OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 20035970
	) Respondent Case ID 205-032
R. HERNANDEZ	)
	)
	)
	)

OPINION

Representing the Parties:

For Appellant:	David Hernandez, Representative
For Respondent:	Courtney Daniels, Tax Counsel III
For Office of Tax Appeals:	Steven Kim, Tax Counsel

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, R. Hernandez (appellant) appeals a Decision issued by respondent California Department of Tax and Fee Administration denying appellant's timely petition for redetermination of a Notice of Determination (NOD) dated June 30, 2014.[1] The NOD is for $18,497.51 in tax, $3,904.28 in penalties, and applicable interest, for the period January 1, 2005, through September 30, 2011 (liability period), and reflects respondent's determination that appellant is personally liable as a responsible person under R&TC section 6829 for the unpaid sales and use tax liabilities of Infinity Paper Converters, Inc. (Infinity).[2]

We decide this matter on the basis of the written record because appellant waived his right to an oral hearing.

[1] Sales and use taxes were formerly administered by the State Board of Equalization (BOE). In 2017, functions of BOE relevant to this case were transferred to respondent. (Gov. Code, § 15570.22.) For ease of reference, when referring to acts or events that occurred before July 1, 2017, "respondent" shall refer to BOE.

[2] The unpaid tax consists of $18,325.51 of the $32,568.72 determined by audit for the period January 1, 2005, through December 31, 2007, and $172 for the third quarter of 2011 (3Q11). The penalties of $3,904.28 are comprised of the following: a penalty of $3,096.58 pursuant to R&TC section 6565 for failure to timely pay a determination (finality penalty) for the period January 1, 2005, through December 31, 2007; a $790.50 late-payment penalty for the period January 1, 2008, through December 31, 2008; and a $17.20 finality penalty for 3Q11. During respondent's appeals process, appellant conceded the 3Q11 liability. Thus, those amounts will not be discussed further.

ISSUES

1. Is appellant personally liable for Infinity's unpaid sales and use tax liabilities pursuant to R&TC section 6829?
2. Is appellant entitled to an adjustment to the determined liability?
3. Should the finality penalty imposed on Infinity and included in the NOD issued to appellant be relieved?

FACTUAL FINDINGS

1. Infinity, a California corporation, operated a paper product folding and finishing business in Santa Ana, California, during the liability period and held a seller's permit from February 1, 2004, through December 31, 2011, when respondent closed out the seller's permit on the basis of Infinity's representation that the business had ceased business operations on or about that date.
2. Appellant was Infinity's owner, chief executive officer, and president.
3. During the liability period, Infinity began to depreciate certain machinery and equipment (fixed assets) for income tax purposes. Infinity reported on its 2007 Federal Summary Depreciation Schedule (depreciation schedule) that the fixed assets had a total cost basis of $629,533 and included what is identified as "10 customized gluers" (gluers) acquired on April 1, 2006, at a cost of $301,500.
4. According to the depreciation schedule, Infinity took depreciation deductions for the gluers of $135,651 for 2006 and $47,388 for 2007. We have no evidence to show what later deductions Infinity took, if any. Respondent audited Infinity for the period January 1, 2005, through December 31, 2007. During the audit, respondent noted fixed assets at Infinity's facility and inquired regarding whether Infinity had paid tax to the vendor(s) or to respondent. On several occasions between August 27 and December 31, 2008, respondent asked appellant to provide evidence to show what taxes were paid in connection with the its purchase or use of the fixed assets. While appellant and Infinity's accountant repeatedly promised to provide the requested documentation, they provided none.[3]

[3] According to the audit work papers, Infinity provided "a summary of each purchase and … lease agreements relating to a different entity, Liberty Foil, Inc," but it did not provide evidence of payment of sales tax reimbursement to the vendor. These summaries were not provided to the Office of Tax Appeals (OTA).

5. Respondent concluded that Infinity's acquisition and use of the fixed assets measuring $629,533 was subject to use tax. Respondent provided a copy of the audit work papers to Infinity and discussed its audit findings with appellant and Infinity's accountant in February 2009.

6. Respondent issued a March 20, 2009 NOD to Infinity. The NOD was for $32,568.72 in tax, plus accrued interest. A February 17, 2009 Field Billing Order indicates the tax was measured by $404,381, which consisted of the following audit items: (1) ex-tax purchases[4] of fixed assets subject to use tax, measured by $629,533; (2) taxable sales of fixed assets, measured by $20,683; and (3) a claim for refund of $245,835 levied in error.[5]

7. Infinity filed a timely petition for redetermination contesting part of the audit, arguing that it included the fixed assets on its depreciation schedule in error and owed no use tax in connection with its purchase and use of the subject fixed assets. According to respondent's Decision and Recommendation (D&R) dated April 19, 2011, Infinity asserted in its petition that it purchased some of the fixed assets for resale and sold those to customers in Costa Rica after the audit, and that it purchased the remainder of the fixed assets with sales tax reimbursement paid to the vendor at the time of purchase.

8. During the agency-level appeal (i.e., before the matter came before OTA), Infinity did not provide any evidence showing that it paid use tax to respondent for the fixed assets, that it paid sales tax reimbursement to the vendor upon purchase of the fixed assets, or that it resold any of fixed assets included within audit item 1 to customers in Costa Rica or anywhere else.

9. In respondent's D&R, dated and properly mailed to Infinity and its representative on April 19, 2011, respondent denied Infinity's petition for redetermination. Respondent's D&R became final when Infinity failed to timely request a hearing. On June 29, 2011, respondent issued and properly mailed to Infinity and its representative a Notice of Redetermination for $32,568.72 in tax, plus accrued interest. When Infinity failed to pay

[4] In this context, "ex-tax purchases" refers to the acquisition and use in California of tangible personal property without the required payment of sales tax reimbursement or use tax.

[5] Items 2 and 3 are not in dispute.

the redetermined amount within 30 days, respondent imposed the $3,096.58 finality penalty.

10. In a letter to respondent dated September 16, 2011, appellant, as the "owner" of Infinity, acknowledged that he was aware of respondent's April 19, 2011 D&R, stated that the D&R had only "just recently" come to his attention, and made a late request for an oral hearing. Nothing in our record suggests that the request for an oral hearing was granted.

11. On March 15, 2012, Infinity's accountant informed respondent that Infinity ceased business operations, but the accountant did not state when business operations ceased or provide new contact information. Respondent closed Infinity's seller's permit effective December 31, 2011.[6]

12. Infinity (or appellant) made payments against the liability, leaving an unpaid balance of $18,325.51 in tax and the $3,096.58 finality penalty, plus accrued interest.

13. Respondent conducted an investigation to determine who was liable for the unpaid liabilities of Infinity and ultimately concluded that appellant was personally responsible for those liabilities based, in part, on the following:

    a. Appellant has variously identified himself as the president, chief executive officer, and owner of Infinity;

    b. Appellant signed Infinity business checks, including the following: (1) a check for $2,000 dated November 28, 2011, payable to the Franchise Tax Board (FTB); (2) a check for $816.30 dated March 15, 2012, payable to respondent; and (3) a check for $177.72 dated April 17, 2012, also payable to respondent;

    c. Appellant filed Infinity's amended sales and use tax returns (SUTRs) dated July 6, 2007, for the periods January 1, 2005, through December 31, 2005, and January 1, 2006, through December 31, 2006. Appellant also filed Infinity's SUTRs for 2008, 2009, 2010, and 2011; and,

[6] There is also evidence to suggest that respondent considered closing out Infinity's seller's permit effective December 31, 2012, based on an April 10, 2012 statement, attributed to appellant, that the bank and other lienholders were taking everything, and the business was closing on December 31, 2012. As explained below, we need only determine whether Infinity has ceased business operations.

d. The records of the Employment Development Department (EDD) indicate that Infinity paid wages during each quarterly period from 2006 through 2013, and that the annual totals for 2009 through 2013, inclusive, were $299,391, $233,811, $269,352, $336,223, and $394,266, respectively.

14. Respondent issued the June 30, 2014 NOD to appellant.
15. Appellant filed a timely petition for redetermination disputing the NOD in its entirety.
16. Respondent issued a Decision dated February 7, 2020, denying appellant's petition and finding that appellant was personally liable for Infinity's unpaid tax liabilities and that relief of the finality penalty was not warranted.
17. Appellant filed this timely appeal.

DISCUSSION

Issue 1: Is appellant personally liable for Infinity's unpaid sales and use tax liabilities pursuant to R&TC section 6829?

As relevant here, RT&C section 6829(a) provides that upon termination, dissolution, or abandonment of the 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).) Also, as relevant here, personal liability may be imposed only if the evidence shows that the corporation consumed tangible personal property (TPP) in California and failed to pay the required tax to the vendor or respondent. (R&TC, § 6829(c); Cal. Code Regs., tit. 18, § 1702.5(a).) Respondent has the burden to prove by a preponderance of the evidence that the requirements for the imposition of personal liability have been met. (Cal. Code Regs., tit. 18, § 1702.5(d).)

Thus, under the facts alleged, respondent must show that the following four requirements for the imposition of personal liability on appellant are met: (1) Infinity ceased business operations; (2) Infinity consumed TPP in California and failed to pay the required tax to the vendor or respondent; (3) appellant was a person responsible for Infinity's sales and use tax

compliance; and (4) appellant willfully failed to pay, or willfully failed to cause someone else to pay, Infinity's tax liabilities. (R&TC, § 6829; Cal. Code Regs., tit. 18, § 1702.5.)

Cessation of business operations

The first question is whether Infinity has ceased all business activities that require a seller's permit. (R&TC, § 6829(a); Cal. Code Regs., tit. 18, § 1702.5 (a) and (b)(3).) Infinity's seller's permit was closed out effective December 31, 2011, on the basis of a March 15, 2012 statement made by Infinity's representative to respondent to the effect that Infinity had closed its business. Appellant confirmed cessation of business operations, and there appears to be no dispute regarding this element. Therefore, we find that Infinity's business has been terminated, and the first requirement for imposition of personal liability has been met.[7]

Consumption of TPP without paying tax

The second question is whether Infinity consumed TPP in California without payment of the required tax. (R&TC, § 6829(c); Cal. Code Regs., tit. 18, § 1702.5(a)(2).) Appellant argues here that respondent's final determinations in both appeals rely on misrepresentations of fact concerning the gluers. Because appellant provided no new information to OTA, further details regarding appellant's arguments and supporting evidence must be gleaned from the attachments to appellant's brief: respondent's Decision against appellant, including the 17 exhibits.[8]

During the audit, respondent observed some fixed assets at Infinity's business location. Respondent later discovered that during the liability period, Infinity began to depreciate fixed assets with a combined cost basis of $629,533. Infinity could not show – and, in fact, it did not then argue – that it had paid tax reimbursement to the vendor or use tax to respondent in connection with its purchase or use of the fixed assets. According to the D&R issued by respondent in Infinity's appeal, the corporation then alleged that it had mistakenly included the cost of the fixed assets on its depreciation schedule and that it owed no tax reimbursement or tax in connection with its purchase or use of the fixed assets because it had purchased them for resale and after the audit sold them to a company in Costa Rica. Alternatively, Infinity argued

[7] We note that there is evidence that Infinity did not cease business operations until a year or more later. We need only determine whether Infinity has ceased business operations.

[8] Because argument made and evidence provided to the agencies that appear before the OTA do not automatically become part of the record on appeal to OTA, the parties must make such argument and provide such evidence to OTA for its consideration. (See Cal. Code Regs., tit. 18, § 30102(p) & (w).)

that it paid tax reimbursement to the vendor in connection with its purchase of any fixed assets that it did not purchase for resale.[9] Respondent found those arguments unpersuasive due to the lack of evidence.

It is our understanding that appellant (or Infinity) has paid the tax determined by audit as due in connection with its use of some of the fixed assets, and the only tax that remains unpaid pertains to appellant's use of the gluers.[10] Appellant still argues that the gluers are not subject to tax, but he does not argue that Infinity purchased the gluers, for resale or otherwise. According to respondent's Decision on appellant's petition, appellant alleges that Infinity attempted to design and build a marketable gluer in Costa Rica with the intention of fabricating and selling them to others, but it did not succeed. Appellant asserts that Infinity never brought the gluers into California and, therefore, there was no consumption in California, and no use tax was due. Furthermore, appellant asserts that the cost basis, which appellant alleges Infinity mistakenly included in its federal depreciation schedule, included the cost of services provided by a professional engineer (and presumably others) who participated in the project; and if use tax is owed, the measure should not include the cost of such services.

In support of his arguments, appellant has provided: (1) a written statement by a Mr. José Aguilar, who identified himself as a Costa Rica-based automation engineer who is familiar with Infinity's gluer project; (2) Mr. Aguilar's curriculum vitae (CV);[11] (3) what appears to be an electrical diagram; (4) eight photos of machinery or equipment, one or more appearing to have placards or control indicators labeled in Spanish and one or more appearing to have a placard identifying Infinity's California location;[12] and (5) a declaration signed under penalty of perjury by a Mr. Frank Soto, who states that he saw the gluers (apparently those depicted in the photographs that are in evidence) in Costa Rica during the time that they were being developed by appellant.

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[9] As stated below, appellant has made different arguments based on different alleged facts.

[10] We are not aware of any binding concession by appellant that it owed the tax paid toward Infinity's audit liability.

[11] A CV is a summary of a person's education, work experience, and related activities.

[12] We cannot identify the original source of the photos, though it appears Infinity or appellant provided them to respondent.

As a whole, the evidence supports respondent's inclusion of the gluers in the fixed assets subject to tax. According to Infinity's federal income tax returns, the corporation acquired the fixed assets at a cost $629,533, which included the gluers at a cost of $301,500, and began to depreciate the fixed assets for income tax purposes during the liability period. The depreciation of the fixed assets is sufficiently persuasive evidence that Infinity made taxable use of those assets during the liability period. (*McConville v. State Bd. of Equalization* (1978) 85 Cal.App.3d 156, 161-162.) We find that evidence alone is sufficient to meet respondent's burden to prove that a taxable use occurred. The question then becomes whether appellant has provided sufficient evidence to tilt the scale in his favor.

Appellant argues that Infinity never used the gluers in California, and, therefore, the inclusion of the gluers on the depreciation schedule was a mistake. In essence, appellant argues that, as shown by the evidence, the gluers were simply a failed research and development (R&D) project that never left Costa Rica.

Appellant and Infinity never explained why or by whom the fixed assets were included on the depreciation schedule in error, how acquisition costs were determined, when and by whom the error was discovered, or what, if anything, Infinity did about it. There is nothing in the evidence to suggest that Infinity corrected its alleged mistake by filing amended income tax returns for all the years for which it took deductions for depreciation of the gluers (totaling at least $183,039). Appellant's unsupported assertion that Infinity's depreciation of the fixed assets (to Infinity's substantial income tax benefit) was a mistake is not sufficient, alone, to persuade us that respondent's reliance on the depreciation schedule to establish the measure of tax was unreasonable.

Appellant relies on the information provided by Mr. Soto and Mr. Aguilar to establish that the gluers included on the depreciation schedule never left Costa Rica. Mr. Soto states in his declaration that appellant informed him during the 1990's about appellant's idea to design and build a machine to efficiently manufacture "capacity" folders, and that he saw the machines during their development in Costa Rica. He also identified the machines depicted in the photographs as the same machines. Mr. Aguilar states that he became involved in Infinity's gluer R&D project sometime around 1991 and that the project remains unfinished. He also states that the "prototypes" are in appellant's possession and that they are "far from complete and do not operate as intended."

We find the above evidence insufficient to overcome the clear evidence of use in California. Infinity reported that it acquired the fixed assets in 2005, 2006, and 2007, years after events described by Mr. Soto and Mr. Aguilar. We have insufficient evidence to connect the gluers reported on the depreciation schedule with those observed by the witnesses. Mr. Soto's reference to the photographs that are in evidence is of little value since we do not know when, where, or by whom those photographs were taken. Neither witness states the extent to which the gluers were functional when they made their observations. Furthermore, Mr. Aguilar's CV contains information that appears to contradict the suggestion that the gluers were not usable. The CV states that Mr. Aguilar received an award for the "design and development of the electronic controller of a machine used for the manufacturing of high capacity folders as part of a contract with a Southern California settled company," and that the "16 machines [the company] designed and built are still operating today." We find it unlikely that Mr. Aguilar was working on projects for the development of a machine to manufacture high capacity folders for two different southern California companies. Conversely, we find it likely that the 16 machines that were still in use included the 10 at issue here.

We find that Infinity consumed TPP and failed to pay use tax. The second requirement for imposition of personal liability has been met.

Responsible person

"Responsible person" means any officer, member, manager, employee, director, shareholder, partner, or other person having control or supervision of filing returns and paying tax to respondent. (Cal. Code Regs., tit. 18, § 1702.5(b)(1).) Appellant conceded this element during his appeal at the agency level. However, because we do not have written confirmation of a continuing concession of the element, we will discuss it below.

Appellant filed Infinity's amended SUTRs dated July 6, 2007, for the periods January 1, 2005, through December 31, 2005, and January 1, 2006, through December 31, 2006. Appellant also timely filed Infinity's SUTRs for 2008, 2009, 2010, and 2011. There is no indication in the record suggesting that anyone other than appellant handled Infinity's sales and use tax matters. Appellant has not argued otherwise. Therefore, we find that appellant was a person responsible for Infinity's sales and use tax compliance.

Willfulness

In this context, a willful failure is the result of a voluntary, conscious, and intentional course of action. (R&TC, § 6829(d); Cal. Code Regs., tit. 18, § 1702.5(b)(2).) A failure to pay taxes (or a willful failure to cause someone else to pay taxes) may be willful even though such failure was not done with a bad purpose or motive. (*Ibid*.) A person can be found to have willfully failed to pay taxes, or to cause them to be paid, only when respondent establishes on or after the date the taxes came due, the responsible person had actual knowledge that the taxes were due but not being paid when he or she also had the authority to pay the taxes, or the authority to cause them to be paid, and the ability to pay the taxes, but chose not to do so. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(A)-(C).)

Respondent contends that appellant's actual knowledge that Infinity's taxes were not being paid when due is evidenced by his September 16, 2011 letter, in which appellant acknowledged in writing that he was aware of the D&R issued to Infinity and Infinity's unpaid tax liability. It asserts that appellant's authority to pay the taxes when due is established by the evidence (and his concession) that shows he was the person responsible for sales and use tax compliance, by his role as the chief executive officer, president, and "owner" of the corporation, and by his signature on corporate tax returns and corporate checks, including checks payable to FTB and respondent. Finally, respondent contends that appellant's ability to pay Infinity's unpaid tax liability using corporate funds is shown by the evidence that the corporation continued to operate and to pay expenses until near the end of the fourth quarter of 2013, as evidenced by EDD records, which show that Infinity paid over $830,000 in salaries and wages during the period of time after appellant acknowledged respondent's final determination that the taxes were due.

Appellant argues that he did not understand that use tax was due under the circumstances, as he understood them to be, and that the failure to pay the tax was not willful.

Appellant was the owner, chief executive officer, and president of Infinity. He was the person responsible for Infinity's sales and use tax compliance. Infinity acquired and used fixed assets during the liability period and did not pay the required tax, purportedly because appellant did not understand that tax was due. Ignorance of the law does not excuse noncompliance. (*Appeal of Porreca*, 2018-OTA-095P.) Appellant participated in the audit, and he was aware of respondent's request for proof of tax payment in 2008 and of the audit findings, by February

2009. Appellant confirmed his knowledge of respondent's findings in his September 2011 letter, and while he may not have agreed with them, the evidence establishes his knowledge that taxes were due. We find that appellant knew that taxes were due no later than September 2011, when he acknowledged respondent's D&R issued in Infinity's appeal.

The evidence also establishes appellant's authority to pay the taxes when due. He was the owner, chief executive officer, and president, and the person who signed sales and use tax returns and checks payable to respondent. He has not argued or provided evidence to the contrary. We find that appellant had the authority to pay the taxes when due.

Finally, the evidence shows that appellant had corporate funds available to pay the taxes when he had both the knowledge that the taxes were due and the authority to pay them. Infinity remained in business for years after the taxes were due, reporting sales averaging $2.5 million annually during 2005 through 2008, inclusive, over $2 million dollars in 2009, and approximately $1.78 million in 2010 and $1.5 million in 2011. Respondent closed out Infinity's seller's permit at the end of 2011, but appellant informed respondent in 2012 that the company would cease business operations at the end of 2012, and EDD records show that Infinity continued to pay employees until the end of 2013. Those records showed that it paid at least $830,164.25 to employees during the quarters after appellant's written acknowledgment of respondent's final determination that the taxes were due.[13]

We thus conclude that appellant willfully failed to pay the taxes when due and that the fourth and final requirement for imposition of personal liability has been met. Therefore, we find that appellant is personally liable for Infinity's unpaid sales and use tax liabilities for the liability period pursuant to R&TC section 6829.

Issue 2: Is appellant entitled to an adjustment to the determined liability?

California imposes sales tax on all of a retailer's retail sales of TPP in this state, unless the sale is exempt or excluded from tax. (R&TC, § 6051.) The sales tax is imposed upon retailers for the privilege of selling TPP at retail in this state (R&TC, § 6051).[14] Sales tax is measured by a retailer's gross receipts, and all gross receipts are presumed taxable until proven

[13] Infinity paid its employees over $1,400,000 after it received respondent's audit report. There were also lesser payments made to other creditors.

[14] The retailer may collect sales tax reimbursement from the purchaser if the contract of sale so provides. (Civ. Code, § 1656.1(a).)

otherwise, unless the retailer timely and in good faith takes from the purchaser a certificate to the effect that the property is purchased for resale. (R&TC, §§ 6051, 6091, 6092; Cal. Code Regs., tit. 18, § 1668(a).)

When sales tax does not apply, use tax applies to the storage, use, or other consumption of TPP purchased from any retailer for storage, use, or other consumption in this state, measured by the sales price, unless that use is specifically exempted or excluded by statute. (R&TC, §§ 6201, 6401.) Every person storing, using, or otherwise consuming in this state TPP purchased from a retailer is liable for the use tax. (R&TC, § 6202(a).) It is presumed that TPP sold by any person for delivery in this state is sold for storage, use, or other consumption in this state until the contrary is established. (R&TC, § 6241.) It is further presumed that TPP shipped or brought to this state by the purchaser was purchased from a retailer for storage, use, or other consumption in this state. (R&TC, § 6246.)

When respondent is not satisfied with the amount of tax reported by the taxpayer, or in the case of a failure to file a return, respondent may determine the amount required to be paid on the basis of any information which is in its possession or may come into its possession. (R&TC, §§ 6481, 6511.) In the case of an appeal, respondent has a minimal, initial burden of showing that its determination was reasonable and rational. (*Appeal of Talavera*, 2020-OTA-022P.) Once respondent has met its initial burden, the burden of proof shifts to the taxpayer to establish that a result differing from respondent's determination is warranted. (*Ibid*.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Micelle Laboratories, Inc*., 2020-OTA-290P.)

We have already discussed, above, the various arguments made by Infinity and appellant to persuade first respondent and now us that there is *no* unpaid tax liability. We will not repeat that analysis here, except to note that we have already found that respondent proved by a preponderance of evidence that Infinity made taxable use of the fixed assets without paying the required tax to the vendor or respondent. That same proof – that Infinity took tax deductions on its federal income tax returns based on depreciation of the fixed assets – meets respondent's burden of showing a reasonable and rational basis for its determination. (See *McConville v. State Bd. of Equalization*, *supra*.) Consequently, appellant has the burden of proving that the measure of tax should be reduced.

Appellant argues that, if we conclude that use tax is due at all, the measure of such tax should be reduced for the amounts paid to professional engineers (and presumably others) during the R&D work in Costa Rica. However, there is no factual or legal support in the record for appellant's argument that the measure of tax, which was determined from Infinity's depreciation schedule, should be reduced by the cost of services rendered in connection with whatever work took place in Costa Rica. Appellant has not proven that Infinity designed, developed, or fabricated any of the fixed assets or that the cost basis referred to in Infinity's depreciation schedule includes the cost of such work. On that basis, we conclude that no adjustment to the measure for labor or services is warranted, and we find that appellant is not entitled to an adjustment to the determined liability.

Issue 3: Should the finality penalty imposed on Infinity and included in the NOD issued to appellant be relieved?

There is no statutory or regulatory authority for relieving penalties in R&TC section 6829 determinations. However, R&TC section 6592(a) provides that certain penalties may be relieved if it is shown that the act or omission for which the penalty was imposed was due to reasonable cause and circumstances beyond the taxpayer's control, and occurred notwithstanding the exercise of ordinary care and in the absence of willful neglect. A taxpayer seeking relief of a penalty under R&TC section 6592 must submit a statement, signed under penalty of perjury, setting forth the facts upon which the person bases the claim for relief. (R&TC, § 6592(b).) If relief is granted, the derivative liability of the responsible person is likewise adjusted.

Respondent imposed the $3,096.58 finality penalty on Infinity after it failed to timely pay the tax within 30 days of issuance of the June 29, 2011 Notice of Redetermination. Appellant eventually submitted a sworn statement dated September 25, 2019, requesting relief from the finality penalty on the grounds that Infinity was unaware that the D&R or subsequent Notice of Redetermination had been issued and that a request for an oral hearing or payment was required, and on the further grounds that Infinity relied on its representative to protect its interests, and Infinity should not be penalized for the representative's failures.

The evidence shows that respondent properly mailed its D&R against Infinity to Infinity and to Infinity's representative on April 19, 2011. If Infinity had timely requested an oral hearing within 30 days, the Notice of Redetermination would not have been issued until after the hearing. Because Infinity did not timely request an oral hearing, respondent issued the

June 29, 2011 Notice of Redetermination and properly mailed it to Infinity and to Infinity's representative on that date. Notice to Infinity was complete on the date of mailing. (R&TC, §§ 6486, 6566.) The redetermined liability was not timely paid. Consequently, the redetermination became final 30 days later on July 29, 2011, and respondent then imposed the finality penalty. We have no evidence – and appellant has made no argument – to suggest otherwise.[15]

It was Infinity's responsibility to request an oral hearing, if it wanted one, and to timely pay the liability, if it did not want an oral hearing. There is nothing in the Sales and Use Tax Law that allows a taxpayer to avoid responsibility by delegating it to a representative. A taxpayer may choose their representative and is free to delegate tasks to the representative, but the taxpayer remains responsible for compliance with the law. We find that the finality penalty imposed against Infinity cannot be relieved.

[15] Generally, mailing by first-class mail, postage prepaid, to a taxpayer's last known address is deemed sufficient to give notice. (R&TC, § 18416.) Appellant does not contest proper mailing by respondent, and appellant's assertion that Infinity was not aware of the issuance of these documents does not refute that proper notice.

HOLDINGS

1. Appellant is personally liable for Infinity's unpaid sales and use tax liabilities for the liability period under R&TC section 6829.
2. Appellant is not entitled to an adjustment to the determined liability.
3. The finality penalty imposed on Infinity and included in the NOD issued to appellant should not be relieved.

DISPOSITION

Respondent's action in denying appellant's petition for redetermination is sustained.

DocuSigned by:
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Michael F. Geary
Administrative Law Judge

We concur:

DocuSigned by:
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Sheriene Anne Ridenour
Administrative Law Judge

DocuSigned by:
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Teresa A. Stanley
Administrative Law Judge

Date Issued: 3/29/2021