

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeals of:  
**C. BEEBE AND S. BATES**

) OTA Case Nos. 18083586, 18083587  
) CDTFA Acct. Nos. 53-014485, 53-014486  
) CDTFA Case ID's: 961737, 972106  
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**OPINION**

Representing the Parties:

For Appellant:

C. Beebe  
S. Bates

For Respondent:

Sunny Paley, Tax Counsel  
Monica Silva, Tax Counsel IV  
Randy Suazo, Hearing Representative

J. ANGEJA, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, C. Beebe and S. Bates (collectively, appellants) appeal decisions by the respondent California Department of Tax and Fee Administration (CDTFA)<sup>1</sup> denying appellants' timely petitions for redetermination of Notices of Determination (NOD's). The NOD's reflect CDTFA's determination that appellants are personally liable as responsible persons for the unpaid sales tax liabilities of American Water Technology (American Water). The NOD's are each for \$38,369.25 tax, plus accrued interest, and penalties totaling \$5,718.49, for the period July 1, 2010, through June 30, 2013 (Liability Period).

Office of Tax Appeals (OTA) Administrative Law Judges Suzanne B. Brown, Andrew J. Kwee, and Jeffrey G. Angeja held an oral hearing for this matter in Sacramento, California, on February 26, 2020. At the conclusion of the hearing the record was closed, and this matter was submitted for decision.

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<sup>1</sup> Sales taxes were formerly administered by the State 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 this opinion refers to acts or events that occurred before July 1, 2017, "CDTFA" shall refer to its predecessor, the board.

### ISSUE

Whether appellants are personally responsible pursuant to R&TC section 6829 for the self-assessed liabilities identified in American Water's non-remittance returns for fourth quarter 2012 (4Q12) and 1Q13.

### FACTUAL FINDINGS

1. American Water was a manufacturer of water treatment systems.
2. Mr. Beebe was American Water's chief executive officer for all relevant periods, and Mr. Bates was American Water's chief financial officer. During the hearing in this matter, appellants conceded that during the Liability Period: they were responsible for American Water's sales and use tax compliance; American Water collected sales tax reimbursement on all of its taxable sales; and American Water's business operations terminated on June 30, 2013.
3. During the periods at issue here, Ms. Ferkey was American Water's bookkeeper, and she prepared checks for appellants' signatures.
4. An Employment Development Department (EDD) Wage History report shows that American Water paid wages to its employees totaling \$140,323.88 during 4Q12 through 1Q13.
5. American Water paid rent to its landlord in the amounts of \$3,000 and \$4,000 during 4Q12 and 1Q13, respectively.
6. American Water's federal income tax returns for 2012 and 2013 show Cost of Goods Sold of \$762,336 and \$333,807, respectively.
7. On September 26, 2013, American Water filed sales and use tax returns for 4Q12 and 1Q13. Although American Water reported a sales tax liability of \$4,639.80 for 4Q12 and a sales tax liability of \$29,179.10 for 1Q13, American Water did not remit any sales tax with these returns.
8. On March 20, 2014, CDTEFA issued an NOD to American Water for \$27,177.91 tax for the period July 1, 2010, through June 30, 2013, based on a February 12, 2014 audit report.

9. An Automated Compliance Management System (ACMS) <sup>2</sup> entry on February 19, 2015, documents a telephone call between CDTFA and Mr. Bates in which Mr. Bates indicated that appellants held monthly meetings in which American Water's tax liabilities were discussed. During the hearing in this matter, appellants confirmed that these meetings occurred.
10. An ACMS entry dated January 13, 2015, documents a phone call between CDTFA and American Water's accountant, Ms. Floyd, in which she stated that she completed American Water's unpaid tax returns for 4Q12 and 1Q13, and that she reported to appellants the amounts of sales tax that American Water owed to the state.
11. ACMS entries dated May 15, 2013, May 20, 2013, June 11, 2013, and June 24, 2013, show that CDTFA discussed the 4Q12 and 1Q13 liabilities with Mr. Bates on those dates.
12. After leaving American Water, Mr. Beebe was hired by his father's corporation, Beebe's Water Systems, Inc. (Beebe's Water Systems). Beebe's Water Systems also hired Ms. Ferkey as its bookkeeper. On August 1, 2015, Mr. Beebe filed a complaint with the Shasta County Sheriff's Office alleging that Ms. Ferkey embezzled funds from Beebe's Water Systems for the period April 13, 2013, through July 1, 2013.<sup>3</sup> On September 1, 2015, Beebe's Water Systems filed an insurance claim for employee theft with Nationwide Insurance, accusing Ms. Ferkey of theft and poor business practices. The claimed loss was for \$59,459.83 during the period September 1, 2013, through April 23, 2015, consisting of: \$24,101.09 in miscellaneous payroll and related overages paid to Ms. Ferkey, \$3,358.74 in sales tax that the corporation overpaid on exempt transactions, and \$32,000 in loss of customer goodwill.
13. On June 20, 2016, CDTFA issued dual determinations to appellants pursuant to R&TC section 6829 for liabilities identified in the March 20, 2014 NOD and the liabilities identified in the 4Q12 and 1Q13 non-remittance returns.
14. Appellants petitioned the liability, and CDTFA's decisions concluded that appellants are not liable for the \$27,177.91 tax liability identified in the March 20, 2014 NOD, but CDTFA otherwise denied appellants' petition. This timely appeal followed.

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<sup>2</sup> ACMS is a software program that is used by CDTFA to contemporaneously document communications between compliance staff and taxpayers or their representatives.

<sup>3</sup> The matter was referred to the Shasta County District Attorney's office, and on February 15, 2017, the District Attorney's office stated that it had investigated the complaint but decided not to prosecute the matter.

## 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 the liability or cause it 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).)

Here, appellants concede that the first three elements are met. Thus, the only issue remaining as to the proposed tax liability is whether appellants willfully failed to pay, or to cause to be paid, American Water's tax liability.

### Element 4 - Willfulness

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).)

Regarding the first sub-element (actual knowledge), the evidence establishes that on January 17, 2013, Mr. Bates spoke via telephone with CDTFA regarding late prepayments for 4Q12, and that Mr. Bates met personally with CDTFA representatives on May 15, 2013, to discuss American Water's late tax returns for 4Q12 and 1Q13. These facts establish Mr. Bates' actual knowledge of the unpaid liabilities for the quarters at issue.

As to Mr. Beebe, during the hearing appellants confirmed that they held monthly meetings at which American Water's tax liabilities were discussed, which shows Mr. Beebe's admission that he had actual knowledge of American Water's unpaid tax liabilities. Moreover, as one of the persons responsible for American Water's tax compliance and one who had previously caused American Water to file sales and use tax returns, we conclude that Mr. Beebe must have known that American Water did not file tax returns for 4Q12 and 1Q13 (i.e., at the time the liabilities were due). We also note that during the hearing, appellants declined the opportunity to present witness testimony to refute the foregoing evidence.<sup>4</sup> We find that the foregoing evidence establishes that Mr. Beebe also had actual knowledge of American Water's unpaid tax liabilities for 4Q12 and 1Q13 when they were due.

On appeal, appellants argue that they were unaware of the liabilities because American Water's office manager, Ms. Ferkey, concealed these liabilities from appellants. Appellants argue that Ms. Ferkey embezzled funds from American Water, and, as a part of her embezzlement scheme, Ms. Ferkey issued checks for appellants' signature which she neglected to mail. Thus, it is appellants' position that they were unaware of the 4Q12 and 1Q13 liabilities because they signed checks for these periods that Ms. Ferkey did not mail. Furthermore, appellants argue that they remained ignorant of these liabilities because Ms. Ferkey intercepted notices of delinquency at the mailbox.

First, we find the evidence of Ms. Ferkey's alleged conduct during her tenure at American Water to be unpersuasive. Appellants submitted documentary evidence (i.e., a police report) accusing Ms. Ferkey of embezzling funds from *Beebe's Water Systems*, not American

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<sup>4</sup> OTA's Rules for Tax Appeals provide that where a party offers oral testimony as evidence at an oral hearing, the oral evidence shall be taken only on oath or affirmation. (Cal. Code Regs., tit. 18, § 30410.)

Water. Appellants allege that she must have engaged in the same pattern of conduct while she was employed at American Water, but appellants have adduced no documentary evidence showing that Ms. Ferkey actually engaged in such activities while at American Water. Absent persuasive evidence, we decline to conclude that Ms. Ferkey did so.

Second, we found above that appellants each had actual knowledge of the unpaid tax liability for 4Q12 and 1Q13, based on Mr. Bates' direct communications with CDTFA regarding that specific liability, and based on appellants' monthly meetings at which they discussed such liabilities. Those facts establish appellants' actual knowledge of the unpaid liability, even if Ms. Ferkey had embezzled funds from American Water in the manner that appellants allege. Therefore, appellants' allegations regarding Ms. Ferkey's conduct, even if true, do not negate our finding that appellants knew of the unpaid tax for 4Q12 and 1Q13.

As for appellants' authority to pay taxes or to cause them to be paid, appellants do not dispute that they had such authority. In fact, during the hearing, appellants confirmed that they had the authority to sign checks on behalf of American Water. In any event, as American Water's chief executive and financial officers, we find that appellants had the authority to direct the affairs of American Water throughout the audit period, which included the authority to pay taxes. (See *Commercial Sec. Co. v Modesto Drug Co.* (1949) 43 Cal.App.3d 162, 173 [holding that generally, a president and CEO 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].) Nothing in the record indicates that their authority was limited. Accordingly, we conclude that appellants had the authority to cause American Water's taxes to be paid for the periods 4Q12 and 1Q13.

Finally, as for the availability of funds for the payment of taxes, we note that American Water collected sales tax reimbursement on its taxable sales during 4Q12 and 1Q13, and therefore it had those funds available to pay the tax liability. Further, we conclude that American Water had the funds available to pay its sales and use tax liabilities, based on American Water's payments of: wages to its employees totaling \$140,323.88 during 4Q12 through 1Q13; rent to its landlord in the amount of \$3,000 and \$4,000 during 4Q12 and 1Q13, respectively; and payments to suppliers, as reflected in American Water's federal income tax returns for 2012 and 2013 showing Cost of Goods Sold of \$762,336 and \$333,807, respectively. Therefore, we conclude

that American Water had the funds available to pay its sales and use tax liabilities during the liability period.

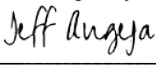
On the basis of the foregoing, all elements have been met to hold appellants personally liable under R&TC section 6829 for American Water’s unpaid sales tax liabilities for 4Q12 and 1Q13.

HOLDING


Appellants are personally liable pursuant to R&TC section 6829 for the self-assessed liabilities identified in American Water’s non-remittance returns for 4Q12 and 1Q13.

DISPOSITION

CDTFA’s action deleting the \$27,177.91 tax liability identified in the March 20, 2014 NOD but otherwise denying appellants’ petitions, is sustained.

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Jeffrey G. Angeja  
Administrative Law Judge

We concur:

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Suzanne B. Brown  
Administrative Law Judge

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Andrew J. Kwee  
Administrative Law Judge

Date Issued: 3/30/2020