OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18083583
	) CDTFA Case ID: 600710
R. FARRELL	)
	)
	)
	)

OPINION

Representing the Parties:

For Appellant:	Ashley Farrell Pickett, Attorney
For Respondent:	Scott Claremon, Tax Counsel IV Joseph Boniwell, Tax Counsel III Jason Parker, Chief of Headquarters Ops.
For Office of Tax Appeals:	Corin Saxton, Tax Counsel IV

K. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, R. Farrell (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)[1] denying appellant's petition for redetermination of the Notice of Determination (NOD) dated December 28, 2011. The NOD is for a tax of $468,489.52, applicable interest, and a 25 percent fraud penalty of $117,122.82, for the period January 1, 2005, through March 31,2005 (liability period). The NOD holds appellant personally responsible for the unpaid liabilities of Irvine Photo Graphics, Inc. (IPG).

Office of Tax Appeals (OTA) Administrative Law Judges Sheriene Anne Ridenour, Andrew J. Kwee, and Keith T. Long held an electronic oral hearing for this matter on November 15, 2022.[2] At the conclusion of the hearing, the record was closed and this matter was submitted for an Opinion.

[1] Sales and use taxes were formerly administered by the State Board of Equalization (BOE). In 2017, functions of BOE relevant to this case were transferred to 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 BOE.

[2] This matter was originally scheduled to be heard on November 8, 2022. At appellant's request and due to limitations concerning witness availability, the hearing was rescheduled and heard electronically.

ISSUES

1. Whether appellant is personally responsible for the unpaid liabilities of IPG.
2. Whether the fraud penalty was properly imposed.

FACTUAL FINDINGS

1. Appellant was the president of IPG, a seller of printed material. Appellant was a responsible person for IPG's sales and use tax compliance, as defined by California Code of Regulations, title 18, (Regulation) section 1702.5(b)(1). IPG terminated operations sometime between December 31, 2008, and December 31, 2009. On May 10, 2010, CDTFA closed IPG's seller's permit effective December 31, 2009.
2. During the period January 1, 1998, through March 31, 2003, IPG collected sales tax reimbursement computed on transactions which are not subject to tax (excess sales tax reimbursement). (See Cal. Code Regs. §1700(b)(1).) Specifically, IPG collected excess sales tax reimbursement on nontaxable or exempt sales in interstate commerce to its customer, The Gap, Inc. (Gap). IPG paid the excess sales tax reimbursement that it collected from Gap to CDTFA.
3. By letter dated March 6, 2001, Gap requested that IPG file a claim for refund of the excess sales tax reimbursement. Gap also stated that IPG should stop collecting sales tax reimbursement from Gap on sales made in interstate commerce.
4. Thereafter, IPG filed a claim for refund for the period January 1, 1998, through December 31, 2000, which was signed by appellant as president of IPG on April 5, 2001, IPG also filed a claim for refund for the period January 1, 2000, through March 31, 2003, which was signed by appellant as president of IPG on April 28, 2003. Gap worked with IPG on the claims for refund.
5. At the time of the claims for refund, CDTFA was conducting an audit of IPG for the period January 1, 1999, through September 30, 2001. The claims were examined in conjunction with the audit. In an August 24, 2004 Report of Discussion of Audit Findings, CDTFA noted that it was reviewing the claims for refund of excess sales tax reimbursement collected from Gap. As relevant here, the Report of Discussion of Audit Finding states:

> Since The Gap paid sales tax reimbursement to the taxpayer on these transactions, the tax refunded by the State of California to the taxpayer must be refunded to The Gap by the taxpayer.

The Report of Discussion of Audit Finding does not provide any instruction to be followed if the tax was not refunded to Gap.

6. On January 26, 2005, CDTFA issued to appellant Notices of Refund of excess sales tax reimbursement collected in the amounts of $52,588.57 and $464,529.63. CDTFA issued payment in the form of two refund checks to IPG on January 31, 2005. It is undisputed that appellant received these refunds.

7. Gap inquired about the refund in emails to appellant dated July 17, 2006, October 16, 2007, October 27, 2008, February 24, 2009, and March 5, 2009. The March 5, 2009 email indicates that appellant had not returned telephone calls from Gap's representative (KPMG) and that, if contact was not made with appellant, Gap would contact CDTFA.

8. In an October 20, 2009 letter to appellant, Gap demanded payment of the refund of excess sales tax reimbursement. Gap asserted that it previously made several requests which were unanswered by IPG.

9. A November 20, 2009 email from Gap to appellant, documents a telephone call in which appellant represented the following: that IPG received a refund from CDTFA approximately 1.5 years earlier (i.e., sometime in 2008); that appellant would review and confirm how IPG handled the refund; and that IPG deducted between $15,000 and $30,000 for legal fees and between $100,000 and $150,000 for internal costs from the refund. Gap requested documentation explaining any deducted amounts.

10. On December 18, 2009, appellant responded that IPG received the refund five years earlier (i.e., sometime in 2004). Appellant asserted that the passage of time made "finding records very difficult." Appellant stated that IPG had found copies of "at least one draft of an e-mail that describes the breakout of our agreed to costs, etc." Appellant stated that IPG would provide those documents and continue to search for more information.

11. On January 19, 2010, Gap issued a final demand for payment to IPG, which addresses appellant directly. The demand indicates that appellant had not provided any

documentation regarding the deducted amounts. The demand also states that Gap denied that any agreement allowing IPG to deduct expenses existed. The demand also states that if IPG failed to pay Gap would turn the matter over to CDTFA.

12. In a September 3, 2010 letter, CDTFA noted that more than five years had passed since it granted the claim for refund. CDTFA requested verifiable evidence that IPG refunded the excess sales tax reimbursement to Gap. CDTFA informed IPG that it was required to either return the excess sales tax reimbursement to Gap or remit it to the CDTFA.

13. On October 11, 2010 appellant issued a letter to CDTFA asserting that:

    a. IPG knowingly collected excess sales tax reimbursement on nontaxable sales in interstate commerce at Gap's insistence;
    b. Gap later contacted IPG requesting that it claim a refund of the excess tax reimbursement;
    c. IPG explained that the cost would be exorbitant and that it would cost hundreds of thousands of dollars;
    d. IPG provided an hourly rate and estimate, at which point IPG was instructed by KPMG and Gap to deduct costs from any refund received from the CDTFA;
    e. The cost of processing the claim for refund was greater than the refund received resulting in a balance due from Gap, which Gap did not pay; and
    f. A representative from Gap contacted IPG twice and when IPG reminded them of the cost deduction agreement, the representative "recalled the matter and did not request additional information or ask additional questions."

14. On November 16, 2010, CDTFA issued an NOD to IPG for tax of $468,491.28, accrued interest of $310,813.04, and a 25 percent fraud penalty of $117,122.82. IPG disputed the NOD. CDTFA denied IPG's appeal in a subsequent Decision and Recommendation (D&R). A hearing was held before the Board of Equalization (BOE) and the D&R was upheld.

15. On December 28, 2011, CDTFA issued an NOD to appellant as a person liable for IPG's tax, penalties, and interest owed, pursuant to R&TC section 6829, for the debt incurred by IPG for having failed to return the refunded excess tax reimbursement to Gap.

16. On February 19, 2014, Gap obtained a judgment pursuant to stipulation against IPG and appellant in the amount of $500,000.
17. Appellant filed a timely petition for redetermination of the NOD holding him personally responsible for IPG, which CDTFA denied in a D&R issued on April 27, 2015.
18. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellant is personally liable for IPG's unpaid liability.

R&TC section 6829 provides that a person is personally liable for the unpaid tax, penalties, and interest owed by a corporation if all the following 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 tangible personal property and failed to remit such tax reimbursement to CDTFA; (3) the person had control or supervision of, or was charged with the responsibility for, the filing of returns or the payment of tax, or was under a duty to act for the 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(a) & (c); Cal. Code Regs., tit.18, § 1702.5(a) & (b).) A person is regarded as having willfully failed to pay taxes, or to cause them to be paid, where he or she had actual knowledge that the taxes were not being paid; had the authority to pay the taxes, or to cause them to be paid on the date the taxes became due and when the person had knowledge; and had the ability to pay the taxes when the person had knowledge, but chose not to do so. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(A)-(C); *Appeal of Eichler*, 2022-OTA-029P.)

On appeal, there is no dispute, and the evidence shows, that IPG's seller's permit was closed on December 31, 2009, and that the corporation had terminated its business on or before this date. There is also no dispute, and the evidence shows, that IPG collected excess sales tax reimbursement on its sales of tangible personal property from Gap. Additionally, appellant does not dispute, and the evidence shows, that he was a responsible person for IPG's sales and use tax compliance as defined in Regulation section 1702.5. Nevertheless, appellant asserts that he may not be held responsible for IPG's unpaid liabilities for two reasons. First, appellant asserts that the NOD issued to IPG was untimely, and as a result the derivative NOD issued to appellant must be cancelled because there is no liability to collect. Second, appellant asserts that CDTFA

has not met its burden of showing that the element of willfulness has been met. Specifically, appellant asserts that he was unaware of the requirement to return the refund to CDTFA (if not paid to Gap) until September 3, 2010, at which point appellant asserts that the business no longer had the ability to pay the taxes. OTA addresses these issues separately:

Whether the NOD was timely

An NOD issued under R&TC section 6829 must be mailed within three years after the last day of the calendar month following the quarterly period in which CDTFA obtains actual knowledge, through its audit or compliance activities, or by written communication by the business or its representative of the termination, dissolution or abandonment of the business of the corporation, or within eight years after the last day of the calendar month following the quarterly period in which the corporation's business was terminated, dissolved, or abandoned, whichever period expires earlier. (R&TC, § 6829(f); Cal. Code Regs., tit.18, § 1702.5(c)(2).) Termination of the business of a corporation includes 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(c)(3).)

On appeal, appellant asserts that IPG terminated operations on December 31, 2008. This is supported by the fact that IPG did not file any sales and use tax returns after December 31, 2008.[3] Thus, there are three relevant dates to consider when determining whether CDTFA timely issued the NOD to appellant: December 31, 2008 (the date that appellant asserts IPG terminated operations); December 31, 2009 (the effective closure date of IPG's seller's permit); and May 10, 2010 (the date that CDTFA closed IPG's seller's permit). If CDTFA obtained actual knowledge of IPG's termination by any of these dates, the December 28, 2011 NOD would be timely. This is because December 28, 2011, is within three years of the last day of the calendar month following the quarterly period for each of the relevant dates. Appellant has not asserted, and OTA does not find any evidence, that IPG terminated earlier than December 31, 2008. There is also no evidence that CDTFA obtained actual knowledge of IPG's

[3] Appellant argues that CDTFA accepted December 31, 2008, as IPG's closure date. As support, appellant refers to the D&R issued to appellant during CDTFA's appeals process. Footnote 1 of the D&R indicates only that IPG may have terminated the business by December 31, 2008. The D&R also states that it "seems to have been the case," that the business closed in 2008. CDTFA's comments only reflect a possibility rather than an acceptance of fact. Therefore, OTA finds the actual date the business terminated to be in dispute. However, this does not affect the outcome of this appeal.

closure prior to the earliest date: December 31, 2008 (the alleged termination date), and in any event the statute of limitations does not begin to run prior to the business termination date. Accordingly, OTA finds that the NOD was timely issued to appellant.

Next, OTA considers whether the November 16, 2010 NOD to IPG was timely. R&TC section 6961 authorizes CDTFA to issue an NOD for the recovery of any refund or part thereof that is erroneously made and any credit or part thereof that is erroneously allowed. (R&TC § 6961(b).) Except in the case of fraud, an NOD issued pursuant to R&TC section 6961 must be mailed within three years after the last day of the calendar month following the quarterly period in which CDTFA made its certification to the controller that the amount collected was in excess of the amount legally due. (*Ibid.*) Here, there is no dispute that CDTFA issued the NOD on November 16, 2010, which is more than three years after the last day of the calendar month following the quarterly period at issue: January 31, 2005 (i.e., the quarter the refunds were paid.) CDTFA would have certified the overpayment to the controller on or before the date payment was made. Thus, in absence of a finding of fraud, then the NOD issued to IPG would be untimely. However, as discussed in detail below, there was sufficient evidence to sustain the fraud penalty. As such, the statute of limitations to issue a deficiency determination for the collected but unremitted excess tax reimbursement was suspended under R&TC section 6961.

In summary, OTA finds that CDTFA timely issued the NODs to Appellant and IPG.

Whether appellant willfully failed to pay or to cause to be paid taxes due from IPG.

A person is regarded as having willfully failed to pay taxes, or to cause them to be paid, where he or she had actual knowledge that the taxes were not being paid; had the authority to pay the taxes, or to cause them to be paid on the date the taxes became due and when the person had knowledge; and had the ability to pay the taxes when the person had knowledge, but chose not to do so. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(A)-(C); *Appeal of Eichler*, *supra.*) CDTFA has the burden of establishing each element was met. (Cal. Code. Regs., tit. 18, § 1702.5(d).)

First, the evidence shows that appellant had authority to pay or cause to be paid IPG's liabilities. For example, appellant was president and CEO of IPG. As president and CEO, appellant had broad authority to manage IPG's finances. (See *Commercial Sec. Co. v Modesto Drug Co*. (1919) 43 Cal.App.162, 173.) Additionally, appellant signed an authorization agreement for electronic funds transfer, allowing electronic payments of tax to be made by IPG. OTA also notes that appellant filed the claim for refund from IPG on Gap's behalf and

was the contact person for CDTFA and Gap with respect to payment of the refund during and after the audit. Furthermore, on appeal, appellant does not dispute this evidence showing that he had authority to pay IPG's liability.

However, appellant asserts that he did not willfully fail to pay, or cause to be paid, IPG's tax liability because he did not know that he was required to pay the excess sales tax reimbursement back to CDTFA if it was not disbursed to the Gap. Appellant also asserts that by the time he had actual knowledge of the requirement to return the refund to CDTFA, IPG no longer had the funds.

With respect to knowledge, the evidence indicates that appellant advised Gap that sales in interstate commerce were not subject to tax. Despite this, and allegedly at Gap's direction, IPG collected excess sales tax reimbursement, which it then paid to CDTFA. That IPG collected and paid the excess sales tax reimbursement to CDTFA is not in dispute. Thus, at a minimum, appellant knew at the time of collection that excess sales tax reimbursement must be paid to CDTFA.

At the time the refunds were issued in 2005, the funds resumed their status as excess sales tax reimbursement. Excess sales tax reimbursement is an amount represented by a person to a customer as constituting reimbursement for taxes due upon an amount that is not taxable. Excess sales tax reimbursement must be refunded to the customer or to CDTFA. (R&TC, § 6901.5.; see also *Appeal of Bodywise*, 2022-OTA-340P.) Thus, appellant was required to refund the excess sales tax reimbursement to Gap or return it to CDTFA in 2005, when IPG received the refund. Additionally, CDTFA directed appellant that "the tax refunded by the State of California to IPG must be refunded to Gap by IPG." Thus, appellant must have known that the refund was required to be refunded to the person from whom it was over-collected (Gap). The corollary of such a condition is that if IPG did not refund the money to Gap, IPG must return the refund to CDTFA. This is consistent with the requirements of R&TC section 6901.5 that the excess tax must be refunded to the customer or paid to CDTFA, which appellant had actual knowledge of, based on IPG's past action in paying the excess sales tax reimbursement to CDTFA.

Appellant relies on a footnote in CDTFA's April 27, 2015 D&R, as support for the contention that he did not know he was required to return the refund to Gap. The footnote states "[i]t would be incongruous to make the effort to obtain a refund of excess tax reimbursement

paid to [CDTFA] as sales tax only to return such refunded amounts to [CDTFA], but that is what is required if such a claim for refund is granted and then the claimant fails to return the excess tax reimbursement to the purchaser for whom it was collected." However, OTA does not see how this footnote benefits appellant. It does not require any nuanced understanding of the Sales and Use Tax Law to recognize that a person that is entrusted with paying funds to another is obligated to return those funds to the source if they cannot be properly disbursed.

In addition, Gap contacted appellant several times regarding the excess sales tax reimbursement. On no less than two occasions, Gap stated that it would turn the matter over to CDTFA if payment was not made. Indeed, Gap's final demand states "this entire matter will be tendered to [CDTFA] for prosecution, which is expected to issue an assessment against [IPG] and its corporate officers, inclusive of fines and penalties." Thus, considering the foregoing, it is more likely than not that appellant knew when IPG received the refund (and at all times before and after) that excess sales tax reimbursement must be paid to CDTFA if not distributed to Gap.

Finally, we consider whether appellant had the ability to pay IPG's liability once he obtained actual knowledge that it was due. OTA has already found that that appellant had knowledge that excess sales tax reimbursement must be paid to CDTFA prior to the 2005 refund. Appellant received the refund from CDTFA. Thus, appellant could have returned the excess sales tax reimbursement to the state in 2005, when IPG failed to pay the funds over to Gap. Further, IPG continued to report taxable sales and pay wages throughout 2008. As such, we find that appellant had the ability to pay IPG's liability once he obtained actual knowledge that it was due. Thus, OTA finds that all elements required for the imposition of personal liability on appellant for IPG's unpaid liability have been met.

While the foregoing is dispositive, OTA addresses appellant's alternative argument that the element of willfulness is not met because IPG was entitled to deduct costs from the refund owed to Gap. Here, OTA notes that there is no provision in the Sales and Use Tax Law, which would allow IPG to deduct its costs from the refund. Next, appellant has not provided any evidence in support of his contention. Appellant's unsupported assertions are insufficient to meet his burden of proof. (*Appeal of Talavera*, 2020-OTA-022P.)

By contrast, there is evidence that no cost deduction agreement existed between IPG and Gap.[4] For example, a statement signed under penalty of perjury by KPMG states that typically any such agreement would be between Gap and IPG. However, in a November 20, 2009 email, Gap requested documentation regarding any deductions from the refund, thereby indicating that Gap was unaware of any alleged agreement. Further, in a January 19, 2010 letter to appellant, Gap stated that KPMG denied the existence of any agreement. In that same letter, Gap noted its previous request and stated that IPG failed to provide evidence of the alleged cost deduction agreement. These documents are further supported by statements signed under penalty of perjury by Gap and KPMG that no such agreement exists. Finally, Gap obtained a judgment against IPG in the full amount of the refund, which is further evidence that IPG was not authorized to deduct costs from the refund amount. Thus, we find that the balance of the evidence shows that there was no cost deduction agreement. Accordingly, we find this contention is without merit.

Issue 2: Whether the fraud penalty is properly imposed.

If any part of the deficiency for which a deficiency determination is made is due to fraud or an intent to evade the law or authorized rules and regulations, a penalty of 25 percent of the amount of the determination shall be added thereto. (R&TC, § 6485.) Fraud or intent to evade shall be established by clear and convincing evidence. (Cal. Code Regs. tit. 18, § 1703(c)(2)(C).)

On appeal, OTA notes two distinct arguments. First, CDTFA asserts that appellant may not dispute the fraud penalty. CDTFA argues that the fraud penalty imposed on IPG was subject to appeal by IPG, upheld at a BOE hearing, and is final. Thus, CDTFA argues that appellant does not have standing to dispute the fraud penalty. On the other hand, appellant asserts that the fraud penalty must be removed because CDTFA failed to show by clear and convincing evidence that appellant knew of the requirement to return the excess sales tax reimbursement to CDTFA. OTA addresses these issues in turn.

[4] OTA notes two statements provided by CDTFA discussing the deduction of interest paid by CDTFA to cover costs. In the first, CDTFA's auditor states that they mentioned it. In the second, appellant's former spouse B. Farrell states that appellant believed IPG was entitled to the interest. While this is evidence that the deduction of costs was discussed, it is not sufficient to show that a formal agreement occurred.

Whether appellant has standing to dispute the fraud penalty imposed under section 6485.

A taxpayer held personally responsible for a corporation's or limited liability company's unpaid tax liability may challenge the liability on its merits. (See *Appeal of Talavera*, *supra.*)[5] R&TC section 6829 is not a penalty provision but instead holds responsible persons dually liable because of their own conduct in failing to cause the defunct business entities to be in compliance with the reporting and payment requirements of the Sales and Use Tax Law. (See CDTFA Business Taxes Law Guide Annotation (annotation) 320.0205 (03/29/2004).)[6] There is no statutory or regulatory authority for relieving penalties in R&TC section 6829 determinations; however, R&TC section 6592(a) provides that certain penalties may be relieved as to the corporation upon a showing of reasonable cause and circumstances beyond the corporation's control, and that they occurred notwithstanding the exercise of ordinary care and in the absence of willful neglect. (*Appeal of Eichler*, *supra*.)

In *Appeal of Eichler, supra*, OTA found that a taxpayer held personally responsible for a late filing penalty may seek relief under R&TC section 6592(a). OTA noted that the late filing penalty was imposed on the underlying corporation. Thus, a person held responsible under R&TC section 6829 could seek relief from the penalty by showing that reasonable cause existed for the underlying corporation's failure to timely pay its taxes.

Unlike the penalty in *Eichler*, a fraud penalty may not be relieved under R&TC section 6592(a). That is because there is no reasonable cause for committing fraud. However, the same logic applied in *Eichler*, also applies in the instant case. Appellant is being held responsible under R&TC section 6829, and the liability includes a fraud penalty imposed under R&TC section 6485. The fraud penalty is not imposed on appellant but on the underlying corporation (in this case, IPG). OTA finds nothing in the Sales and Use Tax Law, which would

[5] In *Appeal of Talavera*, *supra*, a taxpayer was held personally responsible for the unpaid liabilities of a corporation under R&TC section 6829. Whether the elements of R&TC section 6829 were met was not in dispute. Instead, the only issues on appeal were the merits of the audit findings making up the corporation's unpaid tax liability. Without the basic ability to dispute the underlying liability the decision in *Talavera* would not be possible. Thus, it is clear from *Talavera* that a taxpayer may challenge the liability on its merits.

[6] CDTFA's annotations are not regulations, and they are not binding upon taxpayers, CDTFA, or OTA. (*Appeal of Martinez Steel Corporation*, 2020-OTA-074P; Cal. Code Regs., tit. 18, § 35101.) The annotations are digests of opinions written by the legal staff of CDTFA which are evidence of administrative interpretations made by CDTFA in the normal course of its administration of the Sales and Use Tax Law. (*Appeal of Martinez Steel Corporation*, *supra*.) The annotations have substantial precedential effect within CDTFA and the interpretation of its meaning whether embodied in a formal rule or less formal representation. (*Ibid.*)

prevent appellant from contesting his personal responsibility for the underlying corporation's liability on the basis that the corporation's tax liability was erroneously computed, or the fraud penalty is inapplicable. (See, e.g., R&TC, § 6901.) Thus, if appellant can show that the fraud penalty is inapplicable, then appellant would not be held personally liable for the taxes at issue because the corporation's NOD for these taxes would be untimely based on our finding under Issue 1, above.

Whether CDTFA has shown through clear and convincing evidence that IPG committed fraud.

The R&TC does not define fraud, but there are many federal precedents that OTA may look to for guidance. (*ISIF Madfish, Inc.*, 2019-OTA-292P.) Fraud is intentional wrongdoing on the part of the taxpayer with the specific intent to avoid a tax known to be owing. (*Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 30; *Bradford v. Commissioner* (9th Cir. 1986) 796 F.2d 303, 307.) Fraud can be proven by circumstantial evidence. (*Tenzer v.Superscope, Inc.*, *supra*.) Circumstantial evidence of fraud or intent to evade taxation includes but is not limited to: substantial discrepancies between recorded amounts and reported amounts that cannot be explained (the indication that a deficiency is due to intent to evade increases in direct proportion to the ratio of the understatement); when sales tax or sales tax reimbursement is properly charged, evidencing knowledge of the requirements of the law, but not reported; inadequate records; failure to cooperate with tax authorities; failure to file tax returns; and lack of credibility in the taxpayer's testimony. (*Ibid*; *Rau's Estate v. Commissioner* (9th Cir. 962) 301 F.2d 51, 54-55; *Powell v. Granquist* (9th Cir.1958) 252 F.2d 56, 60.) Federal courts also have concluded that the "'[m]ere omission of reportable income is not of itself sufficient to warrant a finding of fraud [but] repeated understatements in successive years when coupled with other circumstances showing an intent to conceal or misstate taxable income present a basis'" for inferring fraud. (*Rau's Estate v. Commissioner* (9th Cir. 1962) 301 F.2d 51, 54-55 [quoting *Furnish v. Commissioner* (9th Cir. 1958) 262 F.2d 727, 728.])

OTA has already discussed whether appellant knew of IPG's requirement to either refund the funds to Gap or pay them to CDTFA. OTA's conclusion here stays the same. CDTFA's August 24, 2004 Report of Discussion of Audit Findings states that IPG must refund the tax to Gap. Thus, appellant must have known that if the excess tax wasn't refunded to Gap, then it must be returned to CDTFA.

Additionally, IPG displayed a continuous pattern of fraudulent behavior by misrepresenting the status of the refund. For example, IPG informed Gap that it had not received the refund when it had. Upon receipt, IPG did not disclose that it received the refund or refund the money to Gap. IPG also misrepresented the time in which it received the money, and how much money was owed to Gap.

Further, IPG misrepresented the status of the refund to CDTFA. In a letter dated October 11, 2010, appellant stated that IPG was entitled to deduct fees from the refund. Appellant argued that Gap actually owed IPG "additional fees above the amount of the refund." Appellant also stated that "on two occasions representatives from the auditing firm contacted IPG regarding the refund. After reminding them of the details of the agreement they recalled the matter and did not request additional information or ask additional questions." However, as discussed in detail above, the evidence shows that no cost deduction agreement existed between IPG and Gap. Additionally, a judgment against appellant reveals that IPG did in fact owe the refund to Gap.[7] Furthermore, the evidence reveals a sustained effort by Gap, in the form of telephone calls, emails, and letters, and culminating in a lawsuit, to retrieve the refund from IPG. Thus, it is readily apparent from the foregoing that appellant misrepresented the status of the refund to CDTFA.

Finally, appellant asserts that the fraud penalty was imposed based, in large part, on unreliable statements by appellant's former spouse, B. Farrell. However, OTA does not base its conclusion on B. Farrell's statements but instead bases its decision on all of the available evidence. Thus, OTA finds that the foregoing constitutes clear and convincing evidence that the NOD issued to IPG is due to fraud or the intent to evade the law, and the fraud penalty was properly imposed.

[7] With respect to the judgment against appellant, OTA notes that although a judgment has been entered requiring a payment of $500,000, appellant has not provided any evidence that he has made actual payment on that judgment.

HOLDINGS

1. The NOD issued to appellant by CDTFA holding him personally responsible under R&TC section 6829 for IPG's unpaid liabilities was timely.
2. Appellant is personally responsible under R&TC section 6829 for IPG's unpaid liabilities for the liability period.
3. The fraud penalty was properly imposed.

DISPOSITION

CDTFA's action denying appellant's petition for redetermination is sustained.

DocuSigned by:
DC88A60D8C3E442...
Keith T. Long
Administrative Law Judge

We concur:

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

DocuSigned by:
Sheriene Anne Ridenour
67F043D83EF547C...
Sheriene Anne Ridenour
Administrative Law Judge

Date Issued: 12/21/2022