OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18032551
	) CDTFA Case ID 722236
S. EICHLER	)
	)
	)
	)

OPINION

Representing the Parties:

For Appellant:	S. Eichler
For Respondent:	Courtney Daniels, Tax Counsel III Stephen Smith, Tax Counsel IV Jason Parker, Chief of Headquarters Ops.
For Office of Tax Appeals:	Casey Green, Tax Counsel III

S. RIDENOUR, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, S. Eichler (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)[1] denying appellant's petition for redetermination of the Notice of Determination (NOD) dated January 23, 2013. The NOD is for $12,259.13 in tax, plus accrued interest, and penalties totaling $2,045.60,[2] for the period July 1, 2008, through June 30, 2009 (liability period). The NOD reflects CDTFA's determination that appellant is personally liable as a responsible person for the unpaid taxes, plus applicable interest, and penalties that Hauswise LLC (Hauswise) accrued during the liability period.

Office of Tax Appeals (OTA) Administrative Law Judges Josh Lambert, Suzanne B. Brown, and Sheriene Anne Ridenour held a virtual oral hearing for this matter on

[1] Sales taxes were formerly administered by the State Board of Equalization (BOE). In 2017, functions of 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 BOE; and when referring to acts or events that occurred on or after July 1, 2017, "CDTFA" shall refer to CDTFA.

[2] As discussed below, this amount consists of failure-to-file penalties, a finality penalty, and late-payment penalties that passed through from Hauswise LLC.

August 25, 2021. At the conclusion of the hearing, the record was closed, and this matter was submitted for a written opinion.

ISSUES

1. Whether appellant is personally liable under R&TC 6829 for Hauswise's unpaid sales and use tax liabilities for the liability period.
2. Whether relief of the penalties asserted against Hauswise is warranted.
3. Whether relief of interest is warranted.

FACTUAL FINDINGS

1. Hauswise operated an interior design business in Menlo Park, California, where it had a showroom selling high-end sinks, tiles, and cabinetry.[3] On February 14, 2005, Hauswise obtained a seller's permit from the Board of Equalization with an effective start date of January 1, 2005.
2. As applicable to the liability period, appellant filed Hauswise's sales and use tax returns for the first quarter of 2008 (1Q08), 2Q08, 1Q09, 2Q09, and 3Q09. Appellant filed Hauswise's 1Q09 and 2Q09 returns as non-remittance returns.
3. Hauswise failed to file sales and use tax returns for 3Q08 and 4Q08.
4. On September 28, 2009, appellant and his wife filed for personal bankruptcy under Chapter 7 of the United States Bankruptcy Code. The bankruptcy court granted appellant and his wife a discharge from their personal liabilities.
5. After Hauswise's continued failure to file returns for 3Q08 and 4Q08, CDTFA issued Hauswise an NOD on June 18, 2010, based on an estimation of taxes due for those quarters.[4] When Hauswise failed to file a petition for redetermination within 30 days of the NOD's issuance, the NOD became final on July 18, 2010.
6. On October 10, 2010, Hauswise's business status with the California Secretary of State was suspended by the Franchise Tax Board after Hauswise failed to pay its state income tax liability for 2005.

[3] Hauswise also installed these items in kitchens and bathrooms under construction contracts.

[4] There is no dispute regarding the estimated amounts.

7. On February 3, 2011, after CDTFA conducted an in-office review determining that Hauswise had reported zero sales for the prior four quarters, and multiple unsuccessful attempts of contacting Hauswise, CDTFA closed Hauswise's seller's permit with an effective date of December 31, 2010. CDTFA identified the effective closeout date as December 31, 2010, because the last return filed by Hauswise was for the period of October 1, 2010, through December 31, 2010.
8. As of December 31, 2010, Hauswise had unpaid tax-related liabilities. The liabilities included failure-to-file penalties totaling $818.20 for 3Q08 and 4Q08; a penalty of $818.20 pursuant to R&TC section 6565 for failure to pay the June 18, 2010 NOD for 3Q08 and 4Q08, when it became final (finality penalty); a late-payment penalty of $367.70 for 1Q09; and a late-payment penalty of $41.50 for 2Q09. CDTFA included these penalties in the January 23, 2013 NOD issued to appellant.
9. On December 4, 2012, during a telephone conversation with a CDTFA employee, appellant indicated that he was the only individual responsible for Hauswise's sales and use tax matters.
10. It is undisputed that during the liability period, Hauswise collected sales tax reimbursement with respect to its taxable sales, appellant was a person responsible for Hauswise's sales and use tax compliance, and Hauswise made the following payments to suppliers: payments to Hajoca Corporation, from August 20, 2008, through March 20, 2009, totaling approximately $13,000; payments to Decorative Plumbing Distributors, from August 12, 2008, through May 13, 2009, totaling approximately $43,000; and payments to Riggs Distributing, from February 3, 2009, through March 13, 2009, totaling $8,000.
11. On January 23, 2013, CDTFA issued an NOD against appellant as an individual, pursuant to R&TC section 6829, for tax of $12,259.13 and penalties totaling $2,045.60, incurred by Hauswise.
12. Appellant filed a timely petition for redetermination of the NOD.
13. In September 2013, appellant contacted CDTFA's Settlement Bureau and filed a settlement proposal. On April 9, 2014, the matter was removed from settlement.

14. On November 12, 2014, CDTFA held an appeals conference on this matter. On September 9, 2015, CDTFA issued a Decision and Recommendation denying appellant's petition for redetermination.
15. Subsequently, appellant again contacted CDTFA's Settlement Bureau and filed a settlement proposal.
16. CDTFA's Settlement Bureau drafted an Original Settlement Agreement, sent June 6, 2017, for appellant's consideration. However, after failing to reach an agreement, the case was removed from settlement on March 11, 2018. Subsequently, appellant contacted the Settlement Bureau and requested settlement for a third time. Thereafter, the Settlement Bureau drafted a Revised Settlement Agreement, sent October 12, 2018, and a Second Revised Settlement Agreement, sent November 30, 2018, for appellant's consideration.[5]
17. On November 8, 2018, appellant revoked his power of attorney for his representative, and on November 9, 2018, the Settlement Bureau confirmed receipt of the revocation.
18. On December 17, 2018, appellant signed and returned to the Settlement Bureau the Second Revised Settlement Agreement.
19. The CDTFA Settlement Bureau employee who was assigned to appellant's case emailed appellant on November 21, 2019. The employee indicated that she had returned from extended leave of absence, was following up on appellant's case, and was sending a cover letter and Third Revised Settlement Agreement for appellant's review. The following day, on November 22, 2019, the Settlement Bureau emailed appellant indicating that "while there was interest accrual, [the Settlement Bureau was] essentially honoring the same settlement amount from back when we last spoke."
20. On December 5, 2019, appellant emailed the Settlement Bureau indicating that upon locating the attached December 17, 2018 signed settlement agreement, his recollection of previously providing the Settlement Bureau with the signed settlement agreement and "having 'done this Agreement'" was confirmed.
21. The Settlement Bureau replied by email dated December 6, 2019, informing appellant that while it would honor the original settlement amount, an updated settlement

[5] All settlement documentation and correspondence was provided by appellant.

agreement would need to be signed. On January 3, 2020, the Settlement Bureau emailed appellant a Fourth Revised Settlement Agreement for his signature.

22. Appellant replied by email dated January 13, 2020, indicating he already signed a settlement agreement and inquired why a new agreement needed his signature.

23. In a January 14, 2020 email, the Settlement Bureau responded to appellant that "Due to the passage of time, an updated settlement agreement with a more current date needs to be signed."

24. Appellant replied by email dated January 21, 2020, indicating that the CDTFA Settlement Bureau's cover letter, which was attached to the settlement agreement that appellant signed, stated: "After I receive the signed Agreement, I will prepare a settlement recommendation that will be forwarded for review and formal approval. We will notify you in writing once the settlement has been approved." Appellant wrote that this language "suggest[s] that the passage of time should not be an issue." Appellant indicated other concerns he had, such as CDTFA's use of the word "updated" when referring to the third and fourth revised settlement agreements.

25. On March 13, 2020, the Settlement Bureau sent a letter to appellant's former representative notifying appellant that it was closing the settlement case.

26. This timely appeal followed.

27. On appeal, as to the elements for personal liability under R&TC section 6829, appellant concedes to the following:

    a. Hauswise's business terminated during 3Q09;
    b. Hauswise collected sales tax reimbursement on its sales of tangible personal property during the liability period;
    c. Appellant had the authority to pay the taxes at issue on Hauswise's behalf; and
    d. Appellant was the person responsible for Hauswise's sales and use tax compliance during the liability period.
    e. Appellant filed Hauswise's 1Q09 and 2Q09 returns as non-remittance returns.

28. On appeal, appellant submitted a CDTFA-735 form (Request for Relief from Penalty, Collection Cost Recovery Fee, and/or Interest) on August 13, 2021, signed under penalty of perjury, requesting relief from the penalties and interest. In response, CDTFA agrees to remove the $818.20 finality penalty.

DISCUSSION

Issue 1: Whether appellant is personally liable under R&TC 6829 for Hauswise's unpaid sales and use tax liabilities for the liability period.

R&TC section 6829 provides that a person is personally liable for the tax, penalties, and interest owed by a business entity, such as a limited liability company (LLC), if all the following elements are met: (1) the LLC's business has been terminated, dissolved, or abandoned; (2) the LLC collected sales tax reimbursement on its sales of tangible personal property and failed to remit such tax reimbursement to CDTFA or consumed tangible personal property and failed to pay the applicable tax to the seller or CDTFA; (3) the person had control or supervision of, or was charged with the responsibility for, the filing of returns or the payment of tax, or was under a duty to act for the LLC in complying with the Sales and Use Tax Law; and (4) the person willfully failed to pay taxes due from the LLC or willfully failed to cause such taxes to be paid. (R&TC, § 6829(a), (c); Cal. Code Regs., tit. 18, § 1702.5(a), (b).) CDTFA must prove these elements by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 1702.5(d).)

Here, appellant concedes that Hauswise's business terminated during 3Q09, Hauswise collected sales tax reimbursement on its sales of tangible personal property during the liability period, and that appellant was responsible for Hauswise's sales and use tax compliance during the liability period. Therefore, the only remaining issue is whether appellant willfully failed to pay, or cause to be paid, Hauswise's tax liabilities.

"Willfully fails to pay or cause to be paid" means that the failure was the result of an intentional, conscious, and voluntary course of action. (R&TC, § 6829(d); Cal. Code Regs., tit. 18, § 1702.5(b)(2).) This failure may be willful even if it was not done with a bad purpose or motive. (Cal. Code Reg., tit. 18, § 1702.5(b)(2).) In order to show willfulness, CDTFA must establish all of the following:

> (A) On or after the date that the taxes came due, the responsible person had actual knowledge that the taxes were due, but not being paid.
>
> (B) The responsible person had the authority to pay the taxes or to cause them to be paid (i) on the date that the taxes came due and (ii) when the responsible person had actual knowledge as defined in (A).
>
> (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.

(*Ibid*.)

Regarding the second requirement of willfulness, appellant concedes that he always had the authority to pay the taxes at issue on Hauswise's behalf. Thus, the remaining requirements of willfulness in dispute are knowledge and ability to pay. Appellant contends that his failure to pay the taxes, or cause Hauswise to pay them, was not willful, and that his intent throughout the liability period was to keep Hauswise a viable entity. Appellant also contends, in the alternative, that his responsible person liability was discharged in his personal bankruptcy[6], and that the Settlement Bureau should honor the December 17, 2018 signed settlement agreement.[7]

Knowledge

The first requirement for willfulness is that the individual had actual knowledge that the taxes were due, but not being paid. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(A).) Appellant asserts that he did not realize Hauswise failed to file its 3Q08 and 4Q08 returns until late 2009, when he spoke with CDTFA staff regarding Hauswise's late filed 1Q09 and 2Q09 returns. Appellant contends that Hauswise did not timely file a return or pay tax for 3Q08 or 4Q08 because the business was struggling during this period due to the financial crisis. Appellant asserts that, while he was preoccupied with keeping Hauswise a viable entity, he unintentionally failed to file returns for 3Q08 and 4Q08.

Here, we first note that appellant acknowledges that he filed non-remittance returns (i.e., returns filed without payment of the reported tax due) for 1Q09 and 2Q09. Therefore, appellant clearly knew taxes were due but not paid for 1Q09 and 2Q09. Next, appellant agrees that he filed Hauswise's returns for the periods both immediately before and after 3Q08 and 4Q08 (i.e., 1Q08, 2Q08, 1Q09, 2Q09, and 3Q09). Appellant was actively involved in Hauswise's business, was the only individual responsible for Hauswise's sales and use tax matters, knew of Hauswise's obligation to remit collected sales tax reimbursement, and was the person who filed

[6] OTA does not have jurisdiction to determine whether a liability has been or should have been discharged in bankruptcy; therefore, we will not discuss this issue further. (*Appeal of Savage*, 2020-OTA-328P; Cal. Code Regs., tit. 18, § 30104(h).)

[7] There is nothing in the Sales and Use Tax Law that requires either party to enter into or accept a settlement agreement. Moreover, OTA does not have jurisdiction over settlement matters; rather, our function in the appeals process is to determine the correct amount of the taxpayer's California tax liability. (See *Appeal of Thomas Conglomerate*, 2021-OTA-030P, see also *Appeal of Robinson*, 2018-OTA-059P.) Therefore, whether CDTFA should honor a signed settlement agreement will not be addressed further.

Hauswise's returns before and after 3Q08 and 4Q08. Based on these facts, we conclude that on or after the date that the taxes came due, appellant must have known that Hauswise failed to file its sales tax returns for 3Q08 and 4Q08, and thus he knew that the tax for those periods was unpaid. Appellant's acknowledgment during the hearing that he knew before the end of 2009 that Hauswise's 3Q08 and 4Q08 returns were not filed and paid corroborates our conclusion that on or after the date the taxes became due, appellant had actual knowledge that taxes were due but not paid for 3Q08 and 4Q08. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(A).)

Based on the foregoing, the evidence establishes that on or after the date the taxes became due for all periods at issue, appellant had actual knowledge that taxes were due, but not being paid.

Ability to pay

The third requirement is that when the individual had actual knowledge, the individual had the ability to pay the taxes but chose not to do so. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(C).) Appellant contends that Hauswise lacked available funds with which to pay the liability. Appellant argues that due to the mid-2008 financial crisis, sales plummeted and Hauswise's cash flow quickly depleted.

The evidence demonstrates that during the liability period, Hauswise had the ability to pay the taxes due but elected not to. Specifically, the records from Hauswise's suppliers show that Hauswise made payments to Hajoca Corporation, from August 20, 2008, through March 20, 2009, totaling approximately $13,000; payments to Decorative Plumbing Distributors, from August 12, 2008, through May 13, 2009, totaling approximately $43,000; and payments to Riggs Distributing, from February 3, 2009, through March 13, 2009, totaling $8,000. During the hearing, appellant conceded that he used available funds to pay the vendors in lieu of paying Hauswise's tax liabilities. Appellant contends that the vendors submitted the liabilities to collection, that appellant endured threatening and abrasive telephone calls from debt collectors, and that using the available funds to pay the vendors was in reaction to the calls. Regardless of the reasons appellant chose to pay the vendors with the available funds, the facts indicate that Hauswise had the funds available to pay the taxes, but appellant elected not to do so.

Moreover, there is no dispute that during the liability period Hauswise continued to operate, and that it collected tax reimbursement from its customers, and thus had those funds available to pay the tax liabilities. Therefore, we conclude that appellant had the ability to pay

Hauswise's unpaid tax liabilities but chose not to do so. Thus, we find that appellant willfully failed to pay or to cause to be paid Hauswise's unpaid sales and use tax liabilities during the liability period.

Accordingly, we find that appellant is personally liable under R&TC section 6829 for Hauswise's unpaid liabilities for the period July 1, 2008, through June 30, 2009.

Issue 2: Whether relief of the penalties asserted against Hauswise is warranted.

CDTFA imposed failure-to-file penalties for 3Q08 and 4Q08; a finality penalty related to the June 18, 2010 NOD; and late-payment penalties for 1Q09 and 2Q09. CDTFA included these penalties in the NOD issued to appellant. Subsequently, CDTFA agreed to remove the finality penalty.[8]

There is no statutory or regulatory authority for relieving penalties in R&TC section 6829 determinations; however, R&TC section 6592(a) provides that such penalties may be relieved if the failure to timely file a return or pay taxes was due to reasonable cause and circumstances beyond the person's control, and occurred notwithstanding the exercise of ordinary care and in the absence of willful neglect. The person subject to the penalties is the LLC. Thus, if appellant were to establish reasonable cause for Hauswise's failure to timely file its returns and pay its liabilities, the penalties incurred by Hauswise would be relieved, and appellant's derivative liability for the penalties would also be eliminated. A person seeking relief of a penalty under R&TC section 6592 must submit a signed statement under penalty of perjury setting forth the facts upon which the person bases the claim for relief. (R&TC, § 6592(b).)[9]

In support of his request for relief of the penalties, appellant argues that Hauswise was not prepared for the mid-2008 financial crisis. Appellant argues that sales plummeted, cash flow quickly went to zero and eventually negative, and soon harassing telephone calls and letters demanding payments for outstanding debts were a regular occurrence. Appellant asserts that he was advised that it was better to file Hauswise's 1Q09 and 2Q09 past-due returns without remittance than to not file at all, and that despite his intentions to eventually remit the tax, by the end of 2009, the close of the business was clear and there was still no money. Appellant

[8] When the June 18, 2010 NOD was issued to Hauswise, Hauswise's business was terminated and the bankruptcy court granted appellant and his wife a discharge from their liabilities. Thus, CDTFA found that appellant reasonably believed there was not a reason to file a timely petition on Hauswise's behalf.

[9] As stated in Factual Finding number 28, appellant filed the requisite statement on August 13, 2021.

contends that failing to file Hauswise's 3Q08 and 4Q08 returns and filing its 1Q09 and 2Q09 as non-remittance returns was done without malicious intent. Appellant asserts that he did not receive money from Hauswise in 2008, eventually having to file for personal bankruptcy, and that he tried various solutions to alleviate Hauswise's financial problem, to no avail, as Hauswise's economic duress was insurmountable due to the financial crisis.

However, an adverse financial situation and economic downturn do not constitute reasonable cause for Hauswise's failure to timely file its returns or pay its tax liabilities, particularly given that Hauswise's collected sales tax reimbursement from its customers and used those funds to pay creditors other than CDTFA. (See *Ashlan Park Center LLC v. Crow* (2015) 233 Cal.App.4th 1274, 1283.)[10] Accordingly, we conclude that appellant has failed to establish reasonable cause for Hauswise's failure to timely file its returns and pay its tax liabilities. Consequently, relief of the penalties is not warranted, except as otherwise conceded by CDTFA.

Issue 3: Whether relief of interest is warranted.

The imposition of interest is mandatory. (R&TC, § 6482.) There is no statutory right to interest relief. (R&TC, § 6593.5.) The law allows CDTFA, in its discretion, to grant relief of all or any part of the interest imposed on a person under the Sales and Use Tax Law where the failure to pay the tax is due in whole or in part to an unreasonable error or delay by an employee of CDTFA acting in his or her official capacity. (R&TC, § 6593.5(a)(1).) Such a delay means, for example, an unreasonable failure to work on an appeal. (*Appeal of Micelle Laboratories, Inc.*, 2020-OTA-290P.) An unreasonable error or delay shall be deemed to have occurred only if no significant aspect of the error or delay is attributable to an act of, or failure to act by, the

[10] At issue in *Ashlan Park Center LLC v. Crow* (2015) 233 Cal.App.4th 1274 (*Ashlan Park*), was R&TC section 4985.2, which in relevant part provides that a penalty resulting from a failure to make a timely property tax payment may be canceled if the failure "is due to reasonable cause and circumstances beyond the taxpayer's control, and occurred notwithstanding the exercise of ordinary care in the absence of willful neglect ...." R&TC section 4985.2 is essentially identical to R&TC section 6592. The court in *Ashlan Park* held that the statute:

> was intended to provide relief from delinquency penalties to a taxpayer who was prevented by outside forces, beyond its control, from making its tax payment to the tax collector before the delinquency date. Such outside forces might include the sudden hospitalization of the taxpayer, who was thereby prevented from carrying on his normal business activities, or an earthquake or other natural disaster that disrupted mail and electronic delivery systems, temporarily preventing delivery of the payment. The statute might also apply where, through the fraud or other wrongdoing of a third party, there was uncertainty about who owned the real property and was liable for payment of the property taxes. *We conclude the statute was not intended as a broad-ranging remedy for a particular taxpayer's adverse financial situation or for a general economic recession*. (*Ashlan Park*, *supra*, at 1283, italics added.)

taxpayer. (R&TC, § 6593.5(b).) Any person requesting interest relief must include a statement under penalty of perjury setting forth the facts on which the request is based. (R&TC, § 6593.5(c).)[11]

Appellant requests interest relief for the period the appeal was being handled by CDTFA's Settlement Bureau. Appellant argues that while he worked diligently during the settlement process, the Settlement Bureau mishandled the appeal, which resulted in unreasonable delay and interest accrual. Regarding the period surrounding the Second Revised Settlement Agreement, appellant contends that after he signed and returned the agreement on December 17, 2018, the Settlement Bureau did not respond, nor countersign it and return it to appellant. Appellant asserts that the Settlement Bureau lost the signed settlement agreement he submitted. Appellant also asserts that when he emailed a copy of the signed agreement on December 5, 2019, and later inquired why a new agreement needed his signature, as opposed to the Settlement Bureau countersigning the December 17, 2018 signed settlement agreement, the Settlement Bureau did not provide him with a complete and transparent explanation. In addition, appellant contends that he was not afforded due process since the Settlement Bureau sent appellant several letters addressed to his former representative, even though the Settlement Bureau previously acknowledged appellant revoked the representative's power of attorney.[12]

CDTFA argues that appellant does not qualify for relief under R&TC section 6593.5. CDTFA argues that there were no delays that were attributable to the Settlement Bureau or to any other CDTFA employee. CDTFA further argues that any delay is attributable to an act of appellant. Specifically, CDTFA contends that appellant's requests to enter into settlement attributed to delays in the appeal. CDTFA argues that appellant entered into settlement negotiations on three different occasions, which is an uncommon occurrence, and each time the parties were unable to reach a settlement agreement.

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[11] As stated in Factual Finding number 28, appellant filed the requisite statement on August 13, 2021.

[12] OTA lacks jurisdiction to determine whether appellant is entitled to a remedy for CDTFA's actual or alleged violation of any substantive and procedural right to due process under the law, unless the violation affects the adequacy of a notice, the validity of an action from which a timely appeal was made, or the amount at issue in the appeal. (See Cal. Code Regs., tit. 18, § 30104(d).) Appellant's contentions regarding the Settlement Bureau's handling of addressing letters intended for appellant do not affect the adequacy of the NOD, the validity of the action, or the amount at issue in this appeal. Therefore, OTA lacks jurisdiction over such alleged due process violations, and we will not address this argument further.

The law allows CDTFA to grant interest relief "in its discretion," provided certain elements are met. (R&TC, § 6593.5.) OTA reviews CDTFA's decisions to deny interest relief on an abuse of discretion standard. (*Appeal of Micelle Laboratories, Inc.*, *supra*; see *Appeal of Gorin*, 2020-OTA-018P.) To show an abuse of discretion, a taxpayer must establish that, in refusing to relieve interest, CDTFA exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law. (*Appeal of Gorin*, *supra*; see *Woodral v. Commissioner* (1999) 112 T.C. 19, 23.)

The time periods for which relief of interest is at issue can be compartmentalized into four time periods. We address each separately, below.

First period: September 2013 to September 9, 2015

The time the appeal was with CDTFA's Settlement Bureau between the first time appellant contacted the Settlement Bureau (i.e., September 2013) to when the Decision and Recommendation was issued (i.e., September 9, 2015) can be analyzed as one period. During this period, the parties entered into settlement negotiations, but were unable to come to an agreement, so the matter was removed from settlement. Thereafter, the matter returned to CDTFA's appeals process, wherein an appeals conference was held on November 12, 2014, and a Decision and Recommendation was prepared, and then issued on September 9, 2015. Therefore, for the first period we find that there is no evidence of an unreasonable error or delay by a CDTFA employee acting in his or her official capacity. Thus, appellant has not established that, in refusing to relieve interest during this period, CDTFA exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law. (*Appeal of Gorin*, *supra*; see *Woodral v. Commissioner*, *supra*.)

Second period: Filed a Second Settlement Proposal (approx. October 9, 2015)[13] *to December 17, 2018*

The second period is measured from the date appellant contacted CDTFA's Settlement Bureau and filed a second settlement proposal (i.e., approx. October 9, 2015), until the date appellant returned the signed settlement agreement (i.e., December 17, 2018). As for the second period, the evidentiary record indicates that the parties were engaged in settlement negotiations,

[13] Neither party has provided the date appellant filed the second settlement proposal. However, for CDTFA to have jurisdiction to have accepted the settlement proposal, the proposal must have been filed within 30 days from the date CDTFA's decision (i.e., the Decision and Recommendation) was mailed. (See Cal. Code Reg., tit. 18, § 35065(g).) Therefore, it appears that appellant filed the second settlement proposal by October 9, 2015.

as demonstrated by an Original Settlement Agreement, sent June 6, 2017; appellant requesting settlement for a third time in May 2018; a Revised Settlement Agreement, sent October 12, 2018, and a Second Revised Settlement Agreement, sent November 30, 2018. Therefore, absent additional evidence, the evidence reflects ongoing, bi-lateral communications, offers, and counteroffers during this period. Thus, for the second period, we find that there is no evidence of an unreasonable error or delay by a CDTFA employee acting in his or her official capacity and, if there was a delay, a significant aspect of the delay was attributable, as least in part, to appellant (i.e., as the result of bi-lateral negotiations). Therefore, we find that CDTFA properly declined to relieve interest for this period.

Third period: December 17, 2018, to November 21, 2019

The third period is measured from the date appellant returned the signed settlement agreement (i.e., December 17, 2018), until the date CDTFA's Settlement Bureau employee assigned to appellant's case emailed appellant (i.e., November 21, 2019). To get a better understanding regarding CDTFA's standard working timeframes during this period, OTA asked CDTFA during the hearing about its standard working timeframes during settlement negotiations and, more specifically, about its standard working timeframes for processing a settlement agreement after obtaining a taxpayer's signature.[14] In response, CDTFA indicated that there are no standard working timeframes for settlement negotiations, and that it is uncertain if there are standard working timeframes for processing a signed settlement agreement. CDTFA also indicated that it was unable to discuss why the Settlement Bureau would need a taxpayer to sign a new settlement agreement after the taxpayer already signed and provided the Settlement Bureau a settlement agreement. In addition, when asked if there were any unexplained absences of work on the appeal, CDTFA states that it was unable to speak to the time when the appeal was with the Settlement Bureau. While CDTFA argued that any delay was attributable to an act of appellant, when asked at the hearing for its position as to whether a significant aspect of the error or delay is attributable to an act of, or failure to act by, appellant during the 339-day period between December 17, 2018, and November 21, 2019, CDTFA stated that it was not prepared to speak about what happened within the Settlement Bureau during that period.

[14] For purposes of considering discretionary interest relief, OTA will generally not second-guess the standard timeframes determined by CDTFA, and will instead defer to CDTFA's timeframes absent evidence of an abuse of discretion. (*Appeal of Micelle Laboratories, Inc.*, *supra*.)

A tax agency is in the best position to know what actions were taken by the agency's officers and employees during the period for which a relief of interest request is made. (*Appeal of Gorin*, *supra*; see also *Jacobs v. Commissioner*, *supra*.) The mere passage of time does not necessarily establish an unreasonable failure to work on a taxpayer's matter. (*Appeal of Gorin*, *supra*.) However, where the administrative record is silent regarding the actions taken on a taxpayer's matter and the tax agency does not come forth with evidence to show that the employees assigned to the matter or involved in its review were actively working on it, there may be no apparent basis to support the agency's determination not to relieve interest, and the unsupported determination may constitute an abuse of discretion. (*Ibid*.) For purposes of interest relief, an unreasonable failure to work on a case is an example of an unreasonable error or delay by an employee of CDTFA acting in his or her official capacity. (See *Appeal of Micelle Laboratories, Inc.*, *supra*.)

Regarding the 339-day period between December 17, 2018, and November 21, 2019, as stated in the November 21, 2019 email sent to appellant from the Settlement Bureau employee who was assigned to his case, she was following up on appellant's case after having returned from an extended leave of absence. CDTFA has provided no explanation or evidence regarding any activity that the Settlement Bureau took during this period, nor explained why the matter was not reassigned to an employee who was not on an extended leave of absence. CDTFA's contention that the delay is "attributable to appellant" because he initiated settlement negotiations is misplaced, because while appellant's settlement offer is an act attributable to appellant, that act alone is immaterial to and did not cause the ensuing delay during the 339-day period. Specifically, the Second Revised Settlement Agreement was dated November 30, 2018, and approximately two weeks later, on December 17, 2018, appellant signed and returned it to the Settlement Bureau. CDTFA has presented no argument or evidence indicating that appellant caused any delay after he submitted the signed settlement agreement. In fact, the Settlement Bureau had no further communication with appellant[15] until the November 21, 2019 email, and it appears from this email and subsequent emails that the Settlement Bureau did not identify any lack of required information, and instead cited only "the passage of time" as the reason that it

[15] While appellant indicates in his December 5, 2019 email that the Settlement Bureau sent him a June 7, 2019 letter notifying him that the matter was in abeyance until December 4, 2019, the letter is not part of the record; therefore, we do not rely on it at all in this matter. Nevertheless, we observe that the alleged contents of the letter, if true, would be consistent with our finding above that the matter was not reassigned to an employee who was not on an extended leave of absence.

needed a current signature on an updated settlement agreement. The administrative record is silent regarding actions the Settlement Bureau took on appellant's matter during this period, and CDTFA has presented no evidence demonstrating that the Settlement Bureau employees assigned to the matter or involved in its review were actively working on it; as such, there is no apparent basis to support CDTFA's determination not to relieve interest. (See *Appeal of Gorin*, *supra*.) In sum, the evidence in the record establishes that CDTFA has failed to establish a reasonable explanation for the Settlement Bureau's apparent absence of work on this case during this period. Furthermore, there is no evidence in the record that appellant contributed to the delay during this period. Accordingly, we conclude that CDTFA abused its discretion in failing to relieve interest that accrued during this period, and that relief of interest is appropriate for this period. (See *Appeal of Gorin*, *supra*.)

Fourth period: November 21, 2019, to March 13, 2020

The fourth period is measured from the date the Settlement Bureau employee assigned to appellant's case emailed appellant (i.e., November 21, 2019), until the Settlement Bureau sent a letter to appellant's former representative notifying appellant that it was closing the settlement case (i.e., March 13, 2020). We can understand appellant's concern regarding the Settlement Bureau's handling of the appeal during this period. (For example, the Settlement Bureau informed appellant, despite his prompt return a signed settlement agreement almost a year prior, that he needed to provide a current signature on an updated settlement agreement "[d]ue to the passage of time," during which "there was interest accrual.") However, after the Settlement Bureau sent appellant the new settlement agreement for his signature on November 21, 2019, the settlement process resumed, and the evidentiary record does not indicate that there was further unreasonable error or delay by a Settlement Bureau employee. Therefore, CDTFA's decision not to abate interest during this period is not an abuse of discretion.

HOLDINGS

1. Appellant is personally liable under R&TC 6829 for Hauswise's unpaid sales and use tax liabilities for the liability period.
2. Relief of the penalties, other than the finality penalty, asserted against Hauswise is not warranted.
3. Relief of interest is warranted for the period December 17, 2018, through November 21, 2019.

DISPOSITION

We sustain CDTFA's decision to delete the finality penalty, and we relieve interest for the period December 17, 2018, through November 21, 2019. Otherwise, we deny the appeal.

DocuSigned by:
Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

We concur:

DocuSigned by:
Josh Lambert
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Josh Lambert
Administrative Law Judge

DocuSigned by:
Suzanne B. Brown
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Suzanne B. Brown
Administrative Law Judge

Date Issued: 11/23/2021