

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeals of:
D. SINAI

) OTA Case No. 19034454
) CDTFA Case IDs: 212091, 212102, 212106
)
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)
)

OPINION

Representing the Parties:

For Appellant: Walter Weiss, Attorney

For Respondent: Jason Parker, Chief of Headquarters
Operations

For Office of Tax Appeals: Steven Kim, Tax Counsel III

N. RALSTON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561 D. Sinai (appellant) appeals decisions issued by the California Department of Tax and Fee Administration (respondent)¹ denying appellant's petition for redetermination and administrative protests² of three separate Notices of Determination (NOD). The first NOD (dated April 25, 2013) is for a tax of \$108,767.33, plus applicable interest, and a penalty of \$18,523.71, for the period June 1, 2005, through February 15, 2010, reflecting respondent’s determination that appellant is personally liable for the unpaid sales and use tax liabilities of Olympic Atlantic Oil Co. (Olympic). The second NOD (dated April 26, 2013) is for a tax of \$137,375.22, plus applicable interest, and \$22,212.14 in penalties, for the period December 1, 2005, through March 9, 2010. The NOD reflects respondent’s determination that appellant is personally liable for the unpaid sales and use tax liabilities of 4th St. Ontario 76, Inc.

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 respondent. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to events that occurred before July 1, 2017, “respondent” shall refer to the board.

² Under regulations promulgated by respondent, and applicable at the time the administrative protest was filed, if a taxpayer files a petition for redetermination after the 30-day time period specified in R&TC section 6561, respondent may accept it as an administrative protest. (Cal. Code Regs., tit. 18, § 35019.)

(Ontario). The third NOD (dated July 9, 2013) is for a tax of \$242,806.69, plus applicable interest, and \$57,282.74 in penalties for the period December 1, 2006, through February 1, 2010. The NOD reflects respondent's determination that appellant is personally liable for the unpaid sales and use tax liabilities of Western Oil 26, Inc. (Western).

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 under R&TC section 6829 for Olympic's unpaid sales tax liabilities for the liability period.
2. Whether any adjustments to the underlying liabilities determined against Olympic are warranted.
3. Whether appellant is personally liable under R&TC section 6829 for Ontario's unpaid sales tax liabilities for the liability period.
4. Whether any adjustments to the underlying liabilities determined against Ontario are warranted.
5. Whether appellant is personally liable under R&TC section 6829 for Western's unpaid sales tax liabilities for the liability period.
6. Whether any adjustments to the underlying liabilities determined against Western are warranted.

FACTUAL FINDINGS

Olympic

1. Olympic, a California corporation, operated a gas station and mini mart located in East Los Angeles, California. Olympic held a seller's permit effective from June 1, 2005, through February 15, 2010. Olympic informed respondent that it sold its business and that its last day of operation was February 15, 2010. Olympic's purchaser applied for a seller's permit with an effective start date of February 15, 2010.
2. Appellant was Olympic's sole shareholder, director, and sole officer for all times relevant herein. Appellant also acted as Olympic's chief executive officer, secretary, chief financial officer, agent for service of process, and president.

3. Respondent issued an October 20, 2008 NOD to Olympic based on an audit it conducted for the period June 1, 2005, through December 31, 2007, which disclosed unreported taxable sales measuring \$739,274.00. During the audit, respondent noted that Olympic included sales tax reimbursement in the selling price of gas. Olympic did not provide sufficient records, and respondent could not verify Olympic's reported taxable sales using the available information. Therefore, respondent established the audited measure of unreported taxable sales using an indirect method. Respondent also imposed a negligence penalty of \$6,070.62.
4. Olympic filed a partial-remittance sales and use tax return (SUTR) for 2Q08. Thus, respondent imposed a late-payment penalty of \$4,231.40.
5. Respondent imposed a late prepayment penalty of \$109.12 pursuant to R&TC section 6476, upon Olympic for its failure to make its January 2009 prepayment.
6. Olympic untimely filed a non-remittance SUTR for 4Q09 and respondent therefore also imposed a late-payment penalty of \$3,173.90.
7. Olympic failed to file a SUTR for the period January 1, 2010, through February 15, 2010. Respondent therefore issued a September 16, 2010 NOD to Olympic using Olympic's SUTRS for 2Q09 to 4Q09, from which it estimated \$23,312.00 in tax for the January 1, 2010, through February 15, 2010 period. The NOD also imposed a failure to file penalty of \$2,631.20. Respondent subsequently imposed a finality penalty of \$2,631.20 pursuant to R&TC section 6565 for Olympic's failure to pay the NOD before it became final. Olympic claimed deductions for sales tax included in gross sales reported on its SUTRs for the periods 2Q06 through 2Q09. Olympic also claimed deductions for sales tax included in gross sales on line 9 of its SUTRs for 2Q06 through 2Q09, which is a representation that it collected sales tax reimbursement on sales of tangible personal property in this state.
8. Appellant filed Olympic's SUTRs for 2Q05, 3Q05, 4Q05, 1Q07, and 3Q07, and the monthly "Sales and Use Tax Prepayment Form" (prepayment forms for the months of June 2005, August 2005, November 2005, and January 2006).
9. Appellant corresponded with respondent on several occasions regarding Olympic's sales and use tax matters, discussing SUTRs and/or payments for 2Q06, 3Q06, 4Q06, 1Q07, 3Q07, 4Q07, 2Q08, 3Q08, and 4Q08.

10. Appellant signed Olympic's power of attorney dated April 22, 2008, appointing a representative to discuss Olympic's sales and use tax matters with respondent.
11. In a Responsible Person Questionnaire dated December 17, 2008, appellant identified himself as the person who had control, supervision, responsibility, or duty to act for Olympic in sales and use tax matters. Appellant also discussed the audit findings and resulting liabilities with respondent. Additionally, appellant stated that Olympic included sales tax reimbursement in the selling price of any tangible personal property.
12. In a letter dated May 18, 2009, appellant instructed respondent to apply Olympic's overpayment for 4Q08 to Olympic's unpaid liabilities for 1Q08 and 2Q08.
13. Appellant signed an Authorization Agreement for Electronic Funds Transfer form for Olympic dated May 8, 2006, to pay Olympic's sales and use tax liabilities from its business checking account to respondent through electronic funds transfers.
14. Appellant signed Olympic's business check dated April 29, 2009, payable to respondent. Respondent's Automated Compliance Management System (ACMS) notes also reflect that on December 17, 2008, appellant admitted to respondent that appellant used the sales tax reimbursement Olympic collected to pay appellant's personal and business expenses.
15. Olympic made purchases from its supplier, ConocoPhillips Company, in excess of \$1,700,000.00 from 1Q07- through 4Q07. Olympic paid the IRS approximately \$20,404 from 1Q08 through 1Q10. Olympic reported on its federal income tax returns cost of goods sold of \$2,666,181. and \$182,795.00 in 2009 and 2010, respectively. Olympic maintained a significant balance in its business checking account from 2Q06 through 2Q07, and available funds in excess of \$105,000 in 4Q08.
16. On April 25, 2013, respondent issued the NOD to appellant for Olympic's unpaid liabilities. Appellant filed an administrative protest disputing the NOD.
17. On January 12, 2015, respondent issued a decision denying appellant's administrative protest.

Ontario

18. Ontario, a California corporation, operated a gas station and mini mart located in Ontario, California. Ontario held a seller's permit effective from December 1, 2005, through March 9, 2010, when Ontario sold its business.

19. Appellant was Ontario's sole shareholder, director, and officer for all times relevant herein. Appellant also acted as Ontario's chief executive officer, secretary, chief financial officer, agent for service of process, and president.
20. Respondent conducted an audit of Ontario for the period December 1, 2005, through December 31, 2007, which disclosed, as relevant here, unreported taxable sales measuring \$988,498.00. During the audit, respondent noted that Ontario included sales tax reimbursement in the selling price of gas. Ontario did not provide sufficient records, and respondent could not verify Ontario's reported taxable sales using the available information, so respondent established the audited measure of unreported taxable sales using an alternative method. Respondent consequently issued an October 16, 2008 NOD to Ontario based on this audit, which included a negligence penalty of \$7,829.48. Ontario filed a petition for redetermination, and respondent conducted a reaudit based on additional information submitted by Ontario during the appeal. Based on the reaudit, respondent reduced the measure of unreported taxable sales to \$812,972.00 and reduced the negligence penalty to \$6,469.16.
21. Respondent subsequently conducted an audit for the period April 1, 2008, through March 9, 2010, which disclosed unreported taxable sales measuring \$969,125.00. Appellant represented Ontario during the audit. Respondent issued a December 8, 2011 NOD based on this audit, which included a negligence penalty of \$1,337.08, and a failure to file penalty of \$4,286.90. Respondent subsequently imposed a finality penalty of \$5,624.00 pursuant to R&TC section 6565 for Ontario's failure to pay the NOD before it became final.³
22. Ontario filed partial-remittance SUTRs for 2Q08 and 3Q09 and therefore incurred late-payment penalties of \$3,106.60 and \$1,338.40, respectively.
23. Ontario also filed a partial-remittance SUTR for 3Q09, which incurred a late-payment penalty of \$1,338.40.
24. Ontario claimed deductions for sales tax included in gross sales reported on its SUTRs for the periods 4Q05 through 3Q09.

³ The taxable measure and penalties were subsequently reduced by \$27,977.00 and \$2,797.70, respectively, to account for credit for sales tax pre-paid to gasoline distributors, resulting in tax of \$56,240.04 and penalties of \$5,623.98.

25. Appellant signed Ontario's prepayment form for April 2006, and Ontario's SUTRs for 2Q07 and 3Q07.
26. Appellant corresponded with respondent on several occasions to discuss Ontario's account balance, delinquent SUTRs, and payments.
27. Appellant also represented Ontario during respondent's audit for the period April 1, 2008, through March 9, 2010.
28. Appellant signed Ontario's claim for refund for the period 2Q08 through 1Q10 as its president on August 5, 2011.
29. Appellant, as Ontario's president, signed an Authorization Agreement for Electronic Funds Transfer form for Ontario dated May 8, 2006, to pay Ontario's sales and use tax liabilities from Ontario's business checking account.
30. Appellant, as Ontario's president, signed an Installment Payment Agreement (IPA) for Ontario dated August 19, 2009, to pay Ontario's sales and use tax liabilities for 2Q08 and 1Q09.
31. Appellant signed Ontario's business checks payable to respondent, including checks dated April 18, 2008, July 1, 2008, October 12, 2008, March 12, 2009, and April 29, 2009.
32. According to Employment Development Department (EDD) records, Ontario paid \$328,681.75 in wages from 4Q05 through 1Q10. Ontario made purchases totaling \$559,376.00 from 4Q05 through 3Q09. Ontario had approximately \$245,112.85 credited to its business checking account in 4Q08. Ontario paid the IRS \$66,250.63 from 2Q06 through 1Q10.
33. On April 26, 2013, respondent issued the above-referenced NOD to appellant for Ontario's unpaid liabilities. Appellant filed an administrative protest disputing the NOD.
34. On January 7, 2015, respondent issued a decision denying appellant's administrative protest.

Western

35. Western, a California corporation, operated a gas station and mini mart located in Los Angeles, California. Western held a seller's permit effective from December 1, 2006, through February 1, 2010.

36. Appellant was Western's chief executive officer, president, and a 50 percent shareholder during the liability period.
37. Respondent conducted an audit of Western for the period December 1, 2006, through December 31, 2007, which disclosed unreported taxable sales measuring \$595,652.00. During the audit, respondent noted that Western included sales tax reimbursement in the selling price of gasoline and diesel. Western failed to provide complete books and records for the audit period. Respondent could not verify Western's reported taxable sales using the provided information, so respondent established the audited measure of unreported taxable sales using an alternative method. Respondent issued a December 4, 2008 NOD to Western based on this audit, which included a negligence penalty of \$4,914.14. Respondent subsequently imposed a finality penalty of \$4,914.14 pursuant to R&TC section 6565 for Western's failure to pay the NOD before it became final.
38. Respondent conducted an audit of Western for the period April 1, 2008, through February 1, 2010, which disclosed unreported taxable sales measuring \$503,079.00. During the audit, respondent noted that Western sold both taxable and nontaxable items in the mini mart. Western did not provide any books and records to support its reported taxable sales. Respondent could not verify Western's reported taxable sales, so respondent established the audited measure of unreported taxable sales using a 0.5 differential for gas, a .1430 differential for diesel, and a 1.5 factor rate for mini mart sales. Respondent issued an October 25, 2011 NOD to Western based on this audit, which included a negligence penalty of \$15,549.72. Respondent subsequently imposed a finality penalty of \$15,549.72 pursuant to R&TC section 6565 for Western's failure to pay the NOD before it became final.
39. Western filed a partial-remittance SUTR for 2Q08 reporting \$60,755.00 in tax and incurred a late-payment penalty of \$6,075.50. Western filed a partial-remittance prepayment form for January 2009 reporting \$4,000.00 in tax and a late-payment penalty of \$240.00. Western filed a non-remittance SUTR for 3Q09 for \$25,943.00 in tax and incurred a late-payment penalty of \$2,594.30.
40. Western claimed deductions for sales tax included in gross sales reported on its SUTRs for 1Q07 and 4Q08. Western also made a prepayment of tax for October 2007.

- Appellant signed Western's SUTRs for 2Q07 and 3Q07, and Western's prepayment form for October 2007.
41. Two of Western's sales receipts dated December 30, 2008, show that it collected sales tax reimbursement on taxable sales in the mini mart.
 42. On May 13, 2010, the Los Angeles County Sheriff's Department visited Western's business location to serve a warrant issued by respondent and noted that the business was surrounded by a chain link fence and appeared to be permanently closed. On May 25, 2010, appellant informed respondent that Western terminated its business operations on February 1, 2010. Appellant also stated he would file Western's delinquent SUTRs for 4Q09 and January 1, 2010, through February 1, 2010.
 43. Western failed to file its SUTRs for 4Q09 and 1Q10, so respondent issued a June 2, 2011 NOD to Western based on a compliance assessment for the period October 1, 2009, through February 1, 2010, for \$37,225.00 in tax, which included a failure-to-file penalty of \$3,722.50. Respondent subsequently imposed a finality penalty of \$3,722.50 pursuant to R&TC section 6565 for Western's failure to pay the NOD before it became final.
 44. Appellant signed an undated Responsible Person Questionnaire as Western's president, stating that tax reimbursement was included in or added to the selling price of tangible personal property sold by Western. Appellant also stated that he was a person who had control, supervision, responsibility, or duty to act for Western in sales and use tax matters. Western's secretary (and 50 percent shareholder) also signed a Responsible Person Questionnaire dated May 16, 2013, stating that tax reimbursement was included in or added to the selling price of tangible personal property sold by Western and that appellant was the person who had control, supervision, responsibility, or duty to act for Western in sales and use tax matters.
 45. Appellant signed an Authorization Agreement for Electronic Funds Transfer form for Western dated January 5, 2008, to pay Western's sales and use tax liabilities from Western's bank account.
 46. Appellant signed an IPA for Western dated June 26, 2009, to pay Western's sales and use tax liabilities for 2Q08. Appellant then signed an updated IPA for Western for the same period, dated July 15, 2009.

47. Appellant signed Western's business checks payable to respondent, including checks dated August 8, 2008, March 12, 2009, and April 29, 2009.
48. Appellant signed, as Western's president, a document entitled Escrow Instructions dated April 16, 2010, for the sale of Western's business. Appellant signed, as Western's president, a document entitled Amended Escrow Instructions dated June 3, 2010, which states that Western's business was last open on February 1, 2010.
49. According to EDD records, Western paid \$148,648.92 in wages from 4Q06 through 1Q10. Western paid its suppliers Costco \$57,377.62 from 4Q06 through 1Q08, and Frito Lay Inc. \$10,124.92 from 4Q06 through 4Q07.
50. On July 9, 2013, respondent issued the above-referenced NOD to appellant for Western's unpaid liabilities. Appellant filed a timely petition for redetermination.
51. On January 6, 2015, respondent issued a decision denying appellant's petition.
52. Appellant filed this timely appeal.

DISCUSSION

Issue 1: Whether appellant is personally liable under R&TC section 6829 for Olympic's unpaid sales tax liabilities for 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 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 respondent; (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; *Appeal of Farrell*, 2023-OTA-095P.)

Business Terminated

Respondent must show that the corporation's business has been terminated, dissolved, or abandoned, in order for appellant to be held personally liable for the corporation's liabilities.

On appeal, there is no dispute, and the evidence shows that Olympic's seller's permit was closed out effective February 15, 2010. Furthermore, appellant notified respondent that Olympic's business was closed out as of February 15, 2010, and Olympic's purchaser applied for a seller's permit with an effective start date of February 15, 2010. Therefore, the evidence establishes Olympic's business was terminated as of February 15, 2010.

Tax Reimbursement

Personal liability can be imposed only to the extent the corporation collected tax reimbursement on its sales of tangible personal property in this state but failed to remit the tax to respondent when due. (Cal. Code Regs., tit. 18, § 1702.5(a)(1).)

Here, appellant does not refute that Olympic collected sales tax reimbursement on its sales of tangible personal property during the audit period. Olympic's collection of sales tax reimbursement is further evidenced by Olympic's 2Q06 through 2Q09 SUTRs wherein Olympic claimed deductions for sales tax included in its gross sales. Appellant argues, however, that Olympic only collected the amount it reported on its SUTRs and not on any audited or estimated measure of unreported taxable sales. However, as we discuss later in this opinion, appellant has failed to show that any adjustments to Olympic's underlying liabilities are warranted.

As appellant admitted in the Responsible Person Questionnaire that Olympic added sales tax reimbursement to the selling price of tangible personal property, Olympic would have collected sales tax reimbursement on its audited, unreported taxable sales, as well. Moreover, Olympic included sales tax reimbursement in the selling price of gas, and diesel. Therefore, the evidence establishes that Olympic collected sales tax reimbursement on its audited, unreported taxable sales and failed to remit it to respondent.

Responsible Person

Personal liability can only be imposed upon a person having control or supervision of, or who is charged with the responsibility for, the filing of returns or the payment of tax or who has a duty to act for the corporation in complying with any provision of the Sales and Use Tax Law when the taxes became due. (R&TC, § 6829(b); Cal. Code Regs., tit.18, § 1702.5(b)(1).)

Appellant does not dispute, and the evidence shows, that he was a responsible person for Olympic's sales and use tax compliance as defined in California Code of Regulations, title 18, section 1702.5. Appellant signed and filed Olympic's SUTRs, participated in Olympic's audit and discussed the audit findings with respondent, discussed Olympic's delinquent SUTRs and payments with respondent, and signed Olympic's Authorization Agreement for Electronic Funds Transfer form for electronic payments to respondent. Appellant wrote a letter to respondent instructing it to apply Olympic's overpayment for one period to its outstanding liabilities for other periods. Appellant identified himself as the person responsible for Olympic's sales and use tax compliance in his Responsible Person Questionnaire. Additionally, appellant was the sole owner, director, and officer of Olympic throughout the liability period. Therefore, the evidence establishes appellant was a responsible person for Olympic during the liability period.

Willfulness

A person is regarded as having willfully failed to pay taxes, or to cause them to be paid, when the failure was the result of a voluntary, conscious and intentional course of action. A person has willfully failed to pay the taxes, or to cause them to be paid, only when respondent establishes all of the following: (a) the person had actual knowledge that the taxes were not being paid; (b) the person 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 actual knowledge that the taxes were due; and (c) the person 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*; *Appeal of Farrell, supra*.) Respondent has the burden of establishing that each element was met. (Cal. Code. Regs., tit. 18, § 1702.5(d).)

The evidence establishes that appellant had actual knowledge that Olympic's taxes were due but not being paid. Following the conclusion of respondent's audit of Olympic, appellant discussed the audit findings and resulting liability with respondent. Further, respondent's ACMS

notes state that appellant specifically discussed Olympic's delinquent 2Q08 return with respondent on October 8, 2008. In a letter dated May 18, 2009, appellant directed respondent to apply an overpayment from 4Q08 to appellant's unpaid tax, interest, and penalties for 1Q08 and 2Q08. Respondent's ACMS notes also reflect that on December 17, 2008, appellant conceded that appellant used the sales tax reimbursement Olympic collected to pay appellant's personal and business expenses. Thus, appellant was aware that Olympic had taxes due that were not being paid.

The evidence also establishes that appellant had the authority to pay Olympic's taxes. Appellant signed Olympic's business check dated April 29, 2009, payable to respondent. Appellant instructed respondent to apply Olympic's overpayments for one period to its liabilities in other periods. Appellant also signed Olympic's Authorization Agreement for Electronic Funds Transfer form. Appellant also used his authority to divert sales tax reimbursement Olympic collected to pay appellant's personal and business expenses.

Finally, the evidence establishes that appellant had the ability to pay Olympic's taxes but chose not to do so. Although Olympic had funds available to pay its suppliers and the IRS throughout the liability period and when Olympic's NOD was issued, appellant did not direct any payments to be made to respondent. Olympic also maintained a checking account balance sufficient to pay its liabilities throughout the liability period.

Appellant contends that he did not willfully fail to pay Olympic's tax liabilities because his actions do not amount to an intentional, conscious, or voluntary failure to pay tax. Rather, appellant argues that Olympic did not collect any sales tax reimbursement in excess of the amount Olympic reported because Olympic did not make any unreported taxable sales.

Given that appellant had knowledge of Olympic's outstanding tax liability and had the authority and ability to pay those taxes, appellant's failure to pay the liability was tantamount to being intentional, conscious, and voluntary. Furthermore, appellant has failed to prove that any adjustments to Olympic's underlying liabilities are warranted (i.e., that it was not in fact underreporting its taxable sales and collecting sales tax reimbursement on those unreported taxable sales). Thus, appellant willfully failed to pay or cause to be paid Olympic's tax liabilities.

Based on the foregoing, respondent met its burden on all of the elements of R&TC section 6829, and appellant is personally liable for the unpaid liabilities of Olympic.

Issue 2: Whether any adjustments to the underlying liabilities determined against Olympic are warranted.

California imposes sales tax on a retailer's retail sales of tangible personal property sold in this state measured by the retailer's gross receipts, 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 the 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 respondent is not satisfied with the amount of tax reported by the taxpayer, or in the case of a taxpayer's failure to file a return, respondent may determine the amount required to be paid based on any information which is in its possession or may come into its possession. (R&TC, §§ 6481, 6511.) In the case of an appeal, respondent has a minimal, initial burden of showing that its determination was reasonable and rational. (*Appeal of Talavera*, 2020-OTA-022P.) Once respondent has met its initial burden, the burden of proof shifts to the taxpayer to establish that a result differing from respondent's determination is warranted. (*Ibid.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid.*)

During the audit of the period June 1, 2005, through December 31, 2007, Olympic failed to provide adequate supporting documentation (such as sales summaries, cash register tapes, or mini mart purchase invoices), and, as a result, respondent was unable to verify Olympic's reported taxable sales. Thus, respondent used an alternative method using the best available information. For Olympic's gasoline sales, respondent applied a +1 cent price differential to the United States Department of Energy's (DOE's) listed gasoline prices, resulting in \$5,807,010 of audited gasoline sales.⁴ For Olympic's diesel sales, respondent applied a +28.10 cent price differential to appellant's purchase price, resulting in \$252,008 of audited diesel sales. Respondent calculated Olympic's taxable mini-mart sales using checks for purchases of mini-mart merchandise as well as ratios for Olympic's taxable mini-mart merchandise purchases

⁴ While respondent has not provided the relevant audit schedule, respondent's use of the +1 differential is documented in the provided audit work papers. Thus, based on the preponderance of the evidence, OTA finds that respondent did in fact use the +1 differential to compute Olympic's audited sales of gasoline.

and exempt food purchases. After factoring in appellant's reported total sales, respondent's audit disclosed unreported taxable sales of \$739,274. Olympic failed to file a SUTR for the period January 1, 2010, through February 15, 2010, and thus respondent performed a compliance assessment based on Olympic's SUTRs for 2Q09 through 4Q09. Olympic also failed to make the requisite prepayment for January 2009 which resulted in the imposition of a negligence penalty. The remainder of Olympic's liability is based on its self-assessed tax as reported on its SUTRs for 2Q08 and 4Q09 that remains unpaid. Based on the foregoing, respondent has satisfied its initial burden of showing its determination of Olympic's liabilities was reasonable and rational.

Here, appellant contends that respondent overestimated Olympic's taxable sales, that the audits were not based on Olympic's sales records, and that appellant does not recall whether Olympic operated its business during January 2010. Specifically, appellant argues that Olympic sold gas for approximately \$0.25 to \$0.50 less than its competitors and that respondent's estimates based on the DOE's average selling price are not accurate. In support, appellant provided some gas sales receipts and declarations. Appellant also argues that respondent's unreported taxable sales from the mini mart are based on an arbitrary estimate.

Olympic failed to provide sufficient books and records to support its reported sales for any part of the liability period. Appellant has now provided some documentation including gas sales receipts and declarations, but the receipts are for a different business (not Olympic) and only one of the declarations relates to Olympic. Appellant has not provided any supporting documentation such as sales records showing Olympic's gas sales prices. Moreover, the declarations were created as a form document stating that the gas station always sold gas at approximately \$0.25 to \$0.50 less than its competitors, with blank spaces to fill in the declarant's name and the business name.⁵ Furthermore, while declarants attest that the business's selling price was less than the nearby competitors' selling price, the declarants do not state that the selling price was at or below the DOE national average or address the fact that Olympic's competitors could have been selling gas at a rate higher than the national average. Also, the declarants state that the "business model was not successful" but it is not clear that the declarants had personal knowledge about the business's financial success. Moreover, one declarant says "during my employment at GAS STATIONS, our gas station always sold gas . . ." Thus, it is

⁵ All of the submitted declarations, except one, follow this format.

not clear to which gas station appellant is referring. Therefore, this statement is also unreliable. Lastly, one declarant stated that he worked at Olympic from 2008 to 2014, but the business was closed in early 2010. As such, the sole declaration pertaining to Olympic is unreliable.

Furthermore, appellant has failed to provide any records for its mini mart sales or to otherwise establish that a result differing from respondent's determination is warranted. Therefore, appellant has failed to show that any adjustments are warranted to Olympic's liabilities.

Issue 3: Whether appellant is personally liable under R&TC section 6829 for Ontario's unpaid sales tax liabilities for the liability period.

Business Terminated

On appeal, there is no dispute, and the evidence shows that Ontario's seller's permit was closed out effective March 9, 2010, when Ontario sold its business. Therefore, the evidence establishes Ontario's business was terminated as of March 9, 2010.

Tax Reimbursement

Appellant does not affirmatively dispute that Ontario collected sales tax on its sales of tangible personal property during the audit period but does argue that Ontario only collected the amount it reported on its SUTRs and not on any audited or estimated measure of unreported taxable sales. However, as discussed later in this opinion, appellant has failed to show that any adjustments to Ontario's underlying liabilities are warranted. As Ontario collected sales tax reimbursement on its taxable sales, it is more likely than not that Ontario collected sales tax reimbursement on its audited, unreported taxable sales, as well. Ontario's collection of sales tax reimbursement on the audited, unreported taxable sales is further evidenced by Ontario's inclusion of sales tax reimbursement in the selling price of gas. Moreover, Ontario claimed deductions on its SUTRs for sales tax included in its gross sales for several reporting periods during the liability period, including the quarterly periods from 4Q05 through 3Q09. Therefore, the evidence establishes that Ontario collected sales tax reimbursement on its audited, unreported taxable sales and failed to remit it to respondent.

Responsible Person

Appellant does not dispute, and the evidence shows, that he was a responsible person for Olympic's sales and use tax compliance as defined in California Code of Regulations, title 18, section 1702.5. Appellant signed and filed Ontario's SUTRs and prepayment form, participated in Ontario's audits, signed Ontario's business checks payable to respondent, signed Ontario's Authorization Agreement for Electronic Funds Transfer form for electronic payments to respondent, and signed an IPA to pay Ontario's outstanding liabilities for 2Q08 and 1Q09 to respondent. Furthermore, appellant was Ontario's sole owner, director, and officer during the entire liability period. Therefore, the evidence establishes appellant was a responsible person for Ontario during the liability period.

Willfulness

The evidence establishes that appellant had actual knowledge that Ontario's taxes were due but not being paid. Appellant was involved in respondent's audits of Ontario. Appellant discussed Ontario's delinquent SUTRs and payments with respondent. Appellant filed Ontario's non-remittance SUTRs for 2Q07 and 3Q07, and therefore knew that Ontario had an outstanding tax liability that Ontario did not pay. The evidence also establishes that appellant had the authority to pay Ontario's taxes. Appellant signed several of Ontario's business checks payable to respondent. Appellant signed Ontario's IPA. Finally, the evidence establishes that appellant had the ability to pay Ontario's taxes but chose not to do so. That is, Ontario had funds available to pay for wages, fuel purchases, and federal income taxes throughout the liability period. Ontario also deposited funds into its business checking account throughout the liability period. Therefore, appellant willfully failed to pay or caused to be paid Ontario's tax liabilities.

Appellant contends that he did not willfully fail to pay Ontario's tax liabilities because his actions do not amount to an intentional, conscious, or voluntary failure to pay tax. Rather, appellant argues that Ontario did not collect any sales tax reimbursement in excess of the amount Ontario reported because Ontario did not make any unreported taxable sales.

The evidence establishes that appellant had actual knowledge of Ontario's unpaid tax liabilities (as it was underreporting its taxable sales), authority to pay Ontario's taxes, and the ability to pay Ontario's taxes when he had actual knowledge that the taxes were not being paid. As such, appellant willfully failed to pay or cause to be paid Ontario's tax liabilities. Moreover,

appellant has failed to prove that any adjustments to Ontario's underlying liabilities are warranted.

Based on the foregoing, respondent has met its burden on all of the elements of R&TC section 6829, and appellant is personally liable for the unpaid liabilities of Ontario.

Issue 4: Whether any adjustments to the underlying liabilities determined against Ontario are warranted.

For the audit of the period December 1, 2005, through December 31, 2007, Ontario failed to provide adequate supporting documentation, such as sales summaries and cash register tapes, and respondent was unable to verify Ontario's reported taxable sales of gas. Thus, respondent used an alternative method using the best available information and the average selling price of gas based on information from the DOE, less a $-\$0.0391$ per gallon differential to establish audited unreported taxable gas sales of $\$812,972$. Respondent accepted Ontario's recorded taxable mini mart sales for this audit period.

For the audit of the period April 1, 2008, through March 9, 2010, Ontario failed to provide any documentation for review. Respondent could not verify Ontario's taxable mini mart sales, so respondent adjusted Ontario's claimed nontaxable sales of food products ($\$190,853$) by a factor of 1.50^6 to calculate $\$286,280$ in taxable mini mart sales for 2Q08 through 3Q09. Ontario did not file a SUTR for 4Q09 or 1Q10, so respondent used the average of Ontario's audited taxable mini mart sales between 2Q08 and 3Q09 ($\$47,713$) to estimate Ontario's taxable mini mart sales for both 4Q09 and 1Q10. In total, respondent determined total unreported taxable mini mart sales of $\$381,706$. For both gas and mini mart sales, respondent's audit disclosed total unreported taxable sales of $\$969,125$.

Ontario's liability also includes unpaid taxes associated with Ontario's partial remittance returns for 2Q08 and 3Q09. Based on the foregoing, respondent has satisfied its initial burden of showing its determination of Ontario's liabilities was reasonable and rational.

Here, appellant contends that respondent overestimated Ontario's taxable sales and that the audits were not based on Ontario's sales records. Specifically, appellant argues that Ontario sold gas for approximately $\$0.25$ to $\$0.50$ less than its competitors and that respondent's estimates based on the DOE's average selling price are not accurate. In support, appellant

⁶ See footnote 3, above.

provided some gas sales receipts and declarations. Appellant also argues that respondent's unreported taxable sales from the mini mart are based on an arbitrary estimate.

Ontario failed to provide sufficient books and records to support its reported sales for any part of the liability period. Appellant has now provided some documentation including gas sales receipts and declarations, but the receipts are for a different business (not Ontario) and none of the declarations relate to Ontario. Furthermore, appellant has failed to provide any records for its mini mart sales or to otherwise establish that a result differing from respondent's determination is warranted. Therefore, appellant has failed to show that any adjustments are warranted to Ontario's liabilities.

Issue 5: Whether appellant is personally liable under R&TC section 6829 for Western's unpaid sales tax liabilities for the liability period.

Business Terminated

Western's seller's permit was closed out effective February 1, 2010. Appellant notified respondent that Western's business was closed out as of February 1, 2010. On May 13, 2010, the Los Angeles County Sheriff's Department visited Western's business location, and noted that the business was fenced off and appeared to be permanently closed. Therefore, the evidence establishes Western's business operations were terminated as of February 1, 2010.

Tax Reimbursement

Appellant acknowledges that Western collected sales tax on its sales of tangible personal property during the audit period but argues that Western only collected the amount it reported on its SUTRs and not on any audited or estimated measure of unreported taxable sales. However, as discussed later in this opinion, appellant has failed to show that any adjustments to Western's underlying liabilities are warranted. Western collected sales tax reimbursement on taxable sales as a general business practice. In fact, both appellant and Western's secretary (each of whom were 50 percent shareholders) stated in separate Responsible Person Questionnaires that Western added sales tax reimbursement to the selling price of tangible personal property. Moreover, Western claimed deductions on its SUTRs for sales tax included in its gross sales for several reporting periods during the liability period, including the quarterly periods from 1Q07 to 4Q08. Western's collection of sales tax reimbursement on taxable sales from its mini mart was also evidenced by two sales receipts dated December 30, 2008. As such, Western would have

collected sales tax reimbursement on its audited, unreported taxable sales, as well. Therefore, the evidence establishes that Western collected sales tax reimbursement on its audited, unreported taxable sales and failed to remit it to respondent.

Responsible Person

Appellant does not dispute, and the evidence shows, that he was a responsible person for Western's sales and use tax compliance as defined in California Code of Regulations, title 18, section 1702.5. Appellant signed and filed Western's SUTRs for 2Q07 and 3Q07 and prepayment form for October 2007, signed Western's business checks payable to respondent, signed Western's Authorization Agreement for Electronic Funds Transfer form for electronic payments to respondent, and signed IPAs to pay Western's outstanding liabilities for 2Q08 to respondent. Additionally, both appellant and Western's secretary identified appellant as a person responsible for Western's sales and use tax compliance in their Responsible Person Questionnaires. Therefore, the evidence establishes appellant was a responsible person for Western during the liability period.

Willfulness

The evidence establishes that appellant had actual knowledge that Western's taxes were due but not being paid. Following the conclusion of respondent's audit of Western for the periods December 1, 2006, through December 31, 2007, and April 1, 2008, through February 1, 2010. Therefore, appellant knew that Western had outstanding tax liabilities. The evidence also establishes that appellant had the authority to pay Western's taxes. Appellant signed several of Western's business checks payable to respondent, including partial payments made towards Western's 2Q08 and 1Q09 liabilities. Finally, the evidence establishes that appellant had the ability to pay Western's taxes but chose not to do so. That is, Western had funds available to pay for wages and purchases throughout its liability periods. Western also deposited funds to its business checking account throughout its liability periods. However, appellant did not apply these funds towards Western's outstanding tax liabilities. Therefore, appellant willfully failed to pay or caused to be paid Western's tax liabilities.

Appellant contends that he did not willfully fail to pay Western's tax liabilities because his actions do not amount to an intentional, conscious, or voluntary failure to pay tax. Rather,

appellant argues that Western did not collect any sales tax reimbursement in excess of the amount Western reported because Western did not make any unreported taxable sales.

The evidence establishes that appellant had actual knowledge of Western's tax liabilities, authority to pay Western's taxes, and the ability to pay Western's taxes when he had actual knowledge. As such, appellant's failure to pay or cause to be paid Western's tax liabilities was intentional, conscious, and/or voluntary. Furthermore, appellant has failed to prove that any adjustments to its audited, unreported sales are warranted.

Based on the foregoing, respondent met its burden on all of the elements of R&TC section 6829, and appellant is personally liable for the unpaid liabilities of Western.

Issue 6: Whether any adjustments to the underlying liabilities determined against Western are warranted.

During the audit of the period December 1, 2006, through December 31, 2007, Western failed to provide adequate supporting documentation (such as sales summaries, cash register tapes, purchase invoices, or federal income tax returns), and respondent was unable to verify Western's reported taxable sales. Thus, respondent used an alternative method using the best available information to establish audited unreported taxable sales of \$595,652. To determine Western's taxable sales of gas, respondent used vendor reports and the slightly above-average selling price of gas based on information from the DOE. To determine Western's taxable diesel sales, respondent used sales tax prepayments reported by appellant combined with near average diesel selling prices based on information from the DOE. Respondent used the price differential from a prior audit to compute the price differential in the current audit. To determine Western's taxable mini mart sales, respondent utilized a store taxable factor obtained from the prior audit.⁷ Respondent applied this ratio to Western's claimed deductions for nontaxable sales of food products to determine unreported taxable mini mart sales.

During the audit of the period April 1, 2008, through February 1, 2010, Western failed to provide any documentation for review. Respondent calculated unreported taxable sales of \$503,079 for the period April 1, 2008, through February 1, 2010. Western failed to file SUTRs for 4Q09 and 1Q10, and thus, respondent performed a compliance assessment for the period

⁷ Respondent computed a store taxable factor of 2, or a ratio of 200 percent. Respondent reduced the taxable sales ratio to a factor of 1.50 to address Western's contention that appellant overstated the audited taxable mini mart sales.

October 1, 2009, through February 1, 2010, based on Western's prior SUTRs for 4Q08 through 3Q09. Based on the foregoing, respondent has satisfied its initial burden of showing its determination of Western's liabilities was reasonable and rational.

Appellant contends that respondent overestimated Western's taxable sales, that the audits were not based on Western's sales records, and that Western did not operate its business during the entire 1Q10. Specifically, appellant argues that Western sold gas for approximately \$0.25 to \$0.50 less than its competitors, and thus respondent's estimates based on the DOE's average selling price are not accurate. Appellant provided some gas sales receipts and declarations purporting to support this argument. As evidence that Western did not operate for the entire 1Q10, appellant submitted Western's bank checking account statement for the period January 14, 2010, through February 10, 2010. Appellant argues that some of the deposits indicated on Western's bank statements were nontaxable automated teller machine transactions but provided no other supporting documentation. Appellant also argues that respondent's unreported taxable mini mart sales are based on an arbitrary estimate.

Western failed to provide sufficient books and records, including its sales records, for any part of the liability period. Appellant has provided some documentation including gas sales receipts and declarations, but the receipts are for a different business (not Western) and only one of the declarations relates to Western. However, in that declaration, an alleged Western employee indicated that he was an employee of Western from 2009 to 2014, although Western closed its business on February 1, 2010. Moreover, the declarations were created as a form document stating that the gas station always sold gas at approximately \$0.25 to \$0.50 less than its competitors, with blank spaces to fill in the declarant's name and the business name.⁸ Furthermore, while declarants attest that the business's selling price was less than the nearby competitors' selling price, the declarants do not state that the selling price was below the DOE national average, or address the fact that Western's competitors could have been selling gas at a rate higher than the national average. Also, the declarants state that the "business model was not successful" but it is not clear that the declarants had personal knowledge about the business's financial success. For these reasons, the sole declaration pertaining to Western is unreliable.

Additionally, respondent does not dispute that Western only operated for a portion of 1Q10, and its audit and compliance assessment reflects Western's close out date of

⁸ All of the submitted declarations, except one, follow this format.

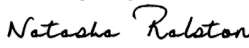
February 1, 2010. Although appellant argues that some of the deposits to Western’s business checking account were nontaxable sales, appellant has not provided any evidence to support that claim. Finally, appellant has failed to provide any records for its mini mart sales, or otherwise establish that a result differing from respondent’s determination is warranted. Therefore, appellant has failed to show that any adjustments are warranted to Western’s liabilities.

HOLDINGS

1. Appellant is personally liable under R&TC section 6829 for Olympic’s unpaid sales tax liabilities for the liability period.
2. No adjustments to the underlying liabilities determined against Olympic are warranted.
3. Appellant is personally liable under R&TC section 6829 for Ontario’s unpaid sales tax liabilities for the liability period.
4. No adjustments to the underlying liabilities determined against Ontario are warranted.
5. Appellant is personally liable under R&TC section 6829 for Western’s unpaid sales tax liabilities for the liability period.
6. No adjustments to underlying liabilities determined against Western are warranted.


DISPOSITION

Respondent’s actions denying appellant’s petition and administrative protests are sustained.

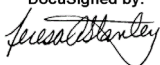
DocuSigned by:


25F8FE08FF56478...
 Natasha Ralston
 Administrative Law Judge

We concur:

DocuSigned by:


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 Lauren Katagihara
 Administrative Law Judge

DocuSigned by:


0CC6C6ACCC8A44D...
 Teresa A. Stanley
 Administrative Law Judge

Date Issued: 6/21/2023