OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18011851
ROBERT VICTOR MIROLLA	) CDTFA Case ID: 780920
	) CDTFA Account No. 53-012196
	)
	) Date Issued: October 29, 2019
	)

OPINION

Representing the Parties:

For Appellant:	David Bowman, CPA
For Respondent:	Mengjun He, Tax Counsel III Monica Silva, Tax Counsel IV Lisa Renati, Hearing Representative
For Office of Tax Appeals:	Deborah Cumins, Business Taxes Specialist III

J. ANGEJA, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Robert Victor Mirolla (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)[1] denying appellant's timely petition for redetermination of CDTFA's Notice of Determination (NOD). The NOD, which assessed personal liability against appellant as a responsible person under R&TC section 6829, consists of a $482,298 tax liability, plus applicable interest, and late-payment penalties of $71,259.90, for the period April 1, 2009, through August 3, 2010. The NOD reflects CDTFA's determination that appellant is personally liable for the unpaid tax liabilities of Associated of Los Angeles, Inc. (ALA).

Office of Tax Appeals Administrative Law Judges Andrew J. Kwee, Nguyen Dang, and Jeffrey G. Angeja held an oral hearing for this matter in Los Angeles, California, on

[1] Sales taxes were formerly administered by the State Board of Equalization (board). In 2017, functions of the board relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) When referring to acts or events that occurred before July 1, 2017, "CDTFA" shall refer to the board; and when referring to acts or events that occurred on or after July 1, 2017, "CDTFA" shall refer to CDTFA.

September 18, 2019. At the conclusion of the hearing, the record was closed and this matter was submitted for decision.

ISSUES

1. Whether the NOD was timely issued by CDTFA.
2. Whether appellant is personally liable, pursuant to R&TC section 6829, for the unpaid tax liabilities incurred by ALA.
3. Whether relief of the penalties asserted against ALA is warranted.
4. Whether relief of interest is warranted.

FACTUAL FINDINGS

1. ALA was a corporation that began doing business in California in January 1968. ALA filed for Chapter 11 Bankruptcy protection on April 2, 2010.
2. ALA filed a return for the third quarter 2010 (3Q10) on or about September 1, 2010, which it marked "FINAL." On that return, ALA self-reported making taxable sales during 3Q10.
3. During the hearing in this matter, appellant conceded that ALA made taxable sales through July 2010, and that appellant had knowledge of the unpaid tax liability during and after the liability period.
4. In a telephone call on September 10, 2010, Darrin Mirolla of ALA informed CDTFA that ALA ceased operations on August 3, 2010.
5. After it filed for bankruptcy protection on April 2, 2010, ALA continued operating the business as a debtor in possession, until at least August 3, 2010. The bankruptcy continued under Chapter 11, and ALA continued as a debtor in possession until the bankruptcy action was converted to a Chapter 7 proceeding on May 18, 2011.
6. As of August 3, 2010, ALA had unpaid tax-related liabilities. The liabilities include 10-percent late-payment penalties imposed against ALA for 2Q09, 4Q09, 2Q10, and 3Q10, as well as a 6-percent late-prepayment penalty for November 2009. CDTFA included these penalties in the NOD issued to appellant.
7. During the audit period, ALA collected sales tax reimbursement with respect to its taxable sales, and appellant was a person responsible for ALA's sales and use tax compliance. For example, appellant was ALA's president and CEO, and appellant signed

an Installment Payment Agreement (IPA) with CDTFA on behalf of ALA, ALA's bankruptcy petition, as well as ALA's monthly operating reports filed with the bankruptcy court.

8. During the audit period, ALA paid over $1,000,000 in wages for 2Q09 through 4Q09 and another $539,523 for the first three quarters of 2010. Also, ALA's October 2009 bank statement shows deposits of over $1,380,000. Further, at least through the third week of May 2010, ALA paid monthly rent of $27,000 to the Mirolla Family Trust.
9. On October 28, 2013, CDTFA issued an NOD against appellant as an individual, pursuant to R&TC section 6829, for tax of $482,298.00 and penalties totaling $71,259.90 incurred by ALA.
10. On November 18, 2013, appellant filed a timely petition for redetermination of the NOD.
11. On October 31, 2017, CDTFA issued a decision that deleted amounts due for the period January 1, 2010, through April 1, 2010, and denied the remainder of the petitioned amount.
12. This timely appeal followed.

DISCUSSION

Issue 1. Whether the NOD was timely issued by CDTFA.

An NOD issued under R&TC section 6829 must be mailed within three years after the last day of the calendar month following the quarterly period in which CDTFA obtains actual knowledge, through its audit or compliance activities, or by written communication by the business or its representative, of the termination, dissolution, or abandonment of the business of the corporation, or within eight years after the last day of the calendar month following the quarterly period in which the corporation's business was terminated, dissolved, or abandoned, whichever period expires earlier. (R&TC, § 6829(f); Cal. Code Regs., tit. 18, § 1702.5(c)(2).) Termination of the business of a corporation includes discontinuance or cessation of all business activities for which the corporation was required to hold a seller's permit. (Cal. Code Regs., tit. 18, § 1702.5(c)(3).)

On appeal, appellant argues that CDTFA had actual knowledge of the termination of ALA's business prior to July 1, 2010, and thus, that the NOD was not issued timely. Appellant has included copies of call logs which document discussions between CDTFA and

Darrin Mirolla. Those logs document that, on April 5, 2010, Darrin Mirolla informed CDTFA that ALA had filed for bankruptcy protection under Chapter 11 on April 2, 2010. Appellant argues that the April 5, 2010 telephone call "begins actual knowledge" of the termination of ALA's business operations. Appellant notes that the "Final" sales and use tax return for 3Q10 represented written notification of the termination of the business of the corporation, but appellant asserts that written notification is not required. Appellant further observes that CDTFA obtained a copy of the bankruptcy filing on April 6, 2010, and states, "[t]his bankruptcy filing is 'the termination, dissolution, or abandonment of the corporation.'"

Here, as a matter of law, liability under R&TC section 6829 cannot accrue (i.e., the statute of limitations under which to issue an NOD cannot begin to run) until the business operations of the entity have ceased. (R&TC, § 6829(a); Cal. Code Regs., tit. 18, § 1702.5(a).) Accordingly, it is immaterial whether CDTFA had actual or constructive knowledge of a potential cessation of business operations prior to the date on which the business operations actually ceased.

Next, the evidence establishes that ALA did not cease its business operations until approximately August 3, 2010. Specifically, ALA did not cease those operations when it filed for Chapter 11 Bankruptcy on April 2, 2010, and in a Chapter 11 Bankruptcy, the business operations of a corporation are not terminated. Rather, a Chapter 11 Bankruptcy offers the business an opportunity to reorganize and attempt to address its debt issues and continue to operate. This reality is clearly evident in this case because ALA's 3Q10 sales and use tax return reported that ALA made sales during that quarter (i.e., June-July-August 2010), and during the hearing appellant conceded that it continued to make sales through July 2010. Based on the foregoing, we find that ALA continued its business operations and made sales during the Chapter 11 Bankruptcy until at least August 3, 2010, the date on which Darrin Mirolla of ALA informed CDTFA that ALA ceased operations. CDTFA did not receive notice of the cessation until September 2010, when CDTFA received ALA's tax return marked "final" and received telephonic notice of the termination from Darrin Mirolla. We find that since the last day of the month following that quarter was October 31, 2010, and the NOD was issued within three years following that date, it was timely. (R&TC, § 6829(f); Cal. Code Regs., tit. 18, § 1702.5(c)(2).)

Issue 2. Whether appellant is personally liable, pursuant to R&TC section 6829, for the unpaid tax liabilities incurred by ALA.

R&TC section 6829 provides that a person is personally liable for the tax, penalties, and interest owed by a corporation if all the following elements are met: (1) the corporation's business has been terminated, dissolved, or abandoned; (2) the corporation collected sales tax reimbursement on its sales of tangible personal property and failed to remit such tax reimbursement to CDTFA; (3) the person had control or supervision of, or was charged with the responsibility for, the filing of returns or the payment of tax, or was under a duty to act for the corporation in complying with the Sales and Use Tax Law; and (4) the person willfully failed to pay taxes due from the corporation or willfully failed to cause such taxes to be paid. (R&TC, § 6829 (a) & (c); Cal. Code Regs., tit. 18, § 1702.5 (a) & (b).) A person is regarded as having willfully failed to pay taxes, or to cause them to be paid, where he or she had knowledge that the taxes were not being paid; had the authority to pay the taxes, or to cause them to be paid; and had the ability to pay the taxes but chose not to do so. (Cal. Code Regs., tit. 18, § 1702.5 (b)(2)(A) – (C).)

Here, we have found that ALA terminated business operations on or about August 3, 2010; appellant conceded that ALA collected sales tax reimbursement with respect to its retail sales; and appellant conceded that he was the person responsible for ALA's sales and use tax compliance. Thus, there is no dispute that the first three requirements for holding appellant personally liable pursuant to R&TC section 6829 have been met. Therefore, the only remaining issue is whether appellant willfully failed to pay, or cause to be paid, ALA's tax liabilities.

Appellant contends that his failure to pay the taxes, or cause ALA to pay them, was not willful. In his opening brief, appellant asserts that his intent throughout the liability period was to keep ALA a viable entity. He describes that period of time as one in which ALA was feeling the effects of the recession, with vendors demanding quicker payments, customers taking longer to pay, and financing becoming less available. He notes that, throughout this difficult period, ALA made partial payments of its sales tax obligations and maintained open communication with CDTFA regarding its plan to pay the amount in full. Appellant's brief opines that R&TC section 6829 appears designed for those individuals who show a pattern of blatant disregard for the law. He states that ALA made a genuine effort to do the right thing and to find a way to get

the sales tax paid in full, but to no avail. On that basis, appellant avers that his failure to pay the taxes when due was not willful.

Personal liability can be imposed on a responsible person only if that person willfully failed to pay or to cause to be paid taxes due from the corporation. (R&TC, § 6829 (a) & (b).) For these purposes, "willfully fails to pay or to cause to be paid" means that the failure was the result of an intentional, conscious, and voluntary course of action. (R&TC, § 6829(d).) This failure may be willful even if it was not done with a bad purpose or motive. (Cal. Code Regs., tit. 18, § 1702.5(b)(2).) A person is regarded as having willfully failed to pay taxes, or to cause them to be paid, where he or she had knowledge that the taxes were not being paid; had the authority to pay the taxes, or to cause them to be paid; and had the ability to pay the taxes but chose not to do so. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(A) – (C).)

The first requirement for willfulness is knowledge. During the hearing in this matter, appellant's representative conceded that appellant had knowledge of the unpaid tax liability during and after the liability period, and therefore this element is satisfied and we need not address it further.

The second requirement for willfulness is that the individual had the authority to pay the taxes or cause them to be paid. As president and CEO, appellant had overall responsibility for ALA's finances, and he admits that he was responsible for ALA's sales and use tax compliance. In addition, the fact that appellant signed the IPA, bankruptcy petition, and reports filed with the bankruptcy court is clear evidence that he was an individual with authority to pay the taxes or cause them to be paid. Also, Darrin Mirolla stated that appellant was the only individual who could authorize payments by ALA. Therefore, we find that appellant had the authority to pay taxes or direct that they be paid, at least until ALA's bankruptcy was converted to a Chapter 7 proceeding on May 18, 2011.

Finally, appellant's failure to pay taxes when due can only be willful if ALA had the ability to pay the taxes when due, but chose to use those funds to pay other creditors instead of remitting the taxes to CDTFA. We first note that throughout the liability period, ALA collected sales tax reimbursement from its customers, which reimbursement was available to pay the sales tax liability. In addition, ALA paid over a million dollars in wages for 2Q09 through 4Q09 and another $539,523 for the first three quarters of 2010. Also, ALA's October 2009 bank statement shows deposits of over $1,380,000. Further, at least through the third week of May 2010,

appellant, Robert Mirolla, caused ALA to pay monthly rent of $27,000 to the Mirolla Family Trust. In other words, ALA had funds to pay the sales tax liabilities when due, but appellant made the conscious choice to pay other creditors.

In his opening brief, appellant opines that the spirit of R&TC section 6829 is designed for those individuals who show a pattern of blatant disregard for the law. This assertion is simply incorrect. An individual with knowledge of an unpaid tax liability who elects to use available funds to pay creditors rather than remitting sales tax, has willfully failed to pay that tax. Indeed, as expressly noted in the regulation, the failure to remit sales tax, when funds are available, is willful even if it was not done with a bad purpose or motive. (Cal. Code Regs., tit. 18, § 1702.5(b)(2).)

For the foregoing reasons, we find that appellant willfully failed to pay the taxes when due, and the fourth requirement for holding him liable pursuant to R&TC section 6829 has been met.

Issue 3. Whether relief of the penalties asserted against ALA is warranted.

As stated above, CDTFA imposed 10-percent late-payment penalties against ALA for the 2Q09, 4Q09, 2Q10, and 3Q10, as well as a 6-percent late-prepayment penalty for November 2009. CDTFA included these penalties in the NOD issued to appellant.

There is no statutory or regulatory authority for relieving penalties in R&TC section 6829 determinations, but R&TC section 6592(a) provides that such penalties may be relieved if the failure to timely pay the liabilities was due to reasonable cause and circumstances beyond the person's control, and occurred notwithstanding the exercise of ordinary care and in the absence of willful neglect. A person seeking relief of a penalty under R&TC section 6592 must submit a signed statement under penalty of perjury setting forth the facts upon which the person bases the claim for relief. (R&TC, § 6592(b).) Thus, if appellant were to establish reasonable cause for *ALA's* failure to timely pay its liabilities, the penalties incurred by ALA would be relieved, and appellant's derivative liability for the penalties would also be eliminated. We explained the foregoing principles to appellant both during our Prehearing Conference and during the hearing in this appeal.

During the hearing in this matter, appellant did not specifically address the penalties, but during this appeal appellant stated that ALA was the victim of a severe downturn in the economy, and that it did everything it could to pay the taxes and keep the business alive.

However, an economic downturn does not represent reasonable cause for ALA's failure to timely pay its tax liabilities, particularly given that ALA collected sales tax reimbursement from its customers and used those funds to pay creditors other than CDTFA. (See *Ashlan Park Center LLC v. Crow* (2015) 233 Cal.App.4th 1274, 1283.)[2] Accordingly we conclude that appellant has failed to establish reasonable cause for ALA's failure to timely pay its tax liabilities.

Issue 4. Whether relief of interest is warranted.

The imposition of interest is mandatory. (R&TC, § 6482.) The law provides for relief of interest only under very narrow circumstances, such as the occurrence of a disaster or unreasonable error or delay by a CDTFA employee acting in his or her official capacity. (R&TC, §§ 6593, 6593.5.) An error or delay will be deemed to have occurred only if no significant aspect of the error or delay was attributable to an act of, or a failure to act by, the taxpayer. (R&TC, § 6593.5(b).) A taxpayer requesting relief of interest under R&TC section 6593.5 must make a statement in writing, signed under penalty of perjury, setting forth the factual basis for the request for relief.

Here, appellant only asserted that interest should be relieved because this appeal "has taken six years." Appellant did not allege or establish any specific facts or periods of unreasonable delay. Absent such facts, we have no basis on which to recommend relief of interest.

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[2] At issue in *Ashlan Park Center LLC v. Crow* (2015) 233 Cal.App.4th 1274 (*Ashlan Park*), was R&TC section 4985.2, which in relevant part provides that a penalty resulting from a failure to make a timely property tax payment may be canceled if the failure "is due to reasonable cause and circumstances beyond the taxpayer's control, and occurred notwithstanding the exercise of ordinary care in the absence of willful neglect . . . ." R&TC section 4985.2 is essentially identical to R&TC section 6592. The court in *Ashlan Park* held that the statute:

> was intended to provide relief from delinquency penalties to a taxpayer who was prevented by outside forces, beyond its control, from making its tax payment to the tax collector before the delinquency date. Such outside forces might include the sudden hospitalization of the taxpayer, who was thereby prevented from carrying on his normal business activities, or an earthquake or other natural disaster that disrupted mail and electronic delivery systems, temporarily preventing delivery of the payment. The statute might also apply where, through the fraud or other wrongdoing of a third party, there was uncertainty about who owned the real property and was liable for payment of the property taxes. *We conclude the statute was not intended as a broad-ranging remedy for a particular taxpayer's adverse financial situation or for a general economic recession.*

(*Ashlan Park Center LLC v. Crow* (2015) 233 Cal.App.4th at 1283, italics added.)

HOLDINGS

1. The NOD was timely issued by CDTFA.
2. Appellant is personally liable, pursuant to R&TC section 6829, for the liabilities at issue, which were incurred by ALA.
3. Appellant failed to establish reasonable cause for ALA's failure to timely pay its tax liabilities.
4. Appellant failed to establish that relief of interest is warranted.

DISPOSITION

CDTFA's action in deleting the responsible person liability for the period January 1, 2010, through April 1, 2010, and denying the remainder of the petition, is sustained.

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Jeff Angeja
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Jeffrey G. Angeja
Administrative Law Judge

We concur:

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Andrew J. Kwee
Administrative Law Judge

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Nguyen Dang
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Nguyen Dang
Administrative Law Judge