

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
PAUL NEUFELD

) OTA Case No. 18083558
) CDTFA Acct. No. 53-011868
) CDTFA Case ID: 768654
)
)
)

OPINION

Representing the Parties:

For Appellant: Paul Neufeld
For Respondent: Jarrett Noble, Tax Counsel III
Monica Silva, Tax Counsel IV
Kevin Hanks, Hearing Representative

J. ANGEJA, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Paul Neufeld (appellant) appeals a Decision and Recommendation (D&R) by respondent California Department of Tax and Fee Administration (CDTFA) denying appellant’s timely petition for redetermination of a September 9, 2013 Notice of Determination (NOD). The NOD is for tax of \$85,246.98, penalties of \$24,728.47, plus applicable interest, for the period of January 1, 2007, through June 30, 2010 (audit period). The NOD reflects CDTFA’s determination that appellant is personally liable for the unpaid sales and use tax liabilities of California Retreaders Inc. (CRI), a California corporation.

Office of Tax Appeals Administrative Law Judges Amanda Vassigh, Andrew J. Kwee, and Jeffrey G. Angeja held an oral hearing for this matter in Sacramento, California, on November 19, 2019. At the conclusion of the hearing, the record was closed and this matter was submitted for decision.

ISSUE

Whether appellant is personally responsible pursuant to R&TC section 6829 for the unpaid tax liabilities of CRI.

FACTUAL FINDINGS

1. CRI, doing business as Schoettler Tire of Fresno, performed retreading of tires and sold new, used, and retread tires and performed tire repairs.
2. During the audit period, CRI collected sales tax reimbursement on its retail sales of tangible personal property in this state.
3. During the audit period, appellant was CRI's president and Chief Executive Officer (CEO), and he owned 50 percent of the stock in CRI. Mr. Matthew Schoettler was CRI's vice-president and he owned 50 percent of the stock in CRI.
4. Appellant's authority as president and CEO was terminated effective August 16, 2010, when appellant signed an agreement transferring that authority to Mr. Matthew Schoettler.
5. Numerous contacts and correspondence between appellant and CDTFA during the period July 29, 2008, through April 23, 2013, establish that appellant had knowledge of CRI's unpaid tax liabilities, which exceeded \$145,000. Those contacts also establish that appellant was directly involved in CRI's sales and use tax compliance matters.
6. During the audit period, appellant had the authority to sign checks on behalf of CRI and make payments for CRI as needed, including utility bill payments to Pacific Gas & Electric (PG&E), dated October 26, 2007 and November 19, 2008.
7. During the audit period, CRI made significant payments to other creditors including: \$5,993,128 in wages reported to the Employment Development Department (EDD); \$461,012 to PG&E; and \$119,634 to CRI's tire suppliers.
8. Pursuant to a September 24, 2010 asset purchase agreement, CRI sold its assets to Jack's Tire & Oil for \$55,000. CRI ceased its business operations on that date.
9. CRI filed non-remittance sales and use tax returns for 4Q08, 2Q09, and 4Q09.
10. On September 10, 2009, CDTFA issued an NOD to CRI for the period January 1, 2007, through September 30, 2008, based on an August 11, 2009 audit report.
11. On September 9, 2013, CDTFA issued an NOD to appellant pursuant to R&TC section 6829 for the unpaid liabilities of CRI (where sales tax reimbursement was collected) identified in the September 10, 2009 NOD and the self-assessed liabilities reported in CRI's 4Q08, 2Q09, and 4Q09 non-remittance returns.

12. Appellant petitioned the liability, and CDTFA denied appellant's petition, although it relieved interest that accrued during the period June 1, 2016, through April 30, 2018. This timely appeal followed.
13. At the hearing in this matter, CDTFA stipulated to the deletion of a \$32.18 penalty imposed for failing to pay tax via electronic funds transfer (EFT penalty) pursuant to R&TC section 6479.3(e).¹

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. (R&TC, § 6829(a); Cal. Code Regs., tit. 18, § 1702.5(a).) Personal liability may only be imposed if CDTFA establishes that, while the person was a responsible person, the corporation collected sales tax reimbursement from customers (whether separately stated or included in the selling price) and failed to remit such tax when due. (R&TC, § 6829(c); Cal. Code Regs, tit. 18, § 1702.5(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. CDTFA has the burden to prove these elements by a preponderance of the evidence. (Cal. Code Regs, tit. 18, § 1702.5(d).)

Elements 1 & 2

First, during the 2009 audit of CRI, appellant confirmed that CRI collected sales tax from its customers and discussed applicable sales tax rates with CDTFA, and on appeal appellant does not dispute that CRI collected sales tax from its customers. Second, CRI sold its business on September 24, 2010, and therefore it terminated its business operations on that date. Therefore, we find that the first two elements for responsible person liability have been met.

¹ The penalty under R&TC section 6479.3(e) is imposed when the tax is timely paid, but by means other than electronic funds transfer. This penalty does not pass through to persons liable under R&TC section 6829, because the penalty is not based on the failure to timely pay the tax. (See R&TC, § 6829(a).)

Element 3 – Responsible Person

Third, personal liability can be imposed only on a responsible person. (R&TC, § 6829(b).) In this context, “responsible person” means any person having control or supervision of, or who was charged with the responsibility for, the filing of returns or the payment of tax or who had a duty to act for the corporation in complying with any portion of the Sales and Use Tax Law when the taxes became due. (Cal. Code Regs., tit. 18, § 1702.5(b)(1).) As relevant here, personal liability applies only if, when the person was a responsible person for the corporation, the corporation sold tangible personal property and collected sales tax reimbursement on the selling price of the property and failed to remit such tax reimbursement when due. (Cal. Code Regs., tit. 18, § 1702.5(a).)

On appeal appellant argues that he is not a responsible person because he was a salesman and did not have direct, hands-on involvement with CRI’s sales tax compliance matters. Appellant testified that Mr. Schoettler was primarily responsible for CRI’s sales tax matters.

Here, the evidence in the record, including appellant’s contacts and correspondence with CDTFA during the audit period, demonstrates that appellant was directly involved in CRI’s sales and use tax compliance. In addition, during the audit period, appellant was CRI’s president and CEO. The president of a corporation is the general manager and chief executive officer of the corporation, unless otherwise provided in the articles or bylaws. (Corp. Code, § 312(a).) A general manager is presumed to have broad implied and actual authority to do all acts customarily connected with the business, including ensuring its compliance with the Sales and Use Tax laws, even if that responsibility is delegated to others. (*See Commercial Sec. Co. v Modesto Drug Co.* (1919) 43 Cal.App. 162, 173.) Here, appellant has not alleged or established that his duties as president did not include responsibility for CRI’s sales and use tax compliance, and accordingly we find that he had the responsibility to ensure CRI’s compliance. Based on all of the foregoing, we find that appellant was responsible for CRI’s tax compliance during the audit period.

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(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(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 was essentially in continuous contact with CDTFA during the period July 29, 2008, through April 23, 2013, regarding the corporation's unpaid liabilities. Appellant testified that he knew the amount of CRI's unpaid liabilities and was working with CDTFA to get them paid. Accordingly, we conclude that appellant had actual knowledge of CRI's unpaid tax liabilities.

The second requirement is that the responsible person had 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. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(B).) Here, appellant admitted that he had the authority to write checks and make payments on behalf of CRI during the audit period, and the evidence establishes that he did so. Moreover, as CRI's president and CEO, appellant clearly had such authority. Accordingly, we conclude that appellant had the authority to pay CRI's sales tax liabilities or cause them to be paid.

The third requirement is that when the responsible person had actual knowledge, the responsible person had the ability to pay the taxes but chose not to do so. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(C).) Here, there is no dispute that CRI collected sales tax reimbursement from its customers on all of its taxable retail sales, and therefore CRI had those funds available to pay its sales tax liabilities during the audit period. In addition, during the audit period, CRI paid in excess of \$6.5 million to third parties (e.g., wages, PG&E, and tire suppliers). Thus, we

conclude that CRI had those funds available to pay its sales tax liabilities, but instead CRI elected to use the funds to pay other creditors. Accordingly, we find that appellant had knowledge of the unpaid liabilities during the audit period and had the ability to pay them, but elected not to. Therefore, we conclude that appellant is personally responsible for CRI's unpaid tax liabilities within the meaning of R&TC section 6829.

On appeal, appellant raises two arguments. First, appellant asserts that the buyer of CRI's business should be liable for the tax instead of appellant, because the tax should have been paid through the escrow. However, appellant's argument is without merit, because a responsible person may be found liable under R&TC section 6829 regardless of whether the buyer of a business may also be found liable for the same liabilities as a successor (see R&TC, §§ 6811, 6812).

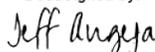
Second, appellant contends that he should not be held liable because Mr. Schoettler had greater responsibility for CRI's tax compliance than appellant. Appellant's argument lacks merit, because the law does not impose liability only on the *most* responsible person, but rather the law imposes liability 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 R&TC section 6829. For the reasons explained above, we have found that all four elements are satisfied as to appellant, which is sufficient to impose liability under R&TC section 6829, without regard to Mr. Schoettler's putative liability.

HOLDING

Appellant is liable under R&TC section 6829 for CRI’s unpaid sales tax liabilities.

DISPOSITION

CDTFA’s action in relieving interest for the period June 1, 2016, through April 30, 2018, and deleting the \$32.18 EFT penalty, but otherwise denying the petition, is sustained.

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Jeffrey G. Angeja
Administrative Law Judge

We concur:

DocuSigned by:

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Andrew J. Kwee
Administrative Law Judge

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Amanda Vassigh
Administrative Law Judge

Date Issued: 1/13/2020