

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

F. FALL

) OTA Case No.: 20106827
) CDTFA Case ID: 244-065
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OPINION

Representing the Parties:

For Appellant:

Michele F. L. Weiss, Attorney

For Respondent:

Courtney Daniels, Attorney
Chad Bacchus, Attorney
Jason Parker, Chief of Headquarters Operations

For Office of Tax Appeals:

Corin Saxton, Tax Counsel IV

J. ALDRICH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, F. Fall (appellant) appeals a decision¹ issued by respondent California Department of Tax and Fee Administration (CDTFA)² denying, in part, appellant’s petition for redetermination of a Notice of Determination (NOD) dated September 11, 2014. The NOD is for tax of \$284,238.78, plus applicable interest, and penalties totaling \$49,932.20,³ for the period January 1, 2009, through January 8, 2012 (liability period). The NOD reflects CDTFA’s

¹ CDTFA issued a decision on February 3, 2019, which was amended by a supplemental decision issued on April 6, 2020, and then amended by a second supplemental decision issued on September 8, 2020. OTA uses 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.

³ These penalties consist of penalties for failing to timely file a return, a negligence penalty, late payment penalties, and a penalty imposed pursuant to R&TC section 6565 for Le Faubourg LLC’s failure to pay an NOD when it became final (finality penalty). The negligence penalty of \$13,533.29 was deleted in CDTFA’s decision.

determination that appellant is personally liable as a responsible person for the unpaid sales and use tax liabilities of Le Faubourg LLC (Faubourg), doing business as (dba) Saint Amour.

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 Cerritos, California, on May 9, 2023. At the conclusion of the hearing, the record was closed, and this matter was submitted for an opinion.

ISSUES

1. Whether appellant is personally liable as a responsible person for the unpaid sales and use tax liabilities of Faubourg, dba Saint Amour, pursuant to R&TC section 6829.
2. Whether relief of the penalties asserted against Faubourg is warranted.

FACTUAL FINDINGS

1. Faubourg held a seller's permit, effective January 1, 2009, through January 8, 2012, for the restaurant Saint Amour (restaurant) in Culver City, California.
2. Faubourg filed non-remittance and partial remittance sales and use tax returns (returns) for the periods third quarter 2009 (3Q09), through 3Q11. Faubourg did not file returns for the fourth quarter of 2011 (4Q11) or 1Q12.
3. Faubourg was audited by CDTFA for the period January 1, 2009, through January 8, 2012. Faubourg reported total sales based on monthly point of sale summaries; however, upon audit, Faubourg was unable to provide complete point of sale summaries.
4. To verify taxable sales, CDTFA requested daily sales receipts and summaries for seven consecutive days (August 15, 2011, through August 21, 2011).⁴ CDTFA used this seven-day test to compute average daily sales, which CDTFA then used to extrapolate audited taxable sales of \$3,912,700 for the audit period.
5. After accounting for Faubourg's reported taxable sales of \$2,315,645 for the audit period, CDTFA established a deficiency measure for unreported taxable sales of \$1,597,055.⁵

⁴ CDTFA used sales summaries for seven consecutive days because Faubourg could not provide complete point of sale summaries because Faubourg had discarded these records.

⁵ CDTFA also established a tax liability of \$10,035 for disallowed claimed nontaxable sales of food (audit item 2) and a tax liability of \$21,271 based on Faubourg's failure to account for an increase in the sales tax rate (audit item 3). These liabilities are not at issue in this appeal.

The audit identified an additional tax liability of \$181,195, which represents an error ratio of 81 percent when compared to the \$223,401 in tax Faubourg reported for the audit period.

6. Appellant assisted in the audit, as evidenced by her signature on a waiver of the statute of limitations, and her completion of a bar fact sheet.
7. On February 22, 2012, appellant called CDTFA and informed it that the business had closed. Following the closure of Faubourg's seller's permit, CDTFA investigated appellant's potential liability under R&TC section 6829, for Faubourg's unpaid liabilities.
8. On April 27, 2012, CDTFA timely issued an NOD to Faubourg for the liability disclosed in the audit. The NOD included a negligence penalty for the first quarter 2009 (1Q09) through 3Q11 (imposed for inadequate records), and failure to file penalties for 4Q11 and 1Q12 due to Faubourg's failure to file a return for these periods. A finality penalty was subsequently imposed for Faubourg's failure to timely pay the NOD before it became final.
9. The evidence CDTFA compiled during its investigation includes the following Faubourg-related documentation bearing appellant's name, signature, title, or position:
 - a. On January 15, 2008, appellant completed a BYCO, Inc. Tenant Worksheet for Faubourg's lease that identified appellant as the owner or principal of Faubourg.
 - b. Appellant is identified as the agent for service of process for Faubourg on the Articles of Organization filed with the California Secretary of State (SOS) on October 15, 2008. The Articles of Organization indicated that Faubourg will have one manager and appellant is indicated as the organizer.
 - c. On March 25, 2009, appellant signed a registration form for the California Employment Development Department (EDD), listing herself as Faubourg's president and 50 percent owner.
 - d. Appellant is identified as Faubourg's sole manager on a Statement of Information filed with the California SOS on April 24, 2009.
 - e. Appellant is identified as the owner of Faubourg on a County of Los Angeles Public Health License/Permit (public health permit), which is signed and dated May 14, 2009.

- f. On September 30, 2010, appellant signed a statement that she and B. Commereuc (appellant's late ex-husband) were the shareholders of L'Eau a La Bouche, Inc. (La Bouche), which was the majority shareholder of Faubourg. Appellant identified herself as the manager of Faubourg.
 - g. Appellant indicated that she and B. Commereuc made the financial decisions regarding La Bouche in a signed letter dated December 9, 2010.
 - h. Appellant is identified on a Confidential Credit Application for Rocker Bros., a supplier, as the general manager or manager of Faubourg.
 - i. What appears to be appellant's signature is on checks drawn on Faubourg's account for its suppliers Di Oggi Fruit & Veggies (Di Oggi) and Universal Seafood for the periods between February 2011, through April 2011, and February 2011, through June 2011, respectively.
 - j. On July 1, 2011, appellant signed Faubourg's application for a seller's permit, which lists appellant as the sole manager of Faubourg.
 - k. Appellant electronically signed as manager on Faubourg's returns for 2Q11 and 3Q11 according to e-filing confirmations.
 - l. Appellant signed business checks to CDTFA dated July 31, 2009, December 1, 2009, December 30, 2009, and February 1, 2010.
10. CDTFA collected questionnaires from former employees of Faubourg as follows:
- a. On December 6, 2010, B. Commereuc signed a Responsible Person Questionnaire as officer of Faubourg. Thereon, he indicated that both he and appellant were responsible for or had a duty to act for the LLC in sales and use tax matters. B. Commereuc indicated that appellant was responsible for maintaining tax returns, sales records, invoices, journals, and other financial records. He also indicated that appellant was paid \$4,370 per month.
 - b. CDTFA received a completed Business Operations Questionnaire from E. Duncan, a hostess at the restaurant. E. Duncan identified appellant as the owner of the restaurant and the signer of her paycheck.
 - c. On January 29, 2014, appellant signed a completed Responsible Person Questionnaire. Appellant indicated that she was not paid for her service between

July 1, 2008 and January 8, 2012, and that B. Commereuc was responsible for sales and use tax matters.

11. The evidence CDTFA compiled also includes entries in CDTFA’s Automated Compliance Management System (ACMS).⁶ These entries memorialize discussions between appellant and CDTFA on multiple occasions between December 9, 2009, and December 12, 2011, regarding unpaid taxes, security deposits, late returns, filing returns, levies, the transfer of a liquor license, and installment payment agreements (IPA). The ACMS entries for the following conversions are as follows (paraphrased):
- a. On December 9, 2009, appellant indicated that Faubourg will send \$15,000 for 3Q09 and would like an IPA for the balance. CDTFA told appellant that the balance would be \$38,093.76 after the \$15,000 payment. CDTFA told her that Faubourg could have a two-month IPA to pay the balance, but Faubourg would need to file and pay-in-full the 4Q09 return or CDTFA would begin collection.
 - b. On January 28, 2010, CDTFA spoke with appellant. She requested an IPA. CDTFA indicated that appellant must e-file and pay-in-full Faubourg’s 4Q09 return before CDTFA would consider an IPA for the tax liability of \$29,226.11. In response, appellant stated that the 4Q09 taxes are approximately \$25,000, and she cannot pay-in-full.
 - c. On July 26, 2010, appellant and B. Commereuc discussed Faubourg’s unpaid 4Q09 and 1Q10 returns. CDTFA requested a weekly payment of \$9,900. In turn, appellant or B. Commereuc requested an IPA of \$2,000 per week. CDTFA said that Faubourg had ample gross sales for 4Q09 and 1Q10 in order to pay the tax liability. CDTFA said “to make sure the 2Q10 [return] which is due at the end of this week is filed with payment in full, [and] if not done, then [CDTFA] will put [the] account in collection.” CDTFA also indicated that CDTFA would start the collection process by suspending the liquor license.
 - d. On August 9, 2010, appellant indicated that she would bring \$2,000 payment and a copy of the 2Q10 return.

⁶ ACMS is a software program used by CDTFA to document communications between compliance staff and taxpayers or their representatives.

- e. On September 24, 2010, appellant indicated she needed to submit Faubourg’s financial documents for the IPA.
 - f. On May 26, 2011, appellant spoke with CDTFA (J. Moten). She indicated that Faubourg’s CPA would file the 1Q11 return and April 2011 return tonight, but she does not have any money to pay them. CDTFA indicated that a keeper⁷ will not be cancelled and a liquor license suspension has been requested. Appellant requested an automatic IPA of \$3,000 per week.
 - g. On October 5, 2011, appellant promised to pay \$11,139 security deposit on or before October 27, 2011. Appellant also promised to transfer the liquor license from La Bouche to Faubourg on or before October 12, 2011. Appellant was also instructed to apply for a new seller’s permit under Faubourg.
 - h. On November 16, 2011, appellant stated she was transferring the liquor license, and would come in to deliver the security deposit.
 - i. On November 30, 2011, CDTFA informed appellant that she needed to pay-in-full the 3Q11 and October 2011 liabilities. Appellant indicated that the business had slowed because of the liquor license suspension and security deposit, but she would “contact her investor for money and [put] together a plan of action.”
 - j. On December 2, 2011, appellant called to discuss an IPA. She confirmed that Faubourg collected sales tax from its customers and failed to remit those funds to CDTFA.
 - k. On December 12, 2011, appellant called asking how to remove the levy. She indicated that Faubourg had no funds to pay even though it was making sales and collecting sales tax reimbursement.
10. CDTFA determined that, during the liability period, Faubourg made payments totaling \$1,148,126.52 to employees, suppliers, and creditors during the liability period. The payments include the follows:
- a. EDD records indicate that Faubourg paid employee wages of \$34,495.14 for 2Q09, \$174,473.16 for 3Q09, \$138,470.16 for 4Q09, \$124,234.97 for 1Q10,

⁷ A keeper warrant is a type of civil warrant that is collected by a peace officer (officer). The keeper warrant typically instructs the officer to leave a representative at the place of business for a full day and to collect the proceeds of the business.

\$83,309.57 for 2Q10, and \$76,718.26 for 3Q10. The total for this period is \$631,701.26.⁸

- b. Invoices from Faubourg’s landlord between the December 26, 2008, through December 20, 2011, show monthly payments of approximately \$12,000.⁹ Each of the monthly invoices were addressed to appellant. The March 21, 2011 invoice has a handwritten note that reads “Florence, I would like to visit and see where you are and get on a better rent payment schedule. Are you available the 30th?” Several other invoices have handwritten notes requesting monthly sales reports from appellant. Also, the September 20, 2011 invoice includes the following handwritten note: “[F]lorence – please forward your monthly sales reports we have not received in a few months.” The total for this period is \$397,705.76.
 - c. Between 3Q10 to 2Q11, Faubourg made payments to Di Oggi that total \$33,916.13.
 - d. Between 4Q10 to 2Q11, Faubourg made payments to Rocker Bros. that total \$9,606.76.
 - e. Between 2Q10 to 2Q11, Faubourg made payments to Universal Seafood that total \$55,822.64.
 - f. Between 4Q11 to 1Q12, CDTFA levied \$19,373.97 from Faubourg’s bank account.
11. For the months of September and October 2010, Faubourg had deposits totaling approximately \$280,000 for both months.
 12. CDTFA obtained Merchant Card Processing Statements from Wells Fargo that show it processed the following payment amounts for Faubourg: \$97,000 for August 2010, \$90,000 for September 2010, and \$107,000 for October 2010.¹⁰
 13. On September 11, 2014, CDTFA issued the above-referenced NOD to appellant for Faubourg’s unpaid sales tax liabilities, which included Faubourg’s audited liability in

⁸ There is no EDD information in evidence after 3Q10.

⁹ During this period the base rent ranged from \$10,000.00 to \$11,119.50 with additional charges of varying amounts. Beginning in March 2010, not all payments were made timely.

¹⁰ These amounts are rounded to the closest thousand.

addition to the non-remitted amounts.¹¹ Appellant timely petitioned the NOD, and CDTFA issued a decision and two supplemental decisions recommending removal of the negligence penalty, but otherwise denying appellant's petition.

14. This timely appeal followed. During briefing, CDTFA conceded that Faubourg's unpaid tax liability for 2Q11 should be reduced by \$3,500, and the late payment penalty for this period should be reduced by \$350, which derivatively will reduce appellant's tax liability.

DISCUSSION

Issue 1: Whether appellant is personally liable for the unpaid sales and use tax liabilities of Faubourg, dba Saint Amour.

R&TC section 6829 provides, in pertinent part, that a person is personally liable for the unpaid tax, penalties, and interest owed by a limited liability company (LLC) if all the following elements are met: (1) the LLC's business has been terminated, dissolved, or abandoned; (2) the LLC collected sales tax reimbursement on its sales of tangible personal property and failed to remit such tax reimbursement to CDTFA 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 LLC in complying with the Sales and Use Tax Law; and (4) the person willfully failed to pay taxes due from the LLC or willfully failed to cause such taxes to be paid. (R&TC, § 6829(a) & (c); Cal. Code Regs., tit. 18, § 1702.5(a) & (b).) A person is regarded as having willfully failed to pay taxes, or to cause them to be paid, where she had knowledge that the taxes were not being paid; had the authority to pay the taxes, or to cause them to be paid on the date the taxes became due and when the person had knowledge; and had the ability to pay the taxes when the person had knowledge, but chose not to do so. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(A)-(C).)

CDTFA bears the burden of proving, by a preponderance, that the requirements of R&TC section 6829 have been satisfied. (Cal. Code Regs., tit. 18, § 1702.5(d).) Moreover, more than one person may be held liable under R&TC section 6829 for the same primary liability, as long as the requirements for imposing responsible person liability on each individual are satisfied.

¹¹ The deadline to timely issue the NOD pursuant to R&TC section 6829(f) was April 30, 2015; thus, the NOD was timely issued. Appellant has not contested the timeliness of the NOD; therefore, OTA does not further address it.

Appellant concedes, and the evidence shows, that Faubourg's business operations have terminated and that Faubourg collected sales tax reimbursement. Therefore, the remaining disputed elements are whether appellant was a person responsible for Faubourg's sales and use tax compliance and whether appellant willfully failed to pay, or to cause to be paid, Faubourg's sales tax liabilities. Appellant disputes that she was a responsible person and disputes that the failure to pay was willful. Appellant contends that she was: (1) dominated by her late ex-husband, B. Commereuc, who made all of the decisions for Faubourg, and (2) forced her through fear and intimidation to sign documents and otherwise be involved in sales and use tax matters. In support of her position, appellant offered her own testimony and declaration, a declaration from her son, a declaration from her mother, as well as the testimony and declaration of a close friend.

Responsible Person

A responsible person includes any person having control or supervision of, or who is charged with the responsibility for the filing of returns, or the payment of tax, or who has a duty to act for the LLC 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 LLC made the sales, collected the sales tax reimbursement, and failed to remit it to CDTFA. (R&TC, § 6829(c); Cal. Code Regs., tit. 18, § 1702.5(a).)

Appellant argues that B. Commereuc was the responsible person for Faubourg. Appellant describes B. Commereuc as an experienced chef and restaurateur. In contrast, appellant was unfamiliar with the industry. Appellant explains that before opening the restaurant, B. Commereuc was convicted of driving under the influence (DUI). Appellant explains that they were advised by their attorney to have appellant's name on the documentation in order to obtain a liquor license for the restaurant because the conviction could endanger the liquor license. Appellant explains that it was crucial for a French restaurant to be able to sell wine. Further, appellant contends that B. Commereuc was responsible for Faubourg's financial, tax, and other administrative affairs. However, appellant claims that B. Commereuc's suffered from mental illness, including alcoholism, which impacted his ability to properly administer Faubourg's tax obligations. In addition, appellant claims that B. Commereuc was reckless, threatening, and explosive in nature. Accordingly, appellant claims she signed documents out of fear of retaliation from B. Commereuc or under duress.

Appellant testified that “we were advised by the attorney at that point not have [B. Commereuc] sign anything, because he would have endangered the liquor license.” (Emphasis added.) Although appellant has not provided any legal authority to support the contention that the DUI conviction would endanger the liquor license, appellant appears to have operated under that assumption.¹² Nonetheless, the decision to use appellant’s name for Faubourg’s paperwork tends to show that appellant and B. Commereuc were exercising their joint authority to accomplish a common goal to the benefit of Faubourg.

OTA also notes that the seller’s permit application was signed by appellant on July 1, 2011. This occurred while appellant was the sole manager and a shareholder of Faubourg; after her relationship with B. Commereuc had deteriorated; after appellant had already informed B. Commereuc that she was leaving; after La Bouche had already obtained a liquor license for the restaurant; and while she was being paid \$4,370 per month. According to the ACMS entries, the July 1, 2011 seller’s permit was obtained while appellant was in the process of transferring the liquor license from La Bouche to Faubourg at CDTFA’s behest. CDTFA made the request for a new seller’s permit as part of CDTFA’s terms for approving an IPA that appellant was requesting for Faubourg’s outstanding reported, but unremitted sales tax liabilities. Further, the ACMS notes show that appellant was actively involved in negotiating IPA requests, making payments, and filing returns. Although it is clear from the declarations and the testimony that appellant’s relationship with B. Commereuc was tumultuous, the evidence shows that appellant was an active manager of Faubourg. Accordingly, OTA is unpersuaded by appellant’s position that she only signed the paperwork to ensure the liquor license process went smoothly or she was acting under duress.

With respect to signing returns, appellant stated in her testimony, and in her declaration, that she intended to leave B. Commereuc, but he suffered a heart attack on November 27, 2009, the day after she communicated her intention. Appellant testified that B. Commereuc required a year to recover from the heart attack (recovery period). During the recovery period, appellant testified that “I did [sign bills]. I don’t remember filing returns, but I did sign [them], [and]

¹² OTA notes that the conviction appears to be a misdemeanor first offense based on the charges, the order to complete a three-month DUI program, the dismissal of the second count (i.e., Vehicle Code section 23152(b)), and the probation term of three years. B. Commereuc completed probation on March 17, 2008, and Faubourg filed its articles of organization in October 2008. Thus, it is unclear what, if any, impact the conviction would impose on Faubourg.

definitely sign[ed] some checks.” There is, however, a material contradiction here because appellant also testified that she never signed returns.

Regarding the testimony of appellant’s close friend, he testified that while B. Commereuc was a well-respected chef or restaurateur, B. Commereuc fought alcoholism and had poor decision making, including “blowups.” Likewise, appellant testified that B. Commereuc was reckless. Here, there is another material contradiction between her testimony that she was acting under duress and the testimony regarding B. Commereuc’s recklessness. Appellant stated “[she would] spend my time trying to fix . . . potential issues[,]” which tends to show that appellant had control over, and was thus responsible for, Faubourg. Also, OTA gives little weight to the testimony of her close friend because of inherent bias based on the relationship between them and the lack of materiality in the testimony offered.

Regarding the Business Operations Questionnaire, appellant also testified that she did not know E. Duncan, the hostess, who identified appellant as the owner and check signer. However, this is not necessarily inconsistent with appellant’s testimony since she also testified that B. Commereuc would regularly hire or dismiss restaurant staff without her knowledge (e.g., B. Commereuc hired the restaurant’s second chef while she was on a trip).

During the liability period, the contemporaneous documentary evidence shows that appellant had broad authority for Faubourg and acted on that authority. Appellant regularly represented herself as the owner or manager to government agencies (e.g., documents filed with the California SOS, the EDD registration, the public health permit, the seller’s permit, the returns, and through telephonic conversations as documented by CDTFA’s ACMS notes). Appellant also regularly represented herself as the owner or manager to private persons (e.g., the lease documents, the credit application for Rocker Bros., the former employee E. Duncan). Appellant also had extensive involvement in Faubourg’s sales tax matters, as evidenced by the sales and use tax checks she signed, the returns she signed, her involvement in the audit, and her communications with CDTFA regarding Faubourg’s sales tax liabilities. Although appellant argues that she was only a manager in title, with no real authority over the business’s finances, her involvement in sales tax matters evidences she was responsible for Faubourg’s compliance with the Sales and Use Tax Law. Further, OTA gives substantial weight to the September 30, 2010 letter wherein appellant states that she is the manager of Faubourg and a shareholder. This letter, together with the other documentary evidence, contradict and detracts

from the reliability of appellant's declaration and testimony. Further, OTA notes that the declaration was made approximately eight years later and appellant's testimony was provided approximately thirteen years later. Given the passage of time and the material contradictions in her declaration and testimony, OTA gives more weight to the contemporaneous documentary evidence. In sum, OTA finds that CDTFA met its burden of proof to show that appellant was a responsible person during the liability period.

Willfulness

The fourth requirement is that appellant must have willfully failed to pay or to cause to be paid the liabilities at issue. The term "willfully fails to pay or to cause to be paid" means that the failure was the result of a voluntary, conscious, and intentional course of action. (R&TC, § 6829(d); Cal. Code Regs., tit. 18, § 1702.5(b)(2).) A failure to pay or to cause to be paid may be willful even though such failure was not done with a bad purpose or motive. (*Ibid.*) In order to show willfulness, CDTFA must establish all of the following: (1) on or after the date the taxes came due, appellant had actual knowledge that taxes were due, but not being paid; (2) appellant had the authority to pay the taxes or to cause them to be paid on the date the taxes became due and when she had actual knowledge that the taxes were due but not being paid; and (3) appellant had the ability to pay the taxes when she had actual knowledge that the taxes were due but not being paid, but chose not to. (Cal. Code Regs., tit. 18, § 1702.5(b)(2).)

Appellant has not made any arguments with respect to knowledge of the liabilities at issue here. However, with respect to the liabilities related to Faubourg's partial remittance and non-remittance sales and use tax returns, OTA finds that appellant's discussion of these liabilities with CDTFA, as well as appellant's signature on sales tax checks and the e-filing confirmations, demonstrates that appellant was aware of these liabilities when these taxes became due. With regard to Faubourg's liabilities for 4Q11 and January 2012, the business failed to report any taxable sales for these periods. However, appellant was actively involved in Faubourg's business; appellant was a person responsible for ensuring sales and use tax compliance; and appellant filed sales and use tax returns for previous periods. Further, the invoices from Faubourg's landlord between 2Q10, through 4Q11 are directed to appellant; and the invoices request that appellant produce monthly sales reports with the rent payment (e.g., the September 20, 2011 invoice), which also tends to support that appellant had knowledge of the

sales taxes due. Based on these facts, OTA concludes that appellant was aware that Faubourg failed to report taxable sales for 4Q11 and January 2012.

With regard to the audit liability, OTA notes that the audited tax liability of \$181,194 represents an error ratio of 81 percent when compared to the \$223,401 tax reported for the audit period. An error ratio of this size is significant, and the size of the error ratio, coupled with Faubourg's failure to maintain daily sales summaries, indicates that appellant knew of Faubourg's understatement of tax. Furthermore, given that appellant knowingly filed, or caused to be filed, partial remittance and non-remittance returns, knowingly failed to file sales tax returns for a portion of the audit period, and interacted extensively with CDTFA regarding the business's sales tax compliance, the evidence establishes that appellant was aware of the audit liability at the time those taxes became due. Consequently, OTA finds that CDTFA has established that appellant was aware of the audit liability when the sales and use tax returns for this period were filed.

The second requirement of willfulness is that the person must have had the authority to pay or to cause to be paid any taxes due from the corporation. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(B).) Appellant contends that she was not the actual manager of the business because she was not the person that made decisions regarding the restaurant and was unable to independently decide which of Faubourg's bills would be paid. Appellant asserts that B. Commereuc was the true manager because he was in charge of the restaurant's operations and was the person who made the decisions regarding how Faubourg's bills were paid. As discussed above, appellant asserts that she signed paperwork for the restaurant because B. Commereuc had a DUI on his record, and, for this reason, he demanded that appellant be listed as the manager on the seller's permit and other documents. Therefore, appellant argues that she signed documents under duress, while B. Commereuc oversaw the restaurant's business operations and administration. Appellant also asserts that CDTFA preferred to interact with her because B. Commereuc was combative and uncooperative and that she interacted with CDTFA under duress. In support of these assertions, appellant has submitted declarations from herself, her mother, her son, and a close friend who frequented the restaurant.

Here, appellant confirmed in her testimony that she and B. Commereuc had check signing authority on the Faubourg's sole checking account. Regarding checks made to Faubourg's suppliers, appellant testified that neither her signature nor B. Commereuc's signature

appear on the February 7, 2011 check to Di Oggi. Likewise, appellant testified that neither her signature nor B. Commereuc's appear on several checks to Faubourg's other suppliers, such as Universal Seafood and Rocker Bros.¹³ Ultimately, it is unclear who signed the checks appellant has identified. Nonetheless, OTA need not rely on those checks because there is substantial other documentary evidence that shows appellant regularly signed or had the authority to pay.

In addition to the checks to suppliers, appellant signed checks for Faubourg's sales tax liabilities. As the sole manager of the LLC, OTA is not aware of any other person who would have had legal authority to pay or cause the taxes to be paid to the state. While a person who is "required to obtain approval" from another person would not have the requisite control (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(B)), a person who had authority to direct payment but merely deferred to the decision of another individual has the requisite authority. Although appellant's declarations assert that B. Commereuc prevented appellant from making independent financial decisions, this assertion is not supported by any contemporaneous documentation, and it is contradicted by appellant's interactions with CDTFA and her testimony. As discussed above, OTA gives appellant's declarations and testimony less weight based on her diminished recollection or credibility. Furthermore, given that appellant told CDTFA on multiple occasions that the business used the sales tax reimbursement to pay other creditors, it appears that appellant's failure to pay the taxes at issue here was not due to B. Commereuc's influence. Therefore, OTA finds that appellant had the requisite authority.

The third requirement of willfulness is that when the responsible person had actual knowledge, the responsible person had the ability to pay the taxes but chose not to do so. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(C).) Appellant argues that Faubourg did not have funds available to pay its taxes, and in support of this argument, appellant refers to her son's declaration, in which he states that he gave appellant and her B. Commereuc money. In addition, appellant notes that thirteen of the checks submitted by CDTFA were returned for nonsufficient funds, which appellant argues is evidence of the business's financial distress.

¹³ Appellant identified the following checks to suppliers Universal Seafood or Rocker Bros.: check no. 2589 (February 7, 2011), check no. 2809 (February 22, 2011), check no. 2824 (February 22, 2011), check no. 2824 (February 22, 2011), check no. 2860 (February 28, 2011), check no. 2759 (March 11, 2011), check no. 2765 (March 11, 2011), check no. 2767 (March 15, 2011), check no. 3069 (May 13, 2011), check no. 3063 (May 10, 2011), check no. 3069 (May 13, 2011) and check no. 3084 (May 23, 2011), and check no. 3318 (May 20, 2011).

Although the returned checks and appellant's son's declaration are indicative of the business's financial difficulties, the evidence nonetheless demonstrates that Faubourg had funds available throughout the liability period, as shown by the payment of business expenses totaling \$1,148,126.52 during the liability period. Moreover, Faubourg collected sales tax reimbursement from its customers on its taxable sales, and therefore had those funds available to pay its sales tax liabilities. Hence, OTA concludes that Faubourg had funds available to pay its sales tax liabilities but instead elected to use the funds to pay other creditors. Therefore, OTA finds that appellant willfully failed to pay or to cause to be paid Faubourg's unpaid tax liabilities during the liability period.

In sum, OTA finds that appellant is personally liable for the unpaid tax liabilities of Faubourg since all of the elements required to impose R&TC section 6829 responsibility have been met.

Issue 2: Whether relief of the penalties asserted against Le Faubourg LLC are warranted.

There is no statutory or regulatory authority for relieving penalties in R&TC section 6829 determinations, but R&TC section 6592(a) provides that certain penalties may be relieved if the failure to timely file or pay was due to reasonable cause and circumstances beyond the person's control and occurred notwithstanding the exercise of ordinary care and in the absence of willful neglect. A person seeking relief of a penalty under R&TC section 6592 must submit a signed statement under penalty of perjury setting forth the facts upon which the person bases the claim for relief. (R&TC, § 6592(b).) The person subject to the penalties is the corporation or LLC. Thus, if reasonable cause is shown why Faubourg failed to timely file returns and pay taxes, then those penalties may be relieved, and, consequently, appellant's derivative liability for the penalties would also be eliminated.

Here, although appellant submitted a declaration that according to CDTFA supported the abatement of the negligence penalty, she did not submit a signed Form CDTFA-735, or similar request, to support the abatement of the other penalties. The other penalties at issue consist of failure to timely file a return, late payment penalties, and a finality penalty, which are penalties eligible for relief under R&TC section 6592(a). Appellant argues that relief of the penalties is warranted because Faubourg's failures to timely pay and file were due to reasonable cause. Specifically, appellant argues that the actions she took as manager were done under duress and that she was not responsible for the business's financial matters. However, given our finding

above that appellant was a responsible person pursuant to R&TC section 6829, this argument fails, and relief of the penalties is not warranted.

Although the foregoing is dispositive, to the extent appellant's penalty relief request is based on the argument that Faubourg faced difficult economic times, an adverse financial situation and economic downturn do not constitute reasonable cause for Faubourg's failure to timely file its returns or pay its tax liabilities, particularly given that Faubourg collected sales tax reimbursement from its customers and used those funds to pay creditors other than CDTFA. (*Appeal of Eichler*, 2022-OTA-029P; see *Ashlan Park Center LLC v. Crow* (2015) 233 Cal.App.4th 1274, 1283.) Accordingly, OTA concludes that appellant has failed to establish reasonable cause for Faubourg's failure to timely file its returns and pay its tax liabilities, and relief of the penalties is not warranted, except as otherwise conceded by CDTFA.

HOLDINGS

1. Appellant is personally liable as a responsible person under R&TC section 6829 for Faubourg’s unpaid sales and use tax liabilities.
2. Appellant is not entitled to relief of the penalties that were imposed on Faubourg and included in appellant’s liabilities under R&TC section 6829.

DISPOSITION

CDTFA’s actions in deleting the negligence penalty, reducing the tax liability for 2Q11 by \$3,500, and making a corresponding \$350 reduction to the 2Q11 late payment penalty, but otherwise denying appellant’s petition, are sustained.

DocuSigned by:

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 Josh Aldrich
 Administrative Law Judge

We concur:

DocuSigned by:

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 Andrew J. Kwee
 Administrative Law Judge

DocuSigned by:

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 Michael F. Geary
 Administrative Law Judge

Date Issued: 8/16/2023