

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

B. KIDD) OTA Case No. 18043009
) CDTFA Case ID: 692607
) CDTFA Acct. No.: 053-010529
)
)
)**OPINION**

Representing the Parties:

For Appellant:

Gary S. Vanderwehe, Attorney

For Respondent:

Amanda Jacobs, Tax Counsel III

J. ALDRICH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, B. Kidd (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)¹ denying appellant's petition for redetermination of the October 2, 2012 Notice of Determination (NOD). The NOD is for \$81,344.37 in tax and applicable interest, for the period October 10, 2008, through June 15, 2009 (liability period).² The NOD reflects CDTFA's determination that appellant is personally liable as a responsible person for the unpaid tax liabilities of Butter Restaurant, LLC, dba Apple Restaurant and Lounge (Butter).

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

ISSUE

Whether appellant is personally responsible for the unpaid liabilities of Butter.

¹ Sales taxes were formerly administered by the State Board of Equalization (BOE). On July 1, 2017, functions of the BOE relevant to this case were transferred to CDTFA. (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 According to CDTFA's Decision and Recommendation, the disputed amount of tax is \$56,080.78 (plus accrued interest) based on payments made by Butter's successor and payments attributable to Butter or appellant.

FACTUAL FINDINGS

1. Butter was engaged in business as a restaurant in California.
2. California Restaurant Authority, Inc. (CRA) did business as Pearl Restaurant in West Hollywood from July 2003 through December 2007. S. Marlton was the managing director of CRA and allegedly the owner. On or about February 7, 2008, CRA sold the business to Butter for the reported price of \$800,000. H. Kern and R. Kory assisted appellant in the formation of Butter. Initially, appellant was the sole LLC member, but KR Capital Partners (KRCP) later became an LLC member of Butter.
3. CDTFA issued the seller's permit effective February 22, 2008, but it was subsequently amended to February 11, 2008, pursuant to Butter's request. Butter reported no taxable sales for the first quarter of 2008 (1Q08) and 2Q08. Butter e-filed its sales and use tax return (SUTR) for 3Q08 on October 29, 2008, reporting taxable sales of \$184,070. Thereafter, Butter reported taxable sales as follows: \$726,716 for 4Q08; \$728,219 for 1Q09; \$509,130 for 2Q09; and \$88,440 for 3Q09 (July 1 through 15, 2009).
4. Butter's liability stems from the following filings without payment: \$3,662.85 for 4Q08 SUTR; \$22,337 for the January 2009 prepayment; \$17,746 for the February 2009 prepayment; \$15,269.66 for the April 2009 prepayment; \$3,382.86 for 1Q09 SUTR; and \$18,996 for the May 1, 2009, through June 15, 2009 prepayment.
5. CDTFA's Automated Compliance Management System (ACMS) contains contemporaneous notes regarding Butter's collection of sales tax reimbursement and related matters:
 - a. On July 12, 2012, J. Salen confirmed she worked at Butter, indicated that Butter collected sales tax reimbursement, and recalled that appellant would come and go.
 - b. On July 12, 2012, M. Nordin confirmed she worked at Butter, indicated that Butter collected sales tax reimbursement, and that she did not remember anyone with appellant's name.
6. Appellant's name, signature, title, or position appear on Butter-related documents as follows:
 - a. Butter's statement of information form filed with the Secretary of State's (SOS) office on November 9, 2007, indicates that appellant is Butter's managing member.

- b. On December 7, 2007, appellant allegedly signed a credit agreement and personal guaranty with Southern Wine & Spirits (SWS), as owner. As an appendix thereto, appellant allegedly signed a resale certificate as owner.³
- c. On January 25, 2008, appellant signed Butter's seller's permit application, Form BOE-400-SPA, with the title of managing member.⁴
- d. Butter's City of West Hollywood New Business License Tax Form, processed on February 19, 2008, indicates appellant is the owner of Butter. Similarly, Butter's Business License Application denotes appellant is the owner. Also, Butter's business license, expiration date of July 31, 2009, lists appellant as owner.
- e. On February 28, 2008, appellant signed Butter's statement of information form, with the title of owner. Butter filed the form with SOS on March 3, 2008.
- f. On or about March 6, 2008, appellant signed the Air Commercial Real Estate Association Guaranty of Lease (lease 1) as guarantor for Butter, the addenda to lease (lease 2) on behalf of Butter as the lessee, and the Air Commercial Real Estate Association Guaranty of Lease (lease 3), the title is left blank under appellant's signature.⁵
- g. Second Amended Restated Operating Agreement (OA2) for Butter executed on June 23, 2008, by appellant and R. Kory. OA2 states that Butter was formed by appellant as the sole LLC member on October 31, 2007, when Butter executed an Asset Purchase Agreement with CRA to purchase Pearl. OA2 further explains that Butter would be managed by a Board of Managers. Appellant and S. Marlton are identified as Butter's LLC managers.
- h. On June 23, 2008, appellant signed the Request for Taxpayer Identification Number and Certification with the title of partner. S. Marlton signed for Butter as director of Butter.

³ Appellant asserts that the signature is a forgery. On March 25, 2015, CDTFA withdrew its reliance on the SWS application because it was not confident that it was appellant's signature.

⁴ The handwriting expert errantly refers to this form as BOE-400-BPA.

⁵ For ease of reference, we adopted the nomenclature of the handwriting expert regarding the lease 1, lease 2, lease 3, which are respectively referred to as K5, K6, and K7 in the expert's report.

- i. Appellant signed the Butter Finance Agreement, effective date of June 23, 2008, as LLC manager of Butter.⁶
- j. Appellant allegedly signed a partially redacted check, dated September 22, 2008, that appears to be a payment from Butter to CDTFA.⁷
- k. Appellant allegedly signed the September 22, 2008, Sales and Use Prepayment Form (BOE-1150).⁸
- l. Twenty-one Wells Fargo Bank checks signed by appellant and drawn on Butter's account: no. 2606 dated November 20, 2008; no. 2794 dated December 5, 2008; no. 3007 dated December 19, 2008; no. 3008 dated December 19, 2008; no. 3034 dated December 19, 2008; no. 3159 dated January 5, 2009; no. 3374 dated January 20, 2009; no. 3354 dated January 20, 2009; no. 3342 dated January 20, 2009; no. 3379 dated January 20, 2009; no. 3383 dated January 20, 2009; no. 3347 dated January 20, 2009; no. 3402 dated January 20, 2009; no. 3391 dated January 20, 2009; no. 3350 dated January 20, 2009; no. 3357 dated January 20, 2009; no. 3403 dated January 20, 2009; no. 3400 dated January 20, 2009; no. 4113 dated March 20, 2009; no. 4054 dated March 20, 2009; and no. 4088 dated March 20, 2009.⁹
- m. Appellant allegedly signed the February 27, 2009 Sales and Use Prepayment Form.¹⁰

⁶There is an undated version of the financing agreement that appellant provided as an exemplar to the handwriting expert.

⁷Appellant's handwriting expert concluded that the quality of the partially redacted check was too poor to conclude one way or another. CDTFA accepts the expert's conclusion that this may not be appellant's signature.

⁸Appellant maintains that the signature is a forgery. Appellant's handwriting expert indicates that "[t]here is some evidence to indicate the signature is genuine, but the evidence is far from conclusive. The quality of the copy was the biggest limiting factor." CDTFA asserts that it is appellant's signature.

⁹Appellant provided these checks to the handwriting expert as exemplars of his signature.

¹⁰Appellant asserts that his signature was forged. Appellant's handwriting expert indicates that "[t]he evidence very strongly shows the signature of B[.] Kidd is non-genuine with a high degree of probability." CDTFA accepts the expert's conclusion that this may not be appellant's signature.

- n. Appellant's name appears on the following forms that were submitted electronically: BOE-401ELF for 3Q08, BOE-401ELF for 4Q08, BOE-401ELF for 1Q09, BOE-401ELF for 2Q09, and Butter's prepayment forms for October 1, 2008, through June 15, 2009.¹¹ The title indicated is either member or owner.
- o. On August 6, 2009, CDTFA received a faxed letter, dated April 30, 2009, from R. Kory in which he confirms that he will be representing Butter in connection with its delinquent sales tax matters. The letter indicates R. Kory carbon copied appellant and S. Marlton. Subsequently, R. Kory indicated that he dealt with appellant regarding the formation of Butter.
- p. On August 25, 2009, appellant allegedly signed the Cancellation of Lease as manager of Butter.¹²
- q. As of October 9, 2009, the California Department of Alcoholic Beverage Control (ABC) license query system summary indicates that appellant was the managing LLC member of Butter.¹³
- r. A Member's Share of Income Deductions, Credits, etc. for the 2009 tax year California Schedule K-1, issued by Core Management Company, LLC, for members of Butter, which indicates that appellant owned 44.66 percent and KRCP owned 55.34 percent of Butter.
- s. A Dining Credit Term Sheet allegedly executed between appellant, as both owner and managing LLC member, S. Marlton on behalf of Sunset Restaurant, LP, and Rewards Network Establishment Services, Inc. (Rewards).¹⁴

¹¹ An Electronic Filing Revenue Record (BOE-401ELF form) confirms electronic filings and payments by taxpayers who identify themselves to the system using a confidential personal identification code disclosed only to the taxpayer. Appellant disputes that he signed, or directed to be signed, these forms.

¹² Appellant claims that since the document was sent from the fax number of S. Marlton's company, Gibraltar Entertainment, it shows that S. Marlton was responsible rather than appellant. Appellant, however, has also provided this signature as an exemplar for the handwriting expert.

¹³ According to CDTFA, ABC purged the original records because of their document retention policy. Appellant acknowledges that he placed money into escrow for the liquor license and that he was assisted by a facilitator in this process.

¹⁴ Appellant claims these signatures are forgeries. These signatures are not included in the handwriting expert's report.

- t. A Mutual Release between Rewards and appellant, executed by appellant on July 28, 2011, as managing LLC member.¹⁵
7. During the liability period, Butter made a variety of payments to employees, suppliers, or creditors:
 - a. According to EDD records, Butter paid wages of \$348,231 in 4Q08 and \$136,988 in 2Q09. In EDD records, appellant is identified as managing member.
 - b. Butter made payments to supplier Southern Wine & Spirits in the following amounts: \$91,759.43 in 4Q08; \$76,127.65 in 1Q09; \$36,643.41 in 2Q09; and \$5,177.82 in 3Q09.
 - c. Butter made payments to supplier Young's Market in the following amounts: \$70,853.87 in 4Q08; \$66,469.85 in 1Q09; \$29,643.57 in 2Q09; and \$8,411.99 in 3Q09.
 - d. Butter's bank account was levied in 3Q09 for \$449.34 by CDTFA.
 - e. Butter's bank account issued checks payable to cash, signed by S. Marlton, totaling \$272,780.25 in the following amounts: \$117,486.00 in 4Q08; \$104,872.25 in 1Q09; and \$50,422.00 in 2Q09.
 - f. Butter loaned South Beach Restaurant Authority (SBRA) an unknown sum of money through check no. 5047 dated December 4, 2008, and check no. 5068 dated January 15, 2009.
8. CDTFA's ACMS contains contemporaneous notes regarding communications between CDTFA and appellant, or someone identifying himself as appellant, pertaining to sales and use tax matters as follows:
 - a. On April 14, 2008, appellant allegedly called CDTFA in response to a Hearing Notice for the security deposit. The caller requested an installment plan comprised of three payments due on April 15, 2008, May 15, 2008, and June 15, 2008. The caller indicated he was an LLC Member.¹⁶

¹⁵ Rewards filed a civil suit in Los Angeles Superior Court against Butter and appellant. Rewards alleged that Butter and appellant had breached the contract between Rewards and Butter. Settlement appears to have been reached between Rewards and appellant. Appellant, as an individual and on behalf of Butter, executed the Mutual Release as part of the settlement.

¹⁶ Appellant disputes that he participated in the call. He asserts that it was probably S. Marlton.

- b. On May 14, 2008, appellant allegedly called and indicated that he would be bringing the second installment payment in on May 16, 2008.¹⁷
- c. On June 5, 2008, there was an outgoing call to appellant's mobile telephone regarding the final payment for the security deposit and potential revocation of the seller's permit.¹⁸ Later that morning, CDTFA received an incoming call, from an individual who identified himself as appellant, regarding arrangements for the final payment of the security deposit.¹⁹
- d. On June 16, 2008, appellant allegedly came into the field office and posted the final installment for the security deposit. This person identified himself as an LLC member.²⁰
- e. On April 20, 2009, there was an outgoing call to appellant's confirmed mobile telephone number. CDTFA left a voicemail and requested a call back. On April 21, 2009, appellant allegedly returned CDTFA's call, from the same number, and left a message to call him. The same day, CDTFA returned the call. CDTFA and appellant allegedly discussed the filing of delinquent returns. The caller indicated that he would contact his accountant and that he should have the returns filed by the end of April. The caller indicated he was Butter's owner.²¹
- f. On July 1, 2009, CDTFA notified Butter via letter that its liquor license would be suspended if its \$94,315.49 delinquent remittance was not cleared by July 16, 2009.
- g. On July 16, 2009, appellant allegedly discussed the outstanding tax liability with CDTFA. He requested to apply the \$20,000 security deposit to the outstanding tax liability. The caller explained that he got behind on payroll and sales taxes,

¹⁷ Appellant disputes that he participated in this call. He asserts that it was probably S. Marlton.

¹⁸ Appellant confirmed that the mobile telephone number memorialized in ACMS was his during the time.

¹⁹ Appellant asserts that he did not contact CDTFA. He asserts it was probably S. Marlton. According to CDTFA, appellant's representative indicated at the appeals conference that the incoming calls that CDTFA identified as originating from appellant's mobile telephone number were from appellant.

²⁰ Appellant claims that it was S. Marlton, not appellant that went into the CDTFA office.

²¹ The outgoing calls and return calls were between CDTFA and appellant's confirmed mobile telephone number. Appellant asserts that he did not answer his mobile telephone, rather someone else answered the phone. That person had a substantive discussion with the Department regarding Butter's sales and use tax issues. We note that on April 24, 2009, Butter's 1Q09 return and delinquent 4Q08 return were filed.

and finally paid \$100,000 payroll in full, and needs two or three months to pay the liability. He indicated that the business had opened on August 14, 2008, even though he requested a change to the start date from February 22, 2008, to February 11, 2008. He also indicated that he had planned to operate the business as is, but ultimately decided to renovate it between February and August of 2008. CDTFA inquired regarding the sale of Butter. He indicated that escrow is holding \$76,000 for the audit so he is not worried. CDTFA advised him that until he gets the clearance, he could be liable. The caller indicated he was Butter's owner.²²

- h. On July 17, 2009, appellant allegedly discussed arrangements to pay Butter's April 2009 and May 2009 prepayments. He discussed Butter's outstanding tax liability and tried to make arrangements for an installment plan. CDTFA indicated that if he paid the 2Q09 according to his proposed schedule, CDTFA could give him 60 days starting from August 1, 2009. The caller indicated he was Butter's owner.²³
9. On August 5, 2009, the new owners informed CDTFA that appellant was no longer the owner and the restaurant had been sold on or about July 15, 2009.
10. CDTFA issued the Notice of Determination (NOD) on October 2, 2012. On November 28, 2012, appellant filed an untimely petition for redetermination, which CDTFA accepted as an administrative protest. On January 3, 2014, CDTFA issued a Report of Discussion of Audit Findings. On January 16, 2014, appellant disputed the report and requested an appeals conference. CDTFA denied the administrative protest in a decision dated December 14, 2016. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellant is personally responsible for the unpaid liabilities of the LLC.

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 an LLC shall be personally liable for unpaid taxes and interest and penalties not so paid upon termination of the business of the LLC. (R&TC, § 6829(a); Cal. Code Regs., tit. 18, § 1702.5(a).) Personal liability may only be imposed if

²² Appellant disputes that he participated in this call. He asserts that it was probably S. Marlton.

²³ Appellant disputes that he participated in this call. He asserts that it was probably S. Marlton.

CDTFA establishes that, while the person was a responsible person, the LLC 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).)

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).) 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).)

Elements 1 – Collection of Sales Tax Reimbursement & 2 – Termination of the Business

The first element is met because former employees confirmed the collection of sales tax reimbursement, and this element is not disputed. The second element is met because the evidence shows that the business was sold on or about July 15, 2009, and that this is the date appellant terminated its business operations.²⁴ (Cal. Code Regs., tit. 18, § 1702.5(b)(3).) Therefore, we find that the first two elements for responsible person liability were 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 LLC in complying with the Sales and Use Tax Law. (Cal. Code Regs., tit. 18, § 1702.5, (b)(1).) Except as otherwise provided by the California Corporations Code, any matter relating to the activity of an LLC is decided exclusively by the LLC manager(s). (Corp. Code, § 17704.07(c)(1).) Personal liability may only be imposed if appellant was a responsible person at the time the LLC made the sales, collected the sales tax reimbursement, and failed to remit it to CDTFA. (R&TC, § 6829(c); Cal. Code Regs., tit. 18, § 1702.5(a).)

²⁴ Appellant does not dispute the first two elements.

It is important to emphasize here that there can be, and oftentimes are, more than one responsible person held personally liable under R&TC section 6829.²⁵ It is not our role to determine whether a person is more or less responsible for Butter'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).)

CDTFA asserts that there is persuasive evidence that appellant was responsible for Butter's sales and use tax matters because appellant represented to CDTFA, as well as other organizations, that he was Butter's managing LLC member. Furthermore, CDTFA argues that it has presented ample credible evidence to establish that appellant was the person who spoke with compliance staff regarding Butter's sales and use tax matters as memorialized in ACMS.

Appellant asserts that he signed some of the documents without review and other signatures were forged by S. Marlton.²⁶ Appellant asserts that since he has never resided in California, he could not be responsible for day-to-day operations or overseeing sales and use tax matters. He further asserts that he was only a passive investor because he had no business experience, unlike S. Marlton, in restaurants or clubs. Appellant claims that he made his living in the oil business and was unfamiliar with operating a restaurant or bar. Appellant also asserts that he had no access to books or banks accounts. Appellant denies ever communicating with compliance staff about Butter's sales and use tax matters. Appellant claims that S. Marlton was more responsible.²⁷

²⁵ We note that when the evidence warrants, CDTFA often pursues multiple individuals when issuing a dual determination. CDTFA investigated S. Marlton, but ultimately concluded there was insufficient evidence to pursue him as a responsible person.

²⁶ See Factual Findings (FF) 6(b), 6(j), 6(k), 6(m), and 6(s). Appellant also cites to two lawsuits *Lawrence Abramson Corporation v. S[.] Marlton, et al.*, and *Rewards Network Establishment Services v. Butter Restaurant LLC and B[.] Kidd* for further proof that S. Marlton forged appellant's signatures.

²⁷ Even after Butter was sold, appellant continued to engage in business ventures with S. Marlton (e.g., SBRA, dba Kore and Apple). Records indicate that appellant was the managing member of SBRA. Of note, the Florida bankruptcy trustee made claims against both appellant and S. Marlton for having wrongfully depleted the assets of SBRA. The trustee claimed that S. Marlton wrote over \$40,000 in checks to cash and gave those checks to appellant, who cashed them. The trustee further claimed that appellant depleted SBRA assets by withdrawing an additional \$12,500 in cash.

Regarding appellant's assertion that he did not communicate with compliance staff regarding sales and use tax matters, CDTFA notes that compliance staff left a voicemail on appellant's confirmed mobile telephone number, received returns calls from the same number, and sales and use tax actions were taken consistent with their discussions. CDTFA refutes appellant's assertion that he did not have access to Butter's books or bank accounts by noting the twenty-one checks drawn on Butter's account and signed by appellant.²⁸ CDTFA further notes that only appellant and S. Marlton were signatories on Butter's Wells Fargo banking account. CDTFA notes that appellant's representations to other entities, as well as his actions, are not consistent with his claimed role of passive investor (e.g., applying for the ABC license with a facilitator, writing checks to pay employees of Butter, and discussing sales and use tax matters with compliance staff).

There is additional evidence that further establishes, by a preponderance of evidence, that appellant was a responsible person during the liability period. We find it more likely than not that appellant discussed tax payment matters with CDTFA on several occasions between April 14, 2008, and July 17, 2009, because the caller identified himself as appellant and the ACMS records involved appellant's confirmed mobile telephone number on various occasions. Likewise, CDTFA used appellant's confirmed mobile number on June 5, 2008, to leave a voicemail regarding possible permit revocation proceedings.²⁹ Thereafter, a caller who identified himself as appellant returned the call to address CDTFA's concerns. Thus, we find it more likely than not that appellant requested a payment arrangement with CDTFA during the permit revocation proceeding. We note that Butter substantially complied with those arrangements, which indicates appellant had some level of authority, certainly more than a passive investor, regarding sales and use tax matters.³⁰ We also note that there are numerous documents that identify appellant as Butter's managing LLC member. And, there are numerous other documents that identify appellant as Butter's owner, partner, or manager. Appellant was directly involved with the formation of Butter (e.g., working with H. Kern and R. Kory; OA2

²⁸ See FF 6(l).

²⁹ Appellant has not adequately explained how someone other than himself had access to his mobile telephone.

³⁰ See FF 8(c).

identified appellant as the sole initial member; and financing the purchase of Butter from CRA). Appellant signed the Wells Fargo request for a taxpayer identification number. Appellant was involved in the close out of Butter. Lastly, appellant was actively involved in establishing a similar business in Florida.³¹ Thus, CDTFA has presented reliable evidence that appellant had the requisite authority to manage sales and use tax matters.

With respect to the purported forgeries, we find that it is more likely than not appellant's signature on the August 2008 prepayment form dated September 22, 2008, because the signature, to the untrained eye, appears similar to his exemplars. Consistent therewith, the handwriting expert indicated that there was some evidence the signature is genuine. Furthermore, appellant's involvement in the formation of the LLC as well as his representations to both private and public sectors tend to support this conclusion. Even if we accepted appellant's assertions regarding all of the purported forgeries, there is sufficient other evidence in the record to prove that appellant had the requisite authority.

Likewise, we reject appellant's argument regarding his residency. Appellant's residency is not dispositive regarding his authority over or knowledge of sales and use tax matters. The technology to remotely manage sales and use tax matters was available to appellant and he availed himself of it (e.g., using an e-mail address, e-filing forms, and using a mobile phone to address sales and use tax matters). Knowledge of and authority over sales and use tax matters does not require California residency. We also note that there are significant inconsistencies in the record regarding appellant's residency as well as his presence at Butter during the liability period.³²

As such, we find little credibility to appellant's assertions because they are not supported by the record. Also, we find appellant's attempts to explain the inconsistencies in his assertions unpersuasive. Therefore, based on his documented direct involvement in handling sales and use

³¹ SBRA involved appellant, S. Marlton, as well as other investors. Appellant and S. Marlton attempted to establish a restaurant and lounge similar to Butter in South Beach, Florida.

³² In addition to the Butter documents, we note that there are numerous documents filed for SBRA that indicate appellant maintained a California address. We also note that during SBRA's bankruptcy proceedings appellant indicated, under oath, that his residency was California, not Texas. Appellant asserts that he was at Butter only occasionally and virtually unknown there. Yet a former part-time employee, A. Rippo, indicated that appellant was at Butter every day for two weeks then he would be gone, then he would return. A. Rippo further indicated that appellant would sign paperwork, watched employees and customers, looked out for the club, and made sure things ran smoothly. According to A. Rippo, appellant and S. Marlton would go to Butter independently and together.

tax matters with CDTFA as managing LLC member, member, or owner, we find that appellant was a person responsible for sales and use tax matters.

Furthermore, appellant was responsible from the formation of the business until shortly after it was sold. Therefore, we conclude that CDTFA has provided sufficient evidence to establish that appellant was a responsible person during the liability period. Since CDTFA met its burden, we find that, during the liability period, appellant was a responsible person.

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).)

In this case, we find that appellant had actual knowledge that the taxes were due, but not being paid. We previously found that appellant signed the September 22, 2008 prepayment form, which demonstrates he was aware that sales tax reimbursement was being collected and was due. The June 5, 2008 ACMS notes indicates that appellant was aware of sales and use tax matters. Furthermore, we find that appellant communicated with CDTFA on April 20, 2009, through April 21, 2009, since the caller identified himself as appellant, indicated that he was Butter’s owner, and the calls involved appellant’s confirmed mobile telephone. The ACMS notes regarding the April 20, 2009, through April 21, 2009, communications with appellant indicate that he was aware that the return for 4Q08 was delinquent and the 1Q09 return would be

due shortly. Therein, he indicated that he would have his accountant address the returns by the end of April. Shortly thereafter, appellant filed or caused to be filed the 4Q08 and 1Q09 returns without remittance based on the April 21, 2009 communications. Appellant's name and title appear on the 4Q08 and 1Q09 returns. Likewise, appellant's electronic signature, name, and title of member or owner appear on Butter's returns for 3Q08, 2Q09, and the prepayment forms from October 1, 2008, through June 15, 2009. Based on the foregoing, we find that appellant was regularly in contact with CDTFA regarding Butter's sales and use tax matters from April 14, 2008, through July 17, 2009. Thus, we find that CDTFA established by a preponderance of the evidence that appellant had the requisite knowledge.

Appellant represented himself as the managing member to CDTFA as well as other entities, both private and public. On other occasions, appellant represented himself as an owner, partner, or manager of Butter. Appellant also had check signing authority as evidenced by the twenty-one checks previously discussed.³³ The available evidence suggests that only appellant and S. Marlton had check signing authority. There is no evidence that appellant was required to obtain approval authority from any other person to sign checks.³⁴ Therefore, we find that CDTFA established by a preponderance of the evidence, discussed both here and above, that appellant had the requisite authority.

The evidence further establishes that during the liability period Butter made well over \$2 million in sales, and collected sales tax reimbursement from its customers, which was available to pay the sales tax liability. Butter failed to remit the collected sales taxes reimbursement to CDTFA. Nevertheless, Butter paid employee wages, suppliers or creditors, wrote checks to cash, and continued to engage in business.³⁵ Thus, we find that, either due to appellant's own affirmative decisions to pay other creditors instead of the state, or his voluntary deference to S. Marlton, 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. Accordingly, CDTFA has met its burden of proving all elements for imposing personal liability on appellant for the unpaid liabilities of Butter for the liability period. Therefore, we conclude that appellant is personally

³³ See FF 6.

³⁴ We note that the co-managing terms in OA2 were not followed according to appellant.

³⁵ See FF 7.

responsible for the unpaid liabilities of the LLC within the meaning of R&TC section 6829 for the liability period.

HOLDING

Appellant is personally liable as a responsible person for the liability period.

DISPOSITION

CDTFA’s action is sustained.

DocuSigned by:
Josh Aldrich
48745BB806914B4...
Josh Aldrich
Administrative Law Judge

We concur:

DocuSigned by:
Keith T. Long
DC88A60D8C3E442...
Keith T. Long
Administrative Law Judge

DocuSigned by:
Andrew J. Kwee
3CAD A62FB4964CB...
Andrew J. Kwee
Administrative Law Judge

Date Issued: 7/8/2020