

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 18073501
)	CDTFA Case ID 892131
B. TREYZON)	
)	
)	
)	

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Igor S. Drabkin, Attorney

For Respondent: Amanda Jacobs, Tax Counsel III

J. LAMBERT, Administrative Law Judge: On January 17, 2023, the Office of Tax Appeals (OTA) issued an Opinion which sustained a Decision issued by respondent California Department of Tax and Fee Administration (CDTFA).¹ CDTFA’s Decision denied, in part, a petition for redetermination filed by B. Treyzon (appellant) of a Notice of Determination (NOD) dated June 18, 2015, for tax of \$111,615.66, plus accrued interest, and penalties of \$93,058.33. In its Decision, CDTFA determined that appellant was personally liable for the unpaid liabilities of West Coast Storm, Inc. (WCS) for the period October 1, 2008, through December 31, 2012 (liability period), and relieved penalties incurred by WCS.² In its Opinion, OTA determined that appellant is personally liable under Revenue and Taxation Code (R&TC) section 6829 for the unpaid tax liabilities of WCS.

On February 15, 2023, appellant filed a timely petition for rehearing (PFR). A rehearing may be granted where one of the following six grounds exists, and the substantial rights of the

¹ The State Board of Equalization (Board) formerly administered the sales and use taxes. On July 1, 2017, the Board’s administrative functions relevant to this case 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, all references to “CDTFA” refer to the Board.

² In its Decision, CDTFA relieved WCS’s failure-to-file penalties, late prepayment penalties, estimated prepayment penalties, and the finality penalties incurred by WCS for failing to timely pay the January 11, 2013, and June 4, 2013 NODs. Otherwise, the Decision denied the petition for redetermination. On appeal, there was no dispute as to CDTFA’s granting relief of the above penalties. In addition, the finality penalty incurred by WCS for failing to timely pay the April 27, 2012 NOD was not in dispute.

filing party are materially affected: (1) an irregularity in the appeal proceedings which occurred prior to issuance of the Opinion and prevented fair consideration of the appeal; (2) an accident or surprise which occurred during the appeal proceedings and prior to the issuance of the Opinion, which ordinary caution could not have prevented; (3) newly discovered, relevant evidence, which the filing party could not have reasonably discovered and provided prior to issuance of the Opinion; (4) insufficient evidence to justify the Opinion; (5) the Opinion is contrary to law; or (6) an error in law in the appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6).)

In his PFR, appellant argues there is insufficient evidence to justify the Opinion. Specifically, appellant argues that CDTFA has not met the applicable burden of proof to show by clear and convincing evidence that appellant is responsible for the unpaid tax liabilities of WCS.³ Appellant argues that the evidence relied upon by CDTFA that appellant was in charge of sales tax is based on hearsay statements and records, and self-serving statements by witnesses who did not testify or were not available for cross-examination.⁴ Appellant contends that these statements are contrary to the testimony provided by appellant and two other witnesses during the hearing that appellant acted as the attorney for WCS and not as chief financial officer (CFO) until April 25, 2012. Appellant asserts that many of the facts in the Opinion are from after April 25, 2012, when appellant officially became CFO, and he should not be liable prior to that date.

To find that there is an insufficiency of evidence to justify the Opinion, OTA must find that, after weighing the evidence in the record, including reasonable inferences based on that evidence, OTA clearly should have reached a different opinion. (*Appeals of Swat-Fame, Inc., et al.*, 2020-OTA-045P.) R&TC section 6829 provides that a person is personally liable for the tax,

³ CDTFA must prove the elements of R&TC section 6829 by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 1702.5(d).) However, if the person is not an officer or a member or a partner or a manager with an ownership interest in the entity, the person is presumed to not be personally liable under California Code of Regulations, title 18, section 1702.5(a), unless CDTFA rebuts this presumption with clear and convincing evidence. (Cal. Code Regs., tit. 18, § 1702.5(e).) In the Opinion, OTA held that the clear and convincing burden applies because, prior to April 25, 2012, appellant was not acting under the title of officer or a title representing a management position with WCS, but rather was held out as providing outside legal services.

⁴ The administrative hearsay provision under the Administrative Procedure Act, Government Code section 11513, which limits the admission of hearsay to supplement direct evidence, is inapplicable to proceedings before the OTA. (Cal. Code Regs., tit. 18, § 30216(d).) For purposes of an appeal before OTA, “evidence” means any information contained in the written record or oral hearing record that the Panel may consider when deciding an appeal. (Cal. Code Regs., tit. 18, 30102(i).)

penalties, and interest owed by a business entity if certain elements are met. In this appeal, the elements in dispute are whether appellant was responsible for WCS's sales and use tax compliance during the liability period, and whether appellant willfully failed to pay the liability or cause it to be paid. (See R&TC, § 6829(a), (c); Cal. Code Regs., tit. 18, § 1702.5(a), (b).)


As to whether appellant was responsible for WCS's sales and use tax compliance, the Opinion discussed evidence from both before and after the liability period demonstrating that appellant was directly involved in, and had control or supervision of, WCS's sales and use tax compliance. (See Cal. Code Regs., tit. 18, § 1702.5(b)(1).) The Opinion discussed emails from 2009 and 2010, from before appellant became CFO, as well as other evidence of communications during the liability period showing that appellant was a point of contact for CDTFA. The Opinion discussed statements that third parties made to CDTFA, such as statements made by WCS's officers and CPA firm in phone calls and questionnaires after the liability period, that are corroborated by contemporaneous evidence from the liability period, such as the emails and communications described above, giving those third-party statements more weight.

As to whether appellant willfully failed to pay the liability or cause it to be paid, the Opinion determined that appellant had the authority to pay the taxes or to cause them to be paid on the date that the taxes came due and when appellant had actual knowledge.⁵ (Cal. Code Regs., tit. 18, § 1702.5(b)(2).) The Opinion discussed emails from 2010 showing that officers of WCS's president and its CPA firm contacted appellant to authorize payment to CDTFA when a payment was required and approval was needed, that appellant was in possession of a name stamp that could be used at any time to issue a check for payments, and that appellant acted unilaterally in dealing with the bank and wire transfers. The Opinion discussed statements made by third parties to CDTFA after the liability period, such as questionnaire responses, that are corroborated by evidence dated during the liability period, such as emails and phone calls with CDTFA, giving those statements more weight.

Appellant repeats the same arguments that were previously considered and addressed in the Opinion. Appellant's dissatisfaction with the Opinion, and his attempt to reargue the same

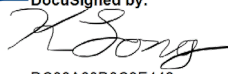
⁵ Willfulness also requires that, on or after the date that the taxes came due, appellant had actual knowledge that the taxes were due, but not being paid, and when appellant had actual knowledge, he had the ability to pay the taxes but chose not to do so. (Cal. Code Regs., tit. 18, § 1702.5(b)(2).) Appellant does not argue there was insufficient evidence to prove these elements.

issues a second time, does not constitute grounds for a rehearing. (*Appeal of Graham and Smith*, 2018-OTA-154P.) Appellant has not shown there was insufficient evidence to justify the determination, or that any ground exists such that a rehearing should be granted. Consequently, the PFR is denied.

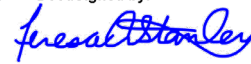
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Josh Lambert
Administrative Law Judge

We concur:

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Keith T. Long
Administrative Law Judge

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Teresa A. Stanley
Administrative Law Judge

Date Issued: 7/13/2023