OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeals of:	) OTA Case Nos. 18011906 & 18011907
WILLIAM BLAINE RIGGLE	) Date Issued: April 26, 2019

OPINION ON REHEARING[1]

Representing the Parties:

For Appellant: Mitchell B. Dubick, Esq.
Joshua P. Katz, Esq.

For Respondent: Kevin B. Smith, Tax Counsel III
Scott Claremon, Tax Counsel IV

K. GAST, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, William Blaine Riggle (appellant) appeals an action by respondent California Department of Tax and Fee Administration (CDTFA) determining that appellant was personally liable, under R&TC section 6829, for the unpaid tax liabilities, plus interest, of (1) 21st Century Oil Corporation (21st Century), consisting of $551,272 in tax and $65,381.90 in penalties, and (2) 21st Century Oil - Front Company, dba ARCO AM/PM (ARCO), consisting of $25,015.46 in tax and $3,625.95 in penalties.[2] The liabilities of 21st Century and ARCO (collectively, the corporations) subject to this appeal became due after May 25, 2004.[3]

Office of Tax Appeals (OTA) Administrative Law Judges Michael F. Geary, Kenneth Gast, and Linda C. Cheng held an oral hearing for this matter in Van Nuys, California, on

[1] The Board of Equalization (BOE) previously decided this matter at an oral hearing on February 1, 2012, when it partially denied appellant's petitions for redetermination. Appellant then petitioned for rehearing the portion that was denied, which the BOE granted. This opinion therefore constitutes our opinion on rehearing in this matter.

[2] Note that these amounts consist of the total tax due after being reduced in accordance with the BOE's decision and credited with payments, as reflected in CDTFA's Notices of Redetermination dated February 21, 2012.

[3] Specifically, 21st Century's unpaid tax liabilities covered the period April 1, 2004, through August 31, 2004, and ARCO's unpaid tax liabilities covered the period April 1, 2004, through July 31, 2004.

October 23, 2018. At the conclusion of the hearing, the record was closed. However, the panel subsequently reopened it for additional briefing. The record is now closed, and this matter is submitted for a decision.

ISSUE

Is appellant personally liable as a responsible person under R&TC section 6829 for the corporations' unpaid tax liabilities that became due after May 25, 2004?[4]

FACTUAL FINDINGS

1. During the time period at issue, the corporations operated gasoline stations with mini-markets.[5]
2. The liabilities asserted against appellant consist of sales tax reimbursement that the corporations charged and collected from their retail customers but did not remit to BOE, CDTFA's predecessor.[6] Appellant was aware of the liabilities when they became due.
3. At all relevant times, appellant was the chief financial officer (CFO) of both corporations. In that capacity, he was in charge of the corporations' sales and use tax compliance matters.
4. Until his death on May 25, 2004, Mr. William Zures was the principal shareholder and chief executive officer (CEO) of the corporations, and he exercised substantial control over their financial affairs.
5. According to appellant, during the years the unpaid tax liability accumulated and up until May 25, 2004, Mr. Zures exercised exclusive authority over payments to creditors and allowed appellant to make payments to the BOE only as directed by him.
6. Mr. Zures was survived by his widow, Ms. Maggie Zures. Bankruptcy documents from 21st Century's (and its related limited liability companies') consolidated Chapter 11 proceedings indicate that, after Mr. Zures' death, Ms. Zures owned at least 90 percent of

[4] Appellant is not disputing the amount of taxes, penalties, or interest assessed. Rather, he is disputing CDTFA's position that the requirements of section 6829 are satisfied such that he is liable for these amounts.

[5] Because the parties generally do not factually distinguish 21st Century from ARCO, but rather essentially treat the facts of both corporations as the same, we will follow that approach in this opinion, unless otherwise noted.

[6] Pursuant to Assembly Bills 102 and 131, responsibility for the administration of most business taxes and fees was transferred from the BOE to CDTFA on July 1, 2017.

the companies, including ARCO. Her ownership interests were due, in part, to her inheritance of Mr. Zures' controlling community property interests in these companies.

7. The record does not indicate whether Ms. Zures was an employee, such as an officer, of either 21st Century or ARCO before or after Mr. Zures' death. It also does not contain information about the corporations' board of directors and her role, if any, in that regard.

8. The corporations eventually ceased business operations, with ARCO on or about July 31, 2004, and 21st Century on or about August 31, 2004.

9. Subsequently, CDTFA issued to appellant two Notices of Determination (NODs), one assessing him for the unpaid tax liabilities of 21st Century, and the other for the unpaid tax liabilities of ARCO.[7]

10. Appellant timely filed petitions for redetermination. The BOE determined that appellant was not personally liable for the unpaid tax liabilities of the corporations that were due prior to May 25, 2004, the date of Mr. Zures' death, but found he was personally liable for the unpaid tax liabilities of the corporations that were due after his death.

11. Appellant timely filed a petition for rehearing for each of the corporations pertaining to the portion of the liabilities due after May 25, 2004. The BOE granted appellant's petitions.[8]

DISCUSSION

Applicable Law

Although businesses are liable for their unpaid sales and use tax liabilities, there are situations when other persons may also be held personally liable. R&TC section 6829 imposes personal liability on persons responsible for paying a business' sales and use taxes, but who willfully fail to do so. Thus, as relevant here, upon termination of a corporation's business, any person, such as an officer, responsible for filing returns or paying the corporation's sales and use

[7] Appellant was issued the NODs, presumably because he was the sole corporate officer of the corporations during the time period at issue. CDTFA also sent a "dual" determination, or NOD, to another individual for ARCO's unpaid tax liabilities under R&TC section 6829 for the same liabilities asserted against appellant. The record does not disclose what happened with respect to this other individual, which is irrelevant for purposes of this appeal. CDTFA did not issue a dual determination to any other individual for the unpaid tax liabilities of 21st Century.

[8] OTA has jurisdiction to hear and decide this matter under California Code of Regulations, title 18, (Regulation), section 30106.

taxes (or who has a duty to act for the corporation in complying with any provision of the Sales and Use Tax Law) is personally liable for any unpaid taxes, and the interest and penalties thereon, if the officer willfully fails to pay or to cause to be paid any taxes due from the corporation. (R&TC, § 6829(a); Regulation § 1702.5(a).) The person is liable only for those taxes, plus interest and penalties, that became due during the period he or she had control, supervision, responsibility, or duty to act for the corporation. (R&TC, § 6829(b).)

CDTFA bears the burden of proving, by the preponderance of the evidence, that the requirements of R&TC section 6829 have been satisfied.[9] (Regulation § 1702.5(d).) Although they can be broken down into four prongs, only the willfulness prong is at issue in this appeal.[10] Under this prong, the person must have willfully failed to pay or to cause to be paid the taxes due. (R&TC, § 6829(a); Regulation § 1702.5(b)(2).) CDTFA need only show that the failure was the result of an intentional, conscious, and voluntary course of action. (R&TC, § 6829(d); Regulation § 1702.5(b)(2).) In addition, willfulness may be shown even though the failure to pay the taxes was not done with a bad purpose or motive. (Regulation § 1702.5(b)(2).)

More specifically, a person has willfully failed to pay the taxes, or to cause them to be paid, only when CDTFA establishes that three requirements have been met. Only two of these requirements are at issue in this appeal.[11] The first is the 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 that the taxes were due, but not being paid. (Regulation § 1702.5(b)(2)(B).) 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

[9] A preponderance of evidence means that 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.)

[10] Appellant concedes the following other three prongs have been met and therefore they are not at issue: (1) the corporations' businesses, for which they were required to hold a seller's permit or certificate of registration for the collection of us tax, were terminated (R&TC, § 6829(a); Regulation § 1702.5(a) & (b)(3)); (2) the corporations sold tangible personal property and collected sales tax reimbursement on the selling price but failed to remit such tax when due to CDTFA (R&TC, § 6829(c); Regulation § 1702.5(a)); and (3) appellant qualified as a "responsible person" because he had control or supervision of, or was charged with the responsibility for, the corporations' sales and use tax compliance matters. (R&TC, § 6829(a); Regulation § 1702.5(b)(1).)

[11] Appellant concedes the other requirement of the willfulness prong has been met and therefore it is not at issue; i.e., on or after the date that the taxes came due, he, as a responsible person, had actual knowledge that the taxes were due, but not being paid. (Regulation § 1702.5(b)(2)(A).)

to be paid. (*Ibid.*) The second is 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)(C).)

Analysis

Based on the evidence CDTFA has presented, we find it has made an initial showing, to support the issuance of its NODs, that appellant had authority to pay the corporations' taxes. (See Regulation § 1702.5(c)(1).) Specifically, as CFO, appellant managed the corporations' financial affairs and was responsible for their sales and use tax compliance matters. He signed both corporations' sales and use tax returns for the second quarter of 2004, and had check-signing authority, as evidenced by a September 24, 2004 check made payable to the BOE, which bears his signature. He signed the "Authorization Agreement for Electronic Funds Transfer," which authorized direct debits from a corporate account to pay CDTFA. He contacted CDTFA on numerous occasions to discuss the corporations' unpaid tax liabilities, including setting up payment arrangements. During the time in question, he appears to have been the only officer of the corporations, which suggests, at least superficially, that no one oversaw what he did on a day-to-day basis. In addition, there is no evidence indicating the corporations' board of directors limited appellant's authority.

On appeal, appellant contends the evidence does not establish he had the authority to pay the taxes. Rather, he asserts that authority rested solely with Ms. Zures, which she exercised by bringing in a lawyer, Mr. William Rathbone, and a corporate receiver, Mr. Richard Kipperman, to help manage the corporations' financial affairs. Based on the actions of these three individuals, appellant asserts he did not have authority to decide whether to pay the taxes. As support, he presented testimony contained in the declarations of Ms. Zures, Mr. Rathbone, Mr. Kipperman, and himself, as well as documents related to the corporations' bankruptcy filing.

After considering the evidence on both sides, we conclude appellant has successfully shown he is not liable under R&TC section 6829. Our conclusion is based on the uncontested testimony contained in the declarations submitted by appellant, which we find to be credible, consistent, and persuasive. It is also based on the available and corroborating non-testimonial evidence.

Everything started and stopped with Ms. Zures. In her declaration dated August 15, 2013, she states that "[i]n May 2004, with [her] husband's sudden passing, [she] found [herself] *in charge of all [Mr. Zures'] business interests, including [the corporations]*." (Emphasis

added.) During that time, she recounts meeting with appellant to discuss the operation of the corporations. Appellant told her they had been struggling for some time and "he did not think he was capable of managing the situation." Although she acknowledged she also "lacked the experience necessary to manage [the corporations'] operations," she informed appellant she wanted to "save" them. Appellant suggested they consult with Mr. Rathbone, an attorney he knew who had experience dealing with struggling companies.

According to her declaration, Ms. Zures and appellant then met with Mr. Rathbone, who suggested they also consult with Mr. Kipperman "to help manage the [corporations] and to serve as a receiver if necessary." After meeting with these two consultants, Ms. Zures "hired the two of them to develop and carry out a plan to save the [corporations]." She and the consultants asked appellant to explain the corporations' operations and financial problems, which he did, "including the delay in paying sales taxes." Upon learning of this, Ms. Zures states that "we," as in she and her two consultants, "told [appellant] *to continue operating as before* until Mr. Rathbone and Mr. Kipperman had finished developing a strategy to save the [corporations]." (Emphasis added.) A month later, Ms. Zures' consultants presented her with their plan. She then "asked them [i.e., Mr. Rathbone and Mr. Kipperman] to *start negotiating with the [corporations'] many creditors*." (Emphasis added.)

On this basis, it is clear that Ms. Zures inherited her late husband's controlling interests in the corporations, as evidenced by the bankruptcy documents. We therefore find her sworn statement in her declaration credible that she found herself in charge of the corporations and effectively took the reins from her late husband. In addition, given that Mr. Zures, prior to his death, had the sole authority over whether to pay creditors and had instructed appellant in the past to not pay taxes to CDTFA, it is only logical to conclude that when Ms. Zures and her consultants "told [appellant] to continue operating as before," this meant to follow the instructions appellant had historically received from Mr. Zures, i.e., do *not* pay CDTFA.

All of the evidence proffered by appellant makes sense. It was Ms. Zures', not appellant's, decision to save *her* corporations. Appellant did not have a financial stake in them, other than as an employee receiving a salary, so he did not have had any incentive—at least that we are aware of—not to pay CDTFA. Although appellant was the CFO, a title which usually carries with it exclusive responsibility and authority to decide which creditors to pay and when, the corporations here appeared to have been closely-held and not to have observed corporate

formalities regarding strict adherence to corporate officer roles. We therefore do not find CDTFA's evidence (e.g., appellant signed the sales and use tax returns, he had check-signing authority, and he authorized direct debits from a corporate account to CDTFA) to be dispositive of whether he had actual authority within the meaning of R&TC section 6829. Rather, under the facts here, it is more likely that his authority, if any, to negotiate and pay creditors during the period at issue was checked by Ms. Zures, just as it was by Mr. Zures prior to May 25, 2004.

Indeed, if appellant had so much expertise and experience in helping financially troubled corporations, Ms. Zures never would have needed to hire her two consultants. She instead would have given appellant the authority to decide whether to pay creditors. But the reality was appellant did not know what to do, and his experience as CFO when faced with these difficult financial times had always been to look to his former boss, Mr. Zures, for guidance and the final say. That is why Ms. Zures, who did not possess the relevant experience herself, turned to her two newly-hired consultants and why she authorized and entrusted them, not appellant, not only to formulate a plan to save the corporations, but also to carry out that plan by negotiating with creditors. To be sure, Ms. Zures does state that "[a]fter [her consultants] took over the [corporations], [she] had no financial control over any part of the [corporations]" and "[t]hey are the ones who made the final decisions and ultimately closed the [corporations] down." But without needing to address the exact import of this statement, notably missing is any mention of appellant.

Mr. Rathbone's declaration also supports the above findings. In his April 23, 2012 declaration, he states that appellant had contacted him in May 2004 to inform him that Mr. Zures had just died. Appellant asked him if he could help Ms. Zures, "who was now [21st Century's] owner." Mr. Rathbone recommended that Mr. Kipperman serve as a bankruptcy receiver. Consistent with Ms. Zures' testimony, he also states that Ms. Zures had "asked [appellant] to continue operating as before" until he and Mr. Kipperman were ready to present their plan toher. He further states that appellant was "available to *assist* both Mr. Kipperman and [him] once M[s.] Zures *authorized* [them] to implement [their] recovery project and open negotiations with [21st Century's] various creditors, *including the Board of Equalization*." (Emphasis added.)

Mr. Kipperman's April 18, 2012 declaration has the same effect as other two declarations. There are, however, a few bolstering statements. Mr. Kipperman "recalls [appellant] telling [him, Mr. Rathbone, and Ms. Zures] that Mr. Zures' instructions had been to

pay certain operating expenses, *but to delay paying the Board* until [21st Century] received additional funds." (Emphasis added.) This lends further support that when "[Ms. Zures] said that [appellant] should operate as before, at least until [her consultants] could report findings to her," it means appellant should continue not paying CDTFA, as Mr. Zures had previously instructed. Mr. Kipperman further declares that after he and Mr. Rathbone reported their findings to Ms. Zures, "[s]he then authorized [them] to begin negotiating with lenders, vendors, landlords, and other creditors, *including the Board*," and "[they] did so ....." (Emphasis added.) As with the other declarations, this shows Ms. Zures, not appellant, was the one calling the shots where payment to creditors was concerned.

We also find appellant's declaration dated April 24, 2012, as well as his oral testimony at the hearing, supports his position. Although his testimony is substantively the same as the declarations discussed above, appellant notably asserts that after Mr. Rathbone and Mr. Kipperman started negotiating with creditors, including CDTFA, "[he] was often present at these meetings to assist them, but, once they were involved, [he] never negotiated with anyone for [21st Century] on [his] own." This statement, along with similar ones in the other declarations, is supported by the documentary evidence submitted by CDTFA. In particular, CDTFA's "Automated Compliance Management System" contains notes for 21st Century dated September 1, 2004, that specifically refer to Mr. Rathbone and Mr. Kipperman by name, indicating they were leading the discussions and/or negotiations with CDTFA. In contrast, appellant, while involved, appears to have been merely assisting them.

Contrary to the dissenting opinion's conclusion that the available evidence does not show Ms. Zures had legal authority to control the corporations, we believe that this very evidence—which we find to be both compelling and *uncontested*—is sufficient to indicate she, in fact, did. To the extent the dissent implies there is no *direct* evidence establishing Ms. Zures did have authority, there is also no direct evidence establishing appellant himself had authority. In our view, the determination of whether someone had the requisite authority under R&TC section 6829, such as here, can be highly fact-intensive, can turn on circumstantial evidence, can hinge on a nuanced factual (and legal) analysis, and can involve audits that may have been conducted well after business entities have ceased operations. In addition, the dissent would have us believe that, in order to overcome an initial showing by CDTFA of payment authority, *direct* evidence is necessary to prove that a CFO or other high-ranking corporate officer in charge of

sales and use tax compliance matters was prevented from exercising financial decision-making authority. That is simply not the case here, as the facts before us demand a more rigorous analysis.

In short, all of the evidence before us strongly indicates that in addition to inheriting her late husband's controlling ownership interests in the corporations, Ms. Zures also inherited his role as the ultimate financial decisionmaker and directed appellant what to do (or rather, what not to do). Simply stated, we believe the buck stopped with her. And, as appellant continuously asserts, the only thing that changed for him after Mr. Zures' death was that he continued working in the same capacity, just for a different boss.[12]

HOLDING

Appellant is not personally liable as a responsible person under R&TC section 6829 for the corporations' unpaid tax liabilities that became due after May 25, 2004.

DISPOSITION

We reverse CDTFA's assessments in full.

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Kenneth Gast
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Kenneth Gast
Administrative Law Judge

I concur:

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Linda C. Cheng
Administrative Law Judge

[12] Because we find appellant did not have the authority to pay or to cause to be paid the taxes due, we need not address the other requirement of the willfulness prong; i.e., whether he had the ability to pay the corporations' taxes but chose not to do so.

DISSENTING OPINION

M. GEARY, Administrative Law Judge: For the reasons stated below, I dissent.

I agree with the majority's opinion that the California Department of Tax and Fee Administration (CDTFA) established by a preponderance of the evidence that William Blaine Riggle (appellant) had the authority to pay the taxes. However, I disagree with Finding of Fact 6, and I would conclude that appellant did not then overcome the Department's evidence and establish that the former CEO's widow, Ms. Maggie Zures, exercised her superior authority direct appellant to not pay the taxes in full. I would also find that CDTFA established by a preponderance of the evidence that appellant had the ability to pay the tax liabilities with corporate funds, but he chose not to do that, and that appellant provided no evidence to the contrary. Based on those findings, I would sustain the determination.

Appellant concedes that the businesses of 21st Century Oil Corporation (21st Century) and 21st Century Oil - Front Company, dba ARCO AM/PM (ARCO) (collectively, the corporations) terminated before the Notices of Determination (NODs) were issued to him. He concedes that the corporations collected tax reimbursement on its retail sales and that he was the person responsible for the corporations' sales and use tax compliance. It is undisputed that both 21st Century and ARCO were corporations, legal entities distinct from the people who owned and operated them. Appellant testified that he was an experienced financial manager, with over 20 years' experience as corporate controller or chief financial officer (CFO), before going to work for Mr. William Zures in 1999. He was the CFO of the corporations, and as such is reasonably expected to have overall control over accounts receivable and accounts payable, subject only to the authority of the executive officer and the board of directors. By the time in question, the executive officer, Mr. Zures, had passed away, and there is no evidence that the board of directors of either corporation limited appellant's authority. There is no evidence that there was any other officer of either corporation during the time in question. Mr. Douglas Anderson, former manager at 21st Century, identified appellant as the person who had control of sales and use tax matters when the business was terminated. Appellant signed both corporations' returns for the second quarter of 2004 (2Q04), and he had check-signing authority, as evidenced by a September 24, 2004 check payable to the Board of Equalization (BOE), which bears his signature. He also signed the "Authorization Agreement for Electronic Funds Transfer," which authorized direct debits from a corporate account to pay CDTFA, and regularly communicated

with CDTFA regarding sales and use tax matters. Appellant concedes that he was aware of the subject liabilities when they became due, and he testified at the hearing that he was aware of his responsibilities for the corporation's sales and use tax matters, and that he could be held personally liable for the corporations' unpaid liabilities if the requirements of Revenue and Taxation Code (R&TC) section 6829 were met. This evidence is sufficient to establish that appellant had the requisite authority to pay the taxes when due. My colleagues apparently agree. However, my colleagues find that appellant has rebutted CDTFA's evidence and established that he did not have authority to pay the taxes when due because that authority rested entirely with Ms. Maggie Zures, the widow of Mr. Zures. This is where we disagree.

The evidence upon which appellant relies to show that he did not have authority can be fairly summarized as follows. According to appellant, while Mr. Zures, the former CEO, was alive, only Mr. Zures decided who to pay, and appellant wrote checks only as specifically directed by Mr. Zures. The corporations were in financial distress during the months (or years) leading up to and following Mr. Zures' death, and Mr. Zures would not allow appellant to payall taxes owed. Appellant, at Mr. Zures' direction, was using tax reimbursement collected from customers to pre-pay tax on fuel purchases, and to pay vendors, salaries, and other operating expenses. After Mr. Zures died on May 25, 2004, appellant was the sole remaining officer. He did not want to be the one to make decisions for the corporations. Ms. Zures, who admits that she knew little, if anything, about the business of the corporations, believed she had the right to control the corporations or their assets after Mr. Zures' death, and in that capacity, she asked appellant to help her to try to save the corporations, or, if they could not be saved, to oversee the termination of their business activities. Appellant told Ms. Zures that he lacked the necessary skills, but he referred her to a bankruptcy attorney, Mr. William Rathbone. Mr. Rathbone, in turn, recommended the corporations hire Mr. Richard Kipperman, whom Mr. Rathbone described as a person with experience managing financially distressed companies and acting as a receiver, should one be necessary. Ms. Zures asked appellant to assist the consultants. Ms. Zures concedes she had no financial control over any part of the business after Mr. Rathbone and Mr. Kipperman "took over." In support of his argument that he did not have the authority to pay the tax liability at issue, appellant provided his own testimony (at the hearing and by declaration), declarations from Ms. Zures, Mr. Rathbone, and Mr. Kipperman, and a "List of

Equity Security Holders" filed by 21st Century Oil – Long Beach, LLC[1] in a bankruptcy proceeding. I will first examine what this evidence shows.

Appellant testified that he knows nothing about the details of the disposition of Mr. Zures' estate. He testified that he thought Ms. Zures was in charge, even if there had not been a formal board of directors meeting electing her as CEO. Ms. Zures states in her declaration that when her husband died, she found herself in charge of the business. She does not say how she came to be in charge of the two corporations or provide any information regarding her late husband's estate or the ultimate disposition of the shares over which he had testamentary control. Mr. Rathbone states that after his first meeting, he considered a possible bankruptcy, but after a month assessing the business, he gave Ms. Zures a plan to keep 21st Century in business, which lasted about two months. Mr. Rathbone says that Ms. Zures became the owner of the corporations on her husband's death, but he says nothing about when or how Ms. Zures assumed control of the corporations, or whether she had the legal authority to control their finances. He recalls that during their first meeting, which occurred eight years before he executed his declaration, Ms. Zures instructed appellant to "operate as before." Mr. Rathbone does not mention ARCO in his declaration and refers only to "corporation" in singular form. Mr. Kipperman also does not mention ARCO in his declaration, which tracks Mr. Rathbone's declaration on the pertinent points, although Mr. Kipperman states that appellant informed those in attendance at the initial meeting (Ms. Zures, Mr. Rathbone, Mr. Kipperman) that Mr. Zures had instructed him to delay paying the sales and use taxes "until the company received additional funds."

Finally, the "List of Equity Security Holders" appears to be a document filed by an LLC in a bankruptcy proceeding. The name of the LLC suggests that it may be related to one of the corporations that are the subject of the appeal, and the ownership information on the document appears to confirm that, but no one has provided an explanation of that relationship. The document purports to identify the owners of the LLC, those with membership interests and those with only economic interests. The membership interests total 99.98 percent and the members are identified as 21st Century (25 percent), Estate of William Zures/Maggie Zures, c/o John Howard

[1] We have no information about this entity.

(65.6 percent), and Tim Finnerty (9.38 percent). The economic interests total something in excess of 99.4 percent[2] and include, as relevant here, The Zures Family Trust (41.3 percent).

The majority concludes that appellant did not have authority to pay the taxes when due. It concludes that Ms. Zures was the person with the authority and that appellant was required to obtain Ms. Zures' approval 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.[3] I disagree.

First and foremost, I am not persuaded that the evidence before us establishes that Ms. Zures had the legal authority to control either corporation. Appellant admitted at the hearing that he knew nothing about the disposition of Mr. Zures' estate, and statements by the declarants (including Ms. Zures) that Ms. Zures was the owner of the corporations when the relevant events were taking place have no foundation. She was the widow of the former CEO of the corporations that employed appellant as their CFO. I understand why appellant would have felt protective of the widow. I understand why he would not have wanted to take responsibility for the demise of the business. But the evidence does not persuade me that Ms. Zures was a shareholder of 21st Century or ARCO during the times at issue, and there is nothing in the record that identifies corporate directors or describes what actions, if any, the board of directors took to limit appellant's authority or grant authority to Ms. Zures after the death of Mr. Zures. Once CDTFA proved that appellant had the authority to pay the taxes and the ability to use corporate funds to do that, but chose to use those funds to pay others, presumably including himself, Mr. Rathbone, and Mr. Kipperman, it became incumbent upon appellant to prove otherwise. He has not done that.

Appellant has had many years to gather evidence and prepare this case for hearing. The BOE issued the NODs to appellant near the end of July in 2007. We have no evidence to suggest that there was anything in the records available to the BOE at that time pointing to Ms. Zures, much less to Mr. Rathbone or Mr. Kipperman, as the person who controlled either corporation. The Decision and Recommendation (D&R) issued by the BOE's Appeals Division (now CDTFA's Appeals Bureau) following a conference with appellant three and a half years after the

[2] One of the amounts is at least .8 percent, but appear to have a number before the decimal that is not legible.

[3] While appellant argued at the hearing that the BOE should have issued determinations against Ms. Zures, Mr. Rathbone, and Mr. Kipperman, not against appellant, the majority has concluded that Ms. Zures was the person who had the authority over the corporations' payment of taxes. That is the finding from which I dissent.

NODs were issued indicates that appellant stated at the conference that he took control of the business after Mr. Zures' death out of necessity because there was no one else who could do it. The D&R does not mention Mr. Rathbone or Mr. Kipperman, and there is nothing in it about Ms. Zures taking control and instructing appellant to not pay taxes owed. Appellant's previously unsuccessful argument has since morphed into its present form, which I find unsupported by the evidence. The regulation upon which the majority relies states, "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." (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(B), emphasis added.) In my view, the evidence does not establish that appellant was required to obtain permission from Ms. Zures. He chose that course.

The majority has not addressed the second disputed element of willfulness, but I am compelled to do so in view of my dissent on the first element.

I would also find that CDTFA proved that appellant had the ability to pay the tax liabilities with corporate funds, but he chose not to do so. Generally, this requirement is satisfied by evidence showing that the corporation had money to pay the liabilities but used it to pay others. CDTFA submitted a copy of 21st Century's sales and use tax return for 2Q04, which shows taxable sales of $14,705,305 and no purchases subject to use tax. This means that 21st Century would have collected sales tax reimbursement from its customers in amounts sufficient to pay its tax liability for that quarter, which was $1,154,142. The return indicates that 21st Century prepaid fuel tax of $586,916, which is consistent with the schedule G that 21st Century filed and which is in evidence. Thus, rather than using the sales tax reimbursement collected from its customers to pay its taxes, 21st Century used it for other purposes, such as salaries, payments to suppliers, or prepaid fuel tax for 3Q04. Records from the Employment Development Department (EDD) show 21st Century reported wages paid during 4Q03, 1Q04, and 2Q04 of $798,810, $588,888, and $632,044, respectively, and copies of schedules G showing that 21st Century continued to purchase a substantial amount of fuel during 1Q04 and 2Q04, with substantially reduced amounts purchased during 3Q04 through at least part of August.

ARCO's 2Q04 schedule G shows it purchased 359,179 gallons of fuel and prepaid fuel tax of $35,917, which is reflected as a credit on its return. Its 2Q04 return shows $901,035 in

taxable sales and no purchases subject to use tax. It also would have collected sales tax reimbursement from its customers in amounts sufficient to pay its tax liability for that quarter, which was $69,830. ARCO did not use the sales tax reimbursement collected from its customers for the purpose for which it was collected: payment of sales taxes. Its 3Q04 schedule G shows it purchased 287,750 gallons of fuel and prepaid tax of $28,775. It would also have collected sales tax reimbursement on its sales of that fuel. Finally, EDD records show that ARCO reported wages paid during 4Q04 of $47,662.

Appellant did not address this element. Therefore, I would conclude, based on the evidence, that when appellant had actual knowledge that the taxes were due, he had the ability to pay the taxes, or cause them to be paid, with corporate funds, but chose not to do so, thus satisfying the final requirement for appellant's liability under R&TC section 6829. Based thereon, I would have sustained CDTFA's assessments.

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Michael F. Geary
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Michael F. Geary
Administrative Law Judge