

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
R. YAU

) OTA Case No. 18012001
) CDTFA Account No. 053-011875
) CDTFA Case ID 746066
)
)
)

OPINION

Representing the Parties:

For Appellant: R. Yau

For Respondent: Joseph Boniwell, Tax Counsel

D. CHO, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 6561, R. Yau (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), determining a personal tax liability of \$50,350.02, a penalty of \$8,817.70, and applicable interest, for the period April 1, 2008, through December 31, 2009 (liability period), for the unpaid liabilities of Habitant Building Supply & Lumber, Inc (Habitant).²

Appellant waived his right to an oral hearing; therefore, the matter is being decided based on the written record.

¹ Sales taxes were formerly administered by the State Board of Equalization (BOE). In 2017, functions of the BOE relevant to this appeal were transferred to CDTFA. (See Gov. Code, § 15570.22.) For ease of reference, when referring to acts or events that occurred before July 1, 2017, “CDTFA” shall refer to the BOE; and when referring to acts or events that occurred on or after July 1, 2017, “CDTFA” shall refer to CDTFA.

² By letter dated November 9, 2018, CDTFA stated that the unpaid tax liability was \$19,959.34 tax, plus accrued interest of \$26,705.84, and a penalty of \$8,817.70. CDTFA also listed an amount of \$950 for a collection cost recovery fee; however, the NOD and the Decision and Recommendation did not include the collection cost recovery fee. As a result, it is our understanding that CDTFA made an error in listing the collection cost recovery fee in its November 9, 2018 letter.

ISSUES

1. Whether appellant is personally responsible for the unpaid liabilities of Habitant for the period at issue.
2. Whether Habitant had reasonable cause for its failure to timely pay its sales and use tax liability.

FACTUAL FINDINGS

1. Habitant was a California corporation that made retail sales of lumber and other building supplies. Appellant was the chief executive officer (CEO) of Habitant and had an ownership interest in the corporation.
2. Appellant signed an application for a seller's permit for Habitant with CDTFA dated June 2, 2007, and listed himself as CEO.
3. Habitant filed its sales and use tax returns for the second and fourth quarters of 2008 and the third and fourth quarters of 2009, but it did not remit any payment with these returns. Because Habitant did not timely pay its sales and use tax liabilities, CDTFA imposed a 10-percent late-payment penalty for these quarters. Appellant signed the sales and use tax return for the second quarter of 2008, which was dated July 31, 2008. Appellant also electronically filed the sales and use tax returns for the third and fourth quarters of 2009 on November 6, 2009, and January 10, 2010, respectively.
4. On April 29, 2010, Habitant informed CDTFA that the corporation had filed for bankruptcy. CDTFA closed Habitant's seller's permit with an effective close-out date of March 31, 2010. Appellant conceded that the business terminated.
5. After the closure of Habitant's seller's permit, CDTFA began an investigation to determine whether appellant could be held personally liable for Habitant's unpaid tax liabilities pursuant to R&TC section 6829.
6. Habitant collected sales tax reimbursement on its sales of tangible personal property. Appellant conceded that Habitant collected sales tax reimbursement on sales for which it received payment.
7. CDTFA found that appellant was a person responsible for sales and use tax matters based on the following: (1) appellant filed Habitant's seller's permit application; (2) appellant signed Habitant's sales and use tax return for the second quarter of 2008; (3) appellant

- electronically filed Habitant's sales and use tax returns for the third and fourth quarters of 2009; (4) appellant filed Requests for Extension of Time to File a Tax Return for the second and fourth quarters of 2008; (5) appellant spoke with CDTFA on numerous occasions regarding Habitant's sales and use tax matters during and after the liability period, which were recorded in CDTFA's Automated Compliance Management System (ACMS); (6) appellant attended a conference with CDTFA staff at a district office on June 3, 2009; (7) appellant was identified as a person responsible for sales and use tax matters by employees of Habitant; and (8) appellant signed Installment Payment Agreement forms as CEO on November 10, 2008, and November 7, 2009.
8. CDTFA further determined that appellant willfully failed to pay or to cause to be paid Habitant's tax liability. Specifically, CDTFA concluded that appellant was aware of the tax liability based on appellant's role in the corporation, signature on numerous documents requesting extensions to pay Habitant's tax liability, and appellant's signature or filing of the non-remittance sales and use tax returns. CDTFA also determined that appellant had the requisite authority to have been able to pay or direct payment of Habitant's tax liabilities. Lastly, CDTFA found that Habitant had funds available to have paid its tax liability, which were used for other purposes.
 9. Based on CDTFA's investigation, CDTFA determined that appellant was responsible for Habitant's unpaid tax liabilities, and CDTFA issued the NOD to appellant. Appellant filed a timely petition for redetermination and attended an appeals conference with CDTFA's Appeals Bureau.
 10. On June 30, 2016, CDTFA's Appeals Bureau issued its Decision and Recommendation finding that appellant was personally liable for Habitant's unpaid tax liabilities. The Decision and Recommendation also found that Habitant did not have reasonable cause for its failure to timely pay its tax liabilities.
 11. This timely appeal followed.
 12. Appellant continues to argue that he was not the only person responsible for sales and use tax matters. In support of this argument, appellant has provided an affidavit from a previous employee of Habitant, which states that appellant was not in charge of the corporation, but the other corporate officers were.

13. Appellant also provided some records for Habitant, which appellant argues is evidence that Habitant was owed a significant amount of money in accounts receivables. As a result, appellant states that Habitant did not collect all of the taxes that CDTFA has included in the dual determination to appellant.

DISCUSSION

Issue 1. Whether appellant is personally liable for the unpaid liabilities of Habitant for the liability period.

R&TC section 6829(a), provides that upon termination, dissolution, or abandonment of a business of a corporation, 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 was under a duty to act for the corporation in complying with any requirement of the Sales and Use Tax Law, is personally liable for the corporation's unpaid tax, interest, and penalties if the person willfully failed to pay or to cause to be paid any taxes due from the corporation. (See also Cal. Code Regs., tit. 18, § 1702.5(a).) CDTFA has the burden to prove the requirements of personal liability by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 1702.5(d).)

There is no dispute that Habitant's business terminated on March 31, 2010. Thus, the remaining elements of R&TC section 6829 are in dispute and are at issue in this appeal.

(a). Collection of sales tax reimbursement.

Personal liability shall only apply if CDTFA establishes that the business sold tangible personal property in the conduct of its business and collected sales tax reimbursement on the selling price. (Cal. Code Regs., tit. 18, § 1702.5(a)(1).) Here, the evidence establishes that Habitant generally collected sales tax reimbursement on the sale of tangible personal property in the ordinary course of its business. However, appellant argues that Habitant had an outstanding amount of account receivables, which would mean that Habitant did not collect the amount of tax that CDTFA is asserting against appellant. In support of this argument, appellant provided a balance sheet for the period January 1, 2009, through February 28, 2010, that listed an accounts receivable amount of \$108,152.65. Appellant also provided monthly statements from the customers that appeared to have a balance due.

CDTFA responded that appellant has failed to demonstrate that Habitant is entitled to a bad debt deduction pursuant to California Code of Regulations, title 18, section 1642.

The amount at issue is based on the non-remittance returns that Habitant filed, and Habitant has not filed amended returns or filed a claim for refund for the alleged bad debt that it incurred. Furthermore, appellant failed to establish that any portion of the alleged account receivable balance is allocable to taxable sales that the corporation reported during the liability period, or that the corporation meets the requirements to claim a bad debt deduction, including, for example, showing that the amounts were charged off for income tax purposes. (Cal. Code Regs., tit. 18, § 1642(a).) Therefore, we find the evidence that appellant provided is insufficient to establish that Habitant did not collect the sales tax reimbursement that was reported during the liability period, or that an adjustment is warranted for bad debts. Accordingly, we find that CDTFA has met its burden of proof with respect to this element.

(b). Person responsible for sales and use tax matters.

A responsible person includes any person having control or supervision of, or who is charged with the responsibility for, the filing of returns, the payment of tax, or who has a duty to act for the corporation in complying with any provision of the Sales and Use Tax Law. (Cal. Code Regs., tit. 18, § 1702.5(b)(1).) Here, numerous documents with appellant's signature establish that appellant was heavily involved in Habitant's sales and use tax matters. Specifically, the sales and use tax returns were either signed by appellant or electronically filed by appellant, appellant communicated with CDTFA staff members regarding Habitant's unpaid sales and use tax liability, appellant signed documents requesting an installment payment plan for Habitant's unpaid sales tax liability, and appellant signed a request to file a sales and use tax return late. These facts weigh heavily in favor of a finding that appellant was a person responsible for sales and use tax matters.

Appellant has not disputed any of this evidence. Instead, appellant appears to argue that he should not be held liable as the only responsible person. There is no provision in R&TC section 6829 or California Code of Regulations, title 18, section 1702.5 that limits personal liability to only one individual. Instead, CDTFA can issue a dual determination against any individual or individuals as long as all of the requirements to impose responsible person liability are met. (See R&TC, § 6829; see also Cal. Code Regs., tit. 18, § 1702.5.) Therefore, we find that appellant's argument and evidence that a different individual or individuals within the corporation should be held liable instead of appellant has no bearing in this appeal.

Based on the foregoing, we find that CDTFA met its burden as to this requirement, and appellant was a person responsible for Habitant's sales and use tax matters.

(c). Willfulness.

Personal liability can only be imposed on a responsible person if that person willfully failed to pay or to cause to be paid any taxes due from the corporation. (R&TC, § 6829(a), (b).) For purposes of R&TC section 6829, "willfully fails to pay or to cause to be paid" means that failure was the result of an intentional, conscious, and voluntary course of action. (R&TC, § 6829(d); see also 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).) A person is regarded as having willfully failed to pay taxes, or to cause them not to be paid, where the person had knowledge that the taxes were not being paid; had the authority to pay the taxes, or to cause them to be paid; and had the ability to pay the taxes but chose not to do so. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(A)-(C).)

The first requirement for willfulness is knowledge, meaning that on or after the date the taxes were due, the person had actual knowledge that the taxes were due but not being paid. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(A).) Here, the evidence shows that appellant was aware of the liabilities on or after the date the taxes were due. Specifically, the November 7, 2009 installment payment agreement to pay Habitant's liabilities for the second and fourth quarters of 2008 through a payment plan, which was signed by appellant, establishes that appellant was aware of these unpaid liabilities. In addition, Habitant's electronically filed non-remittance sales and use tax returns for the third and fourth quarters of 2009, which were filed by appellant, indicate that appellant was aware that Habitant owed tax for these respective quarters. Furthermore, we find that because appellant filed the returns reporting that payment was not being made with the returns, appellant was also aware that the returns did not include the necessary payment. Lastly, according to an ACMS comment dated March 8, 2010, CDTFA staff had a meeting with appellant and other corporate officers at a district office in which CDTFA staff discussed Habitant's unpaid liabilities.

Although appellant contends that he did not know about the liability because he was under the impression that a different corporate officer was handling the payment of the liability, appellant has not provided any documentation to support this contention. In addition, appellant has not disputed the evidence that CDTFA provided into the record in this appeal. Furthermore,

based on the evidence in this appeal, appellant was involved with Habitant's sales and use tax matters and was actively engaged in communicating with CDTFA staff regarding Habitant's unpaid sales and use tax liabilities, which would indicate that appellant was aware of the unpaid liabilities at issue in this appeal. Therefore, we find that CDTFA has met its burden of demonstrating that appellant had the requisite knowledge during and after the liability period.

The second requirement is that the responsible person must have had the authority to pay or to cause the corporation's taxes to be paid on the date that the taxes came due and when the responsible person had knowledge that the taxes were due but not being paid. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(B).) Here, there are copies of checks that bear appellant's signature, which indicates that appellant could direct payments and had the requisite authority. Although appellant states that some of the checks were forged, appellant does not dispute that he had check signing authority. In addition, appellant was the CEO of the corporation during and after the liability period, and as discussed above, he had the authority to enter into payment plans on behalf of Habitant with CDTFA. Therefore, we find that CDTFA has met its burden of establishing that appellant had the requisite authority when he had knowledge of the liability, which was during and after the liability period.

Lastly, the third requirement is that the responsible person had the ability to pay the taxes but chose not to do so when the responsible person had knowledge that the taxes were due but not being paid. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(C).) CDTFA states that Habitant reported gross sales of \$472,465, \$273,472, \$474,935, \$178,927, \$101,225, \$80,226, and \$90,943 for the liability period. In addition, CDTFA provided evidence that Habitant reported gross sales of \$30,090 for the first quarter of 2010, which is after the liability period at issue and when appellant continued to have knowledge of the unpaid taxes. Not only does this evidence indicate that Habitant had the total gross proceeds from these sales available, but Habitant also had the sales tax reimbursement that it collected with respect to these sales. CDTFA also provided evidence that Habitant paid wages of \$50,810 and \$19,500 for the fourth quarter of 2008 and the first quarter of 2009, respectively. Aside from his allegation of \$108,152.65 in unpaid accounts receivables, which we determined above was insufficiently supported, appellant has not disputed this evidence or explained why the corporation did not have the ability to pay the taxes. Therefore, we find that CDTFA met its burden as to this third requirement.

Based on the foregoing, we find that CDTFA met its burden on all of the elements of R&TC section 6829, and appellant is personally responsible for the unpaid liabilities of Habitant.

Issue 2. Whether Habitant had reasonable cause for its failure to timely pay its sales and use tax liability.

Although there is no provision in R&TC section 6829 that would allow for the relief of a late-payment penalty as to the individual, R&TC section 6592(a), provides that CDTFA may relieve a late-payment penalty if it finds that a person's failure to timely pay tax 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).) Therefore, if reasonable cause is shown for Habitant's failure to timely pay its taxes, the penalty may be relieved as to Habitant, which would result in the elimination of appellant's derivative liability of the penalty.

Here, the penalty at issue is a result of Habitant's failure to timely pay its taxes for the second and fourth quarters of 2008 and the third and fourth quarters of 2009.³ Although appellant argues that Habitant had severe cash flow problems due to the outstanding accounts receivables and downturn in the real estate market, these reasons do not constitute reasonable cause. An adverse financial situation and an economic downturn do not constitute reasonable causes for Habitant's failure to timely pay its tax liabilities, particularly given that Habitant collected sales tax reimbursement from its customers and used those funds for other purposes rather than pay its tax liability. (See *Ashlan Park Center LLC v. Crow* (2015) 233 Cal.App.4th 1274, 1283.) Accordingly, we conclude that appellant has failed to establish reasonable cause for Habitant's failure to timely pay its tax liabilities.

³ According to CDTFA's Decision and Recommendation, Habitant's penalty for the third quarter of 2009 was a late-filing and late-payment penalty that was limited to 10 percent. For ease of reference, we are only referring to the late-payment penalty but both penalties would apply to this quarter.

HOLDINGS

1. Appellant is personally responsible for the unpaid liabilities of Habitant for the period at issue.
2. Habitant did not have reasonable cause for its failure to timely pay its taxes.


DISPOSITION

CDTFA’s decision to deny appellant’s petition for redetermination is sustained.

DocuSigned by:
Daniel Cho

 Daniel K. Cho
 Administrative Law Judge

We concur:

DocuSigned by:


 Andrew J. Kwee
 Administrative Law Judge

DocuSigned by:
Alberto T. Rosas

 Alberto T. Rosas
 Administrative Law Judge

Date Issued: 2/24/2020