

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
B. TREYZON

) OTA Case No. 19014245
) CDTFA Case ID 892131
)
)
)
)

OPINION

Representing the Parties:

For Appellant:

Igor S. Drabkin, Attorney
B. Treyzon

For Respondent:

Amanda Jacobs, Tax Counsel III
Stephen Smith, Tax Counsel IV
Jason Parker, Chief of Headquarters Ops.

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, B. Treyzon (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)¹ denying appellant’s petition for redetermination of the Notice of Determination (NOD) dated June 18, 2015. The NOD is for tax of \$111,615.66, plus accrued interest, and penalties of \$93,058.33, for the period October 1, 2008, through December 31, 2012 (liability period). The NOD reflects CDTFA’s determination that appellant is personally liable as a responsible person for the unpaid taxes, plus applicable interest, and penalties that West Coast Storm, Inc. (WCS) accrued during the liability period.

Office of Tax Appeals Administrative Law Judges Josh Lambert, Suzanne B. Brown, and Andrew Wong held an oral hearing for this matter in Cerritos, California, on October 12, 2022. At the conclusion of the hearing, the record was closed, and this matter was submitted for an opinion.

¹ Sales taxes were formerly administered by the State Board of Equalization (BOE). In 2017, functions of BOE relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to acts or events that occurred before July 1, 2017, “CDTFA” shall refer to BOE; and when this Opinion refers to acts or events that occurred on or after July 1, 2017, “CDTFA” shall refer to CDTFA.

ISSUE

Whether appellant is personally liable under R&TC section 6829 for the unpaid tax, interest, and penalty liabilities of WCS.

FACTUAL FINDINGS

1. WCS, a California corporation, was a construction contractor, which manufactured, fabricated, and installed storm drains and storm drain covers.
2. I. Katz, R. Salo (who worked at appellant's law firm), and Y. Shabis (appellant's wife) each owned a 25 percent interest in WCS, and M. and R. Padilla owned the remaining 25 percent interest.
3. M. Padilla was the president of WCS. R. Padilla was WCS's vice president and secretary. WCS hired R. Bianchi's CPA firm to handle its tax matters.
4. WCS had an office located in San Bernadino, California. Appellant and R. Salo worked out of appellant's law firm office in Beverly Hills, California.
5. Appellant received payments in the form of wages from WCS, and he and his law firm provided services to WCS.² On April 25, 2012, appellant became WCS's chief financial officer (CFO). Prior to that time, appellant was not an officer of WCS.
6. A Funds Transfer Agreement from 1st Century Bank in 2009 lists appellant as one of the authorized persons to initiate funds transfers from WCS's bank account.³ Emails from 2011 from 1st Century Bank to appellant asked "...how much should I advance?" Appellant replied "I will get a wire in." The bank asked appellant: "Can I advance now and pay back when the wire comes in?" Appellant replied, cc'ing R. Salo, "Sure advance 100K."
7. In a June 22, 2009 email from A. Yu, who worked at R. Bianchi's CPA firm, to M. Padilla, states:

² Employment Development Department wage reports show that appellant received wages from WCS of \$14,000 in 4Q09, \$104,000 in 2010, and \$175,385 in 2011. Appellant asserts that the payments were not wages as compensation for his services as an employee of WCS, but rather were shareholder dividends. Appellant asserts that compensation for his law firm's legal services for WCS was paid separately.

³ The agreement is unsigned. However, there are related emails dated June 2009 from 1st Century Bank asking appellant and M. Padilla to sign the agreement in case it must be shown that appellant is authorized to initiate a transfer from WCS. In an email, M. Padilla stated that she signed and initialed the form and provided the agreement to appellant for his signature.

[Appellant] mentioned that the sales tax amount for this period will be sizeable, so he wanted us to start preparing for it to get some idea of how much sales tax will be due for this period.

In response, M. Padilla sent invoices to R. Bianchi's CPA firm. In various other emails, M. Padilla provided either the CPA firm and/or appellant with invoices, including a summary of invoiced amounts with and without tax.

8. A July 10, 2009 email from S. Shakib, who worked at R. Bianchi's CPA firm, to appellant, with a "cc" to R. Bianchi, states:

Attached is a copy of WCS sales tax for 2nd quarter of 2009 for your viewing. As we went through the invoices we realized that some of them have used a sales tax of 8.25 instead of 9.25. The following invoices have used the wrong amount of tax and this resulted in an under charge of sales tax from City of Los Angeles."

9. Regarding the second quarter of 2009 (2Q09) sales and use tax return (SUTR), there is an email dated July 13, 2009, from M. Padilla to appellant asking "Do I need to sign and send to you? Or can you just stamp it?" Appellant replied: "We can simply stamp..."
10. In an email dated October 22, 2009, M. Padilla asked if a payment can be made on a balance and appellant replies that he thinks it is paid.
11. An email dated July 8, 2010, from A. Yu to appellant states:

Attached is 2010 2nd quarter sales tax return prepared by West Coast Storm. Please review and let me know if any change is necessary. I have not yet filed this. Upon your approval, I will e-file it for you. Please keep in mind that the tax payment must be submitted through EFT. You must let me know when would be good time to pay for this so that I can schedule payment online.

Appellant replied "Am I correct that this payment of \$252,450 is due on the 8th of August? Also, were the penalties waived?" A. Yu replied:

The payment is due 8/2/10. Payment must be submitted through EFT. No, we have not yet heard from [CDTFA]. I will let you know if we hear anything. Please inform us if you receive anything from them.

Appellant forwarded the message to M. Padilla and stated: "This is what I am getting from [A. Yu]. Let me try to figure this out."

12. In a July 13, 2010 email, with regard to a notice from CDTFA that WCS did not make a sales and use tax prepayment, M. Padilla emailed R. Salo, R. Padilla, and appellant. R.

- Salo stated: “I think [A. Yu] emailed [appellant] saying we are due August 7. Let me find out from [appellant] if that is the case. If not, we will issue payment asap.”⁴
13. In an email dated February 23, 2011, to appellant, R. Salo, and I. Segel, M. Padilla stated that she received checks for invoice payments. Appellant replied: “Please overnight to me.”
 14. In emails dated January 23 and 26, 2012, R. Salo asked M. Padilla for her signature to make a new stamp in order to issue checks, because the original stamp broke.
 15. In a December 11, 2012 email, R. Padilla asked “are you confident that Bianchi did the WCS taxes right.” Appellant replied “yes.”
 16. According to an entry in CDTFA’s Automated Compliance Management System (ACMS)⁵ from July 2011, appellant communicated with CDTFA as to the filing of forms and the liability from the City of Los Angeles. An April 2012 ACMS entry indicates that appellant spoke with CDTFA about WCS’s account and collection issues, and appellant stated he thought the amounts were under review for past due amounts; appellant then stated that he would contact the CPA.
 17. ACMS entries indicate discussions between CDTFA and appellant as to the payment of tax and/or the audit. An ACMS entry dated August 2012, indicates that appellant discussed with CDTFA amounts due and levies on the account. An ACMS entry dated August 2012 indicates that an email was sent by CDTFA to appellant that financial documents were received, and more documents were requested. An ACMS entry dated September 2012 states that a call was received by appellant and issues, including the audit and payments made to CDTFA, were discussed.⁶ Appellant also assured CDTFA that payments had been made. An ACMS entry dated September 2012 indicates that appellant stated that he wanted to make payments for filed returns. An ACMS entry dated October 2012 indicates that appellant stated that WCS is prepared to pay CDTFA, and he is hoping certain funds will satisfy a majority of the liability. An ACMS entry

⁴ A March 2011 email from M. Padilla stated: “I think this is from the bank to [R. Salo and appellant],” and a June 2011 email from M. Padilla states that appellant said it was okay to send her some blank checks.

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

⁶ CDTFA conducted an audit in 2012 and a reaudit in 2014 of WCS. The reaudit workpapers indicate that appellant participated in the reaudit and that the workpapers were sent to appellant in 2014.

dated November 2012 indicates that appellant asked if CDTFA has received any payments. An ACMS entry dated May 2013 indicates that appellant asked if CDTFA received a payment and stated that WCS has said pending funds and are trying to get the money so that appellant can forward the funds to CDTFA. An ACMS entry dated September 2013 indicates that appellant stated that when the audit amount is settled, WCS will write CDTFA a check.

18. An ACMS entry dated April 2015, indicates that appellant stated to CDTFA that checks would be authorized by himself, R. and M. Padilla, and other department heads, and they would use M. Padilla's name stamp to sign.⁷
19. According to an ACMS entry from April 2015, R. Bianchi told CDTFA that he was hired in 2008 and, since then, he would prepare monthly reports and SUTRs, and that payment was authorized by appellant. R. Bianchi stated that he predominantly dealt with appellant, and that appellant was the closest thing to a CFO for WCS.
20. According to an ACMS entry dated September 2012, R. Padilla stated that appellant and R. Salo handled all financial decisions for the business. According to an ACMS entry from February 2015, R. Padilla stated that appellant and M. Padilla had authority to issue checks and appellant had access to a name stamp with M. Padilla's signature. R. Padilla stated that all financial matters went through appellant. According to notes of a phone call between CDTFA and R. Padilla in June 2018, R. Padilla stated that appellant signed all checks and authorized all payments for WCS.
21. In an ACMS entry from February 2014, B. Martello, who was VP of Sales and Marketing for WCS, stated that appellant handled corporate payments, and that appellant would have provided sales figures to the CPA R. Bianchi. In a written response to a Business Operations Questionnaire dated June 2018, B. Martello stated that appellant was responsible for SUTR compliance during the time B. Martello was employed at WCS, which was 2009 through 2012.
22. According to notes of a phone call between CDTFA and B. Martello in June 2018, B. Martello stated that appellant and R. Salo were in charge of making all payments for

⁷ According to a written response to a Business Operations Questionnaire dated June 15, 2018, M. Padilla stated that she worked at WCS until February 2012. An email dated August 16, 2012, indicates that M. Padilla did not work at WCS and had not worked there for some time. According to notes of a phone call between CDTFA and R. Padilla in June 2018, R. Padilla stated that he was fired in 2012.

- WCS, including sales and use tax payments.⁸ B. Martello also stated that appellant would deposit corporate money into different bank accounts, but would only deposit money into an account when a bill was to be paid.
23. According to notes of a phone call between CDTFA and M. Padilla in June 2018, M. Padilla stated that all payments for sales tax were paid out of appellant's office by him or R. Salo using M. Padilla's name stamp from the corporate bank account. As to how sales and use tax matters were handled, M. Padilla stated that she would email invoices to R. Bianchi's CPA firm and then appellant or R. Salo dealt with the firm in paying tax.
 24. WCS paid wages of \$424,417 during 2Q12 and 3Q12 and other operating expenses through 4Q12, including payments totaling \$292,560 to third parties for 1Q12 through 3Q12, and totaling \$13,400 to SoCal Edison for 1Q12 through 4Q12.
 25. CDTFA closed WCS's seller's permit effective December 31, 2012, because its contractor's license expired effective that date.
 26. WCS had unpaid sales tax liabilities originating from: (1) SUTRs filed late for 2Q11 through 1Q12; (2) a late prepayment return for January 2011; (3) estimated prepayment penalties for April 2010, July 2012, and August 2012; (4) an NOD issued to WCS on April 27, 2012, for an audit liability for the period October 1, 2008, through December 31, 2011; (5) an NOD issued to WCS on January 11, 2013, for WCS's failure to file a SUTR for 2Q12; and (6) an NOD issued to WCS on June 4, 2013, for WCS's failure to file a SUTR for 4Q12. CDTFA imposed a tax lien on WCS for its unpaid liabilities.
 27. CDTFA determined that WCS terminated its business on December 31, 2012. CDTFA determined that appellant was personally liable for the unpaid liabilities of WCS for the liability period, and on June 18, 2015, CDTFA issued to appellant an NOD for tax of \$111,615.66, plus accrued interest, and penalties of \$93,058.33.
 28. Appellant timely filed a petition for redetermination. On December 17, 2018, CDTFA issued a Decision relieving WCS's failure-to-file penalties, late prepayment penalties, estimated prepayment penalties, and the finality penalties incurred by WCS for failing to

⁸ B. Martello also stated that appellant asked him a few times to drop off checks to 1st Century Bank, and that appellant was known as the "money man" who was in charge of all the finances for WCS.

timely pay the January 11, 2013, and June 4, 2013 NODs. Otherwise, the Decision denied the petition.

29. This timely appeal followed.
30. On appeal, there is 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 is not in dispute.

DISCUSSION

R&TC section 6829 provides that a person is personally liable for the tax, penalties, and interest owed by a business entity, here a corporation, if all the following elements are met: (1) the corporation has been terminated, dissolved, or abandoned; (2) the corporation collected sales tax reimbursement on its sales of tangible personal property and failed to remit such tax reimbursement to CDTFA or consumed tangible personal property and failed to pay the applicable tax to the seller or CDTFA; (3) the person had control or supervision of, or was charged with the responsibility for, the filing of returns or the payment of tax, or was under a duty to act for the corporation in complying with the Sales and Use Tax Law; and (4) the person willfully failed to pay taxes due from the corporation or willfully failed to cause such taxes to be paid. (R&TC, § 6829(a), (c); Cal. Code Regs., tit. 18, § 1702.5(a), (b).)

Burden of Proof

CDTFA must prove the elements of R&TC section 6829 by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 1702.5(d).) That is, CDTFA must establish that the circumstances it asserts are more likely than not to be correct. (*Appeal of AMG Care Collective*, 2020-OTA-173P.) 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, (Regulation) section 1702.5(a), unless CDTFA rebuts this presumption with clear and convincing evidence.⁹ (Cal. Code Regs., tit. 18,

⁹ CDTFA recommended adding the rebuttable presumption under Regulation section 1702.5(e) “so that staff’s efforts in pursuing personal liability are more focused on those persons, whom prior experience has shown, are generally found to be personally liable based on the evidence.” (California Regulatory Notice Register 2016, No. 29-Z (July 15, 2016) p. 1203.)

§ 1702.5(e).) Clear and convincing evidence requires that the evidence be so clear as to leave no substantial doubt. (*Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314, 320.)

Appellant did not hold an official position in the corporation until April 25, 2012, when he was named acting CFO. Nonetheless, CDTFA argues that the presumption in Regulation section 1702.5(e) does not apply and, therefore, the burden of proof is by a preponderance of evidence. Specifically, CDTFA argues that, even though appellant did not have the official position of CFO or manager during that period, he was a “de facto” CFO as well as an unofficial manager, in addition to having a community property ownership interest in WCS.

To clarify, Regulation section 1702.5(e) indicates that the phrase “with an ownership interest” applies only to the position of “manager.” Additionally, the regulatory history states “that the phrase ‘with an ownership interest in the entity’ only modifies the subdivision’s reference to ‘manager.’”¹⁰ In this case, appellant’s wife had a 25 percent ownership interest in WCS, and the parties agree that appellant had a one-half interest in her ownership of WCS through community property, such that he is considered owning an interest in WCS for purposes of Regulation section 1702.5(e).¹¹

Regulation section 1702.5(e) provides a finite list and does not include additional language or guidance.¹² However, a separate provision, Regulation section 1702.5(b)(1), describes “officer” and “manager” as “titles.” (See Cal. Code Regs., tit. 18, § 1702.5(b)(1) [“The fact that a person possesses any of the aforementioned titles...”] Regulatory provisions should be construed together when they relate to the same person or thing, to the same class of person or things, or have the same purpose or object. (See *Mahon v. City of San Diego* (2020) 57 Cal.App.5th 681, 717.) Therefore, the use of the terms “officer” and “manager” in Regulation section 1702.5(e) may be read as “titles,” consistent with Regulation section 1702.5(b)(1). In addition, a de facto officer has been defined as one who acts under the color of official title even though the legality of that title is deficient. (*Miller v. Filter* (2007) 150 Cal.App.4th 652, 662-663; *Ryder v. U.S.* (1995) 515 U.S. 177, 180.)

¹⁰ California Regulatory Notice Register 2016, No. 29-Z (July 15, 2016) p. 1200.

¹¹ Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property. (Fam. Code, § 760.)

¹² Cf. Cal. Code Regs., tit. 18, § 1702.5(b)(1) [“officer... manager...or other person having control or supervision of...”]

Prior to April 25, 2012, appellant was not acting under the title of officer or a title representing a management position with WCS, regardless of whether such a title was official or legal. Appellant was not held out as, or represented to be, an officer or a manager of WCS, but rather was held out as providing outside legal services. Appellant also did not purport or claim to be an officer or a manager at WCS, or to have such a title. Therefore, under Regulation section 1702.5(e), appellant is presumed to not be personally liable before April 25, 2012, unless CDTFA rebuts this presumption with clear and convincing evidence that he meets the four requirements for imposing responsible person liability. For the portion of the liability period after that date, CDTFA must prove the elements of R&TC section 6829 by a preponderance of the evidence. As discussed below, both before and after appellant became official CFO, there is clear and convincing evidence to show he is personally liable under Regulation section 1702.5(a).

Elements of R&TC section 6829

Appellant concedes elements (1) and (2) of R&TC section 6829, as described above, and only elements (3) and (4) are in dispute, which 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.

Responsible Person

A “responsible person” means any person having control or supervision of, or who was charged with the responsibility for, the filing of returns or the payment of tax or who had a duty to act for the corporation in complying with any provision of the Sales and Use Tax Law when, as relevant here, the business sold tangible personal property and collected sales tax reimbursement on the selling price of the property and failed to remit such tax reimbursement when due. (R&TC, § 6829(b); Cal. Code Regs., tit. 18, § 1702.5(b)(1).) Simply because a person was an officer, member, manager, employee, director, shareholder or partner of a business is not, in and of itself, sufficient to establish that the person is a “responsible person.” (Cal. Code Regs., tit. 18, § 1702.5(b)(1).) As relevant here, personal liability applies only if, while the person was a responsible person for the corporation, the corporation sold tangible personal property and collected sales tax reimbursement on the selling price of the property, but failed to remit such tax reimbursement when due. (Cal. Code Regs., tit. 18, § 1702.5(a).)

Appellant contends that he was not responsible for WCS's sales and use tax compliance, and that he only provided legal assistance to WCS that included pursuing collection actions, obtaining lines of credit, and litigation. Appellant asserts that R. Bianchi, CPA, was in charge of handling WCS's sales and use tax filings and payments. Appellant and R. Salo provided testimony in support of these contentions. However, the contemporaneous evidence in the record demonstrates that appellant was directly involved in, and had control or supervision of, WCS's sales and use tax compliance. For instance, a June 2009 email from A. Yu, who worked at R. Bianchi's CPA firm, to M. Padilla, states:

[Appellant] mentioned that the sales tax amount for this period will be sizeable, so he wanted us to start preparing for it to get some idea of how much sales tax will be due for this period.

This demonstrates appellant's involvement in the calculation of sales tax and giving direction to the CPA firm.

A July 2009 email from S. Shakib, who worked at R. Bianchi's CPA firm, to appellant, with a "cc" to R. Bianchi, states:

Attached is a copy of WCS sales tax for 2nd quarter of 2009 for your viewing. As we went through the invoices we realized that some of them have used a sales tax of 8.25 instead of 9.25. The following invoices have used the wrong amount of tax and this resulted in an under charge of sales tax from City of Los Angeles."

An email from July 2010 from A. Yu to appellant states:

Attached is 2010 2nd quarter sales tax return prepared by West Coast Storm. Please review and let me know if any change is necessary. I have not yet filed this. Upon your approval, I will e-file it for you. Please keep in mind that the tax payment must be submitted through EFT. You must let me know when would be good time to pay for this so that I can schedule payment online.

These emails demonstrate that appellant received SUTRs for review. Specifically, the 2010 email demonstrates that the CPA firm provided the SUTR to appellant for his review and so that he could address any issues in the return and let them know of any changes. In addition, the email shows that appellant was responsible for providing approval so that the return could be filed and for letting the firm know when the payment could be made. In response to that email, appellant replies: "Am I correct that this payment of \$252,450 is due on the 8th of August? Also, were the penalties waived?" A. Yu replies: "The payment is due 8/2/10. Payment must be submitted through EFT. No, we have not yet heard from [CDTFA]. I will let you know if we hear anything. Please inform us if you receive anything from them." Appellant forwards the

message to M. Padilla and states: “This is what I am getting from [A. Yu]. Let me try to figure this out.” These emails show that appellant wanted to confirm the payment amount, and that he received information related to tax from CDTFA. As to the issue of the payment amount and due date, appellant says to M. Padilla that he will “figure this out.”

In July 2010, with regard to a notice from CDTFA that WCS did not make a sales and use tax prepayment, M. Padilla emails R. Salo, R. Padilla, and appellant. R. Salo states: “I think [A. Yu] emailed [appellant] saying we are due August 7. Let me find out from [appellant] if that is the case. If not, we will issue payment asap.” This email shows that the CPA firm reported to appellant the payment due dates and, when a payment needed to be made, it could be issued as soon as possible by appellant and R. Salo.

Appellant was also a point of contact for CDTFA. In July 2011, he communicated with CDTFA as to the filing of forms and the liability from the City of Los Angeles. In April 2012, appellant spoke with CDTFA about WCS’s account and collection issues, and appellant stated he thought the amounts were under review for past due amounts. Appellant then stated that he would contact the CPA. This evidence demonstrates that sales and use tax matters were the responsibility of appellant, that the CPA firm reported to him, and that his areas of responsibility were not limited only to collections, obtaining lines of credit, and litigation, as he contends.

In addition, there are statements in the record, such as responses to CDTFA’s questionnaires and statements noted in ACMS entries, indicating that appellant was responsible for sales and use tax compliance. Appellant contends that the statements are self-serving and not reliable. However, the evidence in the record corroborates the statements, which gives the statements more weight. In an ACMS entry from April 2015, R. Bianchi told CDTFA that he was hired in 2008 and since then, he would prepare monthly reports and SUTRs, and that payment was authorized by appellant. R. Bianchi stated that he predominantly dealt with appellant, and that appellant was the closest thing to a CFO for WCS. In a written response to a Business Operations Questionnaire dated June 2018, B. Martello, VP of Sales and Marketing for WCS, stated that appellant was responsible for SUTR compliance during B. Martello’s time employed at WCS, which was 2009 through 2012. According to notes of a phone call between

CDTFA and B. Martello in June 2018, B. Martello stated that appellant and R. Salo were in charge of making all payments, including sales and use tax payments.¹³

According to an ACMS entry dated September 2012, R. Padilla stated that appellant and R. Salo handled all financial decisions for the business. According to an ACMS entry dated February 2015, R. Padilla stated that all financial matters went through appellant. According to notes of a phone call between CDTFA and M. Padilla in June 2018, M. Padilla stated all payments for sales tax were paid out of appellant's office by him or R. Salo using M. Padilla's name stamp from the corporate bank account. As to how sales and use tax matters were handled, M. Padilla stated that she would email invoices to R. Bianchi's CPA firm and then appellant or R. Salo dealt with the firm in paying tax. This is corroborated by the emails, such as one in June 2009, where M. Padilla emails invoices to the CPA firm after the firm was directed by appellant to determine the sales tax amount due. There are various other emails where M. Padilla provides either the firm and/or appellant with invoices, including a summary of invoiced amounts with and without tax. In an email dated February 23, 2011, to appellant, R. Salo, and I. Segel, M. Padilla stated that she received checks for invoice payments. Appellant replied: "Please overnight to me." Therefore, the statements in the record that appellant was responsible for sales and use tax matters are corroborated by the evidence, including the emails.

After April 25, 2012, appellant was the CFO of WCS, which is evidence that he had broad implied and actual authority to ensure compliance with the Sales and Use Tax Law, even if that responsibility was delegated to others. (See *Commercial Sec. Co. v Modesto Drug Co.* (1919) 43 Cal.App. 162, 173.) In addition, the record shows that appellant was responsible for sales and use tax compliance. According to appellant's declaration, he became CFO on April 25, 2012, in order to deal with the tax lien and audit by CDTFA.¹⁴

The record also includes evidence of more discussions between appellant and CDTFA as to sales and use tax issues, and of the providing of financial documents to CDTFA. An ACMS entry dated August 2012, indicates that appellant discussed with CDTFA amounts due and levies on the account. An ACMS entry dated August 2012 indicates that an email was sent by CDTFA to appellant that financial documents were received, and more documents were requested. An

¹³ B. Martello also stated that appellant asked him a few times to drop off checks to 1st Century Bank, and that appellant was known as the "money man" who was in charge of all the finances for the corporation.

¹⁴ In a December 2012 email, when appellant was officially the CFO of WCS, R. Padilla asked "are you confident that Bianchi did the WCS taxes right." Appellant replied "yes."

ACMS entry dated September 2012 states that a call was received by appellant and issues, including the audit and tax payments made to CDTFA, were discussed. ACMS entries dated September, October, and November 2012, and May and September 2013, indicate phone calls between CDTFA and appellant discussing the payment of tax and/or the audit. After appellant officially became the CFO, the evidence does not show a significant change in appellant's role as to sales and use tax matters, or his level of responsibility in dealing with CDTFA. In other words, his responsibilities basically remained the same both before and after he became an officer. Based on the foregoing, appellant was responsible for sales and use tax matters, including filing and paying tax, pursuant to R&TC section 6829(b) for the entire liability period.

Willfulness

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

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

(B) The responsible person had the authority to pay the taxes or to cause them to be paid (i) on the date that the taxes came due and (ii) when the responsible person had actual knowledge as defined in (A). A responsible person who was required to obtain approval from another person prior to paying the taxes at issue and was unable to act on his or her own in making the decision to pay the taxes does not have the authority to pay the taxes or to cause them to be paid.

(C) When the responsible person had actual knowledge as defined in (A), the responsible person had the ability to pay the taxes but chose not to do so.

(Cal. Code Regs., tit. 18, § 1702.5(b)(2).)

Knowledge

At the appeals conference and in his declaration, appellant states that he became aware of the unpaid liabilities as of April 25, 2012, when he became CFO. As to liabilities that became due after that period, he was CFO and responsible for sales and use tax matters. As stated in his declaration, he became CFO in order to handle the tax lien and the audit. And as stated above,

his position as CFO is evidence that he had broad implied and actual authority to ensure compliance with the Sales and Use Tax Law, even if that responsibility was delegated to others. (See *Commercial Sec. Co. v Modesto Drug Co.*, *supra*, 43 Cal.App at p. 173.) Appellant also discussed the audit and liabilities with CDTFA on multiple occasions in 2012 and 2013, as previously noted.¹⁵ Therefore, the evidence shows that he was aware of the liabilities. Accordingly, on or after the date that the taxes became due, appellant had actual knowledge that the taxes were due, but not being paid, pursuant to Regulation section 1702.5(b)(2)(A).

Authority

Appellant contends that he had no signatory authority over WCS's bank accounts, and that R. and M. Padilla were the only signatories on the bank accounts. Appellant and R. Salo also testified that appellant did not have the authority to authorize tax payments. In addition, I. Segel testified that she was the bookkeeper for WCS who managed accounts payable, and that she did not have much interaction with appellant and that M. Padilla, and not appellant, authorized payments for WCS.

However, the contemporaneous evidence shows 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 he had actual knowledge. For instance, an email dated July 8, 2010, from A. Yu at R. Bianchi's firm to appellant states: "You must let me know when would be good time to pay for this so that I can schedule payment online." An email on July 13, 2010, from M. Padilla to appellant, R. Salo, and R. Padilla asks about a payment due for a sales and use tax prepayment. R. Salo replies: "I think Alex emailed [appellant] saying we are due August 7. Let me find out from [appellant] if that is the case. If not, we will issue payment asap." In another email on July 13, 2010, A. Yu informs appellant that a sales and use tax payment is due August 2, 2010, and that he will let appellant know if he hears anything. Appellant tells M. Padilla "Let me try to figure this out." In an email dated October 22, 2009, M. Padilla asks if a payment can be made on a balance and appellant replies that he thinks its paid. These emails show that appellant was the one approached by both the CPA firm and M. Padilla when a payment was required and approval was needed, and that appellant would "figure it out" and would, along with R. Salo, "issue payment asap."

¹⁵ In addition, the reaudit workpapers indicate that appellant participated in the reaudit and that CDTFA sent the workpapers to appellant in 2014.

In addition, the evidence shows that there was a name stamp with M. Padilla's signature that could be used by appellant. Regarding signing the 2Q09 SUTR, there is an email on July 13, 2009, from M. Padilla to appellant stating "Do I need to sign and send to you? Or can you just stamp it?" Appellant replies "We can simply stamp..." In addition, appellant stated to CDTFA that checks would be authorized by himself, R. and M. Padilla, and other department heads, and they would use M. Padilla's name stamp to sign. Moreover, in emails dated January 23 and 26, 2012, R. Salo asks M. Padilla for her signature to make a new stamp in order to issue checks, because the original stamp broke. Therefore, while appellant contends that he did not have signatory authority, appellant was in possession of a name stamp that could be used at any time in order to issue a check for payments.

There is a Funds Transfer Agreement from 1st Century Bank in 2009 providing that appellant is authorized to initiate funds transfers.¹⁶ Appellant testified that he did not recognize the form, but emails show that the form was emailed to him by the bank, that he forwarded the form to M. Padilla, and that a signed hard copy of the form was provided to him by M. Padilla. In addition, emails from 2011 from 1st Century Bank to appellant asked "...how much should I advance?" Appellant replied "I will get a wire in." The bank asked appellant: "Can I advance now and pay back when the wire comes in?" Appellant replied, cc'ing R. Salo, "Sure advance 100K." Therefore, the emails demonstrate appellant acting unilaterally in dealing with the bank and wire transfers.

Bank statements from 1st Century Bank and First Republic Bank were sent directly to appellant at his law firm address. While the bank statements in the record are for periods after appellant became CFO on April 25, 2012, a March 2011 email from M. Padilla states "I think this is from the bank to [R. Salo and appellant]," which indicates that prior to April 25, 2012, R. Salo and appellant were receiving information from the bank that no one else at WCS received. A June 2011 email from M. Padilla states that appellant said it was okay to send her some blank checks, which demonstrates that appellant was the individual who had access to the blank checks and M. Padilla had to request them from him.

This evidence of appellant's authority over WCS's finances, including its sales and use tax payments, is corroborated by statements in the record, which gives the statements more

¹⁶ While the copy of the agreement in the record is unsigned, emails indicate that M. Padilla signed the agreement and provided it to appellant for his signature.

weight. According to an ACMS entry from April 2015, R. Bianchi stated that payment of tax was authorized by appellant. According to an ACMS entry from February 2014, B. Martello stated that appellant handled corporate payments, and that appellant would have been the one to provide sales figures to the CPA R. Bianchi. According to notes of a phone call between CDTFA and B. Martello in June 2018, B. Martello stated that appellant would deposit corporate money into different bank accounts and would only deposit money into an account when a bill was to be paid. According to notes of a phone call between CDTFA and B. Martello in June 2018, B. Martello stated that appellant and R. Salo were in charge of making all payments for WCS, including sales and use tax payments. According to notes of a phone call between CDTFA and R. Padilla in June 2018, R. Padilla stated that appellant signed all checks and authorized all payments for WCS. According to a February 2015 ACMS entry, R. Padilla stated that all financial matters went through appellant. Thus, in light of all evidence, the record shows that, before appellant was officially CFO, he had authority over WCS's financial matters, including sales and use tax payments.

The evidence does not show that, after appellant became CFO, there was a significant change in his authority to pay taxes or cause them to be paid. And as noted above, that appellant was CFO is evidence that he had broad implied and actual authority to ensure compliance with the Sales and Use Tax Law, even if that responsibility was delegated to others. (See *Commercial Sec. Co. v Modesto Drug Co.*, *supra*, 43 Cal.App at p. 173.) In his declaration, appellant stated that, as CFO, he would deal with the tax lien and audit by CDTFA. And ACMS entries indicate discussions between appellant and CDTFA showing that appellant had the authority to pay taxes and that he had authority to cause payments to be made to CDTFA. In September 2012, appellant stated that he wanted to make payments for filed returns. In October 2012, appellant stated that WCS is prepared to pay CDTFA, and he is hoping certain funds will satisfy a majority of the liability. In May 2013, appellant asked if CDTFA received a payment and stated that once funds are received by WCS, appellant would forward the funds to CDTFA. In November 2012, appellant asked if CDTFA has received any payments and for CDTFA to call him if payments were received. In September 2013, appellant stated that when the audit amount is settled then WCS will write CDTFA a check. These ACMS entries demonstrate appellant's authority as CFO to have the tax paid. Accordingly, appellant had the authority to pay the taxes or to cause them to be paid, pursuant to Regulation section 1702.5(b)(2)(A).

Ability to pay

WCS continued to operate its business until December 31, 2012, and reported sales and collection of sales tax reimbursement. WCS paid wages of \$424,417 during 2Q12 and 3Q12 and other operating expenses through 4Q12, including payments to third parties of \$292,560 for 1Q12 through 3Q12, and SoCal Edison totaling \$13,400 for 1Q12 through 4Q12. In addition, WCS's 2011 income tax return, its August 2012 profit and loss statement, and its bank statements from 1st Century Bank and First Republic Bank show that it had substantial funds available. Therefore, when appellant had actual knowledge that taxes were due but not being paid, he had the ability to pay the taxes but chose not to do so.

HOLDING

Appellant is personally liable under R&TC section 6829 for the unpaid tax liabilities of WCS.

DISPOSITION

CDTFA's action is sustained.

DocuSigned by:
Josh Lambert
CB1F7DA37831416...

Josh Lambert
Administrative Law Judge

We concur:

DocuSigned by:
Suzanne B. Brown
47F45ABE89E34D0...

Suzanne B. Brown
Administrative Law Judge

DocuSigned by:
Andrew Wong
8A4294817A67463...

Andrew Wong
Administrative Law Judge

Date Issued: 1/17/2023