

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

In the Matter of the Appeal of:

**J. GOLDSTEIN**

) OTA Case No. 20025885  
) CDTFA Case ID: 442332  
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**OPINION**

Representing the Parties:

For Appellant:

Warren Nemiroff, Attorney

For Respondent:

Joseph Boniwell, Tax Counsel III  
Cary C. Huxsoll, Tax Counsel IV  
Jason Parker, Chief of Headquarters  
Operations

For Office of Tax Appeals:

Steven Kim, Tax Counsel

J. ALDRICH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, J. Goldstein (appellant) appeals a decision and recommendation, as amended by a supplemental decision and recommendation, issued by respondent California Department of Tax and Fee Administration (CDTFA)<sup>1</sup> partially denying appellant’s petition for redetermination of the Notice of Determination (NOD) dated March 14, 2008. The NOD was for \$369,810.62 in tax, plus applicable interest, and \$130,841.59 in penalties, for the period January 1, 2003, through April 24, 2007 (audit period). The NOD reflected CDTFA’s determination that appellant was personally liable as a responsible person for the unpaid taxes, plus applicable interest, and penalties that National Imaging Company dba Reseda Mobil (NIC), accrued during the audit period. In its supplemental decision and recommendation issued on October 24, 2016, CDTFA recommended deleting NIC’s unpaid liabilities (tax, interest, and penalties) for the period of January 1, 2003, through July 10, 2005. As such, the remaining liability period is

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<sup>1</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.

July 11, 2005, through April 24, 2007 (liability period).<sup>2</sup>

Office of Tax Appeals (OTA) Administrative Law Judges Andrew Wong, Sheriene Anne Ridenour, and Josh Aldrich held an oral hearing for this matter on September 29, 2021.<sup>3</sup> At the conclusion of the hearing, the record was closed, and this matter was submitted for decision.<sup>4</sup>

#### ISSUES<sup>5</sup>

1. Whether appellant is personally liable for the unpaid liabilities of NIC for the liability period pursuant to R&TC section 6829;
2. Whether adjustments to the amount of NIC's unreported taxable sales are warranted;
3. Whether CDTFA properly imposed the fraud penalty on NIC; and
4. Whether relief from the penalties against NIC are warranted.

#### FACTUAL FINDINGS

1. NIC operated a gasoline station, convenience store, and an auto repair shop (auto shop) in Reseda, California. NIC held a seller's permit effective from December 18, 2001, through April 24, 2007.
2. NIC filed its Articles of Incorporation with the California Secretary of State on July 3, 2000, listing N. Moore as its initial agent for service of process and authorizing the issuance of 100,000 shares of stock. Subsequent NIC corporate changes were documented as follows:
  - a. On May 18, 2005, NIC filed a no-change Statement of Information (SOI) with the California Secretary of State. N. Moore signed the SOI on May 11, 2005, as

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<sup>2</sup> For the liability period, the tax liability is \$184,503.48, plus applicable interest and penalties. The fraud penalty is \$46,125.87, and the finality penalty is \$18,450.35 (\$64,576.22 in total penalties).

<sup>3</sup> The parties agreed to hold the hearing electronically via Webex.

<sup>4</sup> The oral hearing record was closed on September 29, 2021. On or about October 5, 2021, appellant submitted an untimely declaration, which we do not consider further because it was submitted after the oral hearing record was closed.

<sup>5</sup> In appellant's opening brief, appellant demanded information relating to an alleged settlement agreement between N. Moore and CDTFA. In California, it is a crime to disclose confidential tax information of another taxpayer, which is statutorily defined to include most settlement agreement information. (R&TC, §§ 7056, 7093.5.) Appellant's counsel, however, clarified during the prehearing conference that he was requesting the outstanding balance of NIC's liability. After the conference, CDTFA submitted an Exhibit detailing that, to date, no payments have been made which would reduce appellant's responsible person liability for NIC's unpaid taxes during the liability period.

- president.
- b. N. Moore filed a Notice of Issuance of Securities dated July 9, 2005, with the Department of Corporations, indicating that he was selling 100,000 shares of NIC.<sup>6</sup> There is a corresponding filing fee, in the form of a money order, dated July 21, 2005.
  - c. According to a document entitled “Notice of Resignation,” N. Moore resigned from his position as president and corporate secretary of NIC, effective July 10, 2005. The document indicates that his resignation was recorded in NIC’s corporate minutes.
  - d. NIC filed a SOI with the California Secretary of State on August 15, 2005, listing appellant as the chief executive officer, chief financial officer, corporate secretary, and sole director. Appellant signed the SOI on July 1, 2005, as president.
  - e. NIC filed another SOI with the California Secretary of State on June 5, 2006, changing appellant’s address; all other information remained unchanged. Appellant signed the SOI on May 11, 2006, as president.
3. NIC collected sales tax reimbursement on its taxable sales of tangible personal property (TPP) in this state throughout the audit period. NIC filed Sales and Use Tax Returns (SUTRs) for the audit period. Appellant’s signature appears on the following SUTRs during the liability period:
- a. Appellant’s signature appears on NIC’s third quarter of 2005 (3Q05) SUTR. The 3Q05 SUTR signature is undated, but there is a CDTFA return analysis stamp dated December 2, 2005.
  - b. Appellant’s signature appears on NIC’s 4Q05 SUTR. The signature is dated January 31, 2006.
  - c. Appellant’s signature appears on NIC’s 1Q06 SUTR. The signature is dated April 28, 2006.
  - d. Appellant’s signature appears on NIC’s 2Q06 SUTR. The signature is dated July 31, 2006. Appellant is identified as the president.

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<sup>6</sup> We note that CDTFA found N. Moore was also personally liable for the unpaid liabilities of NIC. N. Moore was held liable for the liability period between January 1, 2003, through July 10, 2005, which predates the liability period at issue.

- e. Appellant's signature appears on NIC's 3Q06 SUTR. The signature is dated October 31, 2006. Appellant is identified as the owner.
  - f. Appellant's signature appears on NIC's 4Q06 SUTR. The signature is dated January 31, 2007. Appellant is identified as the owner.
  - g. Appellant's signature appears on NIC's 1Q07 SUTR. The signature is dated April 30, 2007.
4. According to CDTFA Appeals Case Management System (ACMS) entries,<sup>7</sup> appellant reportedly discussed NIC's sales tax matters with CDTFA on the following occasions:
- a. On April 17, 2003, appellant discussed NIC's 1Q03 liability. CDTFA reminded appellant that NIC's 1Q03 liability was due at the end of April. Appellant stated that he intended to mail the payment.
  - b. On April 23, 2003, appellant discussed payment of NIC's 1Q03 liability and proposed a payment schedule.
  - c. On June 30, 2003, appellant inquired about how to release levies on NIC's account. He requested to make two payments to satisfy liability. The CDTFA representative rejected the request because the last [payment] arrangement was not kept. Appellant indicated that he understood and would check with the bank.
  - d. On March 26, 2004, appellant discussed making three \$1,500 payments towards NIC's sales tax liabilities, on October 21, 2003, January 30, 2004, and February 23, 2004. Appellant indicated that he would send \$2,000 towards the remaining \$4,487.27 balance by April 9, 2004.
  - e. On June 23, 2004, appellant stated that he would mail the 3Q03 balance no later than June 30, 2004.
  - f. On August 18, 2004, appellant represented to CDTFA that N. Moore was his partner, and that N. Moore was in charge of NIC's sales tax matters. Appellant indicated that he would speak to him and get back to CDTFA. Appellant also discussed payment for 3Q03 and potential collection if the liability was not paid in full. Appellant also discussed the filing and payment requirements for 2Q04.
  - g. On December 29, 2005, appellant indicated that "his accountant" and "his

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<sup>7</sup> CDTFA makes a record of collection activity communications with taxpayers, which are logged under the account number and recorded contemporaneously in ACMS.

company rep[resentative]” were working on the returns and reviewing them.

Appellant also indicated that they believed there was a discrepancy.

- h. On March 17, 2006, CDTFA discussed the balance due with appellant. Appellant informed CDTFA that his accountant, C. Kline, was finished with the return. CDTFA asked if it is the amendment of a return and appellant was not entirely sure but indicated that he would be meeting with the accountant and would have the accountant call.
  - i. On March 19, 2007, appellant informed CDTFA that he was “now” a corporate officer of NIC. CDTFA informed appellant of NIC’s unpaid liabilities for 1Q03 through 3Q03. Appellant indicated that he was not yet involved in the business during that period.
  - j. On January 7, 2008, appellant indicated that he stepped in to manage NIC in 2005 when N. Moore became ill. Appellant stated that the business was going to be sold and that N. Moore was going to use the sale proceeds to pay off his debts. Appellant indicated that N. Moore had the books. Appellant asserted that he had nothing to do with the sales tax.
5. Appellant signed ten NIC business checks for payment of tax to CDTFA on the following dates: (1) October 31, 2005; (2) December 9, 2005; (3) January 31, 2006; (4) January 31, 2006; (5) April 28, 2006; (6) June 26, 2006; (7) July 31, 2006; (8) August 24, 2006; (9) October 31, 2006; and (10) December 12, 2006. Appellant also signed a Western Union money order for an NIC sales tax pre-payment to CDTFA that was deposited by CDTFA on August 4, 2005.
  6. On April 27, 2006, a Fictitious Business Name Statement was filed with the County Clerk of Los Angeles County. The signature line is executed with appellant’s name as president of NIC. On the type or print name line, the name appears to be J. “Goldman.” On April 23, 2007, a Fictitious Business Name Statement was filed with the County Clerk of Los Angeles County. The signature line is executed with appellant’s name as president. Appellant’s name (J. Goldstein) also appears printed.
  7. NIC rented out the auto shop to a tenant for a six-month period from March 15, 2007, through September 15, 2007. Appellant signed the lease agreement as landlord. The signature is undated.

8. According to an ACMS entry, N. Moore informed CDTFA on March 21, 2007, that he had sold NIC in 2005 and no one updated the record. The CDTFA representative requested a copy of the amended articles of incorporation and a copy of the bill of sale.
9. On March 28, 2007, CDTFA sent an audit engagement letter to NIC and N. Moore. In response, NIC failed to provide any books and records for examination. As such, CDTFA used an indirect audit method based on the purchase information provided by NIC's vendors (e.g., ExxonMobil and Costco), National Petroleum News (NPN) Market Facts for 2004,<sup>8</sup> the April 12, 2007 NIC sales receipt, and the quarterly reported taxable measure for the prior permit holder of the auto shop for 1Q04 and 2Q04. These audit components are further described as follows:
  - a. The ExxonMobil purchase invoices cover the period of January 1, 2005, through April 24, 2007 (ExxonMobil invoices). Based on purchase information provided by ExxonMobil, CDTFA noted that NIC purchased \$7,347,554 of gasoline but only reported \$5,019,203 in taxable sales during the period January 1, 2005, through April 24, 2007. On April 12, 2007, and April 19, 2007, CDTFA observed the sales price of gasoline at NIC. Using the purchase price together with the observed sales prices, CDTFA calculated the average markup on gasoline.<sup>9</sup> CDTFA calculated total audited taxable gasoline sales of \$11,206,597 compared to reported gasoline sales of \$6,952,551 during the audit period.
  - b. The Costco Detail Sale Reports span the period January 1, 2004, through April 24, 2007 (Costco reports). According to the Costco reports, the average cigarette purchases were \$1,400 per week. CDTFA used NPN Market Facts for 2004 as well as the auditors prior experience to conclude that cigarette sales accounted for 50 percent of the convenience store sales. CDTFA also utilized this

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<sup>8</sup> CDTFA reports that NPN is an independent trade magazine covering the petroleum industry. It issues annual editions of Market Facts, a comprehensive publication providing historical and current facts, figures, and trends on the U.S. petroleum and convenience store markets.

<sup>9</sup> "Markup" is the amount by which the cost of merchandise is increased to set the retail price. For example, if the retailer's cost is \$0.70 and it charges customers \$1.00, the markup is \$0.30. The formula for determining the markup percentage is  $\text{markup amount} \div \text{cost}$ . In this example, the markup percentage is 42.86 percent ( $0.30 \div 0.70 = 0.42857$ ). A "book markup" (sometimes referred to as an "achieved markup") is one that is calculated from the retailer's records. Markup and gross profit margin are different. The gross profit is the sales price minus the cost. The formula for determining the gross profit margin is  $\text{profit amount} \div \text{sales price}$ . In the above example, the gross profit margin is 30 percent ( $0.30 \div 1.00 = 0.30$ ).

information to calculate taxable soda sales and miscellaneous other taxable sales.

CDTFA calculated audited taxable convenience store sales of \$404,773.

- c. CDTFA's auditor made a purchase on April 12, 2007, which is documented with a receipt that indicates NIC charged sales tax reimbursement.
  - d. Regarding NIC's auto shop, the auditor used the quarterly reported taxable measure from the prior permit holder for 1Q04 and 2Q04 to estimate the taxable sales for the auto shop in the amount of \$144,100 for the audit period. After applying a credit of \$12,573 for tax paid purchases resold, CDTFA computed the unreported taxable measure to be \$4,778,224 for the audit period.
10. According to the Audit Activity Report, the auditor spoke with ExxonMobil territory manager R. Luther on June 22, 2007. R. Luther told the auditor that the last time he met with N. Moore and appellant was May 1, 2007, and that he believed they were partners.
  11. In the memorandum dated August 15, 2007, CDTFA recommended imposing a 25 percent penalty on NIC pursuant to R&TC section 6485 for fraud or intent to evade the payment of tax (fraud penalty) for the period January 1, 2004, through April 24, 2007. CDTFA noted that NIC failed to provide any books and records for review during the audit, and that NIC closed its business shortly after being contacted by CDTFA about the audit. CDTFA argued that, based on the results of the audit, NIC substantially underreported its taxable sales during the audit period by \$4,778,22[4] all the while collecting sales tax reimbursement. CDTFA also noted that NIC failed to file federal income tax returns for 2005 and 2006.
  12. There are two letters from P. Sigelman, appellant's friend and/or former attorney, in evidence:
    - a. The July 31, 2007 letter indicated in pertinent part as follows:
      - i. "At all times, when Mr. Moore operated the business, [he] had full charge of bookkeeping, business records, preparation and filing of tax returns, and payment of sales tax to the Board of Equalization, until he became ill in November 2005."
      - ii. "While [appellant] was a shareholder in the company, [he] did not deal with the bookkeeping, records, tax authorities, or any government obligations until after the onset of Mr. Moore's illness. The book and

record keeping was then undertaken by the company's accountant, with [appellant] signing off in the first quarter of 2006.”

- b. The April 30, 2008 letter clarified that appellant is not and was not a shareholder of NIC.
13. In a letter to CDTFA dated September 12, 2007, the successor trustee for the property owner of the unimproved lot adjacent to NIC's business stated that it leased the adjacent lot to NIC from April 1, 2002, through March 31, 2003. The property owner indicated that appellant signed all the lease payment checks until NIC vacated the property on January 31, 2003. The letter also stated that “[appellant] – as far as I remember – was the Mobil Station operator and as such would have had his direct dealings with Exxon Mobil.”
14. According to a November 26, 2007 Quarterly Return Inquiry obtained from the Employment Development Department (EDD), NIC paid \$106,179 in wages during the following periods: 1Q03, 2Q03, 1Q04 through 1Q05, and 4Q05 through 1Q07.
15. CDTFA issued the March 14, 2008 NOD to appellant.
16. Pursuant to his March 26, 2008 letter, appellant filed a timely petition that disputed the following: his personal liability for NIC's liabilities; NIC's underlying audit liability; and the fraud penalty. Appellant asserted, in part, as follows: “The business was owned and operated by the sole officer and shareholder [N.] Moore . . . . He had full charge of bookkeeping, business records, preparation and filing of tax returns and payment of sales tax to [CDTFA], until he became gravely ill in November 2005. [O]n November 25, 2005, I took over only the office administration activities. . . . But in order for me to write checks, and continue the operation, since Che[xS]ystems closed his account the bank required a filed Statement of Information reflecting my name as authorized officer of the company.”
17. In a letter dated April 29, 2008, NIC's former bookkeeper, C. Kline, stated that she has known appellant for 14 years, and that appellant had asked her to help with bookkeeping and tax return preparation for NIC. C. Kline stated that N. Moore would provide purchase invoices and other figures for sales, income, and expenses, and that she would file NIC's returns based on those records. C. Kline stated that appellant was not involved in the preparation of NIC's returns until sometime in late 2006, when she was notified



that N. Moore was no longer involved with NIC. C. Kline stated that she believed NIC added appellant to the corporation so NIC could get a new bank account and continue the business. C. Kline stated that N. Moore retrieved all NIC books and records after CDTFA notified NIC that it was selected for an audit. C. Kline added that she was “saddened that this business venture did not work out favorably for [appellant] and Mr. Moore, and I wish them all the best.”

18. On November 20, 2009, appellant filed, or caused to be filed, a Chapter 7 personal bankruptcy case. In item no. 18, of the Statement of Financial Affairs, the prompt reads, in part, as follows: “If the debtor is an individual, list the names, addresses, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation.” In response, appellant listed two businesses: J[.] G. Jewelry Design, Inc. and NIC. The beginning and ending dates indicated were: 1994 to present for J[.] G. Jewelry Design, Inc., and 2005 to 2007 for NIC. Appellant also listed CDTFA as a creditor holding an unsecured priority claim. Appellant disputed CDTFA’s claim.
19. In a letter dated April 28, 2010, a former NIC employee declared under penalty of perjury that he worked for NIC when N. Moore and appellant took over in December 2001. The NIC employee stated N. Moore sold the business to appellant in July 2005 before leaving for military duty, and that N. Moore never returned to work at NIC afterward. The NIC employee stated that he worked for appellant until NIC closed its business in 2007.
20. During CDTFA’s appeals process, appellant conceded that NIC ceased business operations on April 24, 2007. Appellant also conceded that NIC added sales tax reimbursement to the selling price of tangible personal property.
21. On April 26, 2012, the Board of Equalization (board) held an oral hearing in the matter but ordered the petition be held in abeyance pending the outcome of a pending settlement between CDTFA and N. Moore. During the hearing, appellant claimed that shortly after NIC received a notice from ChexSystems, he was put on the corporation to open accounts for NIC, and that the SOI was blank when he signed it. Appellant asserted that while he opened the accounts and signed checks, he was not involved with the finances or tax return preparation. Appellant also claimed that the signature on the 3Q06 SUTR was forged.

22. Subsequently, appellant was scheduled for a second oral hearing in February 2015. Appellant submitted a letter dated February 17, 2015, with exhibits. CDTFA requested a postponement to further consider the matter. The exhibits included, in part, the following:
- a. A March 7, 2006 letter from the State Compensation Insurance Fund (SCIF letter) that was addressed to N. Moore requesting production of NIC documents (e.g., cancelled checks, payroll reports, etc.) between December 2003 and March 6, 2005.
  - b. A City of Los Angeles invoice due on April 1, 2007 (LA invoice), which was addressed to N. Moore.
  - c. A June 26, 2006 fax cover-sheet from N. Moore at the U.S. Army War College in Pennsylvania to appellant together with a letter requesting reinstatement of NIC as a franchise dealer after NIC complied with the franchisee proof of insurance requirements, which is also dated June 26, 2006 (reinstatement letter).
23. By memorandum dated May 13, 2015, CDTFA conceded that appellant was not personally liable for NIC's unpaid liabilities for the period January 1, 2003, through July 10, 2005.
24. By letter dated June 23, 2016, appellant continued to dispute that he was personally liable for the remaining liability period. Appellant also asserted that the 1Q07 SUTR signature was forged. CDTFA accepted the letter as an untimely request for reconsideration (RFR). CDTFA responded by memorandum dated July 15, 2016, that its position remained unchanged.
25. Subsequently, CDTFA completed a reaudit to make adjustments to the audited understatement since NIC leased the auto shop for a portion of the liability period.
26. Appellant timely appealed to OTA.

### DISCUSSION

Issue 1: Whether appellant is personally liable for the unpaid liabilities of NIC for the liability period pursuant to R&TC section 6829.

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. As relevant here, R&TC section 6829 provides that a person is personally liable for the unpaid tax, penalties, and interest owed by a corporation if all of the following four elements are met: (1) the corporation's business has been terminated, dissolved, or abandoned; (2) the corporation collected sales tax reimbursement on its sales of TPP 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 corporation in complying with the Sales and Use Tax Law; and (4) the person willfully failed to pay taxes due from the corporation or willfully failed to cause such taxes to be paid. (R&TC, § 6829; Cal. Code Regs., tit. 18, § 1702.5.)

CDTFA bears the burden of proving, by the 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. (See R&TC, § 6829.)

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

The first element is satisfied because appellant conceded during the CDTFA appeals process that NIC ceased business activities on April 24, 2007, CDTFA closed out NIC's seller's permit effective April 24, 2007, following verification by an auditor, and appellant does not dispute it now. The second element is satisfied because appellant conceded during the CDTFA appeals process that NIC collected sales tax reimbursement, appellant does not dispute it now, and the April 12, 2007 NIC sales receipt shows that sales tax was collected during the audit period. Accordingly, we find that NIC's business terminated on April 24, 2007, NIC collected sales tax reimbursement, and only the third and fourth elements remain at issue.<sup>10</sup>

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<sup>10</sup> The September 9, 2021 Minutes and Orders of Pre-Hearing Conference confirmed that it is undisputed that NIC ceased business activities on April 24, 2007, and that sales tax reimbursement was collected by NIC. Subsequently, we confirmed that these elements remained undisputed at the beginning of the hearing.

### 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 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 sold TPP, collected sales tax reimbursement, and failed to remit it to CDTFA. (R&TC, § 6829(c); Cal. Code Regs., tit. 18, § 1702.5(a).)

During the liability period, the evidence shows that appellant had broad authority for NIC. According to documents filed with the California Secretary of State, appellant became NIC’s chief executive officer, chief financial officer, secretary, and sole director on July 1, 2005. The subsequent SOI filed on June 5, 2006, reiterated that appellant held the same titles with their respective responsibilities. Consistent with his corporate duties, appellant’s signature appears on NIC’s SUTRs from 3Q05 through 1Q07. Of note, appellant is listed as NIC’s president or owner on NIC’s SUTRs for 2Q06, 3Q06, and 4Q06. Likewise, appellant signed 10 of NIC’s business checks between October 2005 and December 2006 for payment of tax to CDTFA.

According to ACMS entries, appellant discussed NIC’s sales tax matters with CDTFA on multiple occasions between 2003 and 2008. The discussion topics included, but were not limited to, the filing of returns, sales tax liabilities, the release of levies, and the payment of tax. On August 18, 2004, appellant represented to CDTFA that he and N. Moore were partners. On December 29, 2005, appellant indicated to CDTFA that his accountant was working on NIC’s tax return. On March 17, 2006, appellant indicated to CDTFA that his accountant had finished working on NIC’s tax return and that he would be meeting with her to discuss. On March 19, 2007, appellant informed CDTFA that he is a corporate officer of NIC.

In addition to the representations to CDTFA and the California Secretary of State, appellant’s signature appears on a Fictitious Business Name Statement filed with the County Clerk of Los Angeles on April 27, 2006, as well as the April 23, 2007 filing. On both documents, appellant is listed as NIC’s president. Appellant also represented himself as the landlord for NIC when it subleased the auto shop.

Individuals have also associated appellant with an active role in NIC’s business. Following a meeting on May 1, 2007, the ExxonMobil territory manager, R. Luther, indicated that he believed appellant and N. Moore were partners. We infer from P. Sigelman’s July 31, 2007 letter that appellant dealt with the bookkeeping, records, tax authorities, and

government obligations after N. Moore became ill in November of 2005.<sup>11</sup> The successor trustee for the owner of an adjacent lot remembered appellant as the Mobil Station operator. C. Kline, NIC's former bookkeeper, indicated that she believed NIC added appellant to the corporation so that NIC could get a new bank account, and that she was notified in late 2006 that N. Moore was no longer with NIC. On April 28, 2010, a former NIC employee declared under penalty of perjury that he worked for NIC when appellant and N. Moore took over in December 2001. Furthermore, the former employee declared that N. Moore sold the business to appellant in July 2005 before leaving for military duty. In short, the evidence before us supports the finding that appellant was a responsible person for NIC's sales and use tax compliance during the liability period.

Appellant argues that he was not a responsible person during the liability period. Appellant's primary argument is that he was a "patsy" or "fall guy," and that N. Moore is the responsible person.<sup>12</sup> In support, appellant provided the SCIF letter, the LA invoice, and the reinstatement letter. Appellant also argues that he was nothing more than an hourly worker that made \$500.00 per week. Appellant asserts that he was never a shareholder or owner, but merely followed orders from N. Moore. Furthermore, appellant asserts that N. Moore was the ExxonMobil dealer of record (franchisee), as provided in the franchise agreement, and that appellant never became a franchisee. Appellant explained during the hearing that he had told CDTFA that he and N. Moore were partners "for them to be able to talk to me" so that he could handle the tax liability from an earlier period, pursuant to N. Moore's instruction. Regarding the SOIs filed with the California Secretary of State, appellant does not dispute that he signed the forms or that he agreed to be an officer of NIC. Appellant explained that his agreement to become an officer was in response to a notice from ChexSystem that indicated that the bank accounts for NIC would be closed since N. Moore had been "kiting checks."<sup>13</sup> Appellant claims that he did not fully understand what "kiting checks" meant, at the time. Appellant claims that

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<sup>11</sup> We note that P. Sigelman took the opportunity in his April 30, 2008 letter to clarify that appellant was not a shareholder and made no clarifications regarding appellant's involvement.

<sup>12</sup> According to Merriam-Webster's dictionary, a "patsy" is a person who is easily manipulated or victimized; and a "fall guy" is a person who is blamed for something done by others. (See, <https://www.merriam-webster.com/dictionary/patsy>; <https://www.merriam-webster.com/dictionary/fall%20guy>.)

<sup>13</sup> Generally, "kiting checks" is a form bank fraud. (See, e.g., *United States v. E. Stone*, (1992) 954 F.2d 1187.)

the forms were blank when he signed the first SOI and that accountant/bookkeeper C. Kline or N. Moore filed the SOI listing appellant as the sole director and officer without his knowledge.

The following year, appellant claims that he signed another blank SOI. Appellant acknowledges that first SOI was prepared so that new bank accounts could be opened for NIC, and the business could continue. Likewise, appellant acknowledges that he signed all ten of NIC's business checks paid to CDTFA for sales tax but claims that all he did was sign them. Appellant also argues that his signatures on NIC's 3Q06 and 1Q07 SUTRs were forged. Appellant denies meeting with the ExxonMobil territory manager on May 1, 2007. Instead, appellant asserts that it was N. Moore and a former NIC employee.

We are not persuaded by appellant's arguments for several reasons. One need not be a shareholder to be considered a responsible person for purposes of R&TC section 6829. Regarding appellant's evidence in support, the SCIF letter is not relevant since the documents requested therein are for a period prior to the liability period. Likewise, the LA invoice and the reinstatement letter are without sufficient context or support to prove that N. Moore was the only responsible person during the liability period. Furthermore, when appellant signed the first SOI (on July 1, 2005), appellant had approximately 11 years of experience as a corporate officer or president of J. G. Jewelry Design, Inc. Therefore, appellant would have been familiar with corporate responsibilities. Contemporaneous with signing the first SOI, appellant was aware that N. Moore had allegedly been "kiting checks" and that NIC had sales tax compliance issues as documented by the ACMS entries. Appellant also seemed to understand that the business was in jeopardy because of N. Moore's banking practices, even if appellant did not fully comprehend the term "kiting checks." With respect to appellant's representation to CDTFA that he and N. Moore were partners, appellant could have taken other steps to establish the requisite authority to speak with CDTFA about NIC's tax liabilities (e.g., Power of Attorney / General Authorization Form BOE-392). Appellant's actions (e.g., signing the SOI and establishing new bank accounts) were inconsistent with the responsibilities of an hourly employee and more like the action of someone, such as a partner, with a pecuniary interest in the business. As such, we do not find appellant's representations to be credible. Accordingly, we are not persuaded that appellant was unaware he would be NIC's sole officer and director, especially considering the evidence showing N. Moore resigned, sold the shares, and left the business in July 2005, shortly before the first SOI was filed. Furthermore, C. Kline stated that she knew appellant for 14 years and was

doing appellant a favor by handling NIC's sales tax returns for him even though she specialized in income tax. C. Kline continued to file NIC's returns even after N. Moore left the company, from 3Q05 through 1Q07, which were signed by appellant.

Appellant claims his signature was forged on the 3Q06 SUTR and 1Q07 SUTR. With respect to the 3Q06 SUTR, appellant first raised the argument shortly before the April 26, 2012 board hearing. Of interest, appellant's undisputed signature appears on the corresponding July 31, 2006 check to CDTFA, which is in the same amount that was reported on the 3Q06 SUTR. Also, to the untrained eye, appellant's purported signature on the 3Q06 SUTR appears to be similar to appellant's undisputed signature on the corresponding July 31, 2006 check. Regarding the 1Q07 SUTR, appellant first asserted that this signature was a forgery with his June 23, 2016 RFR. The March 19, 2007 ACMS entry, however, provides additional context that supports the authenticity of the signature. Though not dispositive, the telephone number on the 1Q07 SUTR is the same telephone number on appellant's June 23, 2016 RFR. Also, to the untrained eye, the first part (the given name) of appellant's purported signature on the 1Q07 SUTR appears to be similar to appellant's undisputed signatures; yet the subsequent portion (the surname) appears to be different as if it were rushed or signed on a poor writing surface. In sum, appellant has not provided evidence such as a handwriting expert's analysis of the signatures and the available evidence does not support his assertion. Based on the foregoing, we find appellant has provided insufficient evidence to support the assertion that the signatures were forgeries.

Next, we address appellant's arguments that N. Moore is the responsible person for NIC; that appellant was an NIC employee who acted under the direction and supervision of N. Moore; and that N. Moore was the franchisee pursuant to the agreement with ExxonMobil.<sup>14</sup> First, we reiterate that more than one person can be found to be personally liable for a corporation under R&TC section 6829, although the deficiency would only be paid once. N. Moore was found personally liable for the period January 1, 2003, through July 10, 2005. CDTFA has already conceded the period during which N. Moore was involved with NIC, January 1, 2003, through July 10, 2005. Appellant claims that N. Moore was involved with the business through 2Q07, but the available evidence contradicts his assertion. Finally, appellant's argument regarding the

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<sup>14</sup> The franchise agreement is dated November 16, 2001, and the lease term expired on July 31, 2003. The evidentiary record does not include a more recent franchise agreement.

franchise agreement is unpersuasive since the terms of the agreement expired before the audit period. Thus, we find appellant's arguments unavailing.

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).)

First, we examine whether appellant had actual knowledge that NIC's taxes were due but not being paid. NIC's taxes became due on the due date that its returns were due, which is on or before the last day of the month following each quarterly period (e.g., October 31, 2005, for 3Q05 and April 30, 2007, for 1Q07). (See, R&TC, §§ 6451, 6452, and 6454.) After N. Moore resigned in July 2005, appellant became the sole director and officer of NIC according to the SOI filed on August 15, 2005. Appellant began signing NIC's SUTRs with the 3Q05 SUTR and continued to sign through 1Q07. We note that the signatures on the 3Q05 through 1Q07 SUTRs appear to be “wet signatures” (i.e., signed with a pen on paper). We also note that on each of the SUTRs there is a statement preceding the signature line that reads: “I hereby certify that this return, including any accompanying schedules and statements, has been examined by me and to the best of my knowledge and belief is a true, correct[,] and complete return.” As previously mentioned, appellant's title is indicated as president on the 2Q06 SUTR, owner on the 3Q06 SUTR, and owner on the 4Q06 SUTR. In addition to the SUTRs, appellant signed NIC



business checks payable to CDTFA beginning with the October 31, 2005 check and continued to sign checks to CDTFA through December 12, 2006. Appellant indicated in testimony that he managed the employees, handled invoices, adjusted gas prices as well as other administrative duties (e.g., delivering gas invoices to the accountant). Based on appellant's arguments regarding the markup in the underlying audit, appellant was aware of the profit margins on the gasoline; and CDTFA's audit determined a substantial amount of unreported taxable sales during the liability period. Also, according to ACMS entries appellant regularly communicated with CDTFA regarding NIC tax liabilities prior to the liability period and during the liability period. Prior to N. Moore's departure, appellant had actual knowledge of NIC's tax liabilities as documented by the ACMS entries, and we find it highly unlikely that appellant would have less knowledge when his responsibilities and authority increased (e.g., appellant became NIC's chief executive officer, chief financial officer, secretary, and sole director). The December 29, 2005 ACMS entry as well as the March 17, 2006 entry are clear examples of appellant's actual knowledge during the liability period. Therefore, we find that appellant had actual knowledge that NIC's taxes were due but not being paid.

Second, we examine whether appellant had the authority to pay the taxes when they became due and when appellant had actual knowledge they were not being paid. As discussed above, appellant had broad authority to act for NIC. Appellant was the only person to sign NIC's returns from 3Q05 through 1Q07, and appellant signed NIC business checks for payment of tax to CDTFA in 2005 and 2006. Also, appellant indicated, during the April 26, 2012 board hearing, that he signed checks to vendors. According to the evidence, there was no apparent limitation on appellant's check writing authority. Therefore, we find that appellant had the authority to pay NIC's taxes at the time he had actual knowledge they were not being paid.

Third, we examine whether appellant had the ability to pay the taxes when he had actual knowledge the taxes were due but not being paid. Evidence shows that, during the liability period, NIC paid wages, purchased a significant amount of gasoline, paid other vendors, received rental income, and collected sales tax reimbursement. Appellant, having the authority to pay NIC's sales taxes, chose not to do so but instead paid other creditors and expenses. Therefore, we find that appellant had the ability to pay the taxes but chose not to do so.

In short, appellant had actual knowledge that NIC's taxes were due but not being paid for the liability period; and appellant had the authority and ability to pay the taxes for that period

when they became due but chose not to do so. Therefore, we find that the fourth element is satisfied.

Accordingly, we find appellant is personally liable for the unpaid tax liabilities of NIC for the liability period.

Issue 2: Whether adjustments to the amount of NIC's unreported taxable sales are warranted.

California imposes upon all retailers a sales tax measured by the retailer's gross receipts from the retail sale of tangible personal property in this state, unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, § 6051.) All of a retailer's gross receipts are presumed subject to tax, unless the retailer can prove otherwise. (R&TC, § 6091.)

If CDTFA is not satisfied with the accuracy of the sales and use tax returns filed, it may base its determination of the tax due upon the facts contained in the returns or upon any information that comes within its possession. (R&TC, § 6481.) It is the retailer's responsibility to maintain and make available for examination complete and accurate records necessary to determine the correct tax liability, including bills, receipts, invoices, or other documents supporting the entries in the books of account (i.e., books and records). (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).)

When a taxpayer appeals an NOD, CDTFA has a minimal, initial burden of showing that its determination was reasonable and rational. (*Appeal of Talavera*, 2020-OTA-022P.) Once CDTFA has met its initial burden, the burden of proof shifts to the taxpayer to establish that a result differing from CDTFA's determination is warranted. (*Ibid.*) The applicable burden of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, §§ 30219(c), 35003.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Talavera*, *supra.*)

Upon audit, NIC did not make any records available to CDTFA. Therefore, CDTFA used an indirect audit method based on the following sources: the ExxonMobil invoices; the Costco reports; the April 12, 2007 NIC sales receipt; NPN Market Facts for 2004; and the quarterly taxable measure for the auto shop for 1Q04 and 2Q04, as reported by its prior owner. Regarding the audited gasoline sales, CDTFA compared NIC's reported taxable sales to the ExxonMobil invoices for the same period. CDTFA found that NIC's reported taxable measure was substantially less than the amount NIC paid to ExxonMobil for gasoline purchases during the same period. CDTFA calculated a markup per gallon based on its April 12, 2007, and

April 19, 2007, observations. CDTFA applied the markup to the purchased gallons for the period of 1Q05 to 1Q07. CDTFA then calculated average quarterly gasoline sales for 2004 based on the audited gasoline sales. CDTFA used the Costco reports in conjunction with NPN Market Facts for 2004 to determine the audited taxable measure for the convenience store sales. CDTFA calculated the average quarterly taxable sales for the auto shop for 1Q04 and 2Q04 from the prior business. CDTFA applied the average to 3Q04 through 1Q07 to calculate the audited taxable repair shop sales. In the reaudit, CDTFA reduced the audited taxable auto shop measure based on the portion of the six-month lease that coincided with the liability period. Due to the lack of records, we find that it was appropriate for CDTFA to utilize an indirect audit method as described above. Based on the foregoing, we find that CDTFA has met its initial burden to show that its determination was reasonable and rational. Thus, the burden of proof shifts to appellant.

In general, appellant makes the same assertions that he made during the underlying appeal at CDTFA (e.g., N. Moore absconded with all of NIC's documents; the audited markup for gasoline sales was too high; and NIC's liability for the audit period should be closer to \$60,000). These assertions, however, are unsupported by documentary or other evidence. Thus, we conclude that appellant has failed to meet his burden of establishing that a reduction to the measure of unreported taxable sales is warranted.

Issue 3: Whether CDTFA properly imposed the fraud penalty on NIC.

In the case of a deficiency determination, a penalty of 25 percent of the amount of the determination applies if any part of the deficiency is due to fraud or intent to evade the Sales and Use Tax Law or authorized rules or regulations. (R&TC, § 6485.) Fraud is intentional wrongdoing on the part of the taxpayer with the specific intent to avoid a tax known to be owing. (*Appeal of Delgado*, 2018-OTA-200P.) It is CDTFA's burden to establish fraud by clear and convincing evidence. (Cal. Code Regs., tit. 18, § 1703(c)(3)(C); *Appeal of ISIF Madfish, Inc.*, 2019-OTA-292P.)

The R&TC does not define fraud, but there are many federal precedents that provide guidance. (See, e.g., *Bradford v. Commissioner* (9th Cir. 1986) 796 F.2d 303, 307; *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 30.); *Powell v. Granquist* (9th Cir. 1958) 252 F.2d 56, 60; *Rau's Estate v. Commissioner* (9th Cir. 1962) 301 F.2d 51, 54-55.) Fraud can be proved by circumstantial evidence. (*Bradford v. Commissioner* (9th Cir. 1986) 796 F.2d 303, 307.) Such badges of fraud may include the understatement of income, inadequate records, failure to file tax

returns, implausible or inconsistent explanations of behavior, concealment of assets, failure to cooperate with tax authorities, and lack of credibility in the taxpayer's testimony. (*Ibid.*)

Federal courts have also concluded that the “[m]ere omission of reportable income is not of itself sufficient to warrant finding of fraud, but repeated understatements in successive years, coupled with other circumstances showing intent to conceal or misstate taxable income, present basis for fraud finding.” (*Rau’s Estate v. Commissioner* (9th Cir. 1962) 301 F.2d 51, 54-55.)

Here, there is no direct evidence of a specific intent to evade sales and use tax (e.g., a double set of books). There are, however, several factors present, which, when taken together, clearly and convincingly establish that all or a significant portion of the understatement was due to fraud. NIC filed SUTRs for the period 1Q03 through 1Q07, reported some amount of tax reimbursement collected, and then remitted some amount of tax when filing its SUTR. These actions demonstrate NIC’s knowledge of its obligation to collect sales tax reimbursement and remit it to CDTFA. There is also no dispute that sales tax reimbursement was added to NIC’s taxable transactions. The amount of underreporting during the audit period is substantial. During the period January 1, 2005, through April 24, 2007, NIC purchased \$7,347,554 of gasoline, but only reported taxable sales of \$5,019,203 to CDTFA. Additionally, NIC reported taxable gasoline sales of \$6,952,551 during the period January 1, 2004, through April 24, 2007, compared to the audited taxable gasoline sales of \$11,743,350, resulting in a substantial underreporting of \$4,790,799 in taxable gasoline sales with consistent underreporting every quarter. Neither appellant nor NIC has submitted any supporting documents for NIC’s reported figures. However, NIC must have known that its gasoline purchases exceeded its reported taxable sales based on the large volume of gasoline purchased. Coupled with the fact that NIC collected sales tax reimbursement on all its taxable sales, NIC’s substantial underreporting is strong evidence of fraud or an intent to evade the payment of tax. Furthermore, NIC failed to provide any books and records for review upon audit by CDTFA, closed out its business shortly after being contacted about CDTFA’s audit, and failed to file federal income tax returns for 2005 and 2006. We also note several inconsistencies in appellant’s arguments according to the evidence. For example, appellant argues that N. Moore retrieved all of NIC’s books and records from C. Kline upon CDTFA’s audit in 2007, even though appellant allegedly told C. Kline that N. Moore was no longer associated with NIC in 2006. In other words, it is unclear why NIC’s accountant would turn over NIC’s books and records to someone who was not associated with

NIC. Based on the foregoing, we find clear and convincing evidence of fraud or intent evade payment of tax.

Issue 4: Whether relief from penalties against NIC are warranted.

After adjustments pursuant to CDTFA's October 24, 2016 supplemental decision and recommendation, the late prepayment penalty is no longer at issue, only the \$18,450.35 finality penalty is at issue.<sup>15</sup> There is no statutory or regulatory authority for relieving penalties in R&TC section 6829 determinations, but R&TC section 6592(a) provides that such penalties may be relieved if the failure to timely pay the liabilities 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. (R&TC, § 6592(a)(1).) 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).) Thus, if appellant were to establish reasonable cause for NIC's failure to timely pay its liabilities, the penalties incurred by NIC would be relieved, and appellant's derivative liability for the penalties would also be eliminated. In addition, relief of the finality penalty would be contingent on appellant's payment of the tax liability in full within 30 days from the date of mailing of the notice of final decision in this matter. (See, *Appeal of Davinder Singh Pabla, et al.* (SBE Memo.) 2005 WL 2377713.)

While appellant provided a declaration under penalty of perjury on September 14, 2021, the declaration does not establish reasonable cause for NIC's failure to timely pay its liabilities because it only addresses circumstances relating to the responsible person liability, not the reasonable cause or circumstances relating to NIC failure to timely pay its liabilities. Therefore, we find relief from the finality penalty against NIC is not warranted.

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<sup>15</sup> Pursuant to R&TC section 6565, all determinations made by CDTFA are due and payable at the time they become final. If they are not paid when due and payable, a penalty of 10 per cent of the amount of the determination, exclusive of interest and penalties, shall be added thereto.

HOLDINGS


1. Appellant is personally liable for the unpaid liabilities of NIC for the liability period.
2. Adjustments are not warranted to NIC’s sales tax liabilities;
3. CDTFAs has established by clear and convincing evidence that NIC’s deficiency was due to fraud or an intent to evade payment of tax; and
4. Relief from the finality penalty against NIC is not warranted.


DISPOSITION

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

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 Josh Aldrich  
 Administrative Law Judge

We concur:

DocuSigned by:  
  
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 Andrew Wong  
 Administrative Law Judge

DocuSigned by:  
  
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 Sheriene Anne Ridenour  
 Administrative Law Judge

Date Issued: 1/3/2022