

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18011877
MOHAMMAD BAGHER BAHOUR) CDTFA Case No. 884835
) CDTFA Acct. No. 053-014456
)
) Date Issued: March 4, 2019
)

OPINION

Representing the Parties:

For Appellant: Irene P. Tse, Attorney

For Respondent: Joseph Boniwell, Tax Counsel

J. ANGEJA, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 6561,¹ Mohammad Bagher Bahour (appellant) appeals an action by respondent California Department of Tax and Fee Administration (CDTFA) on appellant’s petition for redetermination of CDTFA’s Notice of Determination (NOD). The NOD assessed personal liability against appellant as a responsible person under section 6829, consisting of a \$317,613.43 tax liability, plus applicable interest, and penalties of \$98,891.78,² for the period January 1, 2005, through June 25, 2014.³ The NOD reflects CDTFA’s determination that appellant is personally liable for the unpaid sales and use tax liabilities of Bahour Oil, Inc. (Bahour).

¹ Unless otherwise indicated, all further statutory (“section” or “§”) references are to sections of the California Revenue and Taxation Code for the tax year at issue.

² The penalties consist of a negligence penalty, finality penalties, and late-payment penalties for various periods from January 1, 2005 through June 25, 2014. On appeal, appellant concedes the computation and imposition of the tax, penalties, and interest against Bahour, but protests his liability as a responsible person for Bahour’s liabilities, and the imposition of the negligence penalty against Bahour. The negligence penalty is \$47,803.12 for the period January 1, 2005 through December 31, 2007.

³ The NOD was timely issued because the applicable three-year statute of limitations would not have expired until July 31, 2017, three years after the last day of the calendar month following the quarterly period in which CDTFA obtained actual knowledge of Bahour’s termination of business operations. (§ 6829(f).)

Appellant waived his right to an oral hearing, and therefore the matter is being decided based on the written record.

ISSUES

1. Whether appellant is liable under section 6829 for Bahour's unpaid sales and use tax liabilities.
2. Whether Bahour was negligent.

FACTUAL FINDINGS

1. Bahour, a California corporation, operated as a gasoline station and mini-mart from January 1, 1989, through June 25, 2014. Bahour obtained a seller's permit with an effective start date of January 1, 1989, and appellant concedes that on June 25, 2014, Bahour ceased the operations for which it required a seller's permit.⁴
2. Appellant concedes that Bahour collected sales tax reimbursement on all of its retail sales of tangible personal property during the period at issue here, January 1, 2005, through June 25, 2014 (the Liability Period).
3. Appellant concedes that during the Liability Period, he was responsible for Bahour's sales and use tax matters, and that he was Bahour's sole officer, president, Chief Executive Officer (CEO) and Chief Financial Officer (CFO). Appellant concedes that he had the authority to pay Bahour's sales and use tax liabilities. Appellant signed Bahour's sales and use tax returns as its president for the first three quarters of 2005, and electronically filed and signed Bahour's returns for the second quarter of 2012 (2Q12) through 4Q12. Bahour's CPA, acting under appellant's authority, filed the returns for the period October 1, 2008, through March 31, 2012, and from January 1, 2013, through June 25, 2014.
4. Between November 28, 2011, and May 3, 2014, appellant signed five installment payment agreements with the Board of Equalization (predecessor to CDTFA), as Bahour's president. These installment payment plans expressly included liabilities from the period January 1, 2005, through June 15, 2010.

⁴On June 25, 2014, CDTFA visited Bahour's business location and learned that Staffing and Management Group, Inc. (Staffing) was operating the business. Appellant is the president of Staffing.

5. Bahour's bank statements show that during the period January 1, 2010, through January 31, 2014, appellant signed a voluminous number of Bahour's checks to various creditors and vendors, as well as the Board of Equalization.
6. On April 25, 2008, and April 23, 2009, respectively, CDTFA issued two separate NOD's to Bahour for the period January 1, 2005, through December 31, 2007 (the audit-based liability). Appellant concedes that he became aware of Bahour's audit-based liability in 2008, when he discussed the audit results with Bahour's CPA, Mr. Alkalla.
7. Records from the California Employment Development Department (EDD) show that Bahour paid wages totaling \$1,835,621 during the Liability Period. Records from Southern California Edison show that Bahour paid utility costs totaling \$208,312 during the period October 1, 2009, through September 30, 2014.
8. During the Liability Period, Bahour paid its suppliers for inventory, and paid its landlord for rent.
9. In his appeal brief, appellant contends that he did not willfully fail to pay Bahour's unpaid tax liability because he relied on Bahour's accountant, Mr. Eldeeb, to properly report Bahour's sales tax liabilities during the period January 1, 2005, through December 31, 2007. Specifically, appellant contends that Bahour provided its financial information to Mr. Eldeeb, who unilaterally reduced the recorded sales by 20 percent, and reported only 80 percent of Bahour's recorded sales as taxable.
10. During the period January 1, 2005, through December 31, 2007, Bahour underreported its taxable sales by an average of 28.16 percent.
11. Bahour was previously audited twice. CDTFA first audited Bahour for the period January 1, 1989, through September 30, 1992, for which CDTFA determined that Bahour underreported its taxable sales by a measure of \$3,016,906, but imposed no penalties. CDTFA then audited Bahour a second time, for the period October 1, 1992, through September 30, 1995, for which CDTFA determined that Bahour underreported its taxable sales by a measure of \$422,132, and CDTFA imposed a 10 percent negligence penalty.

DISCUSSION

Issue 1 - Whether appellant is liable under section 6829 for Bahour's unpaid sales and use tax liabilities.

Section 6829(a) provides that upon termination, dissolution, or abandonment of the business of a corporation, any person having control or supervision of, or who was charged with the responsibility for the filing of returns or the payment of tax, or who was under a duty to act for the corporation in complying with any requirement of the Sales and Use Tax Law, is personally liable for the corporation's unpaid tax, interest, and penalties if the person willfully failed to pay or to cause to be paid any taxes due from the corporation. (See also Cal. Code Regs., tit. 18, § 1702.5(a).)⁵ CDTEFA has the burden to prove the requirements of personal liability by a preponderance of the evidence. (Reg. 1702.5(d).) Here, appellant concedes that Bahour's business operations effectively terminated on June 25, 2014, and that Bahour collected sales tax reimbursement on its retail sales of tangible personal property during the liability period. Appellant also concedes that he was a person responsible for Bahour's sales and use tax matters during the liability period. Thus, the only remaining issue is whether appellant willfully failed to pay, or to cause to be paid, Bahour's tax liabilities.

Personal liability can be imposed on a responsible person only if that person willfully failed to pay or to cause to be paid taxes due from the corporation. (§ 6829(a), (b).) For these purposes, "willfully fails to pay or to cause to be paid" means that the failure was the result of an intentional, conscious, and voluntary course of action. (§ 6829(d); Reg. 1702.5(b)(2).) This failure may be willful even if it was not done with a bad purpose or motive. (Reg. 1702.5(b)(2).) A person is regarded as having willfully failed to pay taxes, or to cause them to be paid, where he or she had knowledge that the taxes were not being paid; had the authority to pay the taxes, or to cause them to be paid; and had the ability to pay the taxes but chose not to do so. (Reg. 1702.5(b)(2)(A) – (C).)

The first requirement for willfulness is knowledge, meaning that on or after the date taxes came due, the person had actual knowledge that the taxes were due, but not being paid. (Reg. 1702.5(b)(2)(A).) Here, appellant concedes that he had actual knowledge of the audit-based liability beginning in 2008. We also note that as president of Bahour, appellant received

⁵ Regulatory references are to Title 18 of the California Code of Regulations, unless otherwise noted.

actual notice of the audit-based liability when Bahour received the April 25, 2008 and April 23, 2009 NOD's from CDTFA. In addition, appellant signed five installment payment plans that each expressly included the audit-based liability, which means that appellant had actual knowledge of the audit-based liability.

The remaining liability for the period January 1, 2009, through June 25, 2014, arises from Bahour's self-reported, unpaid tax liabilities reported on its sales and use tax returns. Appellant filed and signed Bahour's sales and use tax returns for the period April 1, 2012, through December 31, 2012, while the remainder were filed by Bahour's CPA, acting under appellant's authority. Filing such returns without payment for the taxes reported therein establishes appellant's actual knowledge that Bahour's taxes were not being paid during the liability period. Accordingly, we conclude that appellant knew during the Liability Period that Bahour's taxes were not being paid.

The second requirement is that the person must have had the authority to pay or to cause the corporation's taxes to be paid. (Reg. 1702.5(b)(2)(B).) Here, appellant concedes that he had the authority to pay or to cause Bahour's taxes to be paid. In addition, appellant was Bahour's president, CEO, CFO, and sole corporate officer, which establishes that appellant had the authority to pay Bahour's taxes. We further note that appellant signed and made payments pursuant to five installment payment plans on behalf of Bahour, and appellant signed voluminous checks from Bahour to its various creditors. Accordingly, we conclude that appellant had the authority to pay or to cause Bahour's taxes to be paid.

The third requirement is that the person had the ability to pay the taxes but chose not to do so. (Reg. 1702.5(b)(2)(C).) Here, it is undisputed that Bahour collected sales tax reimbursement from its customers on its retail sales of tangible personal property during the liability period, and thus Bahour had those funds available with which to pay its tax liability. In addition, during the Liability Period, Bahour paid wages in excess of \$1.8 million, as well as rent and inventory costs. Thus, we conclude that Bahour had the ability to pay its outstanding sales and use tax liability, but elected to pay other creditors instead. For the foregoing reasons, we conclude that appellant willfully failed to pay Bahour's unpaid tax liabilities.

Appellant's contention that he did not willfully fail to pay Bahour's tax liability because of the alleged errors caused by Mr. Eldeeb lacks merit under the facts of this appeal. Specifically, Mr. Eldeeb's alleged errors occurred during 2005 through 2007 (i.e., *prior* to 2008),

but appellant gained actual knowledge of the audit-based liabilities *in and after* 2008, when appellant also had the authority and ability to pay that liability, thereby establishing all of the elements of the “willfully fails to pay or to cause to be paid” requirement pursuant to Regulation 1702.5(b)(2). Moreover, Mr. Eldeeb’s alleged errors did not cause the remainder of the liability, which began in 2009 as the result of Bahour’s non-remittance tax returns. In other words, appellant’s willful failure to pay Bahour’s unpaid tax liability occurred from 2008 onward, long after Mr. Eldeeb’s alleged errors. Therefore, Mr. Eldeeb’s alleged errors have no effect on appellant’s liability under section 6829.

Issue 2 - Whether Bahour was negligent.

If any part of a deficiency is due to negligence, CDTFA shall add a 10-percent negligence penalty to the deficiency determination. (§ 6484.) Negligence is generally defined as a failure to exercise such care that a reasonable and prudent person would exercise under similar circumstances. (*Warner v. Santa Catalina Island Co.* (1955) 44 Cal.2d 310, 317; see also *People v. Superior Court (Sokolich)* (2016) 248 Cal.App.4th 434, 447 [“The general standard of care applicable to negligence is ‘that of a reasonably prudent person under like circumstances,’ which constitutes an ‘objective reasonable person standard.’” [citations]].)

Here, appellant raises no specific contention regarding the negligence penalty imposed against Bahour. To the extent that his contention above regarding Mr. Eldeeb’s alleged responsibility may also apply to the negligence penalty, that argument is unavailing because Bahour remains responsible for the negligence of its agent (*See Peredia v. HR Mobile Services* (2018) 25 Cal.App.5th 680, 691).

Regardless of Mr. Eldeeb’s alleged errors, we note that the audit established that Bahour underreported its taxable sales by an average of 28.16 percent, and this large error rate is evidence of negligence. Additionally, Bahour was previously audited twice, and was found to be negligent in the second audit. Here in the current, third audit, Bahour repeated the same error from its prior audits (i.e., underreporting its taxable sales), which is clearly negligent. (*See Independent Iron Works, Inc. v. State Bd. of Equalization* (1959) 167 Cal.App.2d 318, 323.) Based on the foregoing, we conclude that Bahour was negligent and that the negligence penalty was properly imposed.

HOLDINGS

1. Appellant is liable under section 6829 for Bahour's unpaid sales and use tax liabilities.
2. Bahour was negligent, and thus the negligence penalty is appropriate.

DISPOSITION

We sustain respondent's action in full.

DocuSigned by:
Jeff Angeja
JD390BC3CCB14A9...
Jeffrey G. Angeja
Administrative Law Judge

We concur:

DocuSigned by:
Daniel K. Cho
9CAF796C88DF4A5...
Daniel K. Cho
Administrative Law Judge

DocuSigned by:
Sara A. Hosey
6D3FE4A0CA514E7...
Sara A. Hosey
Administrative Law Judge