



Alexin. Following the hearing, CDTFA decided to waive its right to present questions to the affiant. By post-hearing order, OTA submitted this case for decision on March 5, 2019.

### ISSUES

1. Whether appellant was responsible for the sales and use tax compliance of Renzo.
2. Whether appellant willfully failed to pay the sales and use tax liability of Renzo during the liability period.

### FACTUAL FINDINGS

1. Renzo filed its Articles of Incorporation with the Secretary of State (SOS) on July 2, 2004. Appellant was identified as the initial agent for service of process for Renzo and was the sole person signing these Articles of Incorporation.
2. On March 15, 2011, Renzo submitted to the SOS a Statement of Information form that lists appellant as the Chief Executive Officer, Secretary, Chief Financial Officer and President.
3. On August 10, 2004, appellant signed an Application For Seller's Permit for Renzo. Appellant lists himself as President, Secretary and Treasurer.
4. Appellant signed, stamped his signature on or enabled other people to stamp his name on State, Local and District Sales and Use Tax Returns (quarterly returns) for the first quarter of 2006 (Q1 2006), Q2 2006 and Q3 2006. All returns were filed on behalf of Renzo with appellant's name appearing followed by the title "President."
5. Appellant electronically prepared and filed Renzo's sales and use tax returns (electronic returns) to the CDTFA between October 2008 and August of 2012. CDTFA's records show appellant as the person reportedly preparing and filing the electronic returns and all submissions were made on behalf of Renzo with appellant listed as "President."
6. Appellant electronically submitted the required sales and use tax prepayments to CDTFA between January 2010 and June 2012. Each payment was reportedly prepared and authorized by appellant, as "President," and was electronically signed in appellant's name.
7. On April 8, 2013, appellant signed a Responsible Person Questionnaire claiming that he is the "officer, manager, member or person who had control, supervision, responsibility

or duty to act for the corporation ... in sales and use tax matters when the business was terminated.”

8. Between May 2008 and September 2014, appellant signed four Power of Attorney forms naming various representatives. He listed himself as “President.”
9. On October 20, 2010, appellant signed an Installment Payment Agreement, on behalf of Renzo agreeing to pay CDTFA \$1,065 each month commencing on November 16, 2010. Appellant signed the installment agreement as “President.” This Installment Payment Agreement included liabilities for the first liability period between July 1, 2005 and September 30, 2008.
10. Appellant signed a September 9, 2008 Waiver of Limitation (Form BOE-122) as “President.”
11. Appellant signed an April 1, 2010 Request for Relief of Penalty (Form BOE-735) as President of Renzo DBA Sabor Tapas Bar, an establishment selling taxable food and drinks.
12. On February 10, 2010, an Automated Compliance Management System (ACMS)<sup>4</sup> note documents a telephone call between CDTFA and appellant concerning a discrepancy in the payments that had been made to CDTFA for the satisfaction of outstanding liabilities. During this conversation, appellant verified the identity of the attorney who had negotiated a payment plan.
13. An ACMS note documents a September 4, 2014 telephone call between appellant and CDTFA wherein appellant affirmed that Maral Rahimi, his girlfriend, had check signing authority but Ms. Rahimi would only issue checks with “his [appellant’s] approval.”
14. EDD’s records report that appellant was Renzo’s President and documents that wages were paid to Renzo’s employees between the third quarter of 2005 and the third quarter of 2012 with the only exception that in the fourth quarter of 2005, EDD has no record that wages were paid. Wages reported varied from a low \$16,518.15 for the third quarter of 2005 to a high of \$118,234 for the third quarter of 2010.
15. Appellant, on behalf of Renzo, signed a lease assignment on August 10, 2004, for the lease of the property where Renzo conducted business. Between August 10, 2004 and

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<sup>4</sup> ACMS is CDTFA’s computer system that is used by CDTFA to document communications between compliance staff and taxpayers or their representatives.

2012, Cucuzza Family Partnership (landlord) received a total of \$1,062,306.87 in rent from Renzo. Appellant personally guaranteed payment to the landlord for all liabilities arising under the lease agreement.

16. Renzo made regular payments to Young's Market Company totaling \$2,487.02 for the first two quarters of 2012 and \$21,877.85 for 2011.
17. Renzo made regular payments to Southern Wine and Spirits totaling \$39,411.47 in the first quarter of 2012, \$31,662.13 in the second quarter of 2012, and \$35,434.76 in the third quarter of 2012.
18. Renzo terminated its business operations on August 31, 2012.
19. Renzo paid PG&E \$22,279.17 in 2011 and \$10,300.24 for the first three quarters of 2012.
20. CDTFA conducted an audit of Renzo for the periods July 1, 2005 through September 30, 2008 and April 1, 2009 through August 30, 2012. For the first liability period, CDTFA issued an NOD based on a January 30, 2009 audit report, finding a deficiency measure of \$428,859, plus penalties and interest. For the second liability period, CDTFA issued an NOD based on an April 30, 2013 audit report, finding a deficiency measure of \$2,753,866 for unreported taxable sales based on mark-up over cost, plus penalties and interest.
21. In its December 1, 2014 NOD, CDTFA proposed to pass through to appellant \$296,081.89 of Renzo's liabilities, that includes tax, penalties, and interest for both liability periods. CDTFA alleges that appellant is a responsible person pursuant to R&TC section 6829 and California Code of Regulations, title 18, section (Regulation) 1702.5.
22. Appellant filed this timely appeal.

### DISCUSSION

#### Issue 1. Whether appellant was responsible for the sales and use tax compliance of Renzo.

Upon termination of the business of a corporation, any officer responsible for the corporation's sales and use tax compliance is personally liable for any unpaid taxes, interest and penalties on those taxes, if the officer willfully fails to pay or to cause to be paid any taxes due. (R&TC § 6829; Cal.; Regulation 1702.5.) The liability extends only to taxes that became due during the period the officer had the control, supervision, responsibility, or duty to act for the

corporation, plus interest and penalties on those taxes, and even then, only if CDTFA proves that the corporation included tax reimbursement in the selling price of, or added tax reimbursement to the selling price of, tangible personal property sold in the conduct of its business or when it proves that the corporation consumed tangible personal property and failed to pay the tax to the seller or had included use tax on the billing and collected the use tax or has issued a receipt for the use tax and failed to report and pay use tax. (*Ibid.*)

Thus, there are four elements that CDTFA must prove: (1) termination of the corporation's business operations; (2) the corporation sold tangible personal property and collected sales tax reimbursement on the selling price but failed to remit such tax when due, or consumed tangible personal property and failed to pay the applicable tax to the seller or the Board, or issued a receipt for use tax and failed to report and pay the tax; (3) taxpayer was a person responsible for the corporation's sales and use tax compliance; and (4) taxpayer willfully failed to pay the tax or cause it to be paid. (*Ibid.*)

Pursuant to Regulation 1702.5(d), CDTFA must prove each of these elements by a preponderance of the evidence. That is, CDTFA must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622; *Appeal of Estate of Gillespie*, 2018-OTA-052P, June 13, 2018, at p. 4.)

At the prehearing conference occurring on February 6, 2019, both appellant and his representative conceded that Renzo terminated business on August 31, 2012, and that during the liability periods, Renzo sold tangible personal property and collected sales tax reimbursement on the selling price. Appellant also conceded that the audit results were accurate. The audits prove that Renzo collected sales tax reimbursement that was not remitted to CDTFA. Appellant continues to contest elements three and four, claiming that he was not the person responsible for the corporation's sales and use tax compliance and that he did not willfully fail to pay the tax or cause it to be paid. We first address whether appellant was the person responsible for the corporation's sales and use tax compliance.

CDTFA has produced evidence supporting its contention that appellant was responsible for Renzo's sales and use tax compliance during the liability periods. Renzo's initial filing with the SOS (Form SI-200 C) on March 15, 2011, identifies appellant as the Chief Executive Officer,

Secretary, and Chief Financial Officer. The articles of incorporation for Renzo lists appellant as the initial agent for service of process. Appellant signed the articles of incorporation on June 29, 2004. Appellant, on behalf of Renzo applied for a seller's permit (Form BOE-400-SPA) on July 1, 2004, listing himself as President, Secretary and Treasurer. Appellant is identified in Renzo's initiating documents as having the authority to act for Renzo on any matter and there is no evidence in this record that shows the initiating documents have been amended.

Appellant submitted to CDTFA quarterly returns (Form BOE-401-A) for Q1 2006, Q2 2006 and Q3 2006 for Renzo, all under his signature. Electronic quarterly returns (Form 401-ELF) were submitted to CDTFA for Renzo from Q4 2008 through Q3 2012, all showing appellant listed as Renzo's president under "PREPARER INFORMATION." Also, in this record are electronic pre-payment forms for the period starting Q1 2010 and continuing through Q2 2012 documenting Renzo's electronic payment of tax. Renzo submitted each of these forms under appellant's name as the preparer.

On April 8, 2013, appellant signed as Renzo's president, a Responsible Person Questionnaire declaring that he is the person "who had control, supervision, responsibility or duty to act for the corporation ... in sales and use tax matters when the business was terminated." Additionally, appellant signed Power of Attorney forms (Form BOE-392) on behalf of Renzo and as Renzo's president on four occasions, May 28, 2008, June 29, 2012, December 5, 2013, and September 15, 2014. Finally, appellant signed as president of Renzo an Installment Payment Agreement (Form BOE-407) dated September 9, 2008, agreeing to pay Renzo's tax for the liability period July 1, 2005 through September 30, 2008.

Appellant alleges that he was not responsible for Renzo's sales and use tax compliance because he was an absentee business owner removed from the day-to-day operation of the business. During the liability period, appellant alleges that he experienced various serious ailments including a 2007 cancer diagnosis and a broken back that removed him from actively operating Renzo. Similarly, appellant alleges that he was absent from Renzo's operations while traveling abroad. Alternatively, appellant alleges that in 2008, he returned to work after the conclusion of his cancer treatment and entered into an agreement with Carlos Carmona, Isaac Barrera, and Pierce Kaldoni to finish remodeling the business and have a grand opening. The San Jose police department canceled Renzo's entertainment license and did not allow the new enterprise to open. After a several months' court battle, the business was able to open, and

Carlos, Isaac, and Pierce took over the operation and ran the business. They submitted sales and use tax returns under appellant's name and, according to appellant, they also had check-signing authority on Renzo's checking account.<sup>5</sup>

As part of appellant's evidence, appellant submitted his signature stamp purportedly to show that people other than appellant had been using his signature stamp to sign documents.<sup>6</sup> However, the documents entered into evidence that have signatures affixed may or may not have signatures created with the use of a signature stamp. Additionally, because a signature stamp may have been used to sign documents, does not necessarily prove that it was utilized without appellant's consent. A signature stamp is the property of the person whose signature is replicated by the stamp. Because unauthorized people may misuse signature stamps, the person who owns the signature stamp is charged with the responsibility of ensuring that unauthorized people do not have access to it. Without convincing evidence of unauthorized access and use, the use of a signature stamp by someone other than the person whose signature appears on the stamp must be consensual. The owner of the signature stamp can authorize use by surrogates who sign on behalf of the stamp's owner.<sup>7</sup>

Appellant submitted medical evidence showing that he had chronic back pain on August 11, 2009, and that the mechanism of injury was "turning (driving, looking back to the right and felt a pop in back with pain)." Also stated that this incident "occurred at home," and that he "had similar symptoms several times previously." There is an operative report showing that appellant

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<sup>5</sup> On January 26, 2018, appellant's representative submitted an appeal. Attached to his appeal was email correspondence dated January 8, 2018, from appellant wherein appellant explained how he was only peripherally involved in Renzo during the liability period.

<sup>6</sup> During the hearing, appellant asked that the signature stamp be admitted into evidence and CDTFA exercised no objection. The parties agreed that we could stamp the signature stamp on a blank piece of paper rather than admitting the physical stamp into evidence. This facsimile of the signature stamp was admitted as appellant's exhibit 11.

<sup>7</sup> By analogy, Uniform Commercial Code section 3-406(a) addresses when "[a] person whose failure to exercise ordinary care substantially contributes to an alteration of an instrument or the making of a forged signature on an instrument is precluded from asserting the alteration or the forgery against a person who, in good faith, pays the instrument or takes it for value or for collection." To illustrate this rule, "*Case #1*" states, "Employer signs checks drawn on Employer's account by use of a rubber stamp of Employer's signature. Employer keeps the rubber stamp along with Employer's personalized blank check forms in an unlocked desk drawer. An unauthorized person fraudulently uses the check forms to write checks on Employer's account. The checks are signed by use of the rubber stamp. If Employer demands that Employer's account in the drawee bank be recredited because the forged check was not properly payable, the drawee bank may defend by asserting that Employer is precluded from asserting the forgery." There is a duty to ensure that a signature stamp is secure from people who may abuse it should the stamp be easily accessible.

received back surgery on August 28, 2009, and was released from the hospital the following day for a compression fracture at L2 resulting from a “suspected traumatic” occurrence rather than osteoporosis. Appellant submitted no documentary evidence showing that he had cancer or that he received cancer treatment in contravention to contentions made in appellant’s appeal and during the hearing. Additionally, there is no evidence in this record other than appellant’s testimony, that he was in a motor vehicle accident. Instead this record is replete with inconsistent and vague claims that appellant was away from his business for extended time due to illness; however, none of this information specifies the precise time appellant’s business operated without him.<sup>8</sup>

Similarly, appellant contends that he was overseas during the liability periods and thus was absent from the operation of Renzo. He submitted a timeline (Exhibit 1) and stamped passport pages (Exhibits 6 and 8) to prove the time periods he was absent from Renzo while traveling abroad. Appellant’s evidence shows that he was in Thailand for two months beginning in April of 2010, and between April 2012 and January 2013. The second liability period ended on August 30, 2012, therefore the relevant timeframe for his second absence is between April 2012 and August 2012, a four-month period. Appellant, however, testified that he was in frequent contact with his bookkeeper while abroad. Additionally, appellant testified that during his time abroad, he requested that the bookkeeper keep him apprised of checks that had been written on Renzo’s account and documentation of gross sales Renzo had incurred. Although an absentee business owner may be expected to stay apprised of Renzo’s business activities, it conversely helps illustrate that even while overseas, appellant was still an engaged business owner.

On the day of the hearing, appellant provided the declaration of Rashel Alexin, a notary, that was marked as Exhibit 10 and entered into the evidentiary record.<sup>9</sup> Ms. Alexin’s declaration

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<sup>8</sup> During the hearing, questions were posed to appellant in an effort to clarify the time frames that his illness required him to be away from Renzo, however, no specific information was provided that would clarify an otherwise vague record.

<sup>9</sup> In OTA’s Prehearing Conference Minutes and Orders dated February 6, 2019, appellant was given until February 15, 2019, to submit additional documents. Appellant was ordered to show good cause why any documents submitted after February 15, 2019 could not have been submitted timely. Within the order it was stated, “Good cause means that despite diligent efforts to obtain the documents or disclose the identities of witnesses, the information could not be obtained by the deadline due to circumstances beyond the party’s control.” At the hearing, CDTFA objected to the declaration as evidence. Appellant represented that due to a death in her family, the declarant was unavailable to submit a declaration earlier. CDTFA did not question appellant about any of the details surrounding the availability of the declarant to submit a declaration. Good cause having been shown, the declaration

states that she has known and worked with appellant since 2009. She further states: “During such time I have known Ray [appellant] to be partners with Carlos Camona, Isaac Barrera, and Piece Kaldoni. The mentioned partners were in charge of daily operations including but not limited to writing check, [sic] issuing reports, EDD filing and CDTFA Quarterly Sales Taxes filings of Sabor / Renzos Bar & Grill Inc.” Ms. Alexin then opines that Ray was “absent and preoccupied in establishing another club in San Jose.”<sup>10</sup>

Ms. Alexin’s declaration raises more questions than it provides clarifying facts. Professionally, Ms. Alexin holds herself out as a notary yet in this capacity has knowledge of appellant’s business dealings nearly throughout the entirety of the liability periods. Appellant acknowledges in his appeal that he had business dealings with owners of an enterprise named “Taste.” These owners are the same people identified by Ms. Alexin as Carlos Camona, Isaac Barrera and Piece Kaldoni, however, the reference to “Taste” in the appeal dates back to 2008, prior to Ms. Alexin’s stated involvement with appellant. Also, appellant in his appeal refers to an April 2012 endeavor whereby he and his partners opened a restaurant called Myth, curiously during the same time appellant was traveling to Thailand. Although Ms. Alexin proclaims that appellant’s partners were running Renzo while appellant was distracted with another business, the statements in her declaration contradict statements made in the appeal and are not time-specific. Nowhere in Ms. Alexin’s declaration does she explain how appellant’s partners were authorized by appellant to use Renzo’s bank account and file documents on behalf of Renzo yet these partners are not listed on any of Renzo’s documents as having the authority to act on behalf of Renzo. Furthermore, Ms. Alexin fails to explain why, with the authorization to act for Renzo, appellant’s alleged partners did not act under their own names but always filed documents and signed checks using appellant’s signature.

At the prehearing conference, and in his appeal, appellant claims that other people were authorized to access Renzo’s bank account. Appellant requested time to acquire the signature card from Renzo’s bank as evidence to prove that other people acted on his behalf during his absence from the business. Clearly as the primary account holder, appellant should be able to

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was admitted as evidence at the hearing and marked Exhibit 10. CDTFA was given an opportunity to issue written questions to the declarant but after the hearing waived the right to do so.

<sup>10</sup> California Code of Regulations, Title 18, section 30420(c) states that if a party waives the right to question the witness “the declaration, if introduced in evidence, shall be given the same effect as if the witness had testified orally.”

acquire a copy of the signature card and submit that card as evidence to supplement the contention that other people were authorized to access Renzo's bank account, yet no signature card evidence was submitted. If appellant's alleged partners were able to access Renzo's bank account by using their own signature, there would no reason for anyone to use appellant's signature stamp.

Even if appellant proved that his partners were authorized to act on behalf of Renzo, this does not negate the fact that appellant himself had signing authority for Renzo, was apprised of Renzo's business operations during the liability periods and that Renzo's returns and payments were submitted by him.

CDTFA has demonstrated by a preponderance of the evidence that appellant is a person responsible for the filing of Renzo's sales tax returns and the payment of that tax. Moreover, appellant's testimony and other evidence is vague as to time, inconsistent with the known record, and thus far less credible than the evidence presented by CDTFA. Appellant is a responsible person for Renzo.

Issue 2. Whether appellant willfully failed to pay the sales and use tax liability of Renzo during the liability period.

A person has willfully failed to pay the taxes, or to cause them to be paid, only when CDTFA establishes that: (1) 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; (2) the responsible person had 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 such actual knowledge; and, (3) when the responsible person had such actual knowledge, he or she had the ability to pay the taxes but chose not to do so. (Regulation 1702.5(b)(2).) 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. (*Ibid.*)

*Actual Knowledge*

The first requirement to determine willfulness is whether the responsible person had actual knowledge that taxes were due but not paid. For the first liability period, July 2005 through September 2008, appellant's signature appears on the quarterly returns, but more

impressively his signature appears on the October 20, 2010 Installment Payment Agreement (installment agreement). In this installment agreement, appellant is agreeing to pay the outstanding tax liability to CDTFA for liabilities assessed during the first liability period. Appellant signed the installment agreement as President of Renzo and stated, "I agree to make a payment of \$1,065 on the 16<sup>th</sup> of each month beginning 11/16/2010." Not only has appellant filed returns reporting gross receipts during the first liability period, but he has also acknowledged by signing an installment agreement that less was paid than owed, otherwise there was no reason for an installment agreement to pay outstanding liabilities.

As additional evidence of actual knowledge, on February 10, 2010, appellant conducted a telephone conversation with a CDTFA employee. She documented in CDTFA's ACMS notes that appellant had missed a payment in 2009. Appellant's response was that he had been paying appropriately in accord with the installment agreement as advised by his lawyer and that his bookkeeper is responsible for making the payments. Clearly the installment agreement and follow-up communication that appellant conducted with a CDTFA employee clearly establishes that appellant had actual knowledge that sales tax was collected but not paid.

For the second liability period, April 2009 through August 2013, appellant clearly knew from his experience during the first audit that Renzo was obligated to pay tax and that he must have known that he continued to underreport sales. Again, appellant signed all of the returns in this record and filed during the second liability period as Renzo's President.

When comparing the cost of goods sold to the actual amounts reported on Renzo's sales and use tax returns for the second liability period, the cost of goods sold far exceeds the gross sales reported on Renzo's quarterly returns. Between the first quarter of 2009 and the third quarter of 2012, Renzo's total cost of goods sold was \$2,199,310 and for the same period Renzo reported a total of \$1,332,482 in sales on quarterly returns. The cost of goods sold exceeded gross sales reported by \$866,828. Appellant, as Renzo's responsible person for sales and use tax matters, must have known that he was underreporting sales, and thus failing to pay tax on actual sales when consistently throughout the second liability period the cost of goods sold far exceeded reported sales.<sup>11</sup> Because appellant filed returns for each quarter of the second liability period, he must have known that he was underreporting sales, similar to the way in which sales were

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<sup>11</sup> In evidence are ACMS notes verifying the total cost of goods sold for each year during the second liability period. (See Exhibit O.)

underreported in the first liability period, that appellant acknowledged as stated above.

Based on the foregoing, we find that appellant possessed actual knowledge that sales were being underreported and not paid when due.

*Authority to Pay*

Next, to be considered willful under section 6829, petitioner must have had the authority to pay the tax liabilities or to cause them to be paid, but failed to do so. Here, ACMS notes from September 4, 2015 document petitioner telling CDTFA staff that although there was one other person on Renzo's bank accounts, she needed his approval to issue any checks, and that he was the only person on Renzo's bank accounts that had the authority to issue checks. Moreover, both during and following the liability period, petitioner signed power of attorney forms, waivers, and an installment payment plan on behalf of Renzo. Appellant has provided no specific argument or any convincing evidence showing he lacked authority to pay the liabilities or cause them to be paid. Instead, appellant alleges that he was absent from Renzo during much of the liability period and he has identified other people who were actually operating Renzo in his absence.

Even if proven that other people were indeed operating Renzo in appellant's absence, no one else was authorized to issue checks other than appellant or the woman identified in the ACMS notes discussed above and she still needed appellant's consent to issue checks for Renzo. Thus, the evidence shows that only appellant had the authority to pay Renzo's liabilities.

*Ability to Pay Tax*

The third component of willfulness is whether the responsible person with knowledge of the tax debt had the ability to pay or cause tax to be paid. Renzo collected tax reimbursement on all of its taxable sales, and therefore had those funds available to pay the tax liability. In addition, appellant paid, or caused to be paid, Renzo's rent, employee wages, vendors such as Youngs Market Company, and PG&E during the liability periods. Thus, appellant was able to pay the tax liability, but elected to pay these other creditors instead of remitting the sales tax reimbursement that was collected to CDTFA. Accordingly, we conclude that appellant willfully failed to Renzo's tax liabilities.

HOLDINGS

1. Appellant is the person responsible for Renzo's sales and use tax compliance
2. Appellant willfully failed to pay Renzo's sales and use tax liabilities.

DISPOSITION

We sustain CDTFA's action in deleting the negligence penalty for the period July 1, 2005 through September 30, 2008 but otherwise denying appellant's petition for redetermination.

DocuSigned by:

*Neil Robinson*

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Neil Robinson

Administrative Law Judge

We concur:

DocuSigned by:

*Andrew J. Kwee*

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Andrew J. Kwee

Administrative Law Judge

DocuSigned by:

*Grant S. Thompson*

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Grant S. Thompson

Administrative Law Judge