OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18011819
	) CDTFA Account No. 053-012555
N. LORTZ	) CDTFA Case ID 812188
	)
	)
	)

OPINION

Representing the Parties:

For Appellant:	Robert H. Brumfield III, Attorney
For Respondent:	Amanda Jacobs, Tax Counsel III Stephen Smith, Tax Counsel IV Lisa Renati, Hearing Representative
For Office of Tax Appeals:	Deborah Cumins, Business Taxes Specialist III

S. BROWN, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, N. Lortz (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)[1] in response to appellant's timely petition for redetermination of a Notice of Determination (NOD). The NOD assessed personal liability pursuant to R&TC section 6829 against appellant for the unpaid liabilities of Lortz & Son Mfg. Co., Inc. (Lortz & Son) of $110,623.12 tax, penalties of $73,901.39,[2] and applicable interest, for the period October 1, 2009, through January 31, 2010, and January 1, 2011, through July 31, 2011. In its subsequent decision, CDTFA reduced the assessed penalties from $73,901.39 to $66,479.96, and denied the remainder of the petition.

Office of Tax Appeals (OTA) Administrative Law Judges Suzanne B. Brown,

[1] Sales taxes were formerly administered by the State Board of Equalization (BOE). In 2017, functions of BOE relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22; Stats. 2017, ch. 16, § 5.) For ease of reference, when referring to acts or events that occurred before July 1, 2017, "CDTFA" shall refer to BOE; and when referring to acts or events that occurred on or after July 1, 2017, "CDTFA" shall refer to CDTFA.

[2] These included two penalties for late prepayment for January 2010 ($9,750.96 and $6,256.28), a late prepayment penalty for July 2011 of $1,165.15, and three penalties for late returns that total $56,727.00.

Michael F. Geary, and Amanda Vassigh held an oral hearing for this matter in Fresno, California, on November 21, 2019. At the conclusion of the hearing, the record was closed, and this matter was submitted for decision.

ISSUES

1. Whether appellant is personally liable, pursuant to R&TC section 6829, for the unpaid liabilities incurred by Lortz & Son for the periods October 1, 2009, through January 31, 2010, and January 1, 2011, through July 31, 2011.
2. Whether there is reasonable cause to relieve penalties that were imposed on Lortz & Son and included in appellant's liability under R&TC section 6829.

FACTUAL FINDINGS

1. Lortz & Son was a retailer and fabricator of sheet metal and parts that began operating in 1947 as a sole proprietorship, and then incorporated in 1970. The business closed on October 10, 2011, and CDTFA closed the business's seller's permit effective October 19, 2011.
2. When it closed, Lortz & Son had unpaid tax liabilities for the liability periods at issue; specifically, the tax liabilities at issue originate from a non-remittance sales and use tax return for 4Q09 and a partial-remittance prepayment return for April 2011.
3. Throughout the liability periods at issue, Lortz & Son collected sales tax reimbursement on its taxable sales of tangible personal property (TPP) in this state.
4. In 2002, appellant became an employee of Lortz & Son, working in sales and production.
5. In 2007, appellant was appointed as president of Lortz & Son, and he remained as president until the close of business operations. Minutes of a November 21, 2007 meeting of Lortz & Son's Board of Directors reflect that appellant called the meeting to order and attended the meeting as president; the minutes reflect appellant's signature approving the content of the minutes, with a signature date of November 24, 2007.
6. Following appellant's appointment as president, appellant's father, C. Lortz, Jr. (hereinafter C. Lortz), continued to hold the position of Lortz & Son's chief executive officer (CEO) and chairman of the board. As president, appellant reported to C. Lortz.

7. Prior to the beginning of the first liability period, appellant signed the corporation's sales and use tax returns for the second quarter of 2007 (2Q07) and 4Q08.
8. By 2009, the impacts of the nationwide economic recession made it increasingly difficult for Lortz & Son to meet its financial obligations. In 2009, 2010, and 2011, appellant participated in weekly or bi-weekly meetings of a "cash-flow committee" to discuss which bills the corporation should pay. As described in his testimony, appellant relied on the expertise of the other committee members, and accepted the committee's recommendations regarding which bills to pay.
9. On March 4, 2010, appellant signed a Power of Attorney, as president of Lortz & Son, authorizing a representative to act for the corporation in sales and use tax matters.
10. Also in 2010, D. Oei, Lortz & Son's controller,[3] informed appellant that the corporation did not have sufficient funds to pay its sales taxes. Thereafter appellant signed, as president, an Installment Payment Agreement (IPA) dated May 4, 2010, which included an authorization to debit the corporate checking account for payments of $56,000 per month from Lortz & Son to CDTFA to pay outstanding liabilities for the periods October 1, 2009, through January 31, 2010. Thereafter Lortz & Son made payments in compliance with the May 4, 2010 IPA, until it missed a payment in February 2011.
11. In spring 2011, Ms. Oei communicated with CDTFA staff to arrange the terms of a new IPA. Appellant signed a letter dated June 1, 2011, which Ms. Oei had drafted for his signature, confirming those discussions and attaching financial records CDTFA had requested.
12. On June 16, 2011, appellant signed the new IPA on behalf of Lortz & Son, authorizing CDTFA to debit the corporate checking account for payments of $5,000 every other week to pay outstanding liabilities totaling $239,823.80 for the periods listed on the document as follows: "4Q2010; 1/10; 1Q2011; 4/11."
13. During the liability periods, appellant had the authority to sign corporate checks as the sole signatory on behalf of Lortz & Son, such as the following: a May 5, 2011 check for $27,400 to Dampney & Company, a July 18, 2011 check for $17,202.65 to Valley Industrial X-Ray, and a September 15, 2011 check for $10,431.35 to Valley Iron, Inc.

[3] The June 1, 2011 letter signed by appellant identifies Ms. Oei's title as controller. During his testimony at the hearing, appellant indicated that Ms. Oei was hired as the controller and later became CFO.

14. On October 14, 2011, Celtic Capital Corporation (Celtic), which was a creditor of Lortz & Son, filed a complaint against Lortz & Son with the Kern County Superior Court. On October 18, 2011, Celtic filed with the court an Ex Parte Application for Appointment of a Receiver for Lortz & Son, which the court granted the following day. Thereafter, the receiver obtained an order for the sale of Lortz & Son's unsecured property and liquidated the business's assets on or about November 17, 2011.
15. On November 29, 2012, CDTFA served a Notice of Levy on the receiver for Lortz & Sons, listing $310,172.01 as the amount due to CDTFA from Lortz & Son. In a written response, the receiver indicated that he had filed the Notice of Levy with the court, but stated that "it is understood by the Receiver that C. Lortz, a principal of [Lortz & Son], holds a blanket lien against the funds held by the Receiver." Based on the receiver's response, CDTFA did not further pursue the levy because it concluded that Celtic and C. Lortz held liens that were superior to CDTFA's claim. Thereafter CDTFA did not collect any funds from the receivership.
16. On April 10, 2014, CDTFA issued an NOD to appellant for tax of $110,623.12, penalties totaling $73,901.39, and applicable interest. The penalties consisted of late payment penalties for 4Q09 ($45,610.70), January 2011 ($2,082.30), and April 2011 ($9,036.00); two prepayment penalties for January 2010 ($9,750.96 and $6,256.28); and a penalty for late prepayment for July 2011($1,165.15).
17. On May 9, 2014, appellant filed a timely petition for redetermination.
18. On October 12, 2016, CDTFA issued a Decision and Recommendation (D&R) in which it deleted two penalties, $6,256.28 for January 2010 and $1,165.15 for July 2011, and denied the remainder of the petition.
19. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellant is personally liable, pursuant to R&TC section 6829, for the unpaid liabilities incurred by Lortz & Son for the periods October 1, 2009, through January 31, 2010, and January 1, 2011, through July 31, 2011.

Although corporations are liable for their unpaid sales and use tax liabilities, there are situations when other persons may also be held personally liable. As relevant here, 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 TPP and failed to remit such tax reimbursement to respondent; (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).)

CDTFA bears the burden of proving, by the preponderance of the evidence, that the requirements of R&TC section 6829 have been satisfied. (Cal. Code Regs., tit. 18, § 1702.5(d).) Moreover, more than one person may be held liable under R&TC section 6829 for the same primary liability, as long as the requirements for imposing such liability on each person are satisfied. (See R&TC, § 6829.)

Here, appellant concedes that Lortz & Son's business operations have terminated and that the corporation collected sales tax reimbursement with respect to its taxable sales of TPP. Accordingly, we address only the two disputed elements: whether appellant was responsible for Lortz & Son's sales and use tax compliance and whether he willfully failed to pay its tax liabilities.

Responsible Person

A "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 provision of the Sales and Use Tax Law when, as relevant here, the business sold TPP and collected sales tax reimbursement on the selling price of the property and failed to remit such tax reimbursement when due. (R&TC, § 6829(b); 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 TPP and collected sales tax reimbursement on the selling price of the property, but failed to remit such tax reimbursement when due. (Cal. Code Regs., tit. 18, § 1702.5(a).) Simply because a person was an officer, member, manager, employee, director, shareholder or partner of a business is not, in

and of itself, sufficient proof to establish that the person is a "responsible person." (Cal. Code Regs., tit 18, § 1702.5(b)(1).)

Here, appellant was Lortz & Son's president throughout the liability periods and until the termination of business operations in October 2011. The president of a corporation is the general manager 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 Law, even if that responsibility is delegated to others. (*See Commercial Sec. Co. v Modesto Drug Co.* (1919) 43 Cal.App. 162, 173.)

On appeal, appellant contends that he is not a responsible person because he was not responsible for oversight of Lortz & Son's sales and use tax compliance. However, given his authority as president, appellant's responsibilities included ensuring the corporation's compliance with provisions of the Sales and Use Tax Law, even if he delegated to other people the responsibility for filing returns and paying taxes. Moreover, appellant's involvement in tax compliance is evidenced by his signature on the June 1, 2011 letter to CDTFA regarding entering into an IPA, his signatures on the 2Q07 and 4Q08 sales and use tax returns, and his signatures on the May 4, 2010 IPA and the June 16, 2011 IPA, which included authorization for CDTFA to debit Lortz & Son's corporate checking account for payment of tax liabilities. Appellant also contends that he is not a responsible person because, although his title was president, throughout the liability periods his job duties remained the same as when he was in sales and production. However, the minutes of the November 21, 2007 meeting of Lortz & Son's Board of Directors reflects that appellant called the meeting to order, attended the meeting as president, and signed his approval of the minutes. Along with the evidence of appellant's involvement in tax compliance, evidence such as the minutes of the Board of Directors meeting runs contrary to appellant's position that his job duties did not change after he was appointed president in 2007.

Based on all of the above, the preponderance of evidence establishes that appellant, as president, had a duty to act for the corporation in complying with the Sales and Use Tax Law. Accordingly, we find that, during his tenure as corporate president, appellant was a responsible person for ensuring Lortz & Son's sales and use tax compliance. Therefore, this requirement for holding appellant liable pursuant to R&TC section 6829 has been met.

Willfulness

The final requirement for a person to be held personally liable pursuant to R&TC section 6829 is that the person must have willfully failed to pay the liabilities at issue. 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); Cal. Code Regs., tit. 18, § 1702.5(b)(2).) This failure may be willful even if it was not done with a bad purpose or evil motive. (Cal. Code Regs., tit. 18, § 1702.5(b)(2).) 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).)

First, we analyze whether appellant had actual knowledge of Lortz & Son's nonpayment of the taxes at issue. Appellant acknowledges that he knew of the unpaid taxes because he signed the May 4, 2010 and June 16, 2011 IPAs. However, during the hearing appellant clarified that while he concedes he knew of the unpaid taxes covered in the IPAs, he had believed that Lortz & Son had been paying taxes in full compliance with those IPAs. Appellant also points to the evidence of the corporation's bank statements that show Lortz & Son made payments to CDTFA. In addition, appellant argues that at the time the receivership was established, he asked the corporation's then-attorney, Ray Mullen, about payment of taxes, and Mr. Mullen indicated that the receivership would pay the taxes.

As evidenced by his signatures on the IPAs and the June 1, 2011 letter, and by his own admission, appellant had actual knowledge that Lortz & Son's taxes were due but not being paid. Regarding appellant's position that he believed the corporation had been paying taxes in full compliance with the IPAs, the evidence establishes that as of July 2011, the corporation was not

in compliance with an IPA. Specifically, regarding the June 16, 2011 IPA, Lortz & Son failed to make the full prepayment for July 2011, and as a result the corporation was no longer in compliance with the terms of that IPA.[4] Similarly, Lortz & Son's compliance with the May 4, 2010 IPA ended when the corporation missed a payment in February 2011, as evidenced by the June 1, 2011 letter appellant signed. Had the corporation been in full compliance with an IPA at the time business operations terminated, we could consider whether such compliance established that appellant had not willfully failed to pay the taxes; however, we cannot reach that question because the evidence establishes that from July 2011 until the termination of the business in October 2011, the corporation was not in compliance with an IPA.[5]

Regarding appellant's reliance on the evidence of bank statements showing payments to CDTFA, we understand that the bank statements demonstrate that Lortz & Son was making payments towards its tax liabilities; however, that fact is not contrary to our conclusion that appellant knew that there remained unpaid tax liabilities Lortz & Son owed for the liability periods. In addition, regarding appellant's position that he believed that the taxes would be paid through the receivership, once control of Lortz & Son's finances was placed in the hands of the receivership, appellant no longer had the requisite authority or ability to pay the unpaid taxes at issue. Thus, because our analysis of willfulness concerns the time period prior to the establishment of the receivership, appellant's knowledge or understanding following the establishment of the receivership is irrelevant to this inquiry. In light of the foregoing, we conclude that appellant had actual knowledge that Lortz & Son had unpaid taxes, and thus this first requirement of willfulness has been met.

Next, we examine whether appellant 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 he had actual knowledge. (Cal. Code Regs., tit. 18, § 1702.5(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

[4] The terms of both IPAs provide that the corporation "must timely file and pay in full all returns and prepayments which become due" and "this agreement will be terminated if I fail to comply with the terms of this agreement."

[5] At the oral hearing in this matter, CDTFA also argued that prior to the start of the receivership, Lortz & Son's tax payments for September and October 2011 "bounced" due to insufficient funds in the corporation's bank account. These reported failures to make payments in compliance with the June 2011 IPA are not documented in the evidentiary record, although appellant does not dispute that they occurred. Because of our finding regarding the failure to make the full prepayment for July 2011, we need not make a finding regarding the alleged noncompliance of September and October 2011.

payment but merely deferred to the decision of another individual had the requisite authority. (See Cal. Code Regs., tit. 18, § 1702.5(b)(2)(B).) There is extensive evidence that, as president, appellant had authority to sign corporate checks and authorize payments on behalf of Lortz & Son. Appellant contends that he only had authority to sign the corporation's checks for amounts up to $5,000, and checks for larger amounts required a second signature. However, the record contains copies of corporate checks that appellant signed for amounts larger than $5,000, such as the May 5, 2011 check for $27,400 and the July 18, 2011 check for $17,202.65. Furthermore, appellant has not argued or offered any evidence that he provided a check in excess of $5,000 for tax liabilities to any other authorized individual who refused to approve the payment. Thus, there is no evidence that appellant's authority to make tax payments was limited, or that he was required to obtain approval from another person in order to make tax payments.

Moreover, appellant argues that he did not consciously or intentionally fail to pay the liabilities because he relied on the advice of experienced professionals who attended the weekly committee meetings. However, whether appellant elected to accept such recommendations is not dispositive of whether appellant had authority to pay the taxes or cause them to be paid; if appellant had the requisite authority, it does not matter whether his decisions were based on his own expertise or on recommendations from someone else. As noted above, a person who had authority to direct payment but merely deferred to the decision of another individual had the requisite authority. (See Cal. Code Regs., tit. 18, § 1702.5(b)(2)(B).) Consequently, appellant's argument on this point is unpersuasive. In light of the evidence establishing appellant's authority to sign checks and make payments, we find that appellant had the authority to pay taxes or to cause them to be paid; hence, this second requirement for willfulness has been met.

The third requirement of willfulness is that when the responsible person had actual knowledge, he had the ability to pay the taxes but chose not to do so. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(C).) Here, the evidence shows the corporation made payments to others during the liability period, including payments to vendors and payment of wages to employees. Moreover, the corporation collected sales tax reimbursement from its customers on all of its taxable retail sales, and therefore had those funds available to pay its sales tax liabilities. Hence, we conclude that Lortz & Son had funds available to pay its sales tax liabilities, but instead elected to use the funds to pay other creditors. Accordingly, we find that this third requirement of willfulness has been met.

In addition, we consider appellant's position that it is unfair to hold him personally liable for the liabilities at issue since he received none of the funds related to the liquidation of the business assets. Since C. Lortz owned 80 percent of the corporation, and appellant did not have an ownership interest in the business, C. Lortz reportedly received from the receivership 80 percent of the surplus funds and un-administered receivership property. Appellant contends that his father took the money available to pay the taxes at issue and left appellant "holding the bag." Appellant argues that CDTFA should have pursued more aggressive collection action against the receivership estate. On this question, nothing in the law prevents CDTFA from asserting liability against a responsible person pursuant to R&TC section 6829 in instances where CDTFA has not attempted to satisfy the liabilities through enforcement procedures against the corporation or against other parties. Regarding appellant's assertion that it is not fair to hold him liable since his father received the funds related to the liquidation of the business, OTA is not empowered to grant equitable relief.

As noted above, there can be more than one responsible person held personally liable under R&TC section 6829. It is not our role to determine whether a person is more or less responsible 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. (R&TC, § 6829(a).)

In summary, we find that appellant knew the taxes were due and unpaid, had the authority to pay the liabilities, and had the ability to make the payments because there were funds available, but instead chose to pay other creditors. Consequently, we find that CDTFA has established by a preponderance of evidence that appellant did willfully fail to pay the taxes or cause them to be paid. Therefore, we conclude that appellant is personally responsible for the unpaid tax liabilities incurred by Lortz & Son during the liability periods.

Issue 2: Whether there is reasonable cause to relieve penalties that were imposed on Lortz & Son and included in appellant's liability under R&TC section 6829.

There is no statutory or regulatory authority for relieving penalties in R&TC section 6829 determinations, but R&TC section 6592 provides that penalties may be relieved if a person's failure to timely file returns or pay taxes 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.[6] (R&TC, § 6592(a).) Here, the penalties at issue consist of the following: late-payment penalties for 4Q09 ($45,610.70), January 2011 ($2,082.30), and April 2011 ($9,036); and a late prepayment penalty for January 2010 ($9,750.96). The person subject to the penalties is the corporation. Thus, if reasonable cause is shown why *Lortz & Son* failed to timely file or pay for 4Q09, January 2011, and April 2011, and why it failed to timely file or prepay for January 2010, then those penalties against the corporation may be relieved and, consequently, appellant's (derivative) liability for the penalties would also be eliminated.

Here, appellant has not argued, and the evidence has not established reasonable cause and circumstances beyond the corporation's control regarding why *the corporation* failed to timely file or pay for 4Q09, January 2011, and April 2011, and why the corporation failed to timely file or prepay for January 2010. As a result, we have no basis on which to recommend relief of these penalties.

[6] A person seeking relief of penalties under R&TC section 6592 must submit a statement under penalty of perjury setting forth the facts upon which the person bases the request for relief. (R&TC, § 6592(b).) Although appellant did not submit a written statement, during the telephonic prehearing conference in this matter, we informed appellant's representative that appellant's testimony under penalty of perjury regarding this issue could address this issue.

HOLDINGS

1. Appellant is liable, pursuant to R&TC section 6829, for the unpaid liabilities incurred by Lortz & Son.
2. Appellant is not entitled to relief of the disputed penalties that were imposed on Lortz & Son and included in appellant's liability under R&TC section 6829.

DISPOSITION

CDTFA's action in deleting the two penalties and otherwise denying the petition for redetermination is sustained.

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Suzanne B. Brown
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Suzanne B. Brown
Administrative Law Judge

We concur:

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Michael F. Geary
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Michael F. Geary
Administrative Law Judge

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Date Issued: 2/18/2020