

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

L. GASICH) OTA Case No. 19034563
) CDTFA Case ID: 858777
) CDTFA Account No. 53-013969
)
)
)**OPINION**

Representing the Parties:

For Appellant:

L. Gasich, Taxpayer

For Respondent:

Sunny Paley, Tax Counsel
Jason Parker, Chief, Headquarters
Operations Bureau
Monica Silva, Tax Counsel IV

A. KWEE, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, L. Gasich (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) dated December 26, 2014. The NOD is for tax of \$32,083, penalties of \$3,208.30, and applicable interest, for the period March 1, 2011, through December 31, 2011 (liability period). The NOD reflects CDTFA’s determination that appellant is personally liable as a responsible person for the unpaid tax liabilities of South Bay Organic Solutions, Inc. (SBOS).

Administrative Law Judges Andrew J. Kwee, Jeffrey G. Angeja, and Sheriene Anne Ridenour held an oral hearing for this matter in Sacramento, California, on January 29, 2020. At the conclusion of the hearing, the Office of Tax Appeals closed the record and this matter was submitted for decision.

¹ Sales taxes were formerly administered by the 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 referring to acts or events that occurred before July 1, 2017, “CDTFA” shall refer to its predecessor, the board.

ISSUE

Whether appellant is personally responsible for the unpaid liabilities of SBOS?

FACTUAL FINDINGS

1. On or about March 1, 2011, SBOS began operating a medical marijuana dispensary in San Jose, California. In connection with this business, appellant filed an application for a seller's permit with CDTFA dated March 1, 2011, and reporting a start date of March 1, 2011, for SBOS's business activities. Appellant signed the application on behalf of SBOS, and reported himself as the only officer of the corporation (the president), and the person responsible for maintaining the corporation's business records.
2. On March 1, 2011, appellant filed a Statement of Information with the California Secretary of State (SOS) on behalf of SBOS. Appellant reported to SOS that he was the Chief Executive Officer (CEO), Secretary, and Chief Financial Officer of the corporation.
3. SBOS terminated its business operations on December 31, 2011, and its corporate status was subsequently dissolved with SOS.
4. On January 31, 2012, SBOS filed a non-remittance return for the liability period. The return reported that the return preparer was L. Gasich, president. At the oral hearing, appellant testified that he filed this return with CDTFA.
5. Following the termination of the business, CDTFA began investigating potential responsible persons for the unpaid tax liability of SBOS. During the course of the investigation, on August 25, 2014, appellant informed CDTFA that another person, Todd Hill, wrote all the checks, held the checkbook, and had check signing authority for SBOS.
6. CDTFA issued a demand to furnish information to SBOS's landlord. SBOS's landlord provided copies of rent checks. All of the checks were signed by appellant, and drawn from an account with First Republic Bank, which was owned by SBOS. According to the landlord's file, SBOS's monthly rent payment was \$3,660, plus an additional \$1,074.40 for taxes, insurance, and access to the common area. The lease started on March 1, 2011, and terminated on December 31, 2011. SBOS paid \$42,486.40 to the landlord during the liability period, with the final payment made via check dated December 16, 2011.
7. CDTFA obtained SBOS's bank information from First Republic Bank. According to the bank's records, appellant was SBOS's president and he was also the only authorized signer for SBOS's bank account. According to copies of cancelled checks, the signatures

on the cancelled checks appear to match the copy of appellant's signature on the bank signature card that was on file with First Republic Bank. At the oral hearing, appellant did not dispute that he was the only authorized signer on the corporation's bank account. Appellant did, however, testify that First Republic Bank may nevertheless have made payments from SBOS's account at the direction of Todd Hill, because Todd Hill had a good working relationship with the bank managers at First Republic Bank.

8. CDTFA contacted Todd Hill, and Todd Hill denied that he was the owner of SBOS. Todd Hill told CDTFA that his relationship to appellant was that he subleased the business premises operated by SBOS to appellant, and appellant regularly asked to borrow money from him. At the oral hearing, appellant testified that appellant had no ownership interest in SBOS. Furthermore, CDTFA and appellant both conceded that there was no documentary evidence in the record regarding the actual ownership of SBOS.
9. On September 8, 2014, CDTFA contacted appellant to discuss his relationship to Todd Hill, and asked appellant whether Todd Hill was dangerous or if appellant had any reason to be afraid of Todd Hill. Appellant informed CDTFA that Todd Hill directed the payments; however, Todd Hill was "a family man with [two] children," had "no bite behind the bark," and was "no physical danger to anyone." Appellant also informed CDTFA that SBOS collected an amount for sales tax from its customers, and that the tax amount was automatically charged at the cash register.
10. According to the Employee Development Department (EDD), SBOS reported paying wages of \$86,442.94 to employees during the liability period. EDD's records also reflect that appellant filed for unemployment insurance with a claim effective start date of January 1, 2012, and that the calculation of the benefit amount included wages reportedly paid by SBOS to appellant during the second and third quarters of 2011 (wage data for the fourth quarter of 2011 was not available at the time the claim was filed).
11. According to Pacific Gas & Electric Company (PG&E), SBOS paid \$2,281.24 to PG&E for utility service during the liability period, and the contact person for SBOS's account was appellant, who was identified on PG&E's records as the CEO.
12. CDTFA issued the NOD to appellant for the unpaid liabilities of SBOS on December 26, 2014, which appellant petitioned.

13. On March 5, 2015, appellant provided CDTFA a copy of an email between Todd Hill and appellant. The email was sent September 8, 2011, from Todd Hill to appellant. In the email, Todd Hill responds “Love to hear your thoughts,” in response to the following inquiry from appellant: “sales have flattened out and as business partners we need to be developing and working out a plan together.”
14. On March 10, 2015, Robin Saunders, former assistant manager for SBOS, completed a responsible person questionnaire and submitted it to CDTFA. In her email to CDTFA, Ms. Saunders states that she worked as the “assistant manager during the time frame in 2011 that Mr. Gasich was the general manager.” Ms. Saunders reported that she was employed with the business from March 2011 through November 2011, and she explained that she reported to appellant and Todd Hill. She also states that Todd Hill “ultimately controlled all financial decisions” for SBOS.
15. CDTFA denied appellant’s petition on May 4, 2017, and this timely appeal followed.
16. On appeal, appellant contends that he left the corporation after six months of employment, on or about August 1, 2011.²

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) collection of sales tax reimbursement; (2) termination of the business; (3) responsible person; and (4) willful failure 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).)

² Appellant also contends that, according to a newspaper article, and other information, Todd Hill was arrested on December 16, 2017, for financial crimes allegedly committed between March 2013 and July 2014, as evidence that Mr. Hill should be responsible for SBOS. Since it is undisputed that these charges are unrelated to any business dealings with SBOS, we do not address this contention further.

Element 1 – Sales Tax

According to CDTFA’s business records, appellant admitted that sales tax reimbursement was collected at the point of sale (cash register) from SBOS’s customers. Furthermore, there is no documentary evidence in the record to contradict this admission, and neither party contends that SBOS did not collect the tax. Therefore, we find that this element is met.

Element 2 – Termination

The “termination” of the business of a corporation includes discontinuance or cessation of all business activities for which the corporation was required to hold a seller’s permit. (Cal. Code Regs., tit. 18, § 1702.5(b)(3).) Here, SBOS reported to CDTFA the termination of its business operations effective December 31, 2011, terminated its lease effective the same date, and subsequently dissolved its corporate status with SOS. Therefore, we find that this element is met.

Element 3 – Responsible Person

A responsible person includes any person having control or supervision of, or who is charged with the responsibility for the filing of returns, or the payment of tax, or who has a duty to act for the corporation in complying with the Sales and Use Tax Law. (Cal. Code Regs., tit. 18, § 1702.5(b)(1).) Personal liability may only be imposed if appellant was a responsible person at the time the corporation made the sales, collected the sales tax reimbursement, and failed to remit it to the board. (R&TC, § 6829(c); Cal. Code Regs., tit. 18, § 1702.5(a).)

On paper, appellant is the archetype example of a “responsible person” for purposes of personal liability under the sales and use tax law. Appellant was the only authorized signer on the corporate bank account. Appellant was, and held himself out to be, the corporate President, CEO, Secretary, and Chief Financial Officer of SBOS. For that matter, appellant was the only officer of SBOS. On paper, appellant was ultimately responsible for SBOS’s compliance with sales and use tax matters and, admittedly, appellant filed the corporation’s only non-remittance tax return. Although appellant contends Todd Hill was pulling the financial strings (which is discussed below, under willfulness), appellant does not dispute that he was, in fact, the only authorized check signer, the only corporate officer of SBOS, and the person who filed the non-remittance sales tax return reporting the unpaid liability at issue in this appeal. Therefore, the evidence overwhelmingly supports finding that appellant was a person responsible for SBOS’s

sales and use tax compliance. We conclude that appellant was a responsible person within the meaning of R&TC section 6829.

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, we find appellant had knowledge of the unpaid taxes during the time he was a responsible person, because appellant signed and filed the non-remittance return for which he is being held personally liable. Furthermore, although appellant contends Todd Hill made the financial decisions, the emails from Todd Hill that appellant submitted as an exhibit show that appellant was included on these emails discussing financial matters. Appellant was also the person who applied for a seller’s permit for SBOS, and he admitted to CDTFA that SBOS collected the sales tax from customers, evidencing appellant’s knowledge that SBOS collected the sales tax and was required to pay the sales tax collected from its customers to the state. Therefore, as the only authorized check signer on the corporate bank account,³ and the person who reported the unpaid liability to the state, appellant must have known that SBOS did not pay the sales tax that it collected to the state.

³ We do not find sufficient evidence in the record to support appellant’s contention that the bank would make payments from SBOS’s bank account at the direction of Todd Hill based on a good working relationship with the bank managers, and in absence of a signature card on file.

The second requirement of willfulness is that the person must have had the authority to pay or to cause to be paid any taxes due from the corporation. (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 (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(B)), a person who had authority to direct payment but merely deferred to the decision of another individual has the requisite authority. Here, appellant had check signing authority, and did, in fact, sign checks for SBOS to other creditors. Further, as the *sole* corporate officer and *sole* authorized check signer for SBOS, we are not aware of any other person who would have legal authority to pay or cause the taxes to be paid to the state.

In his defense, to rebut the documentary evidence tending to establish that appellant had authority to pay the taxes within the meaning of R&TC section 6829, appellant contends that Todd Hill controlled all the finances. Appellant was unable to provide any documentary evidence to show that Todd Hill ever overrode a financial decision made by appellant, or that he ever instructed appellant that appellant could not make a tax payment. For example, in one email provided by appellant, Todd Hill asks Sue Goodwin, an accountant with Bells & Whistles LLC, a third-party firm which provided accounting services to SBOS, whether a \$2,000 tax bill had been paid to the City of San Jose. In the email, Todd Hill writes, “what amount did you send? I gave you the money for this, the 2k is money owed to me that I have not collected.” While appellant asserts this is evidence that Todd Hill controlled the finances, this exchange is also consistent with Todd Hill’s explanation that he was not an owner and he merely loaned money to appellant for the business. Evidence that Todd Hill asked that payments be made, or loaned money to SBOS, is insufficient to establish that appellant was acting solely under the direction and control of Todd Hill in failing to pay the taxes to the state.

Furthermore, when CDTFA inquired about the control Todd Hill exercised over appellant, appellant conceded to CDTFA that Todd Hill was a family man, and not a danger to anyone. Neither party has offered any documentary evidence regarding the ownership of the corporation, and Todd Hill, the person whom appellant alleges is the owner, has denied having an ownership interest in the corporation. While it may be the case that appellant deferred financial decisions to Todd Hill, based on his role as an investor and silent business partner, this is insufficient to establish that appellant was effectively forced to act under the direction and

control of Todd Hill, when making financial decisions such as whether to pay the sales tax collected from customers to the state.

Appellant separately contends that he left the corporation on August 1, 2011, and as such he had no authority to pay the taxes at issue. We find this contradicted by the evidence in the record. First, appellant claimed unemployment benefits from the EDD, and the claim effective date was January 1, 2012, which is consistent with the reported closeout of the business: December 31, 2011. Second, appellant's own email, dated September 8, 2011, explains that SBOS's sales have "flattened out" and appellant refers to Todd Hill as his "business partner" in that email. This evidence strongly suggests that appellant was still working for SBOS as of September 8, 2011, the date of the email. Furthermore, the assistant manager, Robin Saunders, stated that she reported to appellant during her period of employment: March through November of 2011. Finally, appellant admits filing SBOS's sales tax return on January 31, 2012. After weighing all the evidence, we have insufficient evidence to find that appellant left the corporation on August 1, 2011.

Appellant failed to provide contemporaneous documentation to support his testimony that he was acting under the direction and control of Todd Hill. We believe the balance of the contemporaneous evidence is sufficient to show that appellant had authority to pay the sales taxes to CDTFA. Appellant's position within the corporation, as the CEO, President, Chief Financial Officer, and the only authorized check signer, is also consistent with a finding of authority to pay the sales taxes. Appellant did not offer credible evidence to refute that he had such authority. Therefore, we conclude that appellant had the requisite authority.

Finally, we turn to ability to pay. Here, the evidence further establishes that during a period in which the corporation collected \$32,083 in sales tax reimbursement from its customers that it did not pay to the state, the corporation nevertheless paid rent of \$42,486.40 to the landlord, wages of \$86,442.94 to employees, and \$2,281.24 to PG&E. Additionally, since the business continued to engage in business, it must have also made payments to its suppliers. Therefore, we find that appellant had the ability to pay the liability to the state.

During the liability period, appellant was the only authorized check signer, and the evidence indicates he was kept in the loop on financial matters, and signed check payments, including rent payments to the landlord. Thus, we find that, either due to appellant's own affirmative decisions to pay other creditors instead of the state, or his voluntary deferral to

Todd Hill to make such decisions, appellant willfully failed to pay, or cause to be paid, the sales tax liabilities to the state within the meaning of R&TC section 6829. Therefore, we conclude that appellant is personally responsible for the unpaid liabilities of the corporation within the meaning of R&TC section 6829.

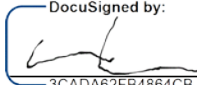
We find that CDTFA has established that all elements required by R&TC section 6829 to impose responsible person liability have been met and that appellant is personally liable for the amounts at issue.

HOLDING

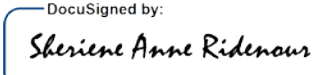
Appellant is personally liable for the sales tax liabilities incurred by SBOS for the period March 1, 2011, through December 31, 2011.

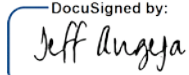
DISPOSITION

We sustain CDTFA’s decision to deny the petition.

DocuSigned by:

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Andrew J. Kwee
Administrative Law Judge

We concur:

DocuSigned by:

67F043D83EF547C
Sheriene Anne Ridenour
Administrative Law Judge

DocuSigned by:

9D390BC3CC814A9
Jeffrey G. Angeja
Administrative Law Judge

Date Issued: 2/24/2020