of criminal activity should be compensated for those losses, but also a perception of the value of restitution as a "deterrent to future

criminality" and "to rehabilitate the criminal." Both aims are furthered by imposing a restitution condition in appropriate cases whether or not the victim is an individual. We therefore agree with the dictum that " '[t]he government may be the beneficiary of [restitution] if it has incurred actual loss due to the crime, as in the instance of tax evasion or theft of government property. . . .' " ' " (*Id*. at p. 957, citations omitted.) Nothing in *Crow's* observation that victim restitution may serve to deter and rehabilitate the defendant as well as to indemnify the victim can reasonably be read to transmogrify a statutory penalty the defendant is obligated to pay as a consequence of his conviction into an economic loss of the victim. As observed in *People v. Bernal* (2002) 101 Cal.App.4th 155, 161-162, 168, while victim restitution may serve the additional objectives of deterrence and rehabilitation, those objectives are served by the substantial restitution fine requirement of section 1202.4, subdivision (b).

Citing *People v. Draut* (1999) 73 Cal.App.4th 577, respondent also argues that because the Board is statutorily authorized by Revenue and Taxation Code section 6591 to collect penalties for the failure to report and pay sales taxes, the trial court here had the statutory power to award such penalties as restitution.[13] We reiterate that a penalty imposed on a wrongdoer for wrongful acts, in this case a person who has not made a timely report and payment of sales tax, is not an economic loss to the victim of those wrongful acts. Nor does *Draut* support respondent's argument that a court has statutory power to award penalties as restitution. In *Draut* the defendant was guilty of fraudulently failing to report and remit sales and unemployment insurance taxes. (*Id*. at p. 579.) The losses of the victims, Board of Equalization and Employment Development Department, were comprised of unpaid taxes and investigative costs and totaled approximately $1,157,000. (*Ibid*.) The trial court reduced the amount to $150,000 based on the

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[13] Revenue and Taxation Code section 6591, subdivision (a) states, in pertinent part: "Any person who fails to pay any tax . . . required to be collected and paid to the state. . .within the time required[,] shall pay a penalty of 10 percent of the tax or amount of the tax, in addition to the tax or amount of tax, plus interest at the modified adjusted rate per month . . . from the date on which the tax or the amount of tax required to be collected became due and payable to the state until the date of payment."

defendant's inability to pay. *Draut* reversed, holding the reduction was an abuse of discretion, because a criminal defendant is required under section 1202.4, subdivision (f), to make full restitution to the victim absent compelling and extraordinary reasons, and, by statute (§ 1202.4, subd. (g)), inability to pay is not a compelling or extraordinary circumstance. (*Draut, supra,* 73 Cal.App.4th at p. 582.) *Draut* also observed that the reduced amount came nowhere near reasonably compensating the victims for the amount of their undisputed losses. (*Id*. at p. 583.) The only payments at issue in *Draut* were for victim restitution; it makes no mention of penalties.

A court has broad discretion in fixing a restitution order, but it abuses that discretion if the order rests on a demonstrable error of law. (*People v. Draut, supra*, 73 Cal.App.4th at p. 581; *People v. Thygesen* (1999) 69 Cal.App.4th 988, 993.) Because statutory penalties are not, as a matter of law, an item of victim restitution, the court here erred in including them in its victim restitution order.

DISPOSITION

The victim restitution order is reversed and remanded with directions to calculate a restitution order based only on the economic losses of the Board of Equalization. The clerk of the superior court shall prepare and deliver to the Department of Corrections an amended abstract of judgment consistent with the newly calculated order. In all other respects the judgment is affirmed.

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Jones, P.J.

We concur:

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Simons, J.

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Bruiniers, J.*

*Judge of the Superior Court of Contra Costa County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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Trial judge:	Hon. James J. McBride
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