

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of:

**M. HENRIQUEZ**

) OTA Case No.: 18042584  
) CDTFA Case ID: 862024  
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)  
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**OPINION**

Representing the Parties:

For Appellant:

M. Henriquez

For Respondent:

Mengjun He, Tax Counsel III<sup>1</sup>

J. ALDRICH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, M. Henriquez (appellant) appeals a Decision and Recommendation (decision) issued by respondent California Department of Tax and Fee Administration (CDTFA)<sup>2</sup> denying appellant’s petition for redetermination of the Notice of Determination (NOD) dated February 4, 2015.<sup>3</sup> The NOD is for \$88,675.35 in tax, plus applicable interest, and \$15,016.80 in penalties, for the period April 1, 2011, through June 5, 2012 (liability period).<sup>4</sup> The NOD reflects CDTFA’s determination that appellant is personally liable as a responsible person for the unpaid tax liabilities of AutoCouture LLC dba Auto Couture Motor Cars (AutoCouture).

<sup>1</sup> Mengjun He represented CDTFA during briefing. CDTFA indicated that this representative no longer works for CDTFA; however, CDTFA has not identified a new representative for this appeal.

<sup>2</sup> Sales taxes were formerly administered by the Board of Equalization (board). Effective July 1, 2017, functions of the board relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) When this Opinion refers to acts or events that occurred before July 1, 2017, “CDTFA” shall refer to its predecessor, the board.

<sup>3</sup> The NOD is timely because on June 6, 2012, CDTFA learned that AutoCouture’s business operations had terminated, and the NOD was issued on February 4, 2015, which is within the statute of limitations. (R&TC, § 6829(f).)

<sup>4</sup> The penalties consist of \$6,686.20 in late payment and non-remittance penalties, a \$4,165.30 failure to file penalty, and a finality penalty of \$4,165.30. The penalties were originally imposed on AutoCouture.

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 liable for the unpaid liabilities of AutoCouture for the liability period pursuant to R&TC section 6829.

### FACTUAL FINDINGS

1. AutoCouture operated a used car dealership in Pleasanton, California.
2. On August 5, 2010, appellant signed AutoCouture's Articles of Organization as the organizer and identified himself as the initial agent for service of process. This document was filed with the California Secretary of State on August 18, 2010.
3. On January 20, 2011, appellant executed an application for seller's permit (BOE-400-SPA). Therein, appellant indicated that he held the title of limited liability company (LLC) member. Wells Fargo is listed as AutoCouture's financial institution. The major California-based suppliers are ADESA Golden Gate (ADESA), Wind River, and Manheim San Francisco Bay (Manheim). AutoCouture's seller's permit became effective on February 1, 2011. AutoCouture's permit was closed with an effective date of June 5, 2012. Appellant previously held a seller's permit under his name, doing business as (dba) Auto Couture, from July 20, 2010, through January 31, 2011.
4. During the liability period AutoCouture filed sales and use tax returns (SUTRs) as follows:
  - a. On June 14, 2011, appellant electronically filed (e-filed) AutoCouture's SUTR for the first quarter of 2011 (1Q11). Thereon, appellant identified himself as AutoCouture's owner and reported that AutoCouture had \$0 in sales.
  - b. On September 21, 2011, A. Rosenberg, AutoCouture's accountant, e-filed the SUTR for 2Q11. The SUTR reported the following: total gross sales of \$259,797; claimed deductions of \$13,304 for nontaxable labor and \$7,943 for sales in interstate or foreign commerce; a penalty of \$2,194; and interest of \$219.46. No payment was received contemporaneous with the e-filing of the SUTR.

- c. On January 23, 2012, A. Rosenberg e-filed the SUTR for 3Q11. The SUTR reported the following: total gross sales of \$445,134; claimed deductions of \$60,183 in nontaxable sales for resale, \$21,555 in nontaxable labor, and \$10,000 for sales in interstate or foreign commerce; a penalty of \$2,909.50; and interest of \$460.66. No payment was received contemporaneous with the e-filing of the SUTR.
  - d. On January 31, 2012, A. Rosenberg e-filed the SUTR for 4Q11. The SUTR reported the following: total gross sales of \$228,567; claimed deductions of \$34,978 in nontaxable labor and \$5,545 for sales in interstate or foreign commerce; a penalty of \$1,582.10; and interest of \$92.29. No payment was received contemporaneous with the e-filing of the SUTR.
5. For the remainder of the liability period, CDTFA estimated AutoCouture's daily taxable sales based on its reported taxable sales for 2Q11 through 4Q11. Then, CDTFA applied the established daily average taxable sale of \$2,836 to the number of days AutoCouture operated from January 1, 2012, through June 5, 2012. Based on these calculations, CDTFA issued two NODs to AutoCouture.
  - a. On August 28, 2012, CDTFA issued an NOD to AutoCouture for the period April 1, 2012, through June 5, 2012. The NOD was for \$16,815 in tax, plus applicable interest, and \$1,681.50 in penalties.
  - b. On August 30, 2012, CDTFA issued an NOD to AutoCouture for the period January 1, 2012, through June 5, 2012.<sup>5</sup> The NOD was for \$24,838 in tax, plus applicable interest, and \$2,483.80 in penalties.
6. During the liability period, CDTFA sent AutoCouture various notices and demands. On September 7, 2011, CDTFA sent AutoCouture a Notice of Delinquency - Failure to File 2Q11 SUTR. On October 13, 2011, CDTFA sent AutoCouture a Billing and Refund Notice - Demand for Immediate Payment of the 3Q11 sales tax, interest, and penalty. On December 13, 2011, CDTFA sent AutoCouture a Notice of Delinquency - Failure to File 3Q11 SUTR. On January 10, 2012, CDTFA sent AutoCouture a Notice to Appear - Revocation Proceeding based on AutoCouture's failure to file its 3Q11 SUTR; its failure

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<sup>5</sup> CDTFA reports that taxes asserted under this NOD only covers the period January 1, 2012, through March 31, 2012. A computer-generated error caused the NOD to show a longer liability period.

to pay the balance of tax, interest, and penalty owed; and its failure to post the amount of security requested.

7. On August 1, 2011, appellant signed a Request for Extension of Time to File a Tax Return (BOE-468). Appellant identified his title as LLC member/officer. Appellant wrote:

We did not realize that we were on a quarterly basis. We [were] under the assumption that we were yearly. We are just about done with our returns and will be filing electronically by Wednesday, Aug[ust] 3<sup>rd</sup>, 2011.

8. According to CDTFA Automated Compliance Management System (ACMS)<sup>6</sup> entries, appellant spoke with CDTFA about AutoCouture's delinquent taxes on the following occasions:
- a. On September 14, 2011, appellant called CDTFA to ask a question about district transactions and use taxes, received clarification from CDTFA staff, and requested to have until September 16, 2011, to e-file after making changes.
  - b. On February 16, 2012, appellant called CDTFA regarding tax levies. Appellant indicated that CDTFA had levied over \$14,000 from AutoCouture's Wells Fargo bank account. Appellant asked CDTFA not to contact A. Rosenberg and stated he would be cancelling the power of attorney (POA)<sup>7</sup> for that representative. Appellant was to e-file and pay 4Q11 by February 20, 2012, and call back on February 23, 2012, to arrange a short-term payment plan.
  - c. On March 12, 2012, appellant and CDTFA discussed the revocation of AutoCouture's seller's permit and the sales tax balance due, and appellant informed CDTFA that AutoCouture was no longer selling cars. CDTFA informed him that the full balance was subject to collection and that no tax payment was ever made under the account since AutoCouture began operating except for the levied amount. In response, appellant indicated that he understood and said that he had someone doing returns and thought some payments were made. Appellant indicated that he applied for a personal loan and agreed to pay the 4Q11 taxes

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<sup>6</sup> CDTFA makes a record of collection activity communications with taxpayers, which are logged under the account number and recorded contemporaneously in ACMS.

<sup>7</sup> A copy of the cancelled POA is not in the record. Appellant has not specifically disputed that he signed the cancelation.

online by March 21, 2012, and half of the accounts receivable balance of \$28,000 by April 2, 2012, and the balance by May 1, 2012. CDTFA stated that collection action will be taken if AutoCouture does not pay.

- d. On June 6, 2012, CDTFA informed appellant that AutoCouture’s seller’s permit was no longer valid. Appellant confirmed AutoCouture was no longer selling cars, but instead they were providing auto-detailing for dealers. CDTFA requested that appellant pay the accounts receivable balance in full. Appellant responded that he could not and requested a payment plan.
9. CDTFA’s ACMS notes also memorialize the following relevant communications:
- a. CDTFA received a POA for A. Rosenberg signed by appellant on February 3, 2012.<sup>8</sup>
  - b. On March 6, 2012, CDTFA spoke with Kyle, an AutoCouture employee, who identified appellant as the person that was “doing some errands due to [the CDTFA] levy.”
  - c. On June 6, 2012, CDTFA spoke with A. Limcaco who identified appellant as the manager.
  - d. On August 16, 2012, CDTFA spoke with AutoCouture’s landlord, M. Szulborski, who stated that AutoCouture vacated the premises on June 5, 2012. The landlord stated that the lease for AutoCouture was signed by A. Limcaco. According to the landlord, A. Limcaco was the president and appellant was the business partner.
  - e. On April 1, 2014, CDTFA spoke with A. Rosenberg who confirmed that sales tax reimbursement was charged and collected on retail sales. A. Limcaco had hired him. A. Rosenberg stated that he did not know M. Hernandez,<sup>9</sup> and that he had advised A. Limcaco to pay the sales tax liability even if it’s a partial payment.
  - f. On May 13, 2014, CDTFA spoke with A. Worley at Wells Fargo who indicated that the authorized signer was appellant, and A. Limcaco was not an authorized signer.

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<sup>8</sup> A copy of the POA is not in the written record. On appeal, appellant has not disputed that he signed the POA.

<sup>9</sup> Here OTA notes that A. Rosenberg may not have recognized the name because CDTFA referred to appellant as M. Hernandez instead of M. Henriquez.



- AutoCouture customer and that he had been charged sales tax reimbursement. D. Mohl provided a deal summary which confirms that \$758.83 in sales tax reimbursement was charged.
- c. On May 19, 2014, J. Hullford signed an affidavit confirming that he was an AutoCouture customer and that he had been charged sales tax reimbursement.
  - d. On May 19, 2014, G. Riolo signed an affidavit confirming that he was an AutoCouture customer and that he had been charged sales tax reimbursement.
  - e. On May 28, 2014, A. Limcaco, a customer with the same last name as one of the LLC members,<sup>10</sup> signed an affidavit confirming that he was an AutoCouture customer and that he had been charged sales tax reimbursement.
  - f. On May 29, 2014, C. Limcaco signed an affidavit confirming that she was an AutoCouture customer and that she had been charged sales tax reimbursement.
  - g. On June 1, 2014, M. Martins signed an affidavit confirming that he was an AutoCouture customer and that he had been charged sales tax reimbursement.
14. On March 28, 2013, appellant filed a police report that claimed there was identity theft when a car was sold under his personal information at the San Jose Auto Exchange on October 10, 2011.
15. On March 17, 2014, CDTFA sent ADESA a demand to furnish information regarding AutoCouture for the period 2011 through 2012. ADESA provided a buyer/seller analysis for vehicles sold by AutoCouture between January 1, 2011, through December 31, 2012; it reported 91 as the total number of vehicles and a total sales amount of \$496,000. ADESA also provided a copy of the Registration Application for Auction Access: therein, A. Limcaco referred to himself as an LLC member.
16. CDTFA reports that it obtained purchase data from the California Department of Motor Vehicles (DMV) which shows that AutoCouture made purchases of vehicles totaling \$650,275 from ADESA and Wind River from 2Q11 through 4Q11. CDTFA also reports that it obtained sales data from the DMV that shows AutoCouture made sales totaling \$598,600 from 2Q11 through 2Q12.<sup>11</sup>

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<sup>10</sup> The record is silent on whether this person has any relationship to LLC member A. Limcaco.

<sup>11</sup> A copy of the DMV document or file that itemizes the purchase and sales data is not in the written record. Instead, CDTFA provided an audit schedule that appears to contain this data. Appellant has not specifically contested the sales amounts or purchases amounts.

17. CDTFA reports that AutoCouture made payments to Pacific Gas and Electric Company (PG&E) from 2Q11 through 2Q12 totaling approximately \$1,482.33.
18. On April 2, 2014, appellant signed a responsible person questionnaire indicating that he was a silent partner with check signing authority.
19. On February 4, 2015, CDTFA issued the NOD to appellant.
20. On February 27, 2015, appellant filed a petition for redetermination disputing CDTFA's determination. On November 16, 2016, CDTFA held an appeals conference with appellant. On March 30, 2017, CDTFA issued its decision, denying the petition.
21. Appellant timely appealed to OTA.

### DISCUSSION

California imposes a sales tax on a retailer's retail sales in this state of tangible personal property, measured by the retailer's gross receipts, unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, § 6051.) Although the sales tax is imposed on the retailer, there are situations when other persons may also be held personally liable for unpaid taxes. As relevant here, R&TC section 6829 provides that a person is personally liable for the unpaid tax, penalties, and interest owed by a business entity, such as a LLC, if all of the following four 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 when due; (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 had 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 bears the burden of proving, by a preponderance of the evidence, that the requirements of R&TC section 6829 have been satisfied. (Cal. Code Regs., tit. 18, § 1702.5(d).) Moreover, more than one person may be held liable under R&TC section 6829 for the same primary liability, as long as the requirements for imposing such liability on each person are satisfied.<sup>12</sup> (See R&TC, § 6829.)

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<sup>12</sup> CDTFA reports that it determined A. Limcaco to be a responsible person and issued him a NOD as a dualee for AutoCouture's tax liabilities under R&TC section 6829.



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

The first element is satisfied because appellant, A. Limcaco, and the landlord confirmed that the business had terminated. Based on their representations, the seller’s permit was closed effective June 5, 2012. The second element is satisfied based on the following: the customer affidavits; the May 20, 2014 ACMS notes documenting a conversation with a former customer; and the April 1, 2014 ACMS notes documenting communications with AutoCouture’s former accountant. Accordingly, OTA finds that AutoCouture’s business terminated and AutoCouture collected sales tax reimbursement during the liability period.

Element 3 – Responsible Person

A “responsible person” means any officer, member, manager, employee, director, shareholder, partner, or other person having control or supervision of filing returns and paying 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).) Personal liability may only be imposed if appellant was a responsible person at the time the LLC sold tangible personal property, collected sales tax reimbursement, and failed to remit it to CDTFA. (R&TC, § 6829(c); Cal. Code Regs., tit. 18, § 1702.5(a).)

Appellant argues that CDTFA has not met its burden of proof and that CDTFA has improperly shifted the burden of proof to appellant. Appellant asserts that he was never involved in the day-to-day operations of AutoCouture. Appellant supplied copies of his 2011 and 2012 W-2 wage statements to show that he was a full-time employee of Wells Fargo during the liability period and that he relied upon A. Limcaco to manage the business. On May 5, 2018, appellant declared under penalty of perjury that “I may have received one phone call from [CDTFA], but I do not remember the details of the call, and I also would have most likely have told [CDTFA] to contact A[.] Limcaco.” Appellant also declared, “Any other communication with [CDTFA] under my name, may have resulted from A[.] Limcaco impersonating me.” Appellant also argues that CDTFA cannot merely rely on appellant’s title to meet its burden of proof to show that appellant was a responsible person. Accordingly, appellant contends that CDTFA has not proven that he was a “responsible person.”

Here, appellant signed AutoCouture’s Articles of Organization and he was listed as the agent for service of process thereon. Appellant executed AutoCouture’s application for a seller’s permit. Also, appellant held a prior seller’s permit under his name, dba Auto Couture, which was opened on July 20, 2010, and closed out on January 31, 2011. Appellant e-filed AutoCouture’s 1Q11 SUTR, whereon he identified himself as the owner. On August 1, 2011, appellant signed the BOE-468 as member/officer. Therein, appellant requested an extension of time to file AutoCouture’s 2Q11 SUTR since he was under the mistaken assumption that they had a yearly filing requirement. Appellant indicated that he was nearly done with the returns and would be e-filing by August 3, 2011. AutoCouture’s 2Q11 return was subsequently e-filed on September 21, 2011. In the cross-complaint against A. Limcaco filed in the Alameda County Superior Court, appellant also declared under penalty of perjury that he was a managing member of AutoCouture. Thus, the evidence in the record demonstrates that appellant was a managing LLC member who was responsible for AutoCouture’s sales and use tax matters.

With respect to appellant’s title, AutoCouture is a member-managed LLC with more than one manager according to the Articles of Organization. (Corp. Code, § 17704.07(b)). The management and conduct of the LLC are vested in the members. (Corp. Code, § 17704.07(b)(1).) Except as provided in subdivision (r), each member has equal rights in the management and conduct of the LLC’s activities including equal voting rights. (Corp. Code, § 17704.07(b)(2).) There is no evidence that appellant’s authority was restricted by an operating agreement. (Corp. Code, § 17704.07(r).) Thus, OTA finds appellant had broad implied and actual authority to all acts connected with the business, including ensuring its compliance with the Sales and Use Tax Law. (See *Commercial Sec. Co. v. Modesto Drug Co.* (1919) 43 Cal.App. 162, 173.)

Furthermore, the evidence shows that appellant’s title, managing member, did not exist in the abstract. That is, appellant acted in concordance with the responsibilities of his title. CDTFA’s ACMS notes document conversations between CDTFA and appellant regarding sales and use taxes matters. While appellant’s declaration generally casts doubt on the weight of the ACMS entries, OTA notes that appellant’s declaration does not expressly deny or impeach any particular conversation but uses the modal verb “may” to express a possible conversation that appellant does not recall with particularity. Appellant also declared that A. Limcaco may have impersonated him. OTA finds the ACMS notes to be more compelling evidence since the

ACMS notes are entered contemporaneously and appellant has not actually established that A. Limcaco committed fraud in representing himself as appellant to CDTFA.

According to the ACMS notes, appellant inquired with CDTFA regarding district transactions as well as use taxes; and then he requested an extension to file AutoCouture's SUTR on September 14, 2011. On February 3, 2012, CDTFA received a POA from A. Rosenberg signed by appellant. On February 16, 2012, appellant and CDTFA discussed levies, revocation of the POA, filing AutoCouture's 4Q11 SUTR, and a short-term payment plan. On March 12, 2012, appellant discussed with CDTFA matters including the following: CDTFA's revocation of AutoCouture's seller's permit; the balance of past due taxes; obtaining a personal loan for the payment of taxes; CDTFA collection actions; and other items. On June 6, 2012, appellant discussed with CDTFA AutoCouture's sales tax liability, and when CDTFA requested that the balance be paid, appellant responded that he could not pay the tax and requested a payment plan.

Based on the foregoing, we find that appellant was a responsible person for the liability period, and the third element has been met.

#### Element 4 – Willfulness

The fourth requirement is that appellant must have willfully failed to pay or to cause to be paid the liabilities at issue. For these purposes, "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. (R&TC, § 6829(d); 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. (Cal. Code Regs., tit. 18, § 1702.5(b)(2).) A person has willfully failed to pay taxes, or to cause them to be paid, only when CDTFA establishes all of the following: (1) on or after the date the taxes came due, the responsible person had actual knowledge that the taxes were due but not being paid; (2) the responsible person had the authority to pay the taxes or to cause them to be paid on the date the taxes came due and when the responsible person had actual knowledge that the taxes were due but not being paid; and (3) the responsible person had the ability to pay the taxes when the responsible person had actual knowledge that the taxes were due but not being paid, but chose not to do so. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(A)-(C).)

Regarding the first requirement, we examine the first element of willfulness: whether appellant had actual knowledge that taxes were due but not being paid.

Appellant contends that CDTFA has failed to meet its burden to prove that appellant had actual knowledge that the taxes were due, but not being paid. Appellant argues that the 2017 amendments to California Code of Regulations, title 18, (Regulation) section 1702.5 provided additional guidance regarding the applicability of R&TC section 6829 because it established three specific elements of willfulness, each of which CDTFA must prove to meet its burden. Based on the rulemaking file for the amendments to Regulation 1702.5, appellant claims that CDTFA was engaged in the improper and overreaching application of R&TC section 6829. Appellant asserts that CDTFA overreached and improperly imposed the tax liability at issue on appellant since the NOD and the liability period occurred prior to the 2017 amendments; and appellant claims that CDTFA improperly shifted the burden to appellant. In support, appellant asserts that A. Limcaco ran the day-to-day operations of AutoCouture, collected the sales and use taxes from AutoCouture's vehicle sales, and withheld or stole the taxes collected at AutoCouture. Furthermore, appellant contends that A. Limcaco defrauded him. Appellant asserts that A. Limcaco had stated that he was paying the necessary taxes while managing the day-to-day operations of the business. Appellant asserts that by the time that he became aware that A. Limcaco had lied about paying AutoCouture's sales taxes: A. Limcaco had fled the country; appellant had filed for bankruptcy; and appellant did not have the funds necessary to pay the taxes. In support appellant cites to the police report against A. Limcaco, the cross-complaint against A. Limcaco, and appellant's declaration regarding an investigation by the DMV. Appellant declared that in early 2013, he was contacted by F. Valdivia of the DMV because several customers had filed complaints against AutoCouture. According to appellant, F. Valdivia had indicated that: the customers were unable to receive their car registration from the DMV because of issues with AutoCouture; and that AutoCouture was in arrears on paying taxes to the State of California. Appellant claims that he voluntarily worked with the DMV investigator because A. Limcaco had been the individual selling vehicles to customers and stealing the funds that should have been applied towards the payment of sales or use taxes. Appellant declared that he contacted F. Valdivia to request information about the DMV investigation but had not yet received any response to this request for information.<sup>13</sup> Appellant

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<sup>13</sup> Appellant's submission of exhibits in this appeal did not include any documentation from this DMV investigation.

argues that he never held a DMV dealer's license to sell cars, and that it was A. Limcaco, not appellant, who sold the cars.

Here, AutoCouture's liabilities stem from AutoCouture's failure to pay tax as reported on its returns for 2Q11, 3Q11, 4Q11 (i.e., self-assessed taxes) and the CDTFA-assessed amounts for the remainder of the liability period. Appellant's contacts and communications with CDTFA, as documented by the ACMS notes, demonstrate that appellant was aware of the tax liabilities. For example, on September 14, 2021, appellant called CDTFA to request additional time to e-file, which appears to be in response to CDTFA's September 7, 2011 Notice of Delinquency. Also, appellant called CDTFA after AutoCouture's Wells Fargo bank account was levied. In addition, appellant called CDTFA regarding the revocation of AutoCouture's seller's permit in response to CDTFA's January 10, 2012 Notice to Appear - Revocation Proceeding. Even if we were to disregard the ACMS notes, there is substantial other evidence to show that appellant had actual knowledge that the taxes were due but not being paid, including the following: appellant signed the BOE-468; appellant e-filed the 1Q11 SUTR; and appellant signed, and subsequently revoked, the POA for A. Rosenberg. Appellant also has not sufficiently supported his claim of fraud. Appellant provided a 2013 police incident report written by appellant which does not mention A. Limcaco, nor are there any follow-up documents (e.g., a report authored by a police officer, etc.). Appellant provided the Alameda Superior Court cross-complaint alleging breach of covenant but did not provide the Court's disposition with potentially relevant findings. Appellant did not provide documents relating to the DMV investigation to support his declaration on that matter. OTA also finds the timing of these documents detract from their reliability, and logically their evidentiary weight. For example, the police report filed on March 28, 2013, reported an alleged incident that occurred approximately 17 months prior. The civil cross-complaint filed in Alameda Superior Court was four months after CDTFA levied appellant's bank account and was filed as a defense to civil suit from DSC. Accordingly, OTA finds that appellant's assertion of fraud is unsupported. (See *Appeal of Talavera*, 2020-OTA-022P.) Based on the foregoing, OTA finds that appellant had actual knowledge that AutoCouture's taxes were due but not being paid for the liability period.

Regarding the second requirement of willfulness, appellant argues that CDTFA improperly shifted the burden of proof to appellant when it wrote, "absent evidence to the contrary, we assume that [appellant], as AutoCouture's managing member, with no apparent

limitation on his authority, had the authority to pay taxes or cause them to be paid to the [CDTFA].” OTA has already discussed appellant’s title of managing member and the authority associated therewith. Appellant’s title aside, OTA finds the following evidence compelling regarding appellant’s authority: appellant was the sole authorized signer on AutoCouture’s Wells Fargo bank account; appellant signed the POA and revocation thereof for AutoCouture’s former accountant; the ACMS notes that document CDTFA’s conversations with appellant; and the ACMS notes wherein an AutoCouture employee identified appellant as the individual handling CDTFA’s levy. Thus, OTA finds that appellant had the authority to pay the taxes, or to cause them to be paid, on the date the taxes came due, when he had actual knowledge as discussed above.

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 he did not have the ability to pay the taxes at the time he was informed that the taxes were due. Appellant attributes the inability to pay to A. Limcaco’s conduct or alleged fraud. In support, appellant provided a police report that he filed against A. Limcaco for identity theft; a cross-complaint filed in the Alameda County Superior Court for breach of covenant of good faith and fair dealing and fraud relating to A. Limcaco’s conduct at AutoCouture; and appellant’s declaration alleging the DMV investigation.

In this appeal, the evidence demonstrates that during the liability period, AutoCouture had the ability to pay the taxes due but elected not to. AutoCouture continued to operate through the liability period while collecting tax reimbursement from its customers, and thus had those funds available to pay the tax liabilities. Specifically, AutoCouture made taxable sales totaling \$598,600 between 2Q11 through 2Q12; it collected sales tax on those sales, which is evident from AutoCouture self-assessed tax returns and other evidence supporting the finding that sales tax reimbursement was charged to its customer. According to CDTFA, the DMV data it obtained shows that AutoCouture purchased \$650,275 in vehicles from auction houses ADESA and Wind River. Also, Manheim provided a transaction report which showed that AutoCouture purchased nine vehicles, costing \$24,500. AutoCouture also made payments to PG&E from 2Q11 through 2Q12. During the liability period, appellant was the only authorized signatory on the Wells Fargo bank account; he was a managing member of AutoCouture with the authority and requisite knowledge; and he was the guarantor on the DSC credit line. Thus, the evidence

demonstrates that appellant chose to use the available sales tax reimbursement to pay vendors or other expenses instead of paying those amounts to CDTFA. Accordingly, OTA finds appellant is personally liable for the unpaid tax liabilities of AutoCouture for the liability period.


Regarding the 2017 regulatory amendments, in the responsible person discussion above, we examined appellant’s title in conjunction with the other evidence in the record. Furthermore, the evidence establishes each element of willfulness. In summary, we find that CDTFA met its burden of proof, and, as such, we find appellant’s arguments regarding Regulation section 1702.5 to be moot.<sup>14</sup>

HOLDING

Appellant is personally liable for the unpaid liabilities of AutoCouture for the liability period.

DISPOSITION

CDTFA’s action denying appellant’s petition is sustained.

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

We concur:

DocuSigned by:  
  
3CADA62FB4864CB...  
Andrew J. Kwee  
Administrative Law Judge

DocuSigned by:  
  
47F45ABE89E34D0...  
Suzanne B. Brown  
Administrative Law Judge

Date Issued: 9/26/2022

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<sup>14</sup> Since its effective date of October 10, 1995, R&TC section 6829 has always placed the burden of establishing responsible person liability on CDTFA, and the text of Regulation section 1702.5 never provided otherwise.