

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
CODY LEE BASS

) OTA Case No. 18011875
) CDTFA Case No. 843091
) CDTFA Account No. 53-012897
)
)
)

OPINION

Representing the Parties:

For Appellant: Christopher J. Wood, Attorney

For Respondent: Mengjun He, Tax Counsel III

For Office of Tax Appeals: Deborah Cumins,
Business Tax Specialist III

A. KWEE, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 6561, Cody Lee Bass (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)¹ denying appellant’s petition for redetermination of a Notice of Determination (NOD) dated August 5, 2014. The NOD is for tax of \$87,720.72, penalties of \$30,288.82, and applicable interest, for the period May 1, 2007, through June 30, 2010.² The NOD reflects CDTFA’s determination that appellant is personally liable as a responsible person for the unpaid tax liabilities of Capitol Wellness, Inc., doing business as Capitol Wellness Collective (CWI). CDTFA’s decision reduced the penalties by \$1,606, from \$30,288.82 to \$28,682.82,³ and otherwise denied the petition. This matter is being decided based on the written record because appellant waived the right to an oral hearing.

¹ Sales taxes were formerly administered by the Board of Equalization (board). Effective July 1, 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 its predecessor, the board.

² Notwithstanding the period specified in the NOD, the liability assessed against appellant only includes the period April 1, 2009, through June 30, 2010 (liability period).

³ The remaining penalties assessed against CWI, for which appellant is being held personally liable, include a negligence penalty of \$1,418.86, finality penalties of \$1,646.46, late payment penalties of \$21,048.50, and late prepayment penalties of \$4,569.

ISSUE

Whether appellant is personally responsible for the unpaid liabilities of CWI.

FACTUAL FINDINGS

1. On May 1, 2007, CWI began operating a medical marijuana dispensary in the City of Sacramento. CWI operated at two locations in Sacramento (referred to as the 14th Street location, and the 29th Street location, respectively).
2. On or about September 30, 2009, CWI filed a Statement of Information with the California Secretary of State (SOS), which appellant signed on behalf of CWI, on which appellant reported himself as one of two Directors, and one of three officers of the corporation (the treasurer).
3. On December 10, 2009, CDTFA contacted CWI and informed CWI that it had been selected for an audit. According to CDTFA's Assignment Activity History, appellant discussed audit matters with CDTFA during the audit as early as December 23, 2009.
4. On January 28, 2010, appellant signed an Installment Payment Agreement (IPA) on behalf of CWI, as its Director, agreeing to make monthly payments for CWI's delinquent sales tax liabilities. During the liability period, appellant also signed corporate checks made payable to CDTFA, for CWI's sales tax liabilities.
5. CDTFA completed its audit on July 27, 2010, when it issued a Field Billing Order to CWI for \$333,094 in taxes, plus interest and penalties, for the period May 1, 2007, through December 31, 2009 (audit period). CDTFA determined that CWI underreported its gross receipts by \$4,059,316, consisting of understated taxable sales of \$1,191,676, and disallowed claimed nontaxable labor of \$2,867,640 for the audit period.
6. On August 19, 2010, CDTFA issued an NOD to CWI for the liabilities disclosed by audit.
7. Shortly thereafter, CWI reported to CDTFA an effective closeout date of October 1, 2010, for its 29th Street location.
8. Subsequently, Abatin Wellness Inc., dba Abatin Wellness Center (AWI) began operating a medical marijuana dispensary at the 29th Street location with an effective start date of June 1, 2011.

9. According to the records of the Employment Development Department (EDD), CWI paid wages to 28 employees during fourth quarter 2009 (4Q09), followed by 2 employees during 1Q10, 1 employee during 2Q10 and 3Q10, and no employees for 4Q10, 1Q11, 2Q11, or 3Q11.
10. According to CWI's bank statements, CWI made regular deposits and payments during the liability period (see footnote 2). For example, CWI made \$102,602.46 in withdrawals during May 2010, \$132,955.63 in withdrawals during April 2010, and \$125,431.86 in withdrawals during March 2010, from its Wells Fargo bank account. In addition, CWI made \$84,527.85 in withdrawals during November 2009, and \$88,851.09 in withdrawals during October 2009, from its bank account with California Bank & Trust.
11. According to the records of the Sacramento Municipal Utilities District (SMUD), CWI made monthly payments to SMUD for the 14th Street location, for the period May 4, 2007, through January 4, 2012, at which time CWI terminated utility service to that location. CWI's final utility payment on January 19, 2012, brought the SMUD account balance to \$0.00. SMUD's records also reflect that CWI made monthly payments to SMUD for the 29th Street location, with the first payment made on March 9, 2009, and the final payment made on August 18, 2010.
12. According to the records of the landlord for the 29th street location, CWI paid monthly rent of \$15,000⁴ for the period February 1, 2009, through July 12, 2010 (the reported closeout date for this location to CDTFA was October 1, 2010). The landlord's records indicate that the final transaction for this account occurred over a year later on January 15, 2012, in the amount of \$62,000. On the landlord's records, the column for the invoice number lists this as a "paym[ent]," the memo column lists "capital welln[ess]," and the account column lists this item as "Deposit Rent to Ow[ner]."
13. According to the records of Natural Choice Dist., one of CWI's suppliers for the 29th Street location, CWI made more or less weekly purchases and payments during the period December 31, 2008, through June 24, 2010, and CWI's account has a \$0.00 balance owing to that supplier.

⁴For the first nine months, CWI paid \$15,000 a month. Thereafter, the invoiced monthly rent amount was \$7,500, and the landlord's records include the memo: "RTO deferre..."

14. According to the records of ADT Security Services (ADT), a company providing burglary alarm monitoring services for the 14th Street location, CWI paid monthly monitoring fees from January 10, 2008, until January 12, 2012, when it closed out its account as of February 5, 2012. After termination of the contract, CWI had a credit balance of \$69.15, which ADT refunded to CWI via ACH deposit on March 2, 2012.
15. According to CDTFA's records, on January 9, 2012, CWI filed a Notice of Closeout for its Seller's Permit with CDTFA. On that form, CWI reported that it discontinued business operations as of December 23, 2011, had no successor, and would file a final return. CDTFA therefore closed CWI's seller's permit effective December 23, 2011.
16. Thereafter, CWI filed an undated return for 4Q11, and CWI wrote "final return" on the top of the return. CWI has not filed any returns for reporting periods after December 31, 2011.
17. During the liability period, CWI also filed non-remittance returns for the periods 2Q09, 3Q09, 4Q09, 1Q10, and 2Q10, all of which were electronically filed and signed by appellant as Director or Executive Director.
18. CWI separately incurred penalties for failing to make any of the required prepayments for 4Q09 and 1Q10. Appellant electronically filed and signed all four of the non-remittance prepayment forms as Director.
19. In addition to the self-assessed liabilities, CDTFA also issued a separate NOD to CWI for 3Q09 on March 10, 2010, to which a penalty for failing to timely pay the determination was added (finality penalty). (See Rev. & Tax. Code, § 6565.)
20. According to the California Secretary of State, CWI's corporate status was suspended on August 1, 2011, for failing to meet its tax requirements with the Franchise Tax Board.
21. On August 5, 2014, CDTFA issued a responsible person NOD to appellant for \$87,720.72 tax, penalties of \$30,288.82, and applicable interest, representing a portion of the unpaid liabilities of CWI. Appellant's responsible person liability included a portion of the liabilities disclosed in the NOD for the audit period,⁵ penalties for failing to make timely prepayments, the NOD for 3Q09, and the self-assessed liabilities for 2Q09 through

⁵ Appellant's responsible person liability did not include liability for any periods prior to April 1, 2009, or any amounts for disallowed claimed nontaxable labor.

- 2Q10. Appellant is being held personally responsible for liabilities that CWI incurred during the liability period.
22. On September 4, 2014, appellant filed a timely petition for redetermination.
 23. In a decision dated April 5, 2017, CDTFA recommended deleting the late prepayment penalties, which totaled \$1,606, but otherwise denied the petition.
 24. Appellant timely appealed CDTFA's decision.
 25. During a pre-hearing conference with the parties held by Administrative Law Judge Kwee, appellant clarified that he was only disputing being held personally liable for CWI's sales tax liabilities, and that no other items were at issue in this appeal. Appellant conceded, and the parties agreed, to the following items: (1) CWI collected the sales tax from its customers; (2) CWI owes the penalties disclosed in CDTFA's determination.

DISCUSSION

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. (Rev. & Tax. Code, § 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. (Rev. & Tax. Code, § 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) that the corporation collected sales tax reimbursement (or incurred a use tax liability); (2) termination of the business; (3) that the person was responsible for the corporation's sales and use tax compliance during the liability period; and (4) the person willfully failed to pay or cause to be paid the taxes. CDTFA has the burden to prove these elements by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 1702.5, subd. (d).)

Element 2 – Termination⁶

The “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.

⁶ As indicated above, element 1, collected sales tax, was conceded and is not at issue in this appeal.

Code. Regs., tit. 18, § 1702.5, subd. (b)(3).) Here, CWI reported to CDTFA the termination of its business operations effective December 23, 2011. Consistent with its reporting, CWI terminated its lease agreements for both of its selling locations, terminated its security monitoring services, its utility services for both locations, and reported to EDD that it had no employees. Thereafter, appellant's corporate status was suspended by FTB for failing to meet its tax requirements. CWI also filed a return marked "final return" for the period ending December 31, 2011, and has not filed any subsequent returns. Based on these facts, we find that CWI has terminated its business operations and that this element is satisfied.

Appellant contends that this element, termination, is not satisfied because AWI continues to carry on CWI's business operations. We disagree. As a preliminary matter, it is undisputed that CWI and AWI are two separate and distinct corporations, each registered separately with SOS.⁷ Each corporation is also a separate "person" for purposes of the Sales and Use Tax Law. (Rev. & Tax. Code, § 6005.) As a matter of law, each corporation desiring to engage in or conduct business in this state as a seller is required to apply for its own seller's permit. (Rev. & Tax. Code, § 6066.) Any corporation that is not engaging in or conducting business as a seller of tangible personal property is required to surrender its seller's permit. (Rev. & Tax. Code, § 6071.1) Consistent with the Sales and Use Tax Law, CWI surrendered its seller's permit when it ceased engaging in business as a seller, and AWI applied for its own seller's permit to conduct business at the 29th Street location where CWI operated one of its two retail selling locations, when it began engaging in business as a seller in this state.

The fact that some other retailer is engaged in a business, even the exact same business as CWI, is simply not relevant for purposes of determining whether the corporate entity registered with SOS as "Capitol Wellness, Inc." (i.e., CWI) has terminated its own business operations. We concluded above that CWI terminated its own business operations and that is sufficient to conclude the inquiry for purposes of establishing "termination" within the meaning of Revenue and Taxation Code section 6829. (Cal. Code. Regs., tit. 18, § 1702.5, subd. (b)(3).) As such, we

⁷ CWI's corporation number is C2977774, and AWI's corporation number is C3195455.

do not need to determine whether AWI is a successor of CWI, and we do not further address appellant's arguments on this aspect.⁸

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).) 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. (Rev. & Tax. Code, § 6829, subd. (c); Cal. Code Regs., tit. 18, § 1702.5, subd. (a).)

Although appellant contends that he acted solely under the direction of the president, Aundre Speciale, and had no decision-making authority, there is ample evidence to refute this contention. Here, appellant signed a form filed with SOS reporting that he was one of two Directors of the corporation, and one of three officers of the corporation: the treasurer. Appellant also held himself out as vice president, co-owner, and chief financial officer for the corporation. Appellant signed AWI's non-remittance returns reporting the liability for which he is being held personally responsible, signed and negotiated an installment payment agreement for the liability, represented AWI during the audit for the CDTFA-assessed liability for which he is being held personally liable, and signed check payments to CDTFA for sales taxes.

Moreover, appellant does not dispute that he was hired to clean up CWI's finances and that he signed the returns, prepayment forms, checks made payable to CDTFA, an IPA entered into by CWI on January 28, 2010, and a Waiver of Limitation form for CWI. Appellant also does not dispute that he communicated with CDTFA frequently regarding CWI's sales and use tax liabilities and was CWI's contact person during the audit. The record of appellant's telephone conversations with CDTFA between November 30, 2009 and June 17, 2010, reflects discussions of levies against CWI's bank accounts, negotiating the terms of an IPA, meeting the requirements of the IPA, and CWI's application for a loan to acquire funds to pay its sales and use tax liability. Therefore, we find the evidence overwhelmingly supports finding that appellant

⁸ As relevant, the Sales and Use Tax Law separately allows for holding a successor or purchaser of the business of a corporation, such as CWI, dually liable for the corporation's unpaid sales tax liabilities. (Cal. Code Regs., tit. 18, § 1702.) Nevertheless, in the instant case, CWI reported to CDTFA that it did not have a successor when it surrendered its seller's permit.

was a person responsible for AWI's sales and use tax compliance, and that this element has been satisfied.

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 responsible person, because appellant signed all of CWI's non-remittance returns for which he is being held personally liable, he signed the IPA for those delinquent liabilities, and he represented CWI during the audit for which the CDTFA-assessed liability was assessed against AWI. Moreover, appellant communicated frequently with CDTFA regarding CWI's unpaid sales tax liabilities.

The second requirement of willfulness is that the person must have had the authority to pay or to cause to be paid any taxes due from the corporation. (Cal. Code Regs., tit. 18, § 1702.5, subd. (b)(2)(B).) 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).)

Appellant contends that the corporate president, Aundre Speciale, is the person responsible for CWI's taxes. Appellant's contention lacks merit, because the law does not impose liability only on the "most responsible" person, but rather the law imposes liability on any and all responsible persons as to whom all four elements are met. In other words, there can be, and oftentimes are, more than one responsible person held personally liable under Revenue and Taxation Code section 6829. Although Aundre Speciale was also held liable as 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.⁹ It is not our role to determine whether a person is more or less responsible than another person 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. (Rev. & Tax. Code, § 6829, subd. (a).)

Here, appellant had check signing authority, and did, in fact, sign checks for sales tax payments to CDTFA, filed the sales and use tax returns, and negotiated the IPA. Additionally, in his communication with CDTFA regarding CWI's delinquent sales and use tax liabilities, appellant discussed CWI's intention to pay the sales tax liabilities, including CWI's application for a loan to acquire funds to do so. Aside from a declaration stating that he was under the direction and control of the president, appellant failed to provide any contemporaneous documentation or other evidence to support this declaration. We believe the overwhelming balance of the contemporaneous evidence outweighs the declaration, made during the course of the appeal, that he did not have authority. This evidence is sufficient to show that appellant had authority to pay the sales taxes to CDTFA. Appellant's position within CWI, as treasurer, chief financial officer, and one of two directors of the corporation, is also consistent with a finding of authority to pay the sales taxes. Appellant did not offer credible evidence to refute that he had such authority. Therefore, we conclude that appellant had the requisite authority.

Finally, we turn to ability to pay. Here, the evidence further establishes that during a period in which the corporation reported millions in sales, and collected sales tax reimbursement from its customers that was available to pay the sales tax liability, the corporation failed to remit the taxes to the state. Nevertheless, the corporation elected to pay other creditors including

⁹ CDTFA separately issued a dual determination to the president of the corporation.

payments to employees for wages, rent, suppliers, and utilities. Furthermore, it is undisputed that appellant was an authorized check signer on the corporate bank account, and during the five months in the liability period for which bank records were available, CWI’s bank records show that it averaged over \$100,000 in payments per month to its creditors. 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 Revenue and Taxation Code section 6829. Therefore, we conclude that appellant is personally responsible for the unpaid liabilities of the corporation within the meaning of Revenue and Taxation Code section 6829.

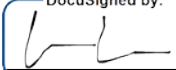
We find that all requirements required by Revenue and Taxation Code section 6829 have been met and that appellant is personally liable for the amounts at issue.

HOLDING

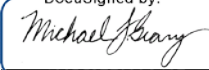
Appellant is personally liable for the sales tax liabilities incurred by CWI for the period April 1, 2009, through June 30, 2010.

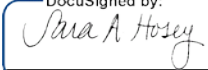
DISPOSITION

We sustain CDTFA’s decision to reduce the penalties by \$1,606, from \$30,288.82 to \$28,682.82, and otherwise deny the appeal.

DocuSigned by:

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Andrew J. Kwee
Administrative Law Judge

We concur:

DocuSigned by:

1A9B52EF8BAC4C7
Michael F. Geary
Administrative Law Judge

DocuSigned by:

6D3FE4A0CA514E7
Sara A. Hosey
Administrative Law Judge

Date Issued: 1/8/2020