

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

E. ROMAN

) OTA Case No. 21108728
) CDTFA Case ID: 1-894-303
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)

OPINION

Representing the Parties:

For Appellant:

E. Roman

For Respondent:

Courtney Daniels, Tax Counsel III

For Office of Tax Appeals:

Casey Green, Tax Counsel III

K. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, E. Roman (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)¹ denying appellant’s petition for redetermination of a Notice of Determination (NOD) dated December 31, 2019. The NOD is for tax of \$210,622.06,² plus applicable interest, and penalties of \$21,491.00,³ for the period April 23, 2013, through June 30, 2017 (liability period). The NOD reflects CDTFA’s

¹ Sales and use 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 events that occurred before July 1, 2017, “CDTFA” shall refer to the board.

² This amount consists of: (1) \$4,288.00 in tax attributable to CDTFA’s compliance assessment of Roman Realty Management Services, LLC, dba One Stop Auto Sales (RRMS) for the period April 1, 2014, through June 30, 2014; (2) \$11,090.00 in taxes reported on RRMS’s sales and use tax returns for the third quarter of 2014 (3Q14), 4Q15, 1Q16, and 2Q16; (3) \$187,260.06 in tax attributable to two audits of RRMS for the periods April 23, 2013, through December 31, 2014, and January 1, 2015, through May 25, 2017; and (4) \$7,984.00 in tax liabilities reported on RRMS’s prepayment forms that it filed for July 2015, August 2015, January 2016, and February 2016. Appellant has not offered argument or evidence to dispute the amounts that RRMS reported on its unpaid sales and use tax returns, unpaid prepayment forms, or CDTFA’s compliance assessment and these items will not be discussed further.

³ Appellant has not made any argument or offered evidence disputing these penalties. As such, OTA finds they are not in dispute and will not discuss them further.

determination that appellant is personally liable for the unpaid taxes, interest, and penalties of Roman Realty Management Services, LLC, dba One Stop Auto Sales (RRMS).

Appellant waived the right to an oral hearing; therefore, the matter is being decided based on the written record.

ISSUES

1. Whether appellant is personally liable as a responsible person for RRMS's unpaid sales and use taxes, applicable interest, and penalties during the liability period.
2. Whether reductions to the audit liabilities assessed to RRMS are warranted.

FACTUAL FINDINGS

1. RRMS, a limited liability company (LLC), filed Articles of Organization with the California Secretary of State's office on March 30, 2004. RRMS listed appellant as its agent for service of process and appellant signed the Articles of Organization as RRMS's organizer. On April 24, 2015, RRMS filed a statement of information form with the California Secretary of State's office, which appellant signed as RRMS's chief executive officer (CEO).
2. RRMS obtained a seller's permit effective April 23, 2013. The seller's permit lists appellant as an LLC principal and an LLC member/manager and contact person for "business activities." RRMS operated a used car dealership in Riverside, California, beginning in 2013. RRMS added a second location in Redlands, California, in 2014.
3. CDTFA conducted an audit of RRMS for the period April 23, 2013, through December 31, 2014 (the first audit). For the first audit, RRMS did not provide any books and records. CDTFA obtained sales records from the DMV, which it compared to the taxable sales reported on appellant's sales and use tax returns, to calculate unreported taxable sales of \$539,973.
4. On June 2, 2017, appellant informed CDTFA that RRMS had terminated its business operations. Based on their conversation, CDTFA closed RRMS's seller's permit effective May 26, 2017.
5. CDTFA conducted an audit of RRMS for the period January 1, 2015, through May 25, 2017 (the second audit). For the second audit, RRMS provided an incomplete

set of dealer jackets.⁴ CDTFA also obtained DMV sales records. The DMV sales records did not include an exact sales price, only an estimated sales price. Appellant was CDTFA's contact for the second audit.⁵

- a. CDTFA compared the sales recorded in RRMS's dealer jackets to the sales recorded by the DMV. CDTFA found that in each case the sales price recorded in the dealer jackets was 28.38 percent higher than that recorded with the DMV on average.
 - b. Where there was no corresponding dealer jacket, CDTFA applied the 28.38 percent rate to the Department of Motor Vehicles (DMV) sales records and found audited DMV sales of \$1,921,585.
 - c. CDTFA scheduled the sales recorded in RRMS's dealer jackets and found recorded taxable sales of \$502,004.
 - d. CDTFA combined the taxable sales recorded in RRMS's dealer jackets with the audited DMV sales to find total audited taxable sales of \$2,423,589, which when compared to reported taxable sales revealed unreported taxable sales of \$2,063,917. CDTFA reduced unreported taxable sales by unclaimed bad debt deductions of \$5,240 and found unreported taxable sales of \$2,058,677.
6. Following the closure of RRMS's seller's permit, CDTFA investigated whether appellant could be held personally liable for RRMS's unpaid tax liabilities pursuant to R&TC section 6829.
7. CDTFA's investigation revealed evidence that RRMS collected sales tax reimbursement on its sales of tangible personal property, including:
- a. CDTFA notes from an October 11, 2019 telephone call in which appellant stated that RRMS collected sales tax reimbursement on its sales.
 - b. CDTFA notes from an August 31, 2016 site visit in which an RRMS employee informed CDTFA that sales tax reimbursement was charged on RRMS's sales.

⁴ A vehicle dealer jacket is typically maintained by a used car dealer for each vehicle sale. The jacket includes the sales contract and any documents related to the sale.

⁵ CDTFA provided a copy of its Report of Discussion Audit Findings for the first audit, which indicates that RRMS's other LLC member, S. Barragan, represented RRMS during the first audit.

- c. CDTFA notes in a copy of form CDTFA-1296, *Account Update Information*, dated November 6, 2017, that RRMS included or added sales tax reimbursement to the selling price as evidenced by a sales contract.
 - d. A July 3, 2015 motor vehicle sales contract showing that RRMS added sales tax reimbursement to the sale.
8. CDTFA’s investigation revealed evidence that appellant was a responsible person for RRMS’s sales and use tax liabilities, including the following:
- a. Documents filed with the California Secretary of State’s office, which identify appellant as RRMS’s organizer, and CEO.
 - b. Documents filed with the DMV and signed by appellant, which identify appellant as RRMS’s principal and president.
 - c. RRMS’s seller’s permit application, which lists appellant as a member/manager. The same document lists appellant as the contact person for business activities.
 - d. CDTFA notes from an October 11, 2019 telephone call in which appellant stated that he was the only officer of RRMS and responsible for the payment of RRMS’s tax liabilities.
 - e. An Auction Access registration application dated July 28, 2013, signed by appellant, which lists appellant as RRMS’s owner.
 - f. CDTFA notes from an August 31, 2016 site visit, in which an RRMS employee identified appellant as a person with knowledge and authority to pay the sales tax liability.
 - g. A June 25, 2014 document titled “Dealer Credit Rating Worksheet for Adesa Auction Use Only,” which lists appellant as RRMS’s owner.
 - h. A CDTFA “Responsible Person Questionnaire,” completed and signed by appellant, which identifies appellant as an officer of RRMS.
 - i. A March 1, 2017 contract for the sale of RRMS’s business to Wade City Promotions, LLC, which appellant signed as “Seller,”⁶ indicates that the seller “has all necessary corporate power, authority and capacity to enter into [the] Agreement and to carry out its obligations.”

⁶ The first page of the contract for sale identifies RRMS as the seller. However, appellant is also identified as the seller on the signature line of the contract.

- j. Notes document phone calls between CDTFA and appellant during the period May 27, 2014, through October 28, 2019 about RRMS's tax liabilities, including the negotiation of a payment plan on RRMS's behalf.
 - k. RRMS's non-remittance sales and use tax returns for the first quarter of 2015 (1Q15) through 1Q16, which appellant prepared and filed, identify appellant as RRMS's president.
9. CDTFA's investigation revealed that appellant willfully failed to pay RRMS's outstanding liabilities because appellant had knowledge, authority, and RRMS had the funds available to pay its outstanding liabilities, including the following:
- a. RRMS's non-remittance sales and use tax returns for the period 1Q15 through 1Q16, which were prepared and filed by appellant.
 - b. CDTFA's notes document telephone calls with appellant, in which appellant discusses RRMS's outstanding tax liabilities with CDTFA.
 - c. Documents filed with the California Secretary of State's office, DMV, and CDTFA, which identify appellant as the person responsible for RRMS's sales and use tax matters.
 - d. Records, which show that during the period 2Q14 through 4Q16, RRMS made payments to suppliers totaling \$746,799.

DISCUSSION

Issue 1: Whether appellant is personally liable as a responsible person for RRMS's unpaid sales and use taxes during the liability period.

R&TC section 6829 provides, in pertinent part, that a person is personally liable for the unpaid tax, penalties, and interest owed by an LLC, if all of the following elements are met: (1) the LLC's business has been terminated, dissolved, or abandoned; (2) the LLC collected sales tax reimbursement on its sales of tangible personal property and failed to remit such tax reimbursement to CDTFA when due; (3) the person had control or supervision of, or was charged with the responsibility for, the filing of returns or the payment of tax, or had a duty to act for the LLC in complying with the Sales and Use Tax Law; and (4) the person willfully failed to pay taxes due from the LLC or willfully failed to cause such taxes to be paid. (R&TC,

§ 6829(a), (c); Cal. Code Regs., tit. 18, § 1702.5(a)(b).) CDTFA must prove these elements by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 1702.5(d).)

On appeal, appellant does not make any arguments disputing his personal responsibility under R&TC section 6829. Instead, appellant asserts that he sold RRMS in January 2017 and that the buyer agreed to be responsible for the liabilities at issue herein. Therefore, appellant argues that he is no longer responsible for RRMS's sales and use tax liabilities. Nevertheless, OTA considers whether CDTFA has met its burden of proving each element of R&TC section 6829 by a preponderance of the evidence.

Element 1 – Termination

The “termination” of the business of a corporation includes discontinuance or cessation of all business activities for which the LLC was required to hold a seller's permit. (Cal. Code Regs., tit. 18, § 1702.5(b)(3).) Here, on or about June 2, 2017, appellant informed CDTFA that RRMS had closed out the car dealership effective May 26, 2017, and there is no argument or evidence to the contrary. Thus, OTA finds that this requirement for holding appellant liable pursuant to R&TC section 6829 has been met.

Element 2 – Sales Tax Reimbursement

As relevant here, personal liability can be imposed only to the extent the LLC collected tax reimbursement on its sales of tangible personal property in this state but failed to remit the tax to CDTFA when due. (R&TC, § 6829(c); Cal. Code Regs., tit. 18, § 1702.5(a).)

Here, appellant does not dispute, and the evidence establishes that, RRMS collected sales tax reimbursement on its sales of tangible personal property. For example, on October 11, 2019, appellant informed CDTFA via telephone RRMS collected sales tax reimbursement on its sales. Additionally, CDTFA visited RRMS's business on August 31, 2016, and was informed by an employee that sales tax reimbursement was collected on RRMS's sales. Finally, a copy of a motor vehicle sales contract dated July 3, 2015, shows RRMS added sales tax reimbursement to the sale. Thus, OTA finds that this requirement for holding appellant liable pursuant to R&TC section 6829 has been met.

Element 3 – Responsible Person

Personal liability can be imposed only on a responsible person. (R&TC, § 6829(b).) In this context, “responsible person” means any person having control or supervision of, or who was charged with the responsibility for, the filing of returns or the payment of tax or who had a duty to act for the LLC in complying with any portion of the Sales and Use Tax Law when the taxes became due. (*Ibid.*; Cal. Code Regs., tit 18, § 1702.5(b)(1).) As relevant here, personal liability applies only if, when the person was a responsible person for the LLC, the LLC sold tangible personal property and collected sales tax reimbursement on the selling price of the property and failed to remit such tax reimbursement when due. (Cal. Code Regs., tit. 18, § 1702.5(a).) Simply because a person possesses the title of a member, owner, manager, or employee, of a business is not, in and of itself, sufficient proof to establish that the person is a “responsible person.” (Cal. Code Regs., tit. 18, § 1702.5(b)(1).) A CEO, however, is presumed to have broad implied and actual authority to do all acts customarily connected with the business, including ensuring its compliance with the Sales and Use Tax Law, even if that responsibility is delegated to others. (See *Commercial Security Co. v Modesto Drug Co.* (1919) 43 Cal.App.162, 173-174.)

Here, appellant prepared and filed RRMS’s sales and use tax returns for the period 1Q15 through 1Q16. Additionally, appellant spoke with CDTFA throughout the liability period regarding RRMS’s sales and use tax matters. Appellant also negotiated a payment plan on behalf of RRMS for the delinquent taxes herein. Further, in an October 11, 2019 telephone call, appellant informed CDTFA that he was the only officer of RRMS and had the responsibility and authority to pay the sales tax liabilities at issue herein. These facts are strong evidence that appellant was responsible for RRMS’s sales and use tax liabilities.

The evidence also establishes that appellant was the CEO, president, and owner of RRMS. For example, appellant signed documents filed with the California Secretary of State’s Office as CEO, and signed documents filed with the DMV as president. CEOs are presumed to have broad implied and actual authority to do all acts customarily connected with the business, including ensuring its compliance with the Sales and Use Tax Law. (See *Commercial Security Co. v. Modesto Drug Co.*, *supra.*)

Accordingly, OTA finds CDTFA has established by a preponderance of the evidence that appellant had control, supervision, and responsibility for filing tax returns and paying taxes

throughout the liability period and had a duty to act for RRMS in complying with provisions of the Sales and Use Tax Law when the taxes became due.

Element 4 – Willful

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

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

(B) The responsible person had the authority to pay the taxes or to cause them to be paid (i) on the date that the taxes came due and (ii) when the responsible person had actual knowledge as defined in (A). 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.

Knowledge

The first requirement is that the responsible person had actual knowledge that the taxes were due, but not being paid. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(A); *Appeal of Eichler*, 2022-OTA-029P.)

Here, by negotiating the payment plan on behalf of RRMS, and filing RRMS’s non-remittance sales and use tax returns, appellant necessarily knew that tax was due and not paid. In addition, appellant told CDTFA on May 28, 2014, that he was aware of RRMS’s tax liabilities going back to 4Q13. Appellant was also aware of RRMS’s unpaid tax liabilities for the audits, as CDTFA sent the audit reports, dated April 17, 2015, and July 19, 2017, to RRMS, for which

appellant was the only officer and had the responsibility and authority to file sales and use tax returns and pay sales tax liabilities for RRMS.

OTA notes that appellant has not provided any argument or evidence to dispute these facts. Thus, based on the foregoing, OTA finds that there is sufficient evidence to show that appellant had actual knowledge that RRMS's sales and use taxes were due and unpaid.

Authority

The second requirement is that the responsible person had 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. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(B).)

Here, appellant does not dispute, and the evidence establishes that, he had the authority to pay RRMS's tax liabilities. For example, CDTFA's notes dated October 15, 2015, and October 19, 2015, indicate that appellant visited a CDTFA office and made tax payments. Similarly, CDTFA notes indicate that in a December 21, 2016 telephone call appellant stated that he could come make a \$40,000 payment of RRMS's tax liabilities and then pay the remaining balance a week later. Further, CDTFA documented an October 11, 2019 telephone call in which appellant stated that he had the authority to pay RRMS's sales and use tax liabilities. These contemporaneous records are strong evidence that appellant had the authority to pay RRMS's tax liabilities. Thus, based on the foregoing, OTA finds that appellant had the authority to pay the taxes at issue or to cause them to be paid throughout the liability period.

Ability to Pay

The third requirement is that when the responsible person had actual knowledge, 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)(C).)

Here, CDTFA obtained documentation that RRMS purchased vehicles totaling \$746,799 from 2Q14 through 4Q16. Therefore, RRMS had funds available to pay its tax liability during the period 2Q14 through 4Q16 but chose to pay its vendors instead. Further, appellant informed CDTFA that RRMS collected sales tax reimbursement on all its taxable sales during the liability period. CDTFA was also informed by RRMS employees that sales tax reimbursement was collected during the liability period. As such, RRMS had those funds available to pay the tax

liability during each reporting period of the audit but failed to do so. Accordingly, OTA finds that this requirement for holding appellant liable pursuant to R&TC section 6829 has been met.

In summary, OTA finds that CDTFA has proven that all of the requirements of R&TC section 6829 have been met and that appellant is personally liable for the amounts at issue.

Regarding appellant's contention that he sold RRMS in 2017, and that the buyer agreed to be responsible for RRMS's sales and use tax liabilities, appellant's argument lacks merit. There is nothing in the law that would relieve appellant's liability herein based on a private contract with another taxpayer. (Civil Code, § 1656.1.) Thus, OTA must reject appellant's contentions.

Issue 2: Whether reductions to the liabilities assessed to RRMS are warranted.

California imposes sales tax on a retailer measured by retailer's gross receipts from the retail sale of all tangible personal property sold in this state, unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, §§ 6012, 6051.) For the purpose of the proper administration of the Sales and Use Tax Law and to prevent evasion of the sales tax, the law presumes that all gross receipts are subject to tax until the contrary is established. (R&TC, § 6091.) It is the retailer's responsibility to maintain complete and accurate records to support reported amounts and to make them available for examination. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).)

If CDTFA is not satisfied with the amount of tax reported by the taxpayer, or if any person fails to make a return, CDTFA may determine the amount required to be paid on the basis of any information which is in its possession or may come into its possession. (R&TC, §§ 6481, 6511.) In the case of an appeal, 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.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid.*)

On appeal, appellant does not make any contentions specific to RRMS's liability. However, appellant offers a general statement disagreeing with the "accounting method used" by CDTFA to determine RRMS's liabilities.

With respect to the first audit, RRMS did not provide any books or records. To calculate the taxable measure, CDTFA obtained vehicle sales records from the DMV, which when

compared to RRMS's sales and use tax returns revealed discrepancies that could not be explained. Considering appellant's failure to provide any books or records for the audit, CDTFA's use of the DMV information was both reasonable and rational.

As to the second audit, RRMS did not provide a complete set of books and records. Instead, RRMS only provided an incomplete set of dealer jackets. CDTFA compared the available dealer jackets to DMV sales records and found that in every instance, the recorded dealer jacket price was greater than the price estimated by the DMV by an average of 28.38 percent. Therefore, CDTFA increased the sales price recorded in the DMV records by 28.38 percent to calculate audited taxable DMV sales. When combined, the dealer jacket sales and the audited taxable DMV sales (less the unclaimed bad debt deduction) revealed total audited taxable sales of \$2,418,349. When compared to RRMS's reported taxable sales, the audited taxable sales revealed a discrepancy that could not be explained. Considering the severe lack of books and records, OTA finds that CDTFA's use of the available dealer jackets and DMV records was reasonable and rational. Further, because each dealer jacket revealed a price higher than the corresponding DMV record, OTA finds that CDTFA's use of a ratio to estimate audited taxable DMV sales was both reasonable and rational.

Thus, for both audits, the burden of proof shifts to the taxpayer, and unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Id.*) As noted above, appellant has not made any arguments other than a general disagreement with the audit method. Appellant also has not provided any evidence to support a reduction of the taxable measure. Accordingly, appellant has not met his burden of proof.

HOLDINGS

1. Appellant is personally liable as a responsible person for RRMS’s unpaid sales and use taxes during the liability period.
2. No reductions to the liabilities assessed to RRMS are warranted.

DISPOSITION


CDTFA’s action in denying appellant’s NOD is sustained.

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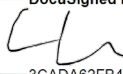
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Keith T. Long
 Administrative Law Judge

We concur:

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Andrew Wong
 Administrative Law Judge

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Andrew J. Kwee
 Administrative Law Judge

Date Issued: 1/20/2023