

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

B. COHEN) OTA Case No. 18063324
) CDTFA Case ID 959402
)
)
)
)**OPINION**

Representing the Parties:

For Appellant:

B. Cohen

For Respondent:

Courtney Daniels, Tax Counsel III
Scott Claremon, Tax Counsel IV
Jason Parker, Chief of Headquarters Ops.

For Office of Tax Appeals:

Lisa Burke, Business Taxes Specialist III

A. KWEE, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, B. Cohen (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA),¹ in response to appellant's timely petition for redetermination of a Notice of Determination (NOD) dated June 3, 2016. The NOD, which reflects CDTFA's determination that appellant is personally liable as a responsible person for the unpaid tax liabilities of G&B Seafoods, Inc. (G&B), is for tax of \$63,535.03, late payment penalties of \$6,414.40, and applicable interest for the period January 1, 2013, through September 12, 2013 (liability period).

Payments were made towards G&B's unpaid taxes, interest, and penalties by a person other than appellant. Those payments satisfied in full G&B's tax liabilities. G&B's remaining unpaid liability consists entirely of interest and penalties. After applying the payments towards the primary account (G&B), the amounts for which appellant is being held secondarily liable, and at issue in this appeal, are as following: \$3,400.56 in interest and penalties for the first

¹ Sales taxes were formerly administered by the State Board of Equalization (board). In 2017, functions of the board relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to acts or events that occurred before July 1, 2017, "CDTFA" shall refer to the board.

quarter of 2013 (1Q13), and \$14,538.67 in interest and penalties for 2Q13. The total amount at issue is \$17,939.23 in interest and penalties.² Furthermore, 3Q13 is no longer at issue.

Office of Tax Appeals (OTA) Administrative Law Judges Andrew J. Kwee, Keith T. Long, and Josh Lambert held an oral hearing for this matter in Sacramento, California, on July 20, 2022. At the conclusion of the hearing, the record was closed, and this matter was submitted for decision.

ISSUE

Whether appellant is personally liable as a responsible person for the unpaid sales and use tax liabilities of G&B for the period January 1, 2013, through June 30, 2013.

FACTUAL FINDINGS

1. From approximately January 1, 2013, until September 12, 2013, G&B operated a restaurant with a bar doing business as Village Fish Market. The restaurant was in Westlake Village, California.
2. G&B collected sales tax reimbursement from its customers on its sales of food and beverages.
3. Appellant was G&B's president and a 50 percent owner of the corporation. Appellant primarily oversaw management of the bar and restaurant.
4. G. Cigliano, the corporate secretary, was the other 50 percent owner of G&B. The corporate secretary primarily handled G&B's finances. The corporate secretary also prepared and electronically filed G&B's sales and use tax returns, including the returns which self-assessed the liability at issue in this appeal.
5. It is undisputed that both the corporate secretary and appellant had check signing authority for G&B's bank account.
6. G&B failed to timely pay its sales and use taxes during the liability period.

² The record does not contain a further breakdown of the remaining unpaid liability, such as whether there were any additional payments (after satisfying the taxes) and, if so, whether they were applied towards interest or penalties. The penalty amounts asserted in the NOD are \$1,064.00 for 1Q13 and \$2,764.60 for 2Q13.

7. On May 30, 2013, the corporate secretary late-filed G&B's sales and use tax return for 1Q13, reporting tax due of \$20,640, and remitting tax of \$10,000, leaving an unpaid reported tax balance of \$10,640, plus interest, and a \$1,064 late payment penalty.³
8. Between March and July 2013, appellant loaned \$230,500 to G&B to cover unpaid debts, based on his discussions with the corporate secretary regarding G&B's financial troubles.
9. The corporate secretary provided a statement to CDTFA asserting that “[a]ll of the sales tax returns filed by G&B, like all financial matters, were discussed with [appellant].”
10. It is undisputed that during July 2013, both co-owners discussed closing the business, and appellant and a third-party investor (investor) offered to buy out the corporate secretary's ownership interest in G&B for \$100,000.
11. On August 1, 2013, the corporate secretary late-filed G&B's sales and use tax return for 2Q13, reporting tax due of \$27,646.00, and remitting tax of \$48.83, leaving an unpaid reported tax balance of \$27,597.17 for 2Q13, plus interest, and a late payment penalty of \$2,764.60.⁴
12. That same day, on August 1, 2013, appellant sent an email to his attorney summarizing the status of appellant's offer to buy out the corporate secretary as follows:

Here's the offer I made:

1. Pay \$100,000 for his shares.
 1. Change to \$50,000 due to new knowledge of Payroll and Sales Taxes that [investor] and I will assume.
 2. We will pay all the bills for the company. . . ¶
 5. No indemnity provisions. . . ¶
- That's what I am offering. It's that simple.

13. It is undisputed that the corporate secretary did not accept the offer. The reason is that appellant, and the investor, were unwilling to indemnify the corporate secretary against personal liability for G&B's unpaid taxes.
14. CDTFA contacted G&B's vendors. Responses from three vendors, including copies of canceled checks and account statements, show that G&B made the following payments (listed in reverse chronological order) during the period August 1, 2013 (i.e., after he sent the email to his attorney about the sales tax liability), until the business terminated:

³ Accrued interest reported with the return was \$103.20. CDTFA added a \$1,064.00 late-payment penalty.

⁴ The return reported accrued interest of \$138.23, plus a \$2,764.60 late-payment penalty.

- Check for \$1,330.25, dated September 9, 2013, payable to Sea Win, Inc. (hereinafter referred to as a food vendor), signed by appellant.
 - Check for \$1,539.40, dated September 4, 2013, payable to a food vendor, signed by appellant.
 - Check for \$1,586.28, dated August 26, 2013, payable to a food vendor, signed by appellant.
 - Payment of \$1,996.26, paid to vendor Prospect Enterprises, on August 26, 2013 (a copy of the cancelled check was not provided to show who signed it).
 - Check for \$1,628.08, dated August 18, 2013, payable to a food vendor, signed by the corporate secretary.
 - Check for \$1,073.20, dated August 10, 2013, payable to a food vendor, signed by the corporate secretary.
 - Payment of \$2,250.33 on August 6, 2013, for utilities (a copy of the cancelled check was not provided to show who signed it).
 - Check for \$1,181.30, dated August 4, 2013, payable to a food vendor, signed by the corporate secretary.
15. Appellant ceased to be an owner or officer of G&B on October 31, 2013.
 16. On February 26, 2014, the corporate secretary faxed a letter to CDTFA reporting the closure of the restaurant, effective September 12, 2013.
 17. On December 29, 2014, the corporate status of G&B was dissolved.
 18. In CDTFA's investigation to determine whether appellant was a person responsible for handling G&B's sales and use tax matters, CDTFA concluded that, as president of the corporation, appellant had control or supervision over sales and use tax matters and had the authority to cause G&B to make payments, including tax payments.
 19. CDTFA obtained evidence that G&B paid wages of \$248,474.91 during 1Q13, \$307,413.90 during 2Q13, and \$267,270.94 during 3Q13, and concluded that G&B had funds available during the liability period, but that appellant chose to use those funds to pay other liabilities. There is no record of any payments by G&B after it closed out its seller's permit.

20. On June 3, 2016, CDTFA issued a responsible person dual determination (NOD) holding appellant personally liable for G&B's unpaid sales and use tax liabilities, which appellant petitioned. CDTFA also issued a separate NOD to the corporate secretary.
21. CDTFA issued a decision on May 14, 2018, denying appellant's petition.
22. This timely appeal to OTA followed.
23. During the appeal to OTA, another person made payments towards G&B's unpaid liabilities, and the only remaining amounts at issue are interest and penalties for 1Q13 and 2Q13.
24. During the oral hearing on July 20, 2022, appellant provided, in pertinent part, the following testimony:
 - Appellant testified during the hearing that the corporate secretary signed 90 percent of the checks and was primarily responsible for handling the finances.
 - Appellant testified that he was not aware that there were any unpaid sales and use tax liabilities until the business unraveled.
 - Appellant testified that the corporate secretary did not keep him timely apprised of sales and use tax matters, or that the taxes were not being paid. Instead, appellant testified that the corporate secretary was the only person who monitored G&B's mailbox and, as such, appellant had no reason to know that the taxes were not being paid because he did not personally see any late-payment notices sent from CDTFA.

DISCUSSION

The law provides, in pertinent part, that any responsible person who willfully fails to pay or to cause to be paid the taxes due from a corporation shall be personally liable for unpaid taxes and interest and penalties not so paid upon termination of the business of the corporation. (R&TC, § 6829(a); Cal. Code Regs., tit. 18, § 1702.5(a).) Personal liability may only be imposed if CDTFA establishes that, while the person was a responsible person, the corporation collected sales tax reimbursement from customers (whether separately stated or included in the selling price) and failed to remit such tax when due. (R&TC, § 6829(c); Cal. Code Regs, tit. 18, § 1702.5(a).) In summary, there are four elements that must be met in order to impose responsible person liability: (1) collection of sales tax reimbursement; (2) termination of the business; (3) responsible person; and (4) willful failure to pay or cause to be paid. CDTFA has

the burden to prove these elements by a preponderance of the evidence. (Cal. Code Regs, tit. 18, § 1702.5(d).)

Element 1 – Collection of Sales Tax Reimbursement

According to CDTFA’s records, appellant acknowledged to CDTFA that the business collected sales tax reimbursement. Furthermore, CDTFA obtained statements from several persons associated with the business, including the corporate secretary, a bartender, the bookkeeper, and G&B’s authorized representative, stating that sales tax reimbursement was collected. These facts were not disputed by either party in the appeal before OTA. Therefore, we find this element is met.

Element 2 – Termination

The “termination” of the business of a corporation includes the discontinuance or cessation of all business activities for which the corporation was required to hold a seller’s permit. (Cal. Code Regs., tit. 18, § 1702.5(b)(3).) Here, G&B reported to CDTFA the termination of its restaurant business operations effective September 12, 2013, and subsequently dissolved its corporate status with the Secretary of State. Therefore, we find this element is met.

Element 3 – Responsible Person

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

Here, appellant was, and held himself out as, G&B’s president. Corporations Code section 312(a) provides that the president of a corporation is the general manager and chief executive officer of the corporation, unless otherwise provided in the articles or bylaws. One federal district court opinion explained that under California law a corporation’s president “is more than an agent and acts and speaks directly for the corporation in conducting its activities and objects . . . [I]t is well established that the general manager has implied authority to bind the corporation and do in the transaction of its ordinary affairs whatever the corporation itself could

do within the scope of its powers.” (*Bakst v. Cmty. Mem’l Health Sys., Inc.*, No. CV 09-08241 MMM, 2011 WL 13214315, at p. 4 (C.D. Cal. 2011).) Thus, a general manager is presumed to have broad implied and actual authority to do all acts customarily connected with the business, including ensuring its compliance with sales and use tax matters, even if that responsibility is delegated to others. (See *Commercial Sec. Co. v. Modesto Drug Co.* (1919) 43 Cal. App. 162, 173.)

Nevertheless, appellant contends that he was not responsible for G&B’s sales and use tax matters because he and the corporate secretary agreed to a division of their labor wherein appellant ran the restaurant and the corporate secretary handled the finances. The R&TC includes no provisions that would limit responsible person liability to only one person, or to the most culpable person. (See *Ibid.*) Thus, while CDTFA ultimately held the corporate secretary personally liable as a responsible person, that individual’s responsibility by itself has no relevance in determining whether appellant also meets the definition of a responsible person. Instead, the law requires us to determine whether, based on a preponderance of the evidence, the elements for imposing responsible person liability are met with respect to appellant, and irrespective of whether some other person could be or was also held personally responsible for the same liabilities. (R&TC, § 6829(a).)

Appellant has not provided any articles or bylaws of G&B establishing that his duties and responsibilities as president of G&B were restricted from those broad general powers of a corporate president as set forth by statute. Appellant did provide evidence that the corporate secretary handled sales and use tax matters before CDTFA. Nevertheless, as corporate president, appellant’s duties and responsibilities would have inherently included oversight of a corporate secretary. There is nothing in the record, including evidence of their status as co-equal shareholders, which would have altered that power dynamic.

In conclusion, even if we accept that the corporate secretary had primary responsibility for the corporation’s sales and use tax matters, we conclude that appellant, in his role as president of the corporation, had ultimate responsibility for, and a duty to act on behalf of, G&B with respect to sales and use tax compliance. Accordingly, we find that this element has been met.

Element 4 – Willfulness

The term “willfully fails to pay or to cause to be paid” means that the failure was the result of a voluntary, conscious, and intentional course of action. (Cal. Code Regs., tit. 18, § 1702.5(b)(2).) A failure to pay or to cause to be paid may be willful even though such failure was not done with a bad purpose or motive. (*Ibid.*) In order to show willfulness, CDTFA must establish all the following:

(A) On or after the date that the taxes came due, the responsible person had actual knowledge that the taxes were due, but not being paid.

(B) The responsible person had the authority to pay the taxes or to cause them to be paid (i) on the date that the taxes came due and (ii) when the responsible person had actual knowledge as defined in (A). A responsible person who was required to obtain approval from another person prior to paying the taxes at issue and was unable to act on his or her own in making the decision to pay the taxes does not have the authority to pay the taxes or to cause them to be paid.

(C) When the responsible person had actual knowledge as defined in (A), the responsible person had the ability to pay the taxes but chose not to do so.

(Cal. Code Regs., tit. 18, § 1702.5(b)(2).) In summary, for the fourth element, CDTFA must establish knowledge, authority, and ability to pay.

The first requirement to establish willfulness is demonstrating appellant had knowledge of the liability either on or at some point after the due date for payment of taxes. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(A).) For these purposes, knowledge may be acquired after the fact, and it is not necessary to establish that appellant had knowledge of the taxes at the time they were due. (*Ibid; Appeal of Eichler, 2022-OTA-029P.*) Here, appellant testified that because the corporate secretary hid the corporate finances from him, it was not until after the business unraveled that appellant first discovered that the corporation was not paying its sales and use tax liabilities. Appellant did not provide a specific date of when he acquired this knowledge, although appellant asserts that it was acquired after the fact. As a preliminary matter, we note that this testimony is contradicted by statements provided to CDTFA from people formerly associated with G&B, including the corporate secretary. Those statements asserted that appellant

was fully and contemporaneously appraised of all financial matters. Nevertheless, we need not make any decisions on credibility with respect to the contradictory evidence in the record.⁵

Appellant submitted into evidence an email that appellant testified he sent to his attorney on August 1, 2013. In that email, appellant states that due to “new knowledge” of the sales taxes that he would have to assume, he was reducing his offer to purchase the corporation from the corporate secretary by \$50,000.00 (from \$100,000.00, to \$50,000.00). On his exhibit, appellant underlined the phrase “new knowledge” with a permanent marker. That same day, G&B filed a partial remittance tax return for 2Q13, reporting a balance due of \$27,597.17 in unpaid tax and penalties of \$2,764.60. That return was due a day earlier on July 31, 2013. This self-assessed amount for 2Q13 brought G&B’s total unpaid sales and use tax liabilities to \$42,065.77, plus interest.⁶ Based on the above, we find that appellant had actual knowledge of G&B’s outstanding sales and use tax liabilities by no later than August 1, 2013, the date appellant emailed his attorney stating that he had new knowledge of G&B’s sales tax liabilities. Moreover, instead of directing payment towards the self-assessed tax liabilities, appellant reduced his offer to purchase the corporation by an amount roughly comparable to the outstanding tax liabilities left unpaid as of his revised offer date. Accordingly, this evidence establishes that appellant must have known that G&B had, that same day, late-filed a partial-remittance return. Furthermore, appellant continued as president until after the termination of the restaurant business, on September 12, 2013. In summary, we find that CDTFA sufficiently established appellant’s actual knowledge of G&B’s unpaid liabilities on or after the date such liabilities became due. Here, we find that appellant possessed such knowledge no later than August 1, 2013.

The second requirement for willfulness is to establish that appellant had authority to pay the taxes or cause them to be paid. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(B).) This element

⁵ There is evidence that appellant had knowledge of the unpaid liabilities prior to August 1, 2013, including direct evidence such as statements from the bartender and the corporate secretary that appellant was fully appraised of the tax situation, in addition to indirect evidence provided by appellant that he continued loaning hundreds of thousands of dollars in personal funds to the business to keep it going during and throughout the liability period, which indicates that appellant knew there was insufficient cash flow to pay all the bills. Nevertheless, appellant disputed knowledge during his testimony. We need not resolve whether appellant acquired knowledge prior to August 1, 2013, because California Code of Regulations, title 18, section 1702.5 explicitly provides for responsible person liability in the case where the responsible person acquires knowledge after the fact, and the business continues operating without payment of taxes.

⁶ This amount (\$42,065.77) consists of adding 2Q13 (\$27,597.17 + \$2,764.60) and 1Q13 (\$10,640.00 + \$1,064.00).

only requires that appellant had check-signing authority, or the power to direct another person to pay the taxes without first securing approval from a third person. (*Ibid.*) Here, appellant testified at the hearing that both he and the corporate president had check-signing authority over the corporate bank account; we find that is sufficient to establish appellant's authority. Appellant further testified that the corporate secretary handled these matters 90 percent of the time. Based on appellant's admitted authority to sign the checks, and evidence of cancelled checks demonstrating that he did, in fact exercise such authority at least some of the time, including after he acquired knowledge of the unpaid liabilities, we find that this requirement to establish willfulness is met.

The third and final requirement for showing that appellant willfully failed to pay G&B's taxes is establishing that appellant had the ability to pay the taxes on and after the time he had knowledge of the unpaid liability. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(C).) Here, by no later than August 1, 2013, there is substantial evidence that appellant had actual knowledge that G&B owed approximately \$50,000 in unpaid sales and use taxes. Nevertheless, instead of paying those liabilities, appellant reduced his offer to purchase G&B by the approximate amount of the unpaid taxes, \$50,000, which he also stated in his email that he would assume. In other words, the evidence indicates that appellant made a conscious decision to offer to assume the \$50,000 in G&B's unpaid taxes in lieu of allowing G&B to pay those same taxes, and as a result appellant knowingly caused or allowed the corporation to file a partial remittance return.

G&B reported substantial amounts of taxable sales on which it had collected sales tax reimbursement during this period, and G&B continued operating as a restaurant until September 12, 2013. G&B also received a loan of \$8,000.00 from appellant on August 11, 2013. The sales tax reimbursement G&B collected from its customers represented funds that could have been paid towards the tax liability. G&B did not use these funds to pay the tax liabilities. Instead, G&B used the collected sales tax reimbursement to pay other expenses. For example, after August 1, 2013, G&B continued making payments to vendors, including \$12,585.00 paid to three vendors. Appellant personally signed at least three of those check payments during September 2013, and prior to the closure of the business. In addition, G&B paid wages of \$248,474.91 during 1Q13, \$307,413.90 during 2Q13, and \$267,270.94 during 3Q13.

Thus, we conclude that on August 1, 2013, and continuing until the business terminated on September 12, 2013, G&B had funds available to pay the taxes. However, appellant chose to

use the available funds to pay other expenses, such as payroll, utilities, and vendors. Given that appellant had knowledge, authority, and funds available to pay G&B’s taxes, and nevertheless he personally signed checks to pay other vendors and not the taxes during September 2013, we find that appellant’s decision to sign check payments for vendors instead of taxes demonstrates willfulness within the meaning of R&TC section 6829.

HOLDING

Appellant is personally liable as a responsible person for G&B’s remaining unpaid liabilities for 1Q13 and 2Q13.

DISPOSITION

CDTFA’s action is sustained with respect to 1Q13 and 2Q13. The liabilities for 3Q13 are no longer at issue and we make no finding with respect to 3Q13.

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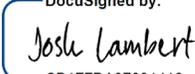
Andrew J. Kwee
Administrative Law Judge

We concur:

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Josh Lambert
Administrative Law Judge

Date Issued: 9/6/2022