

February 3, 2020, appellants indicated that they had no additional evidence on that issue; thus, on that date, the record was closed and the matter was submitted for decision.

ISSUES

1. Whether the February 2, 2007 NODs were timely issued to appellants.
2. Whether appellants are personally liable under R&TC section 6829 for the unpaid liabilities of Sea Elm for the periods May 1, 1998, through October 31, 1998, and December 1 through December 31, 1999.
3. Whether there is reasonable cause to relieve the late payment penalties imposed on Sea Elm that were included in each appellant's liability under R&TC section 6829.

FACTUAL FINDINGS

1. Sea Elm was a California corporation that operated a florist business and held a seller's permit effective July 1, 1996.
2. Appellant-husband was president, chief executive officer (CEO), chief financial officer (CFO), treasurer, and director of Sea Elm, and appellant-wife was secretary and director of Sea Elm.
3. During the hearing in this matter, appellants conceded that Sea Elm collected sales tax reimbursement on its taxable sales during the liability period; that Sea Elm's business operations have terminated; and that at the time Sea Elm's taxes were due, appellants had knowledge of the unpaid tax liabilities at issue.
4. Appellants did not file sales and use tax returns in their own names at any time during the liability period.
5. In August 1998, appellants first consulted with a bankruptcy attorney about Sea Elm filing for bankruptcy. On October 30, 1998, Sea Elm filed a voluntary Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Central District of California. On December 15, 1998, that court dismissed Sea Elm's bankruptcy petition on the grounds that the Central District of California was not the proper venue because appellants resided in the Northern District of California.
6. On or about December 22, 1998, Sea Elm filed non-remittance sales and use tax returns signed by appellant-wife for May 1998, July 1998, August 1998, and October 1998. Also

- in December 1998,² Sea Elm filed its sales and use tax return for November 1998, signed by appellant-wife, and paid the tax due.
7. On January 25, 1999, Sea Elm filed a voluntary Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Northern District of California.
 8. Following the bankruptcy filing, Sea Elm continued to operate the business as a debtor in possession under Chapter 11 of the United States Bankruptcy Code. As the debtor in possession, Sea Elm filed sales and use tax returns and paid tax due, but filed a non-remittance return for December 1999. On April 3, 2000, Sea Elm's bankruptcy was converted to Chapter 7, and Sea Elm ceased operations.
 9. Sea Elm's seller's permit was closed out effective April 10, 2000.
 10. On February 2, 2007, CDTFA issued an NOD to each appellant for the self-assessed liabilities reported in Sea Elm's non-remittance returns, penalties totaling \$2,921.98, and applicable interest.
 11. On February 26, 2007, appellants each filed a timely petition for redetermination. Subsequently, CDTFA determined that appellants are not personally liable for tax, interest, and penalties incurred during the period January 1, 1999, through January 25, 1999, and that appellants are entitled to conditional relief of the amnesty interest penalty, but otherwise CDTFA denied the remainder of the petitions. CDTFA also confirmed that it relieved interest that accrued for the period July 1, 2014, through April 30, 2018.³
 12. This timely appeal followed.

DISCUSSION

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

For NODs issued under R&TC section 6829 prior to January 1, 2009, the NOD must have been mailed within eight years after the last day of the calendar month following the

² On the sales and use tax return, the signature date is December 15, 1998.

³ Appellants indicated that if such relief is available, they are also seeking relief of interest for the period from approximately May 1, 2018, until September 21, 2018, when OTA completed notification to the parties that it had received both appellants' cases. However, appellants have not identified any unreasonable error or delay by OTA during that period. Hence, in light of all circumstances, we need not address whether R&TC section 6593.5 authorizes relief of interest due to an error or delay by OTA.

quarterly period in which the corporation's business was terminated, dissolved, or abandoned, or three years from the date that the responsible person filed a return in his or her own name for the quarter in which the corporate business terminated, whichever period expires earlier.⁴ (R&TC, § 6487(a); former R&TC, § 6829(a); *Appeal of McKoon* (SBE Memo.) 2007 WL 1932801.) A responsible person cannot be held liable under section 6829 until the business that sold or used the property is terminated, without regard to when the corporation incurred the tax debt. (R&TC, § 6829(a).) Where a person does not file any return for a given quarter, a determination for amounts due from that person for that quarter must be issued to that person within eight years of the due date of the return. (R&TC, § 6487(a); former R&TC, § 6829(a); *McKoon, supra*.)

On appeal, appellants argue that CDTFA's pre-2009 procedure of issuing NODs within this eight-year timeframe was contrary to law. Appellants argue that holding individuals subject to an eight-year statute of limitations for a corporation's liability is not legally justifiable given that corporations are only subject to a three-year statute of limitations for corporate liability. Thus, appellants argue that the NODs were untimely under the statute of limitations because they were not issued within three years after the termination of the corporation.

There is no legal authority contradicting application of the eight-year statute of limitations under the present facts. Unlike liability imposed directly on a corporation, 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).) In upholding the application of R&TC section 6829 to liability imposed on a corporation's CFO, the California Court of Appeals noted that the eight-year statute of limitations applied pursuant to R&TC section 6487 if the responsible person had not filed his own sales and use tax return. (*Bd. of Equalization v. Wirick* (2001) 93 Cal.App.4th 411, 418-419.) Here, appellants did not file sales and use tax returns under their own names, and there is no question that the February 2, 2007 NODs were issued within eight years of the last day of the calendar month following the quarterly period in which

⁴ Effective January 1, 2009, section 6829(f) provides that an NOD issued under this section shall be mailed within three years after the last day of the calendar month following the quarterly period in which CDTFA obtains actual knowledge of the termination, dissolution, or abandonment of the business, or within eight years after the last day of the calendar month following the quarterly period in which the business was terminated, dissolved, or abandoned, whichever period expires earlier. Because the NODs issued to appellants were issued prior to that date, subdivision (f) of section 6829 is not applicable here.

Sea Elm terminated operations. Thus, the NODs were timely issued within the then-applicable eight-year statute of limitations, and appellants' arguments to the contrary are not persuasive.

Issue 2. Whether appellants are personally liable under R&TC section 6829 for the unpaid liabilities of Sea Elm for the periods May 1, 1998, through October 31, 1998, and December 1 through December 31, 1999.

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 and failed to remit such tax when due. (R&TC, § 6829(c); Cal. Code Regs, tit. 18, § 1702.5(a).) 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 four 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 (TPP) 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 during the liability period; and (4) the person willfully failed to pay taxes due from the corporation or willfully failed to cause such taxes 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 Sea Elm's business operations have terminated and that Sea Elm collected sales tax reimbursement from its retail sales of TPP during the entire liability period. Thus, the only issues remaining as to the proposed tax liability are whether appellants were responsible persons and whether they willfully failed to pay, or to cause to be paid, Sea Elm's tax liability.

Element 3 - 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, while 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 to establish that the person is a “responsible person.” (Cal. Code Regs., tit. 18, § 1702.5(b)(1).)

On appeal, appellants contend that they were not responsible persons because Sea Elm’s bankruptcy attorneys became the responsible persons due to Sea Elm’s bankruptcy filings; appellants argue that due to this role of the bankruptcy attorneys in Sea Elm’s operations, appellants reasonably perceived that they were no longer responsible persons.

Here, the evidence establishes, and appellants do not dispute, that appellants were the only corporate officers of Sea Elm; appellant-husband was president, CEO, CFO, and director, and appellant-wife was secretary and director.⁵ It is also undisputed that appellants each signed numerous documents related to the corporation’s sales and use tax compliance, such as a blanket resale certificate and the seller’s permit application, and appellant-wife signed the corporation’s sales and use tax returns, including after both the October 1998 and January 1999 bankruptcy filings. These bankruptcy filings were initially under Chapter 11 of the United States Bankruptcy Code, and thus appellants operated Sea Elm as debtors in possession (see, e.g., 11 U.S.C. § 1107(a)) until the bankruptcy was converted to Chapter 7 in April 2000. Thus, the evidence clearly establishes that at all relevant times, appellants’ responsibilities included ensuring the corporation’s compliance with provisions of the Sales and Use Tax Law, even if they delegated responsibilities to other people. Consequently, we find that appellants were responsible for Sea Elm’s tax compliance during the liability period, and accordingly this requirement has been met.

⁵ The president of a corporation is the general manager and CEO of the corporation, unless otherwise provided in the articles or bylaws. (Corp. Code, § 312(a).) A 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, even if that responsibility is delegated to others. (See *Com. Sec. Co. v. Modesto Drug Co.* (1919) 43 Cal.App. 162, 173.)

Element 4 - 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. “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 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).)

The first requirement for willfulness is knowledge. At the hearing, appellants’ representative stated that appellants do not dispute this aspect of willfulness; appellants concede that during and after the liability period, they had knowledge that the taxes were due but not being paid.

Next, we examine whether appellants 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 they 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 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 no dispute that prior to August 1998, both appellants had authority to sign checks and pay the corporation’s tax liabilities. However, appellants argue that they did not have authority to pay the taxes because, as of August 1998, they were following the instructions they

received from their bankruptcy attorneys regarding how Sea Elm's bankruptcy filing would affect their ability to pay pre-bankruptcy petition taxes.⁶ Appellants argue that they were entitled to rely on advice from their attorney, a licensed attorney in good standing in California, and thus appellants claim that they reasonably perceived that they lacked authority to pay Sea Elm's taxes. In support, appellants cite *Gray Line Co. v. Granquist* (9th Cir. 1956) 237 F.2d 390, 395 (*Gray Line*), wherein the court found that under a federal statute,⁷ a taxpayer's failure to pay federal taxes was not willful because the taxpayer had acted in good faith and with reasonable cause in reliance on the advice of both the taxpayer's attorney and a special deputy tax collector.

Initially, we note that the May 1998 taxes were due and payable on June 30, 1998, prior to appellants' August 1998 consultation with Mr. Lucid; there is no argument or evidence that appellants lacked authority to pay the May 1998 taxes at the time they became due and payable. Regarding the July, August, and October 1998 tax liabilities, those taxes remained due and payable after Sea Elm's initial Chapter 11 bankruptcy filing was dismissed on December 15, 1999, and we find no evidence that appellants did not have authority to pay those taxes during the period from December 16, 1998, until January 25, 1999, when Sea Elm filed for Chapter 11 bankruptcy in the Northern District of California; appellants' authority to pay those taxes is demonstrated by appellant-wife's payment of the November 1998 taxes in December 1998.

The applicable law does not support appellants' position that their own perceived lack of authority means that they do not meet the requirement for authority under section 6829. Regarding appellants' reliance on *Gray Line, supra*, 237 F. 2d at p. 395, even to the extent that we might consider by analogy the standards that apply under Internal Revenue Code section 6672, we are unable to find that appellants lacked authority to pay the taxes. As the court explained in *Alioto v. U.S.* (N.D. Cal. 1984) 593 F.Supp. 1402, 1406, in *Gray Line* the taxpayer relied not only on advice of counsel, but also on advice from a government agent, a special

⁶ For example, appellants point to two letters from their bankruptcy attorney, Dan Lucid, regarding Sea Elm's October 1998 bankruptcy filing in the Central District of California. The letters from Mr. Lucid address how bankruptcy law prohibited appellants from paying Sea Elm's pre-bankruptcy petition liabilities (i.e., prior to October 30, 1998) before the Central District case was dismissed. However, nothing in the letters supports a conclusion that appellants did not have authority to pay those liabilities during the period after that dismissal on December 15, 1999, until Sea Elm's January 25, 1999 bankruptcy filing in the Northern District of California.

⁷ *Gray Line, supra*, involves application of former section 1718(c) of title 26, United States Code, which was the precursor to Internal Revenue Code section 6672.

deputy tax collector; on this basis, the *Alioto* court distinguished that where a taxpayer relied solely on advice of counsel, “the degree of reasonableness does not approach that found in *Gray Line*.” (*Alioto v. U.S.* (N.D. Cal. 1984) 593 F.Supp. 1402, 1406.) Moreover, in the present case, it is unclear how, following the dismissal of the Central District bankruptcy filing, appellants could have lacked authority to pay the July through October 1998 tax liabilities while, at the same time, they were able to pay the tax due on the November 1998 sales and use tax return.

Regarding the taxes due for December 1999, appellants’ representative argued at the hearing that the failure to pay the December 1999 taxes must have been due to advice from Sea Elm’s bankruptcy attorneys, but appellants’ representative indicated that he was unable to be more specific because he was not a party to those communications. In written statements, appellants argue that the failure to pay the December 1999 taxes was the fault of the bankruptcy trustee. However, in January 2000, when the December 1999 taxes were due, Sea Elm was operating as a debtor in possession (11 U.S.C., § 1107(a)), and thus appellants, not the bankruptcy trustee, were charged with the responsibility for paying the taxes. Therefore, appellants had authority to pay the December 1999 taxes when they became due, and appellants continued to have that authority until the conversion to Chapter 7 bankruptcy in April 2000.

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).) Based on all of the foregoing, we conclude that appellants had the authority to pay the taxes at issue or to cause them to be paid; hence, this requirement for willfulness has been met.

The third requirement of willfulness is that when the responsible person had actual knowledge, he or she had the ability to pay the taxes but chose not to do so. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(C).) Appellants argue that Sea Elm’s bankruptcy attorneys were the individuals who instructed appellants not to pay the taxes at issue, and thus appellants lacked the ability to pay, or at least reasonably perceived that they lacked such ability.

Here, the evidence shows that during the liability period, Sea Elm made payments to others, such as payment of wages totaling \$92,062 over the period from November 1998 to February 2000. Moreover, on line 9 of its sales and use tax returns during the liability period, Sea Elm deducted sales tax included in total sales reported; thus, Sea Elm collected sales tax reimbursement from its customers on taxable retail sales, and therefore had those funds available

to pay its sales tax liabilities. Regarding appellants' argument that they lacked ability to pay, we find no support in the law for the interpretation that appellants ceded their ability to pay Sea Elm's tax liabilities. Similar to our findings above regarding appellants' authority, the evidence establishes that during the period from December 15, 1998, until January 25, 1999, appellants had the ability to pay the May 1998 through October 1998 taxes. Regarding the December 1999 taxes, appellants operated Sea Elm as debtors in possession, and thus retained the ability to pay Sea Elm's taxes until the April 2000 conversion to Chapter 7 bankruptcy. Under the facts of this case, appellants' asserted perception that they lacked ability to pay is unpersuasive.

In light of all evidence, we conclude that appellants had funds available to pay Sea Elm's 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 summary, we find that appellants 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. As a result, we conclude that CDTFA has established by a preponderance of evidence that appellants did willfully fail to pay the taxes or cause them to be paid. Therefore, appellants are personally responsible within the meaning of R&TC section 6829 for the unpaid tax liabilities incurred by Sea Elm during the liability period.

Issue 3. Whether there is reasonable cause to relieve late-payment penalties that were imposed on Sea Elm and included in appellants' liabilities under R&TC section 6829.

For each of the periods at issue (May 1998, July 1998, August 1998, October 1998, and December 1999), Sea Elm incurred 10-percent late-payment penalties, totaling \$622.61. (R&TC, § 6591.) CDTFA included these penalties in the NODs issued to appellants.

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. (R&TC, § 6592(a).) The person subject to the penalties is the corporation. Thus, if appellants were to establish reasonable cause why Sea Elm failed to timely pay for the periods at issue, then those penalties against the corporation may be relieved and, consequently, appellants' (derivative) liability for the penalties would also be eliminated.


Here, appellants have submitted a signed statement under penalty of perjury setting forth the facts upon which the person bases the claim for relief. (R&TC, § 6592(b).) In support of their request for relief of the penalties, appellants argue the same points that they raised regarding Issue 2 above. Regarding the May 1998 tax liability, there is no evidence or argument that Sea Elm received advice from a bankruptcy attorney during that period. Regarding the tax liability for the July 1998 through October 1998 period, Sea Elm's purported reliance on advice from its bankruptcy attorneys does not establish reasonable cause for Sea Elm's failure to timely pay the taxes, particularly in light of its timely payment of the November 1998 taxes. Regarding the December 1999 tax liability, as we determined above, payment of taxes was within Sea Elm's control as the debtor in possession, and thus there is no indication of reasonable cause for Sea Elm's failure to timely pay the taxes for that month. Consequently, the evidence does not establish reasonable cause and circumstances beyond Sea Elm's control regarding why Sea Elm failed to timely pay the taxes for these periods.

HOLDINGS

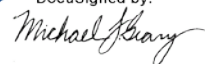
1. The February 2, 2007 NODs were timely issued under the statute of limitations.
2. Appellants are liable, pursuant to R&TC section 6829, for the unpaid liabilities incurred by Sea Elm.
3. Appellants are not entitled to relief of the late-payment penalties that were imposed on Sea Elm and included in appellants’ liabilities under R&TC section 6829.

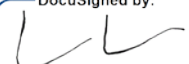
DISPOSITION

CDTFA’s actions in deleting the responsible person liability for the period January 1, 1999, through January 25, 1999, granting conditional relief of the amnesty interest penalty, and relieving interest accrued for the period July 1, 2014, through April 30, 2018, but otherwise denying the remainder of the petitions, are sustained.

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 Suzanne B. Brown
 Administrative Law Judge

We concur:

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 Michael F. Geary
 Administrative Law Judge

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 Andrew J. Kwee
 Administrative Law Judge

Date Issued: 4/21/2020