OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No.: 19115516
	CDTFA Case ID: 123-047
R. FALCHE	

OPINION

Representing the Parties:

For Appellant: R. Falche

For Respondent: Jarrett Noble, Tax Counsel IV
Scott Claremon, Tax Counsel IV
Jason Parker, Chief of Headquarters Ops.

J. ALDRICH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, R. Falche (appellant) appeals a decision[1] issued by respondent California Department of Tax and Fee Administration (CDTFA)[2] denying appellant's petition for redetermination of the Notice of Determination (NOD) dated June 25, 2015. The NOD is for $1,069,916.91 in tax, applicable interest, and penalties of $211,183.42, for the period January 1, 2008, through December 31, 2010, and for the first and fourth quarters of 2011 (1Q11 and 4Q11) (liability period).

Office of Tax Appeals (OTA) Administrative Law Judges Michael F. Geary, Andrew J. Kwee, and Josh Aldrich held an oral hearing for this matter in Sacramento, California, on September 21, 2022. At the conclusion of the hearing, the record was closed, and this matter was submitted for an opinion.

[1] CDTFA issued a decision on May 31, 2018, which was amended by a supplemental decision issued on November 13, 2018, and then amended by a second supplemental decision issued on September 13, 2019. We use the term decision to refer collectively to the decision, the supplemental decision, and the second supplemental decision, except where specifically noted.

[2] Sales taxes were formerly administered by the Board of Equalization (board). Effective July 1, 2017, functions of the board relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) When this Opinion refers to acts or events that occurred before July 1, 2017, "CDTFA" shall refer to its predecessor, the board.

ISSUES

1. Whether the NOD was timely issued to appellant.
2. Whether appellant is personally liable under R&TC section 6829 for the unpaid liabilities of International Marine Fuels Group, Inc. (IMFG) for the liability period.
3. Whether adjustments are warranted to the underlying audited understatement.
4. Whether the negligence penalty was properly imposed on IMFG.
5. Whether interest relief is warranted for the period from May 31, 2018, through the present.

FACTUAL FINDINGS

Appellant's responsible person liability

1. IMFG was a California corporation that operated multiple gas stations. It sold various grades of gasoline and diesel fuel through a cardlock fuel distribution network,[3] and sold related products such as motor oil and antifreeze. IMFG also made bulk fuel sales.
2. Appellant purchased an ongoing fuel business in 1990. On February 27, 1990, appellant signed the first articles of incorporation for IMFG. On the statement of domestic stock corporation appellant is listed as the CEO, Secretary, CFO, and agent for service of process for IMFG.
3. On March 5, 1990, appellant signed an application for a seller's permit on behalf of IMFG. IMFG's seller's permit began effective March 1, 1990.
4. When appellant purchased the fuel business, appellant retained all of its employees, including the controller. Appellant retained the former owner for six months. During his ownership, appellant expanded the business from two cardlock sites to 11 cardlocks sites. Appellant also expanded the bulk fuel sales business from three trucks to eight trucks by 2010.
5. IMFG was previously audited for the period April 1, 1991, through March 31, 1994, resulting in unreported taxable sales of $32,000, disallowed sales for resale of $8,900, and disallowed bad debts of approximately $20,000 (first audit). IMFG was also audited

[3] A cardlock fuel distribution network is comprised of self-service fuel facilities located throughout the country, typically along highways and in commercial or industrial areas, which are generally used by commercial, industrial, and governmental fleet customers.

for the period October 1, 1998, through September 30, 2001, no additional tax was determined (second audit).[4]

6. Appellant was the president, sole shareholder, and corporate officer of IMFG during the liability period. Appellant had sole check signing authority.

7. As relevant herein, sales tax reimbursement was added to the price of items sold, it was separately stated on receipts and invoices, and it was collected from IMFG's customers. This Factual Finding is supported by the evidentiary record, in pertinent part, as follows:

   a. General audit comments for the period January 1, 2008, through December 31, 2010, which indicate that IMFG added sales tax reimbursement to the selling price.

   b. According to CDTFA's Automated Compliance Management System (ACMS),[5] on April 8, 2010, appellant provided CDTFA with a copy of an invoice that showed IMFG charged sales tax reimbursement.

   c. An ACMS entry, dated October 18, 2010, states that former IMFG sales manager, B. Viles, indicated that sales tax reimbursement was charged.

   d. A customer invoice dated June 27, 2011, shows that sales tax reimbursement was separately stated.

   e. On June 22, 2014, CDTFA received an affidavit from one of IMFG's former customers, signed by A. Gescheidt, stating that on an order dated May 27, 2009, sales tax reimbursement was charged, and two other orders were marked exempt.

   f. On July 9, 2014, according to ACMS notes, IMFG's former outside accountant, A. West, indicated that IMFG charged sales tax and that it was separately stated.

   g. On July 10, 2014, A. West signed a *Business Operations Questionnaire*. He indicated that sales tax was included as a separate item on the customer's receipts or invoice. A. West indicated that he worked as an outside accountant for IMFG from 1999 – 2004 and that the person responsible for IMFG's sales and use tax compliance was IMFG's controller.

[4] The audit work papers for the previous audit periods are not in the evidentiary record.

[5] ACMS is a software program used by CDTFA to document communications between compliance staff and taxpayers or their representatives.

h. On November 24, 2014, according to the ACMS notes, appellant indicated that sales tax reimbursement was charged on taxable items, but he was not sure if it was separately stated.

i. On December 2, 2014, appellant signed a *Responsible Person Questionnaire* whereon he indicated that sales tax reimbursement was collected from IMFG's customers.

j. IMFG's pre-invoice journals from customer Cardlock shows IMFG charged sales tax reimbursement on Cardlock's purchases of fuel between 1Q08 and 3Q10.

8. During the liability period, appellant signed numerous corporate checks to its suppliers and creditors;[6] IMFG's landlord;[7] the San Francisco Tax Collector;[8] and authorized payment of wages to employees.[9] Appellant also signed sales and use tax returns (SUTRs);[10] communicated with CDTFA regarding the filing and payment of delinquent returns; and filed a claim for refund dated November 23, 2011.

9. During October 2009, appellant informed CDTFA that IMFG's controller, who had prepared and filed SUTRs prior to the 4Q09, was no longer employed by IMFG and that appellant would prepare and file corrected returns for 1Q09 and 2Q09.

10. In November 2014, appellant informed CDTFA that the former controller never had check signing authority and worked directly under appellant's direction.[11]

11. On July 12, 2011, IMFG filed a Chapter 11, or reorganization, bankruptcy petition with the United States Bankruptcy Court, Northern District of California. Appellant is

[6] Copies of IMFG's corporate checks indicate that IMFG made payments totaling $2,160,965.85 between 1Q08 and 3Q08. Bank statements for August 2011 and October through December 2011 indicate that IMFG made payments totaling $311,101.56 to creditors and suppliers between 3Q11 and 4Q11. CDTFA scheduled all the payments that IMFG made to creditors, totaling $14,553,736.87, from 1Q08 through 2Q12.

[7] Cancelled checks drawn on IMFG's bank account indicate that IMFG paid Bay Area Paving $141,849.16 between February 1, 2009, and February 17, 2012.

[8] Information from the Office of the Treasurer & Tax Collector for the City and County of San Francisco indicates IMFG paid the San Francisco Tax Collector $5,785 on February 25, 2008, and $510 on February 18, 2009.

[9] An Employment Development Department (EDD) wage history report indicates that IMFG paid wages to its employees totaling $2,087,410.18 between 1Q08 and 2Q12.

[10] Appellant signed, as IMFG's president, SUTRs filed for 4Q09 through 3Q11, as well as the prepayment returns for April, May, July, and August 2010. Appellant also signed as the former president for the July 2012 prepayment return.

[11] Per ACMS notes dated October 12, 2009, October 26, 2009, and November 24, 2014.

described in the petition as a corporate officer, president, and sole shareholder of IMFG. On July 15, 2011, appellant filed an *Application to Designate Responsible Individual* with the court. The application requested that "Mr. Falche is the President [of] the Debtor and shall be responsible for the duties and obligations of the debtor." Appellant testified, during the oral hearing before OTA, that he was required to file monthly operating reports with the bankruptcy court for each month of operation. There is a line item for sales tax reimbursement in the monthly operating reports. CDTFA was listed as an Unsecured Priority Claim Creditor on Schedule E of the bankruptcy petition.

12. On March 5, 2012, appellant signed the *Declaration of R. Falche in Support of Motion to Borrow Funds and Grant Security Interest in Post-Petition Receivables*. According to the declaration, IMFG's pre-petition assets consisted of approximately $1,725,000.[12] Therein, appellant stated, "The Debtor owns a station in Van Nuys, California, which has been temporarily shut down and cannot reopen until certain repairs are made to the facilities." Appellant also stated that he had arranged a loan from a friend to make the repairs.

13. On March 14, 2012, A. Landis, as Acting United States Trustee (US Trustee) with the United States Department of Justice,[13] filed a request or motion for the Chapter 11 bankruptcy case to be converted to a Chapter 7, or liquidation, bankruptcy. The US Trustee asserted that IMFG had been operating at a loss, with no prospect of reorganizing. The US Trustee's memorandum noted that IMFG made disbursements exceeding its receipts; reported losses on its monthly reports filed with the Bankruptcy Court; had unpaid rent; and had a negative cash flow. Therefore, the US Trustee concluded that IMFG was operating at a loss. The US Trustee noted that IMFG's gross sales were decreasing and only a small percentage of accounts receivables were current.

14. On April 6, 2012, appellant, on behalf of IMFG, filed an *Opposition to the US Trustee's Motion to Convert* (Opposition to Convert). IMFG requested an additional 30 days to submit a plan, asserting as part of the plan a proposal to sell one of its properties. However, the US Trustee objected to the plan because the property was in litigation.

[12] This amount excludes accounts receivables that appellant considered uncollectable.

[13] The US Trustee, serving under the United States Department of Justice, is responsible for overseeing the administration of bankruptcy cases and private trustees under 28 U.S.C. § 586 and 11 U.S.C. § 101, et seq.

15. On April 13, 2012, the bankruptcy court converted IMFG's bankruptcy proceeding to a Chapter 7 (liquidation) proceeding.
16. On October 26, 2012, CDTFA closed IMFG's seller's permit, effective April 13, 2012.
17. As of October 26, 2012, IMFG had unpaid sales tax liabilities originating from: late SUTRs filed with partial or no remittance for 3Q09 through 3Q10; late prepayment returns filed with no remittance for July and August 2010; two NODs issued to IMFG on June 19, 2012,[14] and September 24, 2012[15] for the period October 1, 2011, through April 13, 2012, and for 1Q11, respectively, because IMFG had failed to file SUTRs; and an NOD issued to IMFG for the audit of the period January 1, 2008, through December 31, 2010.
18. On the *Responsible Person Questionnaire* dated December 2, 2014, appellant indicated that he was the person who had responsibility for IMFG's sales and use tax compliance during the liability period and was authorized to sign business checks on IMFG's behalf.
19. CDTFA sent appellant a Notice of Proposed Determination, dated May 19, 2015, which proposed a determination of personal liability for tax of $1,066,916.91; interest of $435,523.40; and penalties of $212,164.12.
20. CDTFA determined that appellant was a person responsible for the payment of IMFG's sales and use tax and on June 25, 2015, issued an NOD to appellant as a person responsible, pursuant to R&TC section 6829, for $1,069,916.91 in tax, $430,644.95 in applicable interest, and penalties of $211,183.42 originally incurred by IMFG.[16]
21. On June 26, 2015, appellant filed a petition for redetermination of the NOD holding him personally responsible for IMFG's liability.

[14] The June 19, 2012 NOD to IMFG is for $66,747 in tax, plus accrued interest, and a failure-to-file penalty of $6,232 for the period October 1, 2011, through April 13, 2012, after IMFG failed to file a SUTR for this period. CDTFA determined that IMFG also incurred a 10 percent finality penalty of $6,674.60, when IMFG failed to pay the liability when it became due.

[15] The September 24, 2012 NOD to IMFG is for $55,681, plus accrued interest, and a failure-to-file penalty of $5,567.10 for 1Q11, after IMFG failed to file a SUTR for this period. CDTFA determined that IMFG also incurred a 10 percent finality penalty of $5,568.10, when IMFG failed to pay the liability when it became due.

[16] CDTFA did not include in the NOD issued to appellant any of IMFG's unpaid sales tax liabilities for the periods April 1, 2011, through July 11, 2011, or January 1, 2012, through April 13, 2012, because of IMFG's July 12, 2011 Chapter 11 bankruptcy petition and the April 13, 2012 conversion to a Chapter 7 bankruptcy.

22. On May 31, 2018, CDTFA issued a decision granting conditional relief to IMFG of the finality penalties[17] applied to the NODs issued June 19, 2012, and September 24, 2012; relieving interest for the periods May 1, 2012, through January 31, 2013, August 1, 2016, through January 31, 2017, and February 1, 2018, through May 31, 2018; and otherwise denying the petition for redetermination.
23. On June 29, 2018, appellant filed a timely request for reconsideration (RFR) of the decision.
24. On November 13, 2018, CDTFA issued a supplemental decision, in which its conclusions remained unchanged.
25. On December 13, 2018, appellant filed an RFR of the supplemental decision, reiterating many of the arguments raised previously. CDTFA accepted the RFR with respect to appellant's arguments related to the accuracy of the point of sale (POS) records used by CDTFA to establish audited taxable sales for the period January 1, 2008, through September 30, 2010.
26. On September 13, 2019, CDTFA issued a second supplemental decision, in which its conclusions and orders from the first supplemental decision remained unchanged.
27. This timely appeal followed. In addition to disputing the timeliness of the NOD and the responsible person liability determination against him, appellant also disputes the underlying audit liabilities against IMFG for the liability period.

Audit of the period January 1, 2008, through December 31, 2010

28. CDTFA conducted an audit of IMFG for the period January 1, 2008, through December 31, 2010. During that period, IMFG reported total sales of $70,638,462, claimed deductions totaling $10,914,077,[18] and reported taxable sales of $59,724,385.
29. Initially, IMFG did not provide records to support its reported sales, and appellant declined to sign a waiver of the statute of limitations. The statute of limitations for 1Q08 would have expired on April 30, 2011, however, CDTFA issued an NOD on

[17] R&TC section 6565 requires respondent to impose a penalty equal to 10 percent of the unpaid tax when a taxpayer fails to pay a determination before it becomes final. CDTFA conditioned its recommendation for relief of these penalties on appellant's payment of the tax portion of the liability within 30 days from the date of mailing of the notice of final decision in this matter.

[18] The total is comprised of sales for resale of $10,242,346, bad debt deductions of $473,052, and state tax-exempt sales of motor vehicle fuel of $198,679.

April 13, 2011.[19] To establish the understatement for the NOD, CDTFA disallowed a large percentage of IMFG's claimed sales for resale and all claimed bad debts.

30. IMFG filed a timely petition for redetermination and subsequently provided various records, including its POS records for the period January 1, 2008, through September 30, 2010. The POS records include information such as the taxable measure, sales tax amount, sales tax rate, and gross sales.

31. In a reaudit, CDTFA used IMFG's POS records to establish audited taxable sales for the period January 1, 2008, through September 30, 2010. CDTFA compiled recorded sales tax accrued of $5,963,089 for that period. On a quarterly basis, CDTFA divided the recorded sales tax accrued by the average sales tax rate for all districts, based on reported sales tax. CDTFA computed taxable sales of $70,477,118 for the portion of the audit period before 4Q10.

32. CDTFA also used a fuel differential pricing method (different method) to compute audited sales for the entire audit period. It used the number of gallons of gasoline and diesel purchased by IMFG[20] and the average selling prices reported by the Department of Energy (DOE),[21] after certain adjustments. Using this different method, CDTFA established audited sales of fuel of $69,214,105 for the period January 1, 2008, through September 30, 2010. For those 11 quarters, CDTFA used this different method only as secondary verification that reported taxable sales were substantially understated.

33. For 4Q10, IMFG did not provide POS records. Accordingly, for that quarter only, CDTFA established audited taxable sales using the method described above as the different method. Using the numbers of gallons purchased and audited selling prices

[19] The April 13, 2011 NOD included $450,610.29 in tax, plus accrued interest, and a negligence penalty of $45,051.21. On February 2, 2013, CDTFA asserted a timely increase to the NOD against IMFG. (R&TC, § 6563.) CDTFA determined that the deficiency measure should be increased from $4,992,184 to $11,894,048 for an increased tax liability of $894,497.17. The NOD also included five late-payment and late-filing penalties totaling $14,091.99 for 3Q09 through 3Q10; two late-prepayment penalties totaling $812.50 for July and August 2010; two failure-to-file penalties totaling $8,701.20 for 1Q11 and 3Q11; a negligence penalty of $178,876.53, for the audit period January 1, 2008, through December 31, 2010, and three finality penalties, totaling $98,127.85, for failing to pay the three previous NODs.

[20] To establish the numbers of gallons for each quarter, CDTFA divided the amounts of prepaid sales tax by the prepayment amounts per gallon.

[21] The U.S. Energy Information Administration under the U.S. Department of Energy publishes reports showing the average selling prices for fuel each week in specific areas.

(prices reported by DOE, adjusted for differentials), CDTFA established sales of gasoline and diesel of $1,141,315 for 4Q10.

34. CDTFA compared audited sales of $71,618,433 ($70,477,118 + $1,141,315) to reported taxable sales of $59,724,385 to compute an understatement of reported taxable sales of $11,894,048.

35. CDTFA disallowed IMFG's claimed bad debt deductions and did not allow additional bad debts that appellant identified during the audit, because IMFG did not provide evidence that the claimed uncollectible amounts had been deducted on federal income tax returns (FITRs) or written off in accordance with generally accepted accounting principles (GAAP).

36. CDTFA computed an understatement of tax of $1,009,009.17. It then reduced the audited understatement of reported sales tax by amounts of sales tax prepayments that IMFG had not claimed on its SUTRs, which totaled $114,512. The net amount of $894,497.17 was then reduced by a payment of $230.66, to establish the $894,266.51 of unpaid sales taxes, which were included in the NOD to appellant.

37. CDTFA concluded that the understatement was the result of negligence and added a negligence penalty of $178,876.53.

38. IMFG disputed the findings of the reaudit but did not appear at the appeals conference on June 27, 2013, or respond to CDTFA's July 3, 2013 letter offering 15 days to present arguments and evidence in writing.

39. On August 23, 2013, CDTFA issued a decision and recommendation recommending the denial of IMFG's petition for redetermination. IMFG did not respond to the decision and recommendation or request an oral hearing, and CDTFA issued a Notice of Redetermination on October 25, 2013. The audit liability became final 30 days later.

NODs issued for 1Q11 and 4Q11 because IMFG did not file SUTRs

40. For 1Q11 and 4Q11, IMFG did not file SUTRs. According to CDTFA's May 31, 2018 decision,[22] the taxes due for the two quarters were based on IMFG's SUTRs for 3Q10 and 2Q11.

[22] We do not have detailed information to provide more specific computations of the amounts of tax for the two quarters.

41. On June 19, 2012, CDTFA issued an NOD to IMFG for tax of $66,746 and a failure-to-file penalty of $6,232[23] for the period October 1, 2011, through April 13, 2012.[24]

42. On September 24, 2012, CDTFA issued an NOD to IMFG for tax of $55,681 and a failure-to-file penalty of $5,567 for 1Q11.

DISCUSSION

Issue 1: Whether the NOD was timely issued by CDTFA.

R&TC section 6829(f) provides, in relevant part, that an NOD shall be mailed within three years after the last day of the calendar month following the close of 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 business was terminated, dissolved, or abandoned, whichever period expires earlier. If a business or its representative files a notice of business termination, dissolution, or abandonment with a state or local agency other than CDTFA, this filing shall not constitute actual knowledge by CDTFA. (*Ibid.*)

Appellant contends that IMFG had ceased operations for all intents and purposes by the end of 2011, or at the very least by the end of March 2012 when the US Trustee asked to convert the matter. Appellant asserts that CDTFA should have become aware that the business had terminated based on the notices CDTFA received as an unsecured priority creditor in IMFG's bankruptcy proceedings. In support, appellant references the *Request for Allowance and Payment of Administrative Expenses*, filed by IMFG's franchisor, Pacific Pride, that states as of August 11, 2011, Pacific Pride had suspended IMFG's "Foreign Purchases authority," which means that IMFG could no longer operate. Appellant also references the US Trustee's request to convert the Chapter 11 bankruptcy to a Chapter 7 bankruptcy. Furthermore, appellant asserts that IMFG continued to operate at a loss from the time that it filed the Chapter 11 bankruptcy petition with no prospect of reorganizing.

[23] It is not clear from the record why this penalty is not 10 percent of the tax.

[24] According to CDTFA, the tax liability assessed against appellant included only the amount due for the 4Q11, $31,331.

With respect to appellant's argument that CDTFA should have surmised that IMFG had ceased operations by March 2012, at the latest, R&TC section 6829(f) requires actual knowledge. There is no evidence that appellant or IMFG provided CDTFA with a written notice that IMFG had ceased its business operations. The fact that CDTFA could have discovered such knowledge is immaterial. Even if R&TC section 6829(f) imposed such a duty, which it does not, evidence suggesting that a business *may cease* its operations is distinct from actual knowledge that a business *has ceased* its operations. Here, there is evidence that shows IMFG was trying to reorganize so that it could continue operating.[25] Logically, IMFG's April 6, 2012 Opposition to Convert is strong evidence that IMFG had not terminated its business operations by the end of March; as is the US Trustee's statement that gross sales were declining (i.e., not yet ceased). In light of these circumstances, OTA finds that CDTFA obtained the requisite knowledge when it was notified that IMFG's Chapter 11 proceeding was converted to a Chapter 7 proceeding on April 13, 2012. Based on the April 13, 2012 conversion, OTA finds that the statutory deadline is July 31, 2015 (e.g., April is in the second quarter of the calendar year; the second quarter ends on June 30; and the last day of the calendar month following the end of the second quarter is July 31 of a given year).[26] Therefore, OTA finds that the June 25, 2015 NOD was timely issued to appellant.

Alternatively, appellant contends that the NOD is barred by either the equitable defense of laches, or by equitable estoppel. Specifically, appellant argues that CDTFA should have acted on its determination against appellant prior to June 25, 2015, before his memory faded, and before he was unable to compile a complete set of records to pursue his petition for redetermination. According to appellant, CDTFA's delay in issuing the NOD caused his inability to provide sufficient documentary evidence during the appeal before CDTFA, thereby prejudicing his case.

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[25] On March 14, 2012, the US Trustee requested for the matter to be converted to a Chapter 7. The US Trustee asserted that IMFG had been operating at a loss. The US Trustee also noted that IMFG's gross sales were decreasing which is evidence that IMFG had not ceased its business operations. Appellant, on behalf of IMFG, opposed the conversion. Appellant requested 30 days to submit a plan. As part of the plan, appellant suggested that IMFG sell one of its properties. The US Trustee opposed the plan because the property was in litigation. Ultimately, on April 13, 2012, the court converted the Chapter 11 bankruptcy to a Chapter 7 bankruptcy. As part of the conversion, the court ordered IMFG to surrender all of its property and records to the US Trustee. Prior to April 13, 2012, IMFG continued to file monthly operating reports and some SUTRs.

[26] Although there is no evidence to show when CDTFA first had actual knowledge of the conversion, the earliest it could have had that knowledge was April 13, 2012, which would start the running of the three-year statute of limitations on the last day of the first month following 2Q12.

Laches is an equitable defense developed by courts "to protect defendants against 'unreasonable, prejudicial delay in commencing suit.'" (*Petrella v. Metro-Goldwyn-Mayer, Inc.* (2014) 572 U.S. 663, 667.) That is, laches is defined as the neglect or failure of a plaintiff to assert a right for such a period of time that results in prejudice to defendant requiring that the plaintiff's cause of action be barred in equity. (*Appeals of Renshaw* (86-SBE-191) 1986 WL 22873.) Specifically, the Ninth Circuit has held that "laches is not a defense to the [government's] enforcement of tax claims." (*Dial v. Commissioner* (9th Cir. 1992) 968 F.2d 898, 904.) Moreover, the Court found that there is no unreasonable delay where the statute of limitations was not violated. (*Ibid*.)

In general, equitable estoppel may be raised as a defense against the government only in rare and unusual circumstances and when its application is necessary to prevent manifest injustice. (See *U.S. Fidelity & Guaranty Co. v. State Bd. of Equalization* (1956) 47 Cal.2d 384, 389; see also *Appeal of Smith* (91-SBE-005) 1991 WL 280345.) Generally, equitable powers can only be exercised by a court of general jurisdiction. (See *Standard Oil Co. v. Bd. of Equalization* (1936) 6 Cal.2d 557, 559.) OTA lacks authority to exercise judicial powers. (Cal. Const., Art. 6, § 1.) Furthermore, in lieu of equitable estoppel the legislature enacted R&TC section 6596, effective January 1, 1985. R&TC section 6596 imposes four requirements. Here, the requirements, specifically a request for written advice, have not been met.

Furthermore, the NOD was issued within the applicable statute of limitations under R&TC section 6829(f). As such, there is no unreasonable delay, in accordance with the Ninth Circuit's holding in *Dial v. Commissioner*, *supra* at p. 904. Therefore, OTA finds appellant's equitable defense arguments to be without merit.

Issue 2: Whether appellant is personally liable under R&TC section 6829 for the unpaid liabilities of IMFG for the liability period.

The law provides, in pertinent part, that any responsible person who willfully fails to pay or to cause to be paid the taxes due from a corporation shall be personally liable for unpaid taxes and interest and penalties not so paid upon termination of the business of the corporation. (R&TC, § 6829(a); Cal. Code Regs., tit. 18, § 1702.5(a).) Personal liability may only be imposed if CDTFA establishes that, while the person was a responsible person, the corporation collected sales tax reimbursement from customers and failed to remit such tax when due. (R&TC, § 6829(c); Cal. Code Regs., tit. 18, § 1702.5(a).) As relevant here, R&TC section 6829

provides that a person is personally liable for the tax, penalties, and interest owed by a corporation if all the following four elements are met: (1) the corporation's business has been terminated, dissolved, or abandoned; (2) the corporation collected sales tax reimbursement on its sales of tangible personal property (TPP) 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 during the liability period; and (4) the person willfully failed to pay 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).) CDTFA has the burden to prove these elements by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 1702.5(d); *Appeal of Eichler*, 2022-OTA-029.)

Here, appellant concedes that IMFG's business operations have terminated, and we concluded above that IMFG's business operations have terminated. The evidence, specifically the April 13, 2012 order to covert, also supports a finding that business operations have terminated. Appellant also concedes that he was a person responsible for IMFG's sales and use tax compliance until the filing of the Chapter 11 bankruptcy, and the evidence summarized above corroborates that he was a responsible person during this period. Thus, OTA must determine whether CDTFA met its burden to prove that IMFG collected sales tax reimbursement from its retail sales of TPP during the entire liability period; whether CDTFA met its burden to prove that appellant was a responsible person for 4Q11; and whether CDTFA met its burden to prove that appellant willfully failed to pay, or to cause to be paid, IMFG's tax liability.

Sales Tax Reimbursement

Personal liability can be imposed only to the extent the corporation collected sales tax reimbursement on its sales of TPP in this 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, the evidence indicates that IMFG collected sales tax reimbursement on its retail sales during the liability period based on: invoices reflecting that sales tax was separately stated; appellant's response to a *Responsible Person Questionnaire* verifying that IMFG collected sales tax reimbursement from its customers; statements from IMFG's former accountant and IMFG's former sales manager confirming that IMFG separately stated and collected sales tax reimbursement from its customers; and an affidavit from IMFG's customer indicating that sales tax was a separately stated item on

purchases. The most persuasive evidence, however, is IMFG's own records (i.e., its POS reports and cardlock records). The POS reports include information such as the taxable sales measure, sales tax amount, sales tax rate, gross sales amount. The POS reports showed, on an actual basis, that IMFG had accrued sales tax on its taxable sales from 1Q08 through 3Q10. Also, IMFG's pre-invoice journals from customer Cardlock shows IMFG charged sales tax reimbursement on Cardlock's purchases of fuel between 1Q08 and 3Q10. Based on the foregoing, OTA finds that IMFG collected sales tax reimbursement on its retail sales of TPP during the liability period.

Responsible person 4Q11

A "responsible person" means any officer, member, manager, employee, director, shareholder, partner, or other person having control or supervision of filing returns and paying tax, or who has a duty to act for the corporation in complying with the Sales and Use Tax Law. (Cal. Code Regs., tit. 18, § 1702.5(b)(1).) Personal liability may only be imposed if appellant was a responsible person at the time the corporation sold TPP, collected sales tax reimbursement, and failed to remit it to CDTFA. (R&TC, § 6829(c); Cal. Code Regs., tit. 18, § 1702.5(a).)

The president of a corporation is the general manager and chief executive officer of the corporation, unless otherwise provided in the articles or bylaws. (Corp. Code, § 312(a).) A general manager 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 laws, even if that responsibility is delegated to others. (See *Commercial Sec. Co. v. Modesto Drug Co.* (1919) 43 Cal.App. 162, 173.)

Appellant argues that he was not a responsible person after he filed, or caused to be filed, the Chapter 11 bankruptcy petition on behalf of IMFG.

Here, however, the evidence shows that appellant had broad authority over IMFG. Appellant was the president, sole shareholder, and sole corporate officer of IMFG during the liability period. In that capacity, appellant filed for Chapter 11 protection due, in part, to CDTFA's April 13, 2011 NOD. In many Chapter 11 bankruptcies, as is the case here, the debtor remains in control of its business, and is subject to the oversight and jurisdiction of the court. In general, Chapter 11 bankruptcies have three possible outcomes: reorganization, conversion, or dismissal. Section 1107 of title 11 of the United States Code places the debtor in possession in the position of a fiduciary, with the rights and powers of a private trustee; it requires the debtor to perform all but the investigative functions and duties of a bankruptcy trustee. (11 U.S.C.,

§ 1107(a).) As requested by appellant in the *Application to Designate Responsible Individual*, appellant continued in his roles of president, sole shareholder, and sole corporate officer at IMFG. Appellant was required to submit monthly operating reports to the court. As a fiduciary, IMFG had the obligation to pay post-petition taxes that accrued from business operation and file SUTRs. Although he was ultimately unsuccessful, appellant attempted to leverage various assets to recapitalize IMFG. Likewise, when the US Trustee asked the bankruptcy court to convert the Chapter 11 bankruptcy to a Chapter 7 bankruptcy, appellant filed an opposition thereto. OTA notes that the 4Q11 liability is department-assessed. In other words, IMFG failed to file its SUTR despite appellant's ongoing duties to file SUTRs. Based on the above, OTA finds CDTFA met its burden of proof to show that appellant was a responsible person within the meaning of R&TC section 6829 for 4Q11.

Willfulness

The final requirement for a person to be held personally liable pursuant to R&TC section 6829 is that the person must have willfully failed to pay the liabilities at issue. "[W]illfully 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).) A person has willfully failed to pay taxes, or to cause them to be paid, only when CDTFA establishes all of the following: (1) on or after the date the taxes came due, the responsible person had actual knowledge that the taxes were due but not being paid; (2) the responsible person had the authority to pay the taxes or to cause them to be paid on the date the taxes came due and when the responsible person had actual knowledge that the taxes were due but not being paid; and (3) the responsible person had the ability to pay the taxes when the responsible person had actual knowledge that the taxes were due but not being paid, but chose not to do so. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(A)-(C).) The first requirement for willfulness is knowledge, meaning the person knew the taxes were due and not being paid.

Appellant asserts that he did not have actual knowledge at the time the taxes were due. Instead, appellant argues that he may have had actual knowledge after the audits were completed and the results reported to him. However, appellant asserts at that time he did have actual knowledge that he did not have the authority or ability to pay the taxes due.

OTA does not agree. IMFG was required to report its sales and use taxes quarterly. Likewise, IMFG was required to remit the sales tax reimbursement it collected no later than the end of the month following the end of the preceding quarterly period. Appellant purchased the business in 1990. He grew it substantially over the next 20 years (i.e., 1990 – liability period). Appellant was the president, sole shareholder, and sole corporate officer of IMFG during the liability period. As we previously found and as appellant partially conceded, appellant was responsible for IMFG's sales and use tax compliance during the entire liability period. Under appellant's ownership, IMFG was audited on two prior occasions. Those audits showed that IMFG and the person responsible for sales and use tax compliance knew how to record, report, and remit in a substantially compliant manner. OTA also notes that during first audit, under appellant's ownership, CDTFA disallowed claimed bad debts deductions, whereas in the second audit CDTFA recommended no change. This evidence demonstrates that appellant, as the responsible person, was a capable businessperson who gained the knowledge of how to accurately record, report, and remit IMFG's sales and use taxes, including how to claim bad debt deductions. Appellant's argument effectively asks OTA to accept that during the intervening 72 quarters (approximately), between IMFG's incorporation and the beginning of this audit period, appellant did not obtain the knowledge of how to accurately interpret IMFG's own books and records.

Here, in the third audit, IMFG underreported in nine out of the 11 quarters for which it provided records. OTA notes that for the first quarter for which there was an underreported liability, 2Q08, the measure of taxable sales was significant, an amount that appellant could not readily overlook or attribute to a clerical error. Following the 2Q08 underreporting, IMFG continued to underreport large taxable measures. Based on its own records, IMFG failed to report the following: over $4.5 million for 2Q08; almost $3 million for 3Q08; over $1 million in sales for 4Q08; and over $2 million for 2Q09.

Also, it is undisputed that appellant signed the SUTRs filed for 4Q09 through 3Q11, as IMFG's president, as well as the prepayment returns for April and May 2010, July and August 2010, and he signed as former president on the July 2012 prepayment return. As for the quarters prior to 4Q09, for which appellant claims IMFG's former controller prepared and signed the returns, the evidence shows that appellant informed CDTFA that the controller did so at his direction and that she did not have check signing authority. In fact, appellant had sole check

signing authority during the liability period. There is also no evidence that anyone other than appellant had authority to make online payments. In other words, from the date of purchase until 2009, the same controller, who was supervised by appellant, prepared IMFG's SUTR. During the same period, the person making payments for sales and use taxes was the same person (i.e., appellant). CDTFA's ACMS notes also reflect that appellant communicated with CDTFA numerous times during the liability period regarding unpaid sales tax liabilities and delinquent SUTRs. For example, during a call on October 28, 2009, appellant informed CDTFA that he would be filing IMFG's delinquent 1Q09 and 2Q09 SUTRs. Also, IMFG filed partial or non-remittance SUTRs for 3Q09 through 3Q10. For the quarters after 4Q09, this means that appellant knew, at minimum, that IMFG owed more taxes than was being paid for those quarters. In addition, appellant participated in the audit.[27] As discussed below, IMFG's books and records, including its POS reports, show that IMFG underreported its sales taxes during the liability period. In light of the above, OTA finds that CDTFA met its burden to establish actual knowledge by a preponderance. Accordingly, OTA finds that appellant had actual knowledge that the taxes were due but not being paid during the entire liability period.

Next, we examine whether appellant 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 they had actual knowledge. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(B).) Here, appellant conceded that he had the authority to pay or cause the taxes to be paid until IMFG filed for bankruptcy protection.

Here, most of the quarters of the liability period occurred, and became due, prior to the bankruptcy petition (i.e., January 1, 2008, through December 31, 2010, and 1Q11), whereas the 4Q11 liability period occurred during the pendency of the Chapter 11 bankruptcy. On July 12, 2011, IMFG filed a Chapter 11 bankruptcy petition. Then, on July 15, 2011, appellant filed an *Application to Designate Responsible Individual* with the bankruptcy court. The application requested that appellant be responsible for the duties and obligations of the debtor. There is no evidence that the application was opposed. There is, however, evidence that appellant was required to file monthly operating reports for each month until the matter was converted to a Chapter 7 proceeding. Furthermore, as discussed above, IMFG was operating as a debtor in possession until the conversion, which means appellant had the obligation, and

[27] The audit workpapers indicate that the audit procedures, computations, and methods were discussed with appellant at the time of the audit. Appellant also participated in the audit (e.g., appellant provided the POS records). Appellant was also provided another copy of the audit workpapers in response to appellant's RFR.

fiduciary duty, to report and remit ongoing sales and use taxes incurred while operating as a debtor in possession (post-petition debts) as part of the ongoing business operations. (11 U.S.C., §§ 704(a), 1106(a), and 1107(a).) The due date for the 4Q11 SUTR was January 31, 2012, which preceded the conversion by approximately three months. Moreover, appellant operated IMFG as debtor in possession, and thus retained the ability to pay IMFG's taxes that accrued from the date of the Chapter 11 petition until the April 13, 2012 conversion.[28] Thus, OTA finds that appellant had the authority to pay taxes or cause them to be paid.

The third requirement of willfulness is that when the responsible person had actual knowledge and authority to pay, he also had the ability to pay the taxes but chose not to do so. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(C).) Appellant argues that given IMFG was in bankruptcy proceedings, appellant lacked the ability to make any payments on behalf of IMFG. Similarly, appellant contends that he is now unable to make any payments on taxes owed by IMFG because of his negative personal net worth, due to court judgments against him, and due to his advanced age and low income. Appellant's contention lacks merit for the simple reason that the ability to pay refers to the time at which taxes became due, and when they remained due, but not necessarily while on appeal.[29]

Here, the evidence shows that during the liability period, IMFG made payments totaling $14,553,736.87 to creditors and suppliers from 1Q08 through 2Q12.[30] IMFG collected sales tax reimbursement from its customers on taxable sales, and therefore had those funds available to pay its sales tax liabilities. Additionally, IMFG paid wages to its employees during the liability period in the amount of $2,087,410.18 between 1Q08 and 2Q12. IMFG also paid its landlord as

[28] For example, during 4Q11 appellant authorized IMFG to pay $29,554.48, in employee wages according to EDD records; $12,636.72 to Bay Area Paving; and other payments totaling $280,569.92 according to IMFG's Union Bank Statements.

[29] OTA in adjudicating this appeal has no authority to consider appellant's personal ability to pay IMFG's tax liabilities. However, at the conclusion of this appeal, appellant may consider seeking a resolution with the Offer in Compromise program directly with CDTFA.

[30] Copies of IMFG's cancelled corporate checks indicate that appellant, on behalf of IMFG, made payments totaling $2,160,965.85 between 1Q08 and 3Q08. Bank statements for August 2011 and October through December 2011 indicate IMFG made payments totaling $311,101.56 to creditors and suppliers between 3Q11 and 4Q11. Appellant had sole check signing authority during this time.

well as the San Francisco Tax Collector.[31] These liabilities were paid with checks bearing appellant's signature. Based on the factual findings and discussion above, OTA finds that when appellant had actual knowledge and authority to pay, he also had the ability to pay but chose not to do so. Thus, the third requirement of willfulness is met.

Based on the foregoing, OTA finds that appellant knew that taxes were due and unpaid, he had the authority to pay, and he had the ability to pay because there were funds available but instead chose to pay others. Hence, CDTFA has established by a preponderance of evidence that appellant did willfully fail to pay the taxes or cause them to be paid. In sum, appellant is personally responsible within the meaning of R&TC section 6829 for the unpaid tax liabilities incurred by IMFG during the liability period, except as otherwise noted.[32]

Issue 3: Whether appellant has shown that adjustments are warranted to the understatement of reported taxable sales established in the audit of IMFG for the liability period.

California imposes sales tax on a retailer's gross receipts from the retail sale of TPP 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 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 CDTFA is not satisfied with the amount of tax reported by the taxpayer, or in the case of a failure to file a return, CDTFA 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, CDTFA has a minimal, initial burden of showing that its determination was reasonable and rational. (*Appeal of Talavera*, 2020-OTA-022P (*Talavera*).) Once CDTFA has met its initial burden, the burden of proof shifts to the taxpayer to establish that a result

[31] Cancelled checks drawn on IMFG's bank account indicate that appellant, on behalf of IMFG, paid Bay Area Paving $141,849.16 between February 1, 2009, and February 17, 2012. Information from the Office of the Treasurer & Tax Collector for the City and County of San Francisco indicates that appellant, on behalf of IMFG paid the San Francisco Tax Collector $5,785 on February 25, 2008, and $510 on February 18, 2009. Appellant had sole check signing authority during this time.

[32] CDTFA did not include in the NOD issued to appellant any of IMFG's unpaid sales tax liabilities for the periods April 1, 2011, through July 11, 2011, or January 1, 2012, through April 13, 2012, because of IMFG's July 12, 2011 Chapter 11 bankruptcy petition and April 13, 2012 conversion to Chapter 7.

differing from CDTFA's determination is warranted. (*Ibid*.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid*.)

Understatement for the period January 1, 2008, through September 30, 2010

During the reaudit, IMFG provided its POS records for the period January 1, 2008, through September 30, 2010. CDTFA used IMFG's records to compile recorded sales tax accrued for the 11-quarter period of $5,963,089. CDTFA established the measure of tax for each quarter by dividing the sales tax accrued by the average sales tax rate for all districts for that quarter. Using that process, CDTFA established audited taxable sales of $70,477,118. In other words, for 11 of the 12 quarters in the audit period, audited taxable sales are the amounts recorded in IMFG's own records. OTA finds CDTFA's use of the recorded sales in IMFG's records was a reasonable and rational method of establishing audited sales. Thus, appellant has the burden to establish that adjustments are warranted. Appellant's arguments are addressed individually below.[33]

Incomplete transactions included in the POS records

Appellant argues that IMFG recorded invoices before the sale was made. However, appellant argues, some of those sales were not actually completed. According to appellant, IMFG sometimes prepared credit memos for these sales and sometimes did not. Appellant states that, when SUTRs were prepared, all invoices were reconciled to the bills of lading; any invoices for which there was no bill of lading were considered canceled sales, and the invoices were deducted from the total sales shown on the POS records to establish the amount of sales reported on the SUTRs. Appellant argues that, if adjustments are made for these incomplete sales, there will be no understatement for the 11 quarters at issue.[34]

CDTFA responds that appellant has not provided evidence to show that the POS records included invoices for which the sales were never completed, but no credit memos were issued to

[33] Appellant argues that IMFG's selling prices were lower than those established by CDTFA based on contractual price controls. We have addressed that argument below, with respect to the amount determined for 4Q10. For the remainder of the audit period, the argument about audited selling prices is not germane because the determined amount was based solely on IMFG's records.

[34] Appellant argued that CDTFA was aware of the incomplete sales, for which no credit memos had been issued, and that it had made adjustments for them in the audit for 1Q08 and 3Q09. Appellant asserted that CDTFA should also make similar adjustments in other quarters. However, as evidenced by the comments in the audit workpapers, CDTFA did not make adjustments for incomplete sales. CDTFA made adjustments for duplicate transactions recorded in error. Accordingly, we will not further address this assertion by appellant.

IMFG's customers. CDTFA also notes that appellant did not make this argument during the audit, when IMFG's records presumably would have been available. There is an extensive discussion of this issue in the second supplemental decision. When appellant filed an RFR with CDTFA on December 13, 2018, he included evidence of credit memos issued for sales that were canceled because the product had not been delivered. Specifically, appellant provided IMFG's Accounts Receivable Detail for January and February 2009 for Central Shops of the City and County of San Francisco and San Mateo Transit, which showed invoices entered for January 2009 that were later removed in February 2009.

Appellant computed that the credit memos represented 20.909 percent of total sales, for January and February of 2009. Appellant argues that he employed the same test period that CDTFA used in its DOE pricing to establish a credit-memo-ratio, which he applied to the POS records in the reaudit period. Accordingly, appellant argues that the recorded amounts found in the POS records should be reduced by 20.909 percent because the amounts recorded on the POS records for the remaining months of the period at issue were greater than the amounts recorded for January 2009. Appellant essentially argues that January 2009 amounts, as modified by the credit memos, are more representative than the other months, and one can surmise that there were incomplete transactions in those other months for which credit memos were not issued.

CDTFA disagreed, noting that the records provided by appellant show that: (1) credit memos were prepared for incomplete sales; and (2) the POS records represent sales net of the credit memos. CDTFA also noted that appellant's computations (using the 20.909 percent) reflect no understatement of reported taxable sales. CDTFA asserts that this conclusion is directly contradicted by the different audit method, described above, which also reflected a substantial understatement of reported taxable sales.

Appellant's argument, that adjustments are warranted to the POS records for incomplete sales, is not supported by the evidence.[35] Appellant has not provided evidence of a single period for which IMFG reconciled invoices to bills of lading and then deducted sales without bills of lading from the POS totals before compiling the amount to report on its SUTR. In addition to the absence of evidence, OTA notes that customers would expect credit memos to adjust their

[35] Appellant documented that, for two months of the 11 quarters at issue, there were incomplete transactions. For those incomplete transactions, IMFG prepared credit memos to adjust the customers' accounts receivable. Thus, the sales recorded in the POS records were net of any incomplete transactions, and no further adjustment was warranted.

accounts receivable. It is implausible that customers would readily accept accounts receivable that included purchases they did not actually make. Appellant has offered no evidence that there were incomplete transactions, for which credit memos were not issued, but were included in the POS totals. Under those circumstances, OTA finds the POS records represented appellant's actual sales. Accordingly, OTA finds that appellant has not shown that adjustments are warranted because the POS records include sales that were never completed.

CDTFA has not met its burden of proof regarding the POS sales in the audit

Appellant argues that CDTFA has not met its burden of proof to show that the audit liability can be verified from IMFG's POS records. On this issue, appellant states that CDTFA has provided the POS records in its audit file, and those records do not support the amounts shown on the audit workpapers.

Appellant misconstrues the responsibilities of the taxpayer and CDTFA. IMFG was responsible for maintaining complete and accurate records to support the reported amounts and to make those records available for examination. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).) When conducting an audit, the staff may keep copies of certain records or copies of a portion of a record as a sample of the information it was provided. When CDTFA uses a taxpayer's records to prepare audit workpapers, and establishes audited taxable sales therefrom, the taxpayer has the opportunity to review the audit workpapers, compare them to the records, and identify any errors.

Here, the fact that the POS records in CDTFA's audit file are incomplete (as CDTFA acknowledges) is of no evidentiary value. Appellant argues that the audit workpapers are uncorroborated hearsay. OTA disagrees. The administrative hearsay provision under Government Code section 11513, which limits the admittance of hearsay to supplement direct evidence in certain administrative proceedings, is inapplicable to proceedings before OTA.[36] (Cal. Code Regs., tit. 18, § 30216(d).) Without this limitation, evidence that is admitted without objection is sufficient to sustain a finding. (*Powers v. Board of Public Works* (1932) 216 Cal.

[36] Evidence for purposes of OTA hearings is defined as any information contained in the oral hearing record that the panel may consider when deciding an appeal. (Cal. Code Regs., tit. 18, § 30102(i).) The California Evidence Code and the California Code of Civil Procedure shall not apply to oral hearings before OTA. (Cal. Code Regs., tit. 18, § 30214(f).) Instead, all relevant evidence shall be admissible, and the panel may use the California rules of evidence when evaluating the weight to give evidence presented in a proceeding before OTA. (Cal. Code Regs., tit. 18, § 30214(f)(1), (4).)

546, 552; *Gallagher v. Connell* (2004) 123 Cal.App.4th 1260, 1268.) Furthermore, it is not CDTFA's responsibility to retain all records that it uses to prepare audit workpapers. CDTFA's audit workpapers, on which it has compiled information from IMFG's POS records, are clear evidence of the sales amounts shown in the POS records. IMFG had the responsibility to identify any errors in CDTFA's compilation, and it did not do so. Similarly, to support any adjustments at this point in the appeal process, appellant must provide documentation (e.g., the actual POS records prepared by IMFG which show that CDTFA made errors in its recording of specific numbers). OTA finds that no adjustment is warranted on the basis of appellant's argument that CDTFA has not provided copies of all of IMFG's POS records to support the figures the auditor compiled.

CDTFA has not shown how the understatement of tax is computed

Appellant argues that it is unclear how CDTFA computed audited taxable sales. Specifically, appellant states in his Opening Brief that, "Without knowing how CDTFA's determination of [the tax liability of $894,266.51] was made for the audit period, there is no way to conclude whether that determination was reasonable or rational." Again, appellant argues that the only evidence underlying the audit is uncorroborated hearsay. IMFG was provided copies of the audit workpapers, and additional copies of the audit workpapers have been provided to appellant during his appeal with CDTFA. The computation of audited taxable sales has been explained above. For the 11 quarters discussed here, the amount of *recorded accrued sales tax* divided by the average sales tax rate for all jurisdictions for each quarter is the audited amount of taxable sales. IMFG's recorded accrued sales tax is the amount of sales tax that it should have reported and paid. The taxable sales for the 4Q10 are discussed below.

Understatement for 4Q10

For 4Q10, IMFG did not file a SUTR. Accordingly, for that quarter only, CDTFA used IMFG's sales tax prepayments for gasoline and diesel, as reported by the fuel vendors, along with the amount of prepayment per gallon, to compute the numbers of gallons of gasoline and diesel purchased for the quarter.

CDTFA then obtained gasoline selling prices from DOE reports. It compiled the prices in each grade of fuel from the weekly DOE reports and computed an average selling price in each grade for the quarter. After computing an average weighted selling price for gasoline for

the quarter, CDTFA reduced that price by 29 cents, which was the differential observed by CDTFA between IMFG's posted selling prices and the DOE prices on July 9, 2011. CDTFA reduced that selling price by the amount of sales tax included.

On July 9, 2011, CDTFA found that IMFG's posted selling prices for diesel were 10 cents less than the selling prices reported by DOE. Accordingly, CDTFA computed an average selling price for the quarter from the weekly DOE reports and reduced that figure by the 18-cent state excise tax per gallon and 10 cents to establish the audited selling price of diesel, which it reduced by the sales tax included.

To establish the audited sales of gasoline and diesel, CDTFA multiplied the audited numbers of gallons purchased by the audited average selling price for the quarter.

Appellant argued that the audited selling prices were excessive. Appellant also argued that IMFG's contract prices were lower. As support, appellant provided a spreadsheet purportedly showing the cardlock fuel selling prices IMFG charged during the months of April and September of 2008, and March 2009. However, that spreadsheet appears to merely list various selling prices. There is no indication in the record that appellant provided source documents, such as cash register tapes or contracts, to support the listed selling prices. Moreover, the selling prices at issue are those in effect during the 4Q10, not in 2008 or 2009.

OTA finds that CDTFA utilized the best available information to establish audited sales for 4Q10. It has used selling prices reported by DOE and made adjustments based on its direct comparison of IMFG's posted selling prices and the prices reported by DOE. Further, CDTFA has computed the numbers of gallons of fuel sold using the amounts of sales tax prepayments reported by IMFG's vendors. Appellant has not provided evidence of errors in the audited numbers of gallons or the audited selling prices used to compute sales of gasoline and diesel for 4Q10, and OTA finds no adjustment is warranted.

Disallowed adjustments for bad debts

A retailer is relieved from liability for sales tax that became due and payable, insofar as the measure of tax is represented by accounts that have become worthless and charged off for income tax purposes by the retailer or, if the retailer is not required to file income tax returns, charged off in accordance with GAAP. (R&TC, § 6055(a); Cal. Code Regs., tit. 18, § 1642(a).) If the amount of an account found to be worthless and charged off is comprised in part of nontaxable receipts such as interest, insurance, repair, or installation labor and in part of taxable

receipts upon which tax has been paid, a bad debt deduction may be claimed only with respect to the unpaid amount upon which tax has been paid. (Cal. Code Regs., tit. 18, § 1642(b)(1).) In support of deductions for bad debts, retailers must maintain adequate and complete records showing: (1) date of original sale; (2) name and address of purchaser; (3) the amount the purchaser contracted to pay; (4) the amount on which the retailer paid tax; (5) the jurisdiction(s) where the local taxes and, when applicable, district taxes were allocated; (6) all payments or other credits applied to the account of the purchaser; (7) evidence that the uncollectible portion of gross receipts on which tax was paid actually has been legally charged off as a bad debt for income tax purposes, or, if the retailer is not required to file income tax returns, charged off in accordance with GAAP; and (8) the taxable percentage of the amount charged off as a bad debt properly allocable to the amount on which the retailer reported and paid tax. (Cal. Code Regs., tit. 18, § 1642(e).)

During the audit period, IMFG had claimed deductions on SUTRs for bad debt losses of $473,052. Also, during the audit, IMFG asserted that additional adjustments were warranted for bad debt losses.

CDTFA found that appellant had not provided documentation to support the bad debt deductions. Comments in the audit workpapers explain that IMFG had not claimed bad debts on its FITR for 2009. Also, according to the audit comments, an accountant informed the auditor that bad debts had not been netted from the amounts reported on the 2009 FITR. The audit comments state that IMFG had not filed its 2010 FITR as of October 15, 2011. Since IMFG did not provide evidence that uncollectible amounts had been claimed on FITRs or charged off in accordance with GAAP, CDTFA disallowed the bad debt deductions claimed on IMFG's SUTRs and did not allow the additional amounts IMFG claimed during the audit.

Appellant argued, during the CDTFA appeals process, that IMFG's uncollectible accounts receivable for the audit period totaled over $9,750,000, and he requested an adjustment of that amount to the audited understatement of reported taxable sales. CDTFA responded that neither IMFG nor appellant had provided the requisite documentation to support an adjustment.

As noted above, IMFG did not provide evidence during the audit that it had claimed bad debt losses on income tax returns or charged off bad debt losses in accordance with GAAP, as required by California Code of Regulations, title 18, (Regulation) section 1642. In addition, there is no evidence that IMFG provided the detailed records described in Regulation

section 1642 to support claimed bad debts (i.e., the dates of the original sales, the names and addresses of the purchasers, the amounts of the original sales, and the amounts of any payments made). Appellant also has not provided the requisite records. OTA finds that appellant has not met his burden of proof to support an adjustment for bad debts.

Adjustment for under-claimed prepayments on purchases of fuel

When fuel is sold by the first supplier, that supplier is liable for a sales tax prepayment, an amount per gallon that is established annually, and it collects the sales tax prepayment when it makes the first sale to its customer. For each subsequent sale, the purchaser reimburses the seller for the amount of sales tax prepayment. (See R&TC, § 6480.1.) When the fuel is sold to a retailer, or to a wholesaler who consumes the fuel, the seller is liable for the full amount of sales and use tax due with respect to the transaction. The seller may then claim a credit for sales tax prepayments made with respect to the relevant gallons of fuel. (R&TC, § 6480.1(d).)

When the seller of fuel is operating through a cardlock network, it makes sales to both its own customers and to customers of other operators in the network. For sales to the former group, appellant is the retailer, and the retailer of fuel is entitled to claim the sales tax prepayments on Schedule G of its SUTRs. Sales to the latter group are considered sales for resale to the other operators, who are then responsible for payment of the sales tax on the sales and may claim the sales tax prepayments that they paid to appellant on Schedule G of their returns. Thus, IMFG was entitled to claim Schedule G credits only for the sales tax prepayments related to its retail sales of fuel.

For each quarter, CDTFA compared amounts of sales tax prepayments reported by IMFG to the amounts of prepayments reported on sales to IMFG by its suppliers (vendor reports).[37] For certain quarters, CDTFA found that the percentages varied broadly from the average percentage CDTFA computed for the audit period.[38] Since CDTFA expected those percentages to remain

[37] The vendor reports, provided by IMFG's fuel vendors, summarized the sales tax prepayments collected from IMFG by the fuel vendors.

[38] For instance, for February 2010, the gasoline sales tax prepayments reported by IMFG's vendors totaled $15,886. IMFG reported gasoline sales tax prepayments totaling $4,258, with an apparent under-claimed amount of prepayments of $11,628. However, CDTFA noted that $4,258 represented only 26.80 percent of $15,886, while the average for the audit period was 60.32 percent. Accordingly, CDTFA applied 60.32 percent to the $15,886 to compute a revised amount of prepayments reported by appellant of $9,583. Thus, CDTFA computed an under-claimed amount of gasoline sales tax prepayments of $6,303 ($15,886 - $9,583) for February 2010.

more consistent from quarter to quarter, CDTFA adjusted the amounts of under-claimed prepayments for certain quarters. In sum, CDTFA made an adjustment of $114,512 to the audited understatement of tax, which represented sales tax prepayments that IMFG had not claimed on its returns during the audit period.

Appellant claims that the total difference between the prepayments claimed by IMFG and the amounts reported to CDTFA by IMFG's vendors was $295,807. Appellant asserts that CDTFA has no basis for reducing the difference between the amounts claimed on IMFG's returns and the amounts reported by IMFG's vendors.

In response, CDTFA explained that, during the reaudit, it noted differences between the reports filed by IMFG's vendors and the accepted credits. CDTFA, therefore, determined it was necessary to examine each quarter for fuel credits and developed an overall percentage of credits. For quarters for which the percentage differed significantly from the overall percentage, CDTFA recomputed the amounts using the overall percentage. In addition, CDTFA noted that the majority of the unclaimed prepayments relate to the 4Q10, for which IMFG did not file a SUTR.

OTA finds that CDTFA made warranted allowances for prepayments not claimed by IMFG. OTA also finds that appellant has not provided evidence to support an increase in the allowance provided by CDTFA in the audit.

Abusive use of disallowance of nontaxable sales for resale[39]

Appellant asserts that CDTFA had no basis to disallow a large portion of IMFG's claimed nontaxable sales for resale. Appellant states that IMFG exercised its rights by not signing a waiver of the statute of limitations. Appellant asserts that CDTFA had no basis to issue an NOD based on the disallowance of claimed sales for resale.

Appellant is incorrect. (See R&TC, § 6481.) Since appellant was unwilling to either provide records or sign a waiver of the statute of limitations, CDTFA estimated an amount of understatement of reported taxable sales and issued an NOD. When IMFG provided records, CDTFA conducted a reaudit. In the reaudit, CDTFA did not disallow any claimed nontaxable sales for resale but found a substantial understatement by comparing appellant's records to the amounts of taxable sales reported.

[39] As noted later in the text, the reaudit does not include any disallowed claimed nontaxable sales for resale. Therefore, we have not included statutory and regulatory detail regarding nontaxable sales for resale. Apparently, appellant is arguing that it was abusive for CDTFA to disallow a portion of the claimed sales for resale when appellant declined to either provide records or file a waiver of the statute of limitations.

OTA finds that no adjustments are warranted based on appellant's assertion of improper disallowed nontaxable sales for resale.

CDTFA inappropriately used the highest of several calculated amounts of understatement

Appellant asserts that CDTFA inappropriately used the highest of several calculated amounts of understatement. Appellant's argument is that there are four different calculations that CDTFA could have chosen as the measure of tax: (1) the reported measure of tax; (2) the amount reported on IMFG's FITRs; (3) the "POS audit alleged unreported sales" of $11,894,048; and (4) the "DOE selling prices alleged underreported sales" of $9,016,668. The first amount is not an audited figure, and the second amount has not been analyzed for the accuracy during the audit or CDTFA appeals process.

Regarding the difference between the POS records and the estimated amount of sales established by CDTFA using known purchases of fuel and audited selling prices, appellant notes that CDTFA has regarded the estimated sales of $9,016,668 as secondary support for the amount based on POS records of $11,894,048. Appellant challenges that assertion, noting that the former figure is about 25 percent less than the latter. Appellant argues that this large discrepancy in CDTFA's calculations is evidence that the use of the POS assumptions and calculations are erroneous and unreliable.

Appellant misconstrues the audit process. IMFG presented POS records to CDTFA for audit. POS records, by definition, are records of each sale made by a retailer. CDTFA compiled the sales *from IMFG's own records* to establish audited sales. In this type of direct audit, the assumption is that the retailer recorded its sales accurately, and the only calculation is totaling the recorded amounts. In contrast to a direct audit, the sales established using gallons purchased and audited selling prices is, by definition, based on estimated selling prices. OTA notes that the estimated amounts represented sales of fuel only, even though IMFG also sold other products at retail (e.g., motor oil and anti-freeze), and those sales would not have been included in the estimate.

Clearly, when records are available, a direct audit is preferable. The benefit of using a secondary audit method is to ensure that the records are substantially complete. Here, the fact that the recorded sales were greater than the estimated sales offered secondary support for CDTFA's decision to accept IMFG's records as substantially accurate.

Generally, when records are adequate, the best, most accurate method of evaluating reported amounts is to compare them to what has been recorded. To dispute the findings of a direct audit, an appellant should provide clear, detailed, specific evidence of erroneously recorded transactions or errors in the arithmetic of the audit. (See *Appeal of AMG Care Collective*, 2020-OTA-173P [for the proposition that "a taxpayer must prove that (1) the tax assessment is incorrect and (2) the proper amount of tax].) Neither IMFG nor appellant has provided such evidence. OTA finds that CDTFA met its initial burden of proof. Thus, the burden of proof shifts to appellant to establish a result differing from CDTFA's determination is warranted. (*Talavera*, *supra*.) OTA finds that appellant has failed to meet his burden of proof to establish that additional adjustments are warranted.

Understatement for 1Q11 and 4Q11

For 1Q11 and 4Q11,[40] IMFG did not file SUTRs. Accordingly, CDTFA estimated the taxes due for those quarters based on IMFG's SUTRs filed for 3Q10 and 2Q11. CDTFA issued NODs in which it determined tax amounts of $55,681 for 1Q11 and $31,331 for 4Q11.

Appellant disputes those estimates. Appellant asserts that CDTFA has not provided any evidence as to the method or computations that it used to establish the amount of taxes assessed, and he argues that the assessments are arbitrary.

During the appeal with CDTFA, appellant asserted that he had provided a draft SUTR for 1Q11, which reflected tax of only $11,690. On that basis, appellant argued that the amount due for 1Q11 should be reduced from $55,681 to $11,690. For 4Q11, appellant stated that he had provided reports filed with the bankruptcy court that reflected tax of $19,352.80 due for the quarter. He asserted that the tax should be further reduced by prepaid sales tax of $9,295, and that the determination for 4Q11 should be reduced from $31,331 to $10,058. Appellant also provided a copy of IMFG's sales journal for 4Q11.

In response, CDTFA found in its May 31, 2018 decision that IMFG had not filed returns for 1Q11 or 4Q11 and had not provided supporting documentation. CDTFA asserted that it had estimated the taxes due for those two quarters using the best available information.

[40] As noted previously, CDTFA issued an NOD for the period October 1, 2011, through April 13, 2012, because IMFG failed to file SUTRs for that period. The determined tax for that period was $66,746, but the liability assessed against appellant as an individual for that NOD is $31,331, the amount of tax applicable to 4Q11.

For 1Q11, the tax asserted by CDTFA of $55,681 was estimated based on the amount reported for 3Q10, because no return was filed for 4Q10.[41] Appellant asserts that the correct amount of tax for 1Q11 is $11,690, based on a draft SUTR he prepared. Appellant asserts that one of IMFG's main suppliers, International Petroleum Corporation (IPC), had been charging IMFG the full amount of sales tax on its purchases, rather than collecting the prepaid sales tax. Appellant has not provided evidence that IPC was collecting the full amount of sales tax on its sales to IMFG. Moreover, appellant has not provided POS reports or other records, supported by source documents, to support the amount of tax on the unfiled draft SUTR. Thus, OTA finds that appellant has not provided sufficient evidence to support an adjustment to the amount of tax estimated for 1Q11 to $11,690.

However, during the period following 3Q10, IMFG's business was in decline (as evidenced by the reduction in estimated tax from $55,681 for 3Q10 to the reported tax of $31,331 for 2Q11, and by IMFG's bankruptcy filing in July 2011). Also, OTA notes that 2Q11 is the quarter immediately following 1Q11. OTA finds that by averaging CDTFA's estimate based on 3Q10 with the reported tax for 2Q11, the result is more likely to be a representative estimate of tax for 1Q11. Accordingly, OTA finds that the amount of tax estimated for 1Q11 should be reduced from $55,681 to $43,506.

Regarding 4Q11, appellant has asserted that IMFG's operating reports filed with the bankruptcy court reflect sales tax due of $19,352.80 for that quarter. CDTFA has not disputed appellant's assertion. Instead, CDTFA's May 31, 2018 decision concludes that the report to the bankruptcy court and IMFG's sales journal are not supported by source documents; and thus, do not represent sufficient evidence to support an adjustment for 4Q11. OTA disagrees.

OTA finds that IMFG's sales journal is comparable to the POS records CDTFA used as evidence of sales in its audit of the period January 1, 2008, through September 30, 2010. Moreover, CDTFA has used the amount of tax due for 2Q11 to estimate the amount due for 4Q11. However, IMFG filed for bankruptcy during 3Q11, on July 11, 2011, and that bankruptcy was converted to Chapter 7 proceeding on April 13, 2012. OTA finds it much more likely than not that IMFG's business was in decline. Thus, if the tax due for 2Q11 was $31,331, OTA finds

[41] It is unclear how, precisely, CDTFA estimated $55,681 in tax for 1Q11, which is 37.5 percent of the tax due for 3Q10. CDTFA estimated the 1Q11 liability based on the return for 3Q10, the last quarter for which IMFG provided POS data. For 3Q10, IMFG recorded $1,709,205 in taxable sales, and collected $148,359 in sales tax from customers. Nevertheless, IMFG only reported $1,099,198 in taxable sales, and $110,137 in sales tax due, resulting in a $38,161 understatement for 3Q10.

it reasonable that, after filing for bankruptcy in July, the tax would further reduce to $19,352.80. OTA, therefore, finds that an adjustment is warranted; the amount of tax estimated for 4Q11 shall be reduced from $31,331 to $19,353.

Issue 4: Whether appellant has shown that the understatement established in the audit of IMFG was not due to negligence.

R&TC section 6484 provides that, if any part of a deficiency for which a deficiency determination is made is due to negligence or intentional disregard of the law or authorized rules and regulations, a penalty of 10 percent of the amount of the determination shall be added thereto. Negligence is generally defined as a failure to exercise such care that a reasonable and prudent person would exercise under similar circumstances. (*Warner v. Santa Catalina Island Co.* (1955) 44 Cal.2d. 310, 317; see also *People v. Superior Court* (*Sokolich*) (2016) 248 Cal.App. 4th 434, 447.) 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).) The failure to maintain and keep complete and accurate records will be considered evidence of negligence and may result in penalties. (Cal. Code Regs., tit. 18, § 1698(k).)

Appellant argues that the error rate of 19.91 percent in IMFG's reported taxable sales was lower than the percentage of difference between CDTFA's direct audit and the sales estimated using gallons of fuel and estimated selling prices (approximately 25 percent). Appellant reasoned that, since CDTFA regarded the findings of the two audit methods to be substantially consistent, it should also find that IMFG's reported sales were substantially consistent with the audit, such that there was no evidence of negligence.

As a preliminary matter, appellant's argument is not logical because the two percentages are not comparable. In this case, it is not the percentage of understatement that is the strongest evidence of negligence. Instead, the primary evidence for negligence is that IMFG had recorded about $11 million more in sales than it chose to report.[42] IMFG underreported in nine out of the 11 quarters for which it provided records. IMFG failed to report over $4.5 million for 2Q08; almost $3 million for 3Q08; over $1 million in sales for 4Q08; and over $2 million for 2Q09. Each of the aforementioned quarters can be used to establish the negligence penalty at issue

[42] Total understatement for 4Q10 is $10,752,733 ($11,894,048 - $1,141,315).

because "if any part of a deficiency for which a deficiency determination is made is due to negligence . . ., a penalty of 10 percent of the amount of the determination shall be added thereto." (R&TC, § 6484.) While any capable businessperson – and the evidence indicates that appellant is capable – should be able to compile recorded sales and report those amounts on SUTRs, IMFG overlooked recorded sales of approximately $11 million. Regardless of the percentage of understatement, $11 million is a substantial amount of unreported sales, and neither IMFG nor appellant provided an adequate explanation. The unreported $11 million in recorded sales is evidence that IMFG did not exercise such care that a reasonable and prudent person would exercise under similar circumstances. This evidence is entitled to more weight because IMFG was previously audited on two occasions. IMFG was audited from April 1, 1991, through March 31, 1994, resulting in unreported taxable sales of $32,000, disallowed sales of for resale of $8,900, and disallowed bad debts of approximately $20,000. IMFG was also audited from October 1, 1998, through September 30, 2001, resulting in a no change audit (i.e., no additional tax was determined). OTA further notes that the same controller worked at IMFG during the prior audits, and, as the sole shareholder and corporate officer, no one other than appellant stood to benefit from the underreporting. Based on the foregoing, OTA finds that the understatement established by audit was the result of negligence, and the penalty was properly imposed.

Issue 5: Whether interest relief is warranted for the period from May 31, 2018, through the present.

The imposition of interest is mandatory. (R&TC, § 6482.) There is no statutory right to interest relief. (R&TC, § 6593.5.) The law allows CDTFA, in its discretion, to grant relief of all or any part of the interest imposed on a person under the Sales and Use Tax Law where the failure to pay the tax is due in whole or in part to an unreasonable error or delay by an employee of CDTFA acting in his or her official capacity. (R&TC, § 6593.5(a)(1).) Such a delay means, for example, an unreasonable failure to work on an appeal. (*Appeal of Micelle Laboratories, Inc.*, 2020-OTA-290P.) An unreasonable error or delay shall be deemed to have occurred only if no significant aspect of the error or delay is attributable to an act of, or failure to act by, the taxpayer. (R&TC, § 6593.5(b).) Any person requesting interest relief must include a statement under penalty of perjury setting forth the facts on which the request is based. (R&TC,

§ 6593.5(c).) Appellant bears the burden of proof to show interest relief is warranted. (Cal. Code Regs., tit. 18, § 30219.)

Here, CDTFA's decisions have already addressed interest relief in response to appellant's request for relief which was accompanied by a signed statement under penalty perjury dated July 6, 2017. This issue is framed to address the period after the first decision was written. At the beginning of the hearing, the issues were confirmed with the parties. OTA notes that neither party addressed this issue in their oral hearing arguments.[43] Nonetheless, OTA finds that additional interest relief is not warranted based on our review of the record. OTA otherwise finds that appellant has not met his burden of proof regarding interest relief after May 31, 2018.

OTHER MATTERS

Appellant also contends that CDTFA's decisions and related procedures violated appellant's federal and state constitutional and substantive due process rights and the excessive fine clause, and that CDTFA's determination should not be upheld on this basis. In general, except where the violation affects the adequacy of a notice, the validity of an action from which a timely appeal was made, or the amount at issue in the appeal, OTA is without jurisdiction to consider whether appellant is entitled to a remedy for CDTFA's actual or alleged violation of any substantive or procedural right. (Cal. Code Regs., tit. 18, § 30104(d).) OTA further notes that, as an administrative agency, OTA lacks constitutional authority to exercise judicial powers and cannot refuse to enforce a statute (e.g., R&TC section 6829) on the basis of it being unconstitutional, unless an appellate court has made a determination that such a statute is unconstitutional. (Cal. Const., Art. 3, § 3.5; see *Appeals of Dauberger, et al.* (82-SBE-082) 1982 WL 11759.) To the extent that appellant's constitutional, due process rights, and excessive fines clause arguments apply to Regulation section 1702.5, OTA cannot refuse to follow a properly promulgated regulation. (*Newco Leasing, Inc. v. State Bd. of Equalization* (1983) 143 Cal.App.3d 120, 124; *Talavera*, *supra*; *Appeal of Body Wise*, 2022-OTA-340P.) Based on the foregoing, OTA does not have jurisdiction to consider the constitutional arguments raised by appellant.

[43] During the CDTFA appeals process appellant submitted a Request for Relief from Penalty and Interest dated July 6, 2017, which was signed under penalty of perjury. However, the focus of that request was for periods prior to May 31, 2018.

OTA notes that a six percent late prepayment penalty was incorrectly imposed against IMFG, as it did not file a return for 3Q10, which should have resulted in a 10 percent failure-to-file penalty. (R&TC, §§ 6477, 6511.) Because the late prepayment penalty was incorrectly imposed on the corporation, it must be deleted from appellant's responsible person liability. (R&TC, § 6829(a); Cal. Code Regs., tit. 18, § 1702.5(a).) However, because CDTFA failed to assert the failure-to-file penalty against IMFG, it cannot now be asserted against appellant as a responsible person.

HOLDINGS

1. The NOD was timely issued to appellant.
2. Appellant is personally liable under R&TC section 6829 for the unpaid liabilities of IMFG for the liability period.
3. Appellant has not shown that adjustments are warranted to the understatement of reported taxable sales established in the audit of IMFG for the period January 1, 2008, through December 31, 2010. The amount of tax estimated for 1Q11 should be reduced from $55,681 to $43,506. For 4Q11, appellant has established that the amount of tax due should be decreased from $31,331 to $19,353. The $812.50 prepayment penalty for 3Q10 must be deleted in its entirety.
4. The negligence penalty was properly imposed on IMFG.
5. Interest relief is not warranted for the period May 31, 2018, through the present.

DISPOSITION

CDTFA's action finding appellant personally liable for the unpaid tax liabilities of IMFG for the liability period is sustained. Adjustments are warranted to IMFG's liabilities insofar as the amount of tax estimated for 1Q11 shall be reduced from $55,681 to $43,506 and the amount of tax due for 4Q11 shall be decreased from $31,331 to $19,353. The corresponding interest and penalties shall be adjusted accordingly. The late prepayment penalty shall be deleted. CDTFA's action denying the remainder of appellant's petition for redetermination is sustained.

DocuSigned by:
Josh Aldrich
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Josh Aldrich
Administrative Law Judge

We concur:

DocuSigned by:
Michael F. Geary
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Michael F. Geary
Administrative Law Judge

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Andrew J. Kwee
Administrative Law Judge

Date Issued: 12/27/2022