

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
RICHARD S. WEISS

) OTA Case No. 18043018
) CDTFA Case ID: 782676
) CDTFA Account No. 053-12039
)
) Date Issued: June 20, 2019
)

OPINION

Representing the Parties:

For Appellant: Richard Weiss, Taxpayer

For Respondent: Amanda Jacobs, Tax Counsel

A. KWEE, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Richard S. Weiss (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA) denying appellant’s petition for redetermination of an October 31, 2013, Notice of Determination (NOD). The NOD is for \$44,250.23 in tax, plus applicable interest, and penalties totaling \$7,209.40, for the period October 1, 2007, through September 30, 2009 (liability period). The NOD reflects CDTFA’s determination that appellant is personally liable as a responsible person for the unpaid tax liabilities of Five Star Video, Inc. (the corporation).

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

ISSUES

1. Whether appellant is personally responsible for the unpaid liabilities of the corporation.
2. Whether any adjustments are warranted to the corporation’s liability as determined by CDTFA.

FACTUAL FINDINGS

1. The corporation was engaged in the business of video tape duplication in California.
2. During 2007, appellant, James Miller, and David Moore each acquired a one-third ownership interest in the corporation. Each of these individuals was also a director of the corporation. Additionally, James Miller was president, David Moore was vice president, and appellant was, at a minimum, responsible for handling sales.¹ These three individuals (purchasers) acquired ownership of the corporation from Patricia and Carl Erickson (sellers). Pursuant to the sales agreement, the sellers indicated that the purchasers made or were required to make some payments to the sellers during the liability period, and that the purchasers stopped making payments when the business began losing money.
3. David Moore's last contact with CDTFA as a corporate officer was on November 8, 2007.² Sometime after this date, while appellant was reviewing the corporation's checking account, he discovered that David Moore was embezzling corporate funds. Due to the embezzlement, David Moore resigned and appellant immediately thereafter took over the position of vice president.
4. The exact date that David Moore resigned, and appellant became vice president, is unclear. The prior owners reported to CDTFA that David Moore was asked to leave after Christmas 2007, and ultimately left in early 2008. On May 14, 2008, the corporation reported to CDTFA that David Moore was no longer associated with the corporation.
5. On January 14, 2009, the corporation filed an updated Statement of Information with the Secretary of State, reporting that it had two directors and three officers. Appellant and James Miller were the two directors. Appellant was the chief financial officer, James

¹ On November 8, 2007, the corporation reported to CDTFA that the three corporate officers were appellant, David Moore, and James Miller. It is unclear what appellant's title or responsibility as a corporate officer was at this point in time.

² The underlying actions in this matter were handled by CDTFA's predecessor, the State Board of Equalization (board). On July 1, 2017, CDTFA took over certain functions of the board, including administration of the sales and use tax law.

Miller was the chief executive officer, and Kandee Escobar was the secretary.³ The statement was filed by Kandee Escobar.

6. The corporation filed non-remittance returns for at least six of the eight quarterly reporting periods during the liability period, for which appellant is now being held personally liable.⁴ All six of the returns were signed by the corporation's president, James Miller. The corporation reported making \$828,898 in sales during these six quarters.
7. The liability period also includes CDTFA assessed liabilities. CDTFA contends that it issued a deficiency determination resulting from a disallowed deduction for the fourth quarter of 2007 (4Q07). CDTFA also contends that it separately issued a determination for failure to file a return for 2Q08, and that the determination estimated sales by projecting reported sales figures from the prior two quarters. CDTFA did not provide a copy of either of the two determinations. The record also contains no evidence of the measure or amount assessed for either of these two quarters.
8. The corporation reported to the Employment Development Department that it paid wages to employees during the period October 1, 2007, through December 31, 2008.
9. One of the corporation's landlords reported receiving rent payments of \$58,135.64, during the period April 1, 2009, through February 22, 2010. This landlord also reported a move in date of May 1, 2009, and a move out date of March 31, 2010.
10. The corporation reported on some of its sales and use tax returns that it sold property on a tax-included basis. Additionally, James Miller reported to CDTFA that the corporation collected sales tax reimbursement from its customers.
11. Appellant discussed sales and use tax matters with CDTFA during the liability period on many occasions:
 - a. On or around September 5, 2008, appellant asked CDTFA to release a levy on the corporation's bank account, because the corporation only had one bank account, and appellant would not be able to make payroll unless the levy was released.

³ CDTFA's records separately document contact with an office manager, identified as "Candy." It is unclear if that person has any relation to, or is the same person as, Kandee Escobar.

⁴ CDTFA contends that the corporation filed seven returns during this period; however, only six of the returns are a part of the record.

- b. On or around October 3, 2008, CDTFA informed appellant that the corporation had failed to file a return for 2Q08, and make a required prepayment for 3Q08.
- c. On or around November 4, 2008, appellant discussed the 2Q08 and 3Q08 delinquencies with CDTFA.
- d. On or around March 19, 2009, CDTFA informed appellant that the corporation had past due tax liabilities in the amount of \$38,414.75.
- e. During September 2009, CDTFA issued a Notice to Appear – Revocation Proceeding to the corporation pursuant to R&TC 6070.
- f. On or around September 23, 2009, appellant and James Miller represented the corporation at the seller’s permit revocation proceeding. During the proceeding, appellant and James Miller filed a non-remittance return for 2Q09, reporting \$8,714 in tax due. CDTFA informed them that the corporation’s current liability was \$51,180.27, plus the \$8,714 for 2Q09. CDTFA also informed them that the seller’s permit was scheduled for revocation, and that if they continued to engage in business after revocation they would be subject to criminal prosecution. During the proceeding, they also informed CDTFA that the corporation had provided updated corporate officer information with the Secretary of State (deleting David Moore) and agreed to provide a copy of the corporation’s most recent filing with the Secretary of State.⁵ Appellant inquired whether the corporation could arrange a payment plan, and CDTFA informed appellant that the corporation would need to first make a payment of a certain amount.
- g. On or around September 30, 2009, appellant and James Miller went to CDTFA’s Van Nuys District Office and submitted a partial payment.
- h. On or around October 16, 2009, appellant and James Miller called CDTFA to request a payment extension.
- i. On or around November 30, 2009, a CDTFA inspector showed up at the business location and seized the corporation’s seller’s permit. At that time, CDTFA met with appellant and James Miller and notified them that it was illegal to operate

⁵The most recent corporate filing was the January 14, 2009, Statement of Information reporting appellant as CFO (discussed above).

with a revoked permit. Appellant and James Miller refused to provide any business records to the CDTFA inspector.

- j. On or around December 2, 2009, appellant and James Miller went to CDTFA's Van Nuys District Office to request a payment plan, and informed CDTFA that business was picking up.
 - k. On or around December 15, 2009, appellant informed CDTFA that he was resigning from the corporation. In support, appellant provided a letter dated December 15, 2009, stating that he was resigning as co-owner, vice president, or "any other title vested in me" and that he was hereby releasing himself "of all responsibilities and or liabilities."
12. On or around August 13, 2010, the corporation reported to CDTFA that it terminated its business in February 2010.
 13. On March 1, 2013, the corporation was suspended by the Franchise Tax Board for failure to meet tax requirements.
 14. CDTFA issued a dual determination to appellant for the unpaid liabilities of the corporation on October 31, 2013. Appellant petitioned the liability, and CDTFA denied the petition in a Decision dated January 21, 2016. This timely appeal followed.
 15. On appeal, appellant contends that "[e]verything was done by what[]ever I could do to keep everyone employed by making our rent, utility's, vender's payments," etc., including loaning his own money to the corporation. Appellant contends he and his then-fiancée loaned over \$100,000 to the corporation. In support, appellant provided copies of four cancelled checks totaling \$18,700, reflecting loans appellant made to the corporation. Appellant also provided a copy of a check stub from the corporation to appellant, repaying a loan in the amount of \$3,700.⁶

DISCUSSION

Issue 1 – Whether appellant is personally responsible for the unpaid liabilities of the corporation

The law provides, in pertinent part, that any responsible person who willfully fails to pay or to cause to be paid the taxes due from a corporation shall be personally liable for unpaid taxes and interest and penalties not so paid upon termination of the business of the corporation.

⁶This is the only corporate check that is a part of the record. The signature line was not provided.

(R&TC, § 6829, subd. (a); Cal. Code Regs., tit. 18, § 1702.5, subd. (a).) Personal liability may only be imposed if CDTFA establishes that, while the person was a responsible person, the corporation collected sales tax reimbursement from customers (whether separately stated or included in the selling price) and failed to remit such tax when due. (R&TC, § 6829, subd. (c); Cal. Code Regs, tit. 18, § 1702.5, subd. (a).) In summary, there are four elements that must be met in order to impose responsible person liability: (1) collection of sales tax reimbursement; (2) termination of the business; (3) responsible person; and (4) willful failure to pay or cause to be paid. CDTFA has the burden to prove these elements by a preponderance of the evidence. (Cal. Code Regs, tit. 18, § 1702.5, subd. (d).)

Elements 1 & 2

First, the corporation reported that it collected sales tax from its customers, and filed some returns reporting sales on a tax-included basis. Second, the corporation reported that it terminated its business operations during February 2010, and its corporate status was thereafter suspended by the Franchise Tax Board. Therefore, we find that the first two elements for responsible person liability were met.

Element 3 – Responsible Person

A responsible person includes any person having control or supervision of, or who is charged with the responsibility for the filing of returns, or the payment of tax, or who has a duty to act for the corporation in complying with the Sales and Use Tax Law. (Cal. Code Regs, tit. 18, § 1702.5, subd. (b)(1).) Here, after the termination of David Moore, appellant was a director, vice president, chief financial officer, and a co-owner. Additionally, in his capacity as vice president, appellant discussed sales and use tax matters on behalf of the corporation on a number of occasions. There are, on the other hand, no documented contacts with appellant prior to him becoming vice president. Therefore, based on his documented direct involvement in handling sales and use tax matters with CDTFA after becoming vice president, we conclude that appellant was a person responsible for sales and use tax matters during periods in which he served as vice president.

Personal liability may only be imposed if appellant was a responsible person at the time the corporation made the sales, collected the sales tax reimbursement, and failed to remit it to the board. (R&TC, § 6829, subd. (c); Cal. Code Regs, tit. 18, § 1702.5, subd. (a).) CDTFA did not

provide sufficient evidence to determine when, precisely, appellant became vice president. Appellant contends that he immediately took over the responsibilities of the vice president upon the resignation of David Moore. Therefore, at a minimum, it is clear appellant was responsible on May 14, 2008, the date the corporation first reported that David Moore was no longer associated with the corporation. The prior owners reported that David Moore was asked to leave after Christmas of 2007, and thereafter left in early 2008. Therefore, we do not believe that CDTFA has provided sufficient evidence to establish that appellant was a responsible person during the period October 1, 2007, through March 31, 2008 (4Q07 and 1Q08).⁷ As such, we conclude that CDTFA failed to provide sufficient evidence to hold appellant personally responsible for 4Q07 and 1Q08.

We find sufficient evidence to conclude that, during the liability period, appellant was a responsible person for sales during and after 2Q08.

Element 4 – Willful

Finally, the term “willfully fails to pay or to cause to be paid” means that the failure was the result of a voluntary, conscious and intentional course of action. (Cal. Code Regs, tit. 18, § 1702.5, subd. (b)(2).) A failure to pay or to cause to be paid may be willful even though such failure was not done with a bad purpose or motive. (*Ibid.*) In order to show willfulness, CDTFA must establish all of the following:

- (A) On or after the date that the taxes came due, the responsible person had actual knowledge that the taxes were due, but not being paid.
- (B) The responsible person had the authority to pay the taxes or to cause them to be paid (i) on the date that the taxes came due and (ii) when the responsible person had actual knowledge as defined in (A). A responsible person who was required to obtain approval from another person prior to paying the taxes at issue and was unable to act on his or her own in making the decision to pay the taxes does not have the authority to pay the taxes or to cause them to be paid.
- (C) When the responsible person had actual knowledge as defined in (A), the responsible person had the ability to pay the taxes but chose not to do so.

(Cal. Code Regs, tit. 18, § 1702.5, subd. (b)(2).) Here, there is unequivocal evidence establishing that appellant had actual knowledge of the unpaid taxes during the time he was a

⁷ As relevant, David Moore was held personally liable as a responsible person for 4Q07 and 1Q08.

responsible person, because appellant was essentially in continuous contact with CDTFA regarding the corporation's unpaid liabilities up until the date he resigned.

The more challenging factual determination we must make is whether appellant had authority to pay the taxes. While a person who is "required to obtain approval" from another person would not have the requisite control, a person who had authority to direct payment but merely deferred to the decision of another individual has the requisite authority. (See Cal. Code Regs, tit. 18, § 1702.5, subd. (b)(2)(B).)

It is important to emphasize here that there can be, and oftentimes are, more than one responsible person held personally liable under R&TC section 6829. Although it is undisputed that James Miller is a responsible person, this fact by itself has no relevance in determining whether appellant is also personally responsible for the unpaid liabilities of the corporation.⁸ It is not our role to determine whether a person is more or less responsible for the corporation's unpaid liabilities. Instead, the law requires us to determine whether, based on a preponderance of the evidence, the elements for imposing responsible person liability are met with respect to appellant, and irrespective of whether some other person could be or was also held personally responsible for the same liabilities. (R&TC, § 6829(a).)

In this case, there are a number of factors which, while not individually dispositive of the matter, when considered together, establish that more likely than not, appellant had the requisite authority. First, appellant discussed tax payment matters with CDTFA on a number of occasions between 3Q08 through 4Q09. Second, appellant physically appeared at CDTFA's district office on at least three occasions to represent the corporation in matters involving its sales and use tax liabilities. Third, appellant requested a payment arrangement with CDTFA during the permit revocation proceeding, indicating some level of authority with respect to payment authority. Fourth, appellant discovered that another officer was embezzling funds, resulting in the termination of that officer, which tends to indicate he had some measure of control over the finances. Fifth, after that officer left the corporation, appellant was one of two officers, co-owners, and directors of the corporation. Ostensibly, appellant would have had equal authority in running the corporation. Sixth, appellant and his fiancée made over \$100,000 in loans to the corporation, and it is unlikely he would have committed such a large sum of money without

⁸ CDTFA separately issued a dual determination to James Miller, holding him personally responsible for the unpaid taxes, interest, and penalties of the corporation from 4Q07 through the closeout of the seller's permit. This covers all the periods for which appellant is being held personally responsible.

some measure of control over repayment of the loan (and, appellant did provide evidence that some of his personal loans were repaid), which further tends to indicate he would have had control over the finances. Seventh, appellant requested that CDTFA release a levy on the corporation's only checking account so that appellant could make payroll,⁹ indicating that appellant made a conscious decision to pay employees over the tax. Eighth, appellant provided evidence showing he was either able to pay himself or cause the corporation to pay him for at least some loans he had made to the corporation. Finally, appellant admits that he did everything in his power "to keep everyone employed by making our rent, utility's, vender's payments," during a period in which taxes were not being paid, which tends to indicate a measure of control and conscious decision-making capacity over how the corporation spent the sales tax reimbursement it collected from customers.

Although appellant did defer on some occasions to James Miller, appellant failed to provide any evidence, aside from his unsworn statements made during the course of this appeal, that would contradict the above evidence establishing authority, or to otherwise show that he was *required* to obtain anyone's approval to pay taxes.¹⁰ To the contrary, the evidence shows that in a phone conversation with CDTFA on October 14, 2013, appellant admitted that David Moore, the former vice president, was an authorized signer on the corporate checking account and was responsible for sales and use tax matters. Similarly, in a phone conversation with CDTFA on November 9, 2007, before he was terminated, David Moore admitted that he was vice president and that it was his responsibility to make sure the corporation's sales and use tax returns were timely filed and paid. Thus, it is clear that the position of vice president was a person with authority to make, or to cause the corporation to make, payments. Appellant concedes he was vice president, which establishes that he, too, had payment authority. There is no evidence that

⁹ CDTFA's record for this phone conversation reads, in pertinent part: "Mr. Weiss said this is only bank acct & he would not be able to make payroll" unless the levy was released.

¹⁰ The dissent emphasizes that because the corporation's office manager called CDTFA on one occasion to discuss a \$3,800 levy on the corporation's bank account, this evidences that appellant contacted CDTFA in a similar capacity. The record shows, however, that the office manager passed the phone call over to James Miller only after CDTFA refused to discuss sales and use tax matters with her on the basis that the required paperwork, a power of attorney for sales and use tax matters, was not on file to authorize her to handle sales and use tax matters with CDTFA. CDTFA did, however, discuss tax matters with appellant, indicating that the corporation must have conveyed to CDTFA in some manner that appellant had authority in such matters. Additionally, the dissent gives considerable weight to appellant's unsworn statements, which were made in connection with this appeal, or in connection with CDTFA's investigation into whether appellant could be held personally liable for the taxes. In reaching our conclusions, we believe greater consideration should be afforded to the evidence that was produced contemporaneous with the liability period, as described above.

the corporate bylaws were subsequently amended to limit the payment authority of the vice president. Therefore, we find that CDTFA established by a preponderance of the evidence, discussed both here and above, that appellant had the requisite authority. We find no evidence in the record to support appellant's contention that his authority was conditioned on any pre-approval requirement with James Miller prior to paying the taxes. To the contrary, the evidence shows that David Moore, who previously served as vice president, had no such pre-approval requirement.

The evidence further establishes that during a period in which the corporation made almost \$1 million in sales, and collected sales tax reimbursement from its customers, which was available to pay the sales tax liability, the corporation failed to remit the taxes to the state. Nevertheless, the corporation paid employee wages, rent, made loan repayments to appellant, and continued to engage in business, evidencing payments to creditors such as suppliers and for utilities. Thus, we find that, either due to appellant's own affirmative decisions to pay other creditors instead of the state, or his voluntary deferral to the president to make such decisions, appellant willfully failed to pay or cause to be paid the sales tax liabilities to the state within the meaning of R&TC section 6829. Therefore, we conclude that appellant is personally responsible for the unpaid liabilities of the corporation within the meaning of R&TC section 6829 for the following reporting periods: 2Q08 through 3Q09.

Issue 2 – Whether any adjustments are warranted to the amount of the liability as determined

When CDTFA is not satisfied with the amount of tax reported by the taxpayer, or in the case of a failure to file a return, CDTFA may determine the amount required to be paid on the basis of any information which is in its possession or may come into its possession. (R&TC, §§ 6481, 6511.) In the case of an appeal, CDTFA has a minimal, initial burden of showing that its determination was reasonable and rational. (See *Schuman Aviation Co. Ltd. v. U.S.* (2011) 816 F.Supp.2d 941, 950; *Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514; *Appeal of Michael E. Myers* (2001-SBE-001) 2019 WL 1187160.) Once CDTFA has met its initial burden, the burden of proof shifts to the taxpayer to establish that a result differing from CDTFA's determination is warranted. (*Riley B's, Inc. v. State Bd. of Equalization* (1976) 61 Cal.App.3d 610, 616.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (See *Ibid*; see also, *Appeal of Aaron and Eloise Magidow* (82-SBE-274) 1982 WL 11930.)

CDTFA established that five out of six of the reporting periods remaining at issue were self-assessments (here, non-remittance returns). Aside from making contentions that CDTFA overstated the corporation's income, appellant provided no basis for disputing the self-assessed liabilities reported on those returns, and, as such, we have no basis to make any adjustments to the amount of his personal responsibility for the corporation's self-assessed liabilities. Therefore, appellant failed to establish error in the self-assessments.

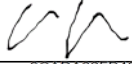
For the remaining reporting period, 2Q08, CDTFA contends that it issued a determination due to the corporation's failure to file a return, and estimated the liability based on sales figures reported in prior reporting periods. Nevertheless, CDTFA failed to provide any evidence from which we may ascertain the measure or amount of its determination for 2Q08. Without knowing what CDTFA's determination was for 2Q08, we have no way to conclude whether that determination was reasonable and rational. (See *United States v. Janis* (1976) 428 U.S. 433 [a "naked" tax assessment for which the government provides no evidence is without rational foundation and excessive].) Therefore, CDTFA failed to meet its initial burden to show that its estimate of the corporation's 2Q08 tax liability was reasonable and rational. As such, we conclude that appellant is not personally responsible for the corporation's unpaid 2Q08 tax liability, as determined by CDTFA.

HOLDINGS

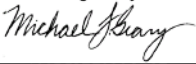
1. Appellant is personally liable as a responsible person for reporting periods in the liability period that occurred on and after April 1, 2008. Appellant is not personally liable for 4Q07 or 1Q08.
2. CDTFA failed to establish that its determination, which estimated sales for 2Q08, was reasonable and rational and, as such, appellant is not personally responsible for 2Q08.

DISPOSITION

CDTFA's action is sustained in part and reversed in part. We direct CDTFA to delete appellant's personal liability for 4Q07, 1Q08, and 2Q08, but we otherwise sustain CDTFA's determination that appellant is personally liable as a responsible person for the unpaid tax liabilities of the corporation for the period July 1, 2008, through September 30, 2009.

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Andrew J. Kwee
Administrative Law Judge

I concur:

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Michael F. Geary
Administrative Law Judge

T. STANLEY, Administrative Law Judge: For the reasons stated below, I dissent.

CDTFA provided sufficient evidence to show that appellant was a responsible person, and that he had actual knowledge that taxes were due but not paid. However, CDTFA failed to prove that appellant had authority to pay the taxes or cause them to be paid, which is a prerequisite to finding that appellant willfully failed to pay. (Cal. Code Regs., tit. 18 (Regulation), § 1702.5.)

A responsible person can only be liable under Revenue and Taxation Code (R&TC) section 6829 for taxes he or she willfully failed to pay or to cause to be paid. (R&TC, § 6829, subd. (a).) Willful failure to pay or to cause to be paid means that the failure was the result of an intentional, conscious, and voluntary course of action. (R&TC, § 6829, subd. (d).) Regulation section 1702.5 implements R&TC section 6829, and, effective April 1, 2017, was amended to include a definition of willfulness that consists of three parts: (1) knowledge, (2) authority, and (3) ability to pay.¹¹

A person has willfully failed to pay the taxes, or to cause them to be paid, only when that responsible person had the authority to pay the taxes or to cause them to be paid on the date that the taxes came due and when the responsible person had actual knowledge of the tax liability. (Regulation, § 1702.5, subd. (b)(2)(B).) A responsible person who must obtain approval from another person to pay the taxes, or is unable to act on his or her own in making the decision to pay the taxes, does not have the authority to pay the taxes or to cause them to be paid. (*Ibid.*)

CDTFA asserted that appellant did not submit arguments or evidence showing he lacked authority to pay the corporation's tax liabilities; however, this argument is implicit in appellant's opening brief, in which appellant asserts that he was just a salesman; that the corporation's president, James Allen Miller (Mr. Miller), assumed banking, 401K, and tax responsibilities; and, that appellant was not responsible for the corporation's financial situation.¹²

¹¹ R&TC, section 7051 states that CDTFA may promulgate regulations and "prescribe the extent to which any ruling or regulation shall be applied without retroactive effect." A regulation so promulgated is to be applied retroactively unless the language of the regulation prescribes only prospective application. (See *Aerospace Corp. v. State Bd. of Equalization* (1990) 218 Cal.App.3d 1300, 1308; *La Societe Francaise De Bienfaisance Mutuelle v. Cal. Employment Com.* (1943) 56 Cal.App.2d 534, 550.) Because Regulation section 1702.5 does not contain language limiting its retroactivity, these amendments apply to the liability period.

¹² CDTFA's response brief does not address appellant's opening brief, but instead incorporates by reference the findings of the Appeals Bureau decision and "requests that this appeal should be denied.

All sales tax returns for the liability period were signed by Mr. Miller. Additionally, on September 3, 2008, Mr. Miller called CDTFA regarding the corporation's sales tax liability and told CDTFA that there had been a change in the person responsible for filing (which was presumably due to previous co-owner, Mr. Moore, leaving the corporation), and that Mr. Miller had taken control himself. Mr. Miller's assertion that he "is taking control himself" strongly indicates that appellant was subordinate to Mr. Miller in sales tax matters and would have needed approval from Mr. Miller prior to making a sales tax payment. No subsequent communication entry shows that Mr. Miller's relinquished control to any other person, including appellant. Mr. Miller was involved in each in-person and telephone conference with CDTFA. Appellant was not, and deferred to Mr. Miller's authority several times.

CDTFA relies, in part, on evidence that appellant was the company's chief financial officer (CFO), based on a single document filed with the California Secretary of State, which appellant never signed nor filed. Appellant claims that he had no knowledge that he was listed on that document, and his statement is borne out by his subsequent resignation letter, which states that he "resign[s] any and all of [his] positions and responsibilities at Five Star Video Inc. or its subsidiary 1555tv listed as Co Owner, Vice President or any other title vested in [him]," but did not resign from the position of CFO. Even if appellant did hold the position, there is no evidence showing that he ever exercised payment authority in that capacity, and a title is insufficient to show responsibility for payments.

Appellant indicated that he wanted to do whatever he could do to "keep everyone employed by making our rent, utility[ies], vend[o]r payments"; however, he qualifies that statement with "by loaning my own personal money." In support, appellant submitted copies of checks made payable to the corporation, not to the corporation's creditors or employees.

The record reflects that appellant reviewed the corporation's bank statements and discovered that a corporation officer was embezzling funds. Appellant stated, however, that he obtained the bank statements because he was offered an ownership interest in the corporation. The fact that appellant had to request copies of bank statements shows that he did not have control over the corporate bank account and finances.

CDTFA asserted that "the vice president of a small corporation" would be expected "to have authority to cause payments for the corporation." CDTFA does not explain why it has such an expectation. In any event, unlike the corporate president—who, under Corporations Code

section 312, subdivision (a), is the general manager and chief executive officer, unless otherwise provided in the articles or bylaws—the Corporations Code does not empower the corporate vice president with broad powers that would typically include financial authority. There is no evidence that the corporation’s bylaws gave the corporate vice president authority to cause payments for the corporation, nor that if such authority were granted, that it would not be subject to approval by the president or general manager. CDTFA asserted that appellant had some measure of control over the finances because appellant had been one of two officers, co-owners, and directors of the corporation. The evidence does not support such an assumption or expectation that the vice-president of a small corporation would have the authority to make or cause payments to be made on behalf of the corporation, nor does it show appellant exercised that authority. Appellant contended that regardless of his titles, he continued to do the same job he had done for the corporation in the past; to act as a salesman.

With respect to appellant’s status as part-owner of the corporation, CDTFA does not identify appellant’s percentage of ownership, but merely states that appellant admitted to being a part-owner. Appellant claims that he purchased one third of the corporation,¹³ but it is unclear whether his ownership percentage increased after Mr. Moore’s departure, and the record contains no evidence showing that appellant obtained a controlling interest in the corporation. Because the business and affairs of the corporation are managed by the board of directors (Corp. Code, § 300, subd. (a)), appellant’s part-ownership of the corporation does not demonstrate authority over corporate finances.¹⁴ Consequently, appellant’s status as a part-owner and vice president does not indicate that appellant could independently direct sales tax payments, which is what is required for a finding of authority under Regulation section 1702.5, subdivision (b)(2)(B).

Several communication entries were submitted showing that appellant interacted with CDTFA. However, none of them prove that appellant ever exercised authority to pay taxes or direct tax payments to be made. For example, a communication entry shows that appellant was informed of the 2Q08 and 3Q08 delinquencies; however, instead of discussing the tax liabilities,

¹³ This assertion is corroborated by an October 10, 2013, CDTFA communication entry stating that the prior owner told CDTFA that Mr. Miller, Mr. Moore, and appellant purchased the business.

¹⁴ While the January 14, 2009 Statement of Information filed with the California Secretary of State lists appellant and Mr. Miller as the corporate directors, I question the accuracy of the statement given appellant’s credible denial of its accuracy. Even if appellant was a director, Five Star’s president, Mr. Miller, was the other director, and therefore appellant’s corporate powers would have been limited to those delegated to him as vice president.

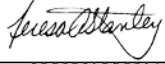
appellant deferred to Mr. Miller. An additional entry shows that on November 4, 2008, CDTFA called the business and spoke with appellant regarding the returns and payment of audit period liabilities. In response, appellant put Mr. Miller on the phone. Similarly, a March 19, 2009, entry shows that CDTFA called the business and informed appellant of a sales tax liability, and appellant told CDTFA that he would have Mr. Miller call back. The entries only prove that appellant acted as an intermediary between Mr. Miller and CDTFA, but deferred to Mr. Miller in sales tax matters. Moreover, during one telephone conversation with CDTFA, appellant discussed check signing authority with CDTFA. He named only Mr. Moore. Nowhere does the entry show that appellant claimed that check signing authority was transferred to him. As of the time that conversation was recorded, on November 14, 2013, there is no indication that appellant ever had any authority to sign checks. The record is devoid of any checks signed by appellant, for any purpose, on behalf of the corporation.

A September 5, 2009, entry states that appellant called CDTFA regarding CDTFA's levy on the corporate bank account. Appellant told CDTFA that the levied account is the corporation's only bank account, which prevented payroll payments from being made. Appellant requested that the funds be released and asked whether anything could be done. CDTFA told appellant that the levy would not be released without financial documentation. This communication only bears out that appellant had the authority to make inquiries with respect to tax obligations, not that he had authority to access the corporate bank account and make payroll payments. Even if appellant could make payroll payments, this would not necessarily mean appellant also had the authority to direct sales tax payments. In addition, a September 10, 2009, entry shows that Five Star's office manager, Kandee Escobar, also called CDTFA to discuss the levy, and, at CDTFA's request, she put Mr. Miller on the phone to discuss it further. Thus, it appears the office manager was simply acting as a go-between for Mr. Miller regarding the levy, and without evidence that appellant was able to make or direct the tax payments, it is more likely than not that appellant's contacts with CDTFA were made in a similar capacity.

Appellant did accompany Mr. Miller to CDTFA's Van Nuys office; but, he never met with CDTFA without Mr. Miller present. At one of those visits, appellant did inquire about the possibility of establishing a payment plan. However, simply inquiring about the possibility of a payment plan is a far cry from independently negotiating and entering a payment plan. It is an even greater leap to assume that discussing payment options shows authority to actually make a

payment. Appellant asked for information about potential solutions to the corporation's tax liabilities; this does not mean appellant had the authority to bind the corporation to such solutions. At another visit, Mr. Miller informed CDTFA that due to a lack of funds he did not bring in a return he had completed, and the communication entry indicates that Mr. Miller requested a grace period for the sales tax liabilities. Although appellant accompanied Mr. Miller during this visit, it was Mr. Miller who spoke on behalf of the corporation with respect to its sales tax liabilities, not appellant. Therefore, the probative value of CDTFA's communication entries showing that appellant participated in communications with CDTFA falls short, and for purposes of determining whether appellant had the authority to pay, it is unpersuasive.

In summary, the record shows that Mr. Miller had final authority regarding the corporation's sales tax payments. Although appellant had knowledge that the tax liabilities were owed, but not paid, it does not prove that appellant had the actual authority to make those payments without Mr. Miller's approval. Accordingly, I would find that a weighing of the evidence does not show that appellant willfully failed to pay or to cause to be paid any of the liabilities at issue, and that he cannot be a responsible person as defined in Regulation section 1702.5.

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Teresa A. Stanley
Administrative Law Judge