

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No.: 220811099
N. CURRAN)	CDTFA Case ID: 03-105-496
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OPINION

Representing the Parties:

For Appellant: N. Curran

For Respondent: Sunny Paley, Attorney

For Office of Tax Appeals: Oliver Pfof, Attorney

J. ALDRICH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, N. Curran (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)¹ denying appellant’s petition for redetermination of a Notice of Determination (NOD) dated August 24, 2021. The NOD is for tax of \$19,958.41, plus applicable interest, and penalties of \$4,735.40, for the period January 1, 2017, through June 30, 2018 (liability period).² The NOD reflects CDTFA’s determination that appellant is personally liable for the unpaid sales and use tax liabilities of Bootleggers Old Town Tavern & Grill, Inc. (Bootleggers).

Appellant waived the right to an oral hearing; therefore, the Office of Tax Appeals (OTA) will decide this matter based on the written record.

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

² While the liability period is broader, the NOD is for unpaid taxes, applicable interest, and penalties for the first quarter of 2017 (1Q17), 2Q17, and 2Q18.

ISSUES

1. Whether appellant is personally liable under R&TC section 6829 for the unpaid sales and use tax liabilities of Bootleggers.
2. Whether appellant has shown reasonable cause to relieve the late payment penalties.

FACTUAL FINDINGS

1. Bootleggers was a California corporation that operated a restaurant in Auburn, California. It held a seller's permit with an effective start date of October 1, 1996.
2. In a Statement of Information filed with the California Secretary of State in May 2018, appellant was identified as a director of Bootleggers. The Statement of Information further identified appellant's nephew, T. Rowe, as the corporation's CEO and CFO, and appellant's sister, J. Rowe, as the corporation's Secretary.
3. In June 2016, CDTFA spoke with T. Rowe regarding an unrelated sales tax matter concerning Bootleggers. During that conversation, T. Rowe stated he and appellant were responsible for the financial decisions of Bootleggers.
4. In a letter addressed to appellant, dated May 31, 2017, American Express denied Bootleggers' application for a business loan.
5. On October 9, 2018, Bootleggers filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Eastern District of California. Appellant signed the bankruptcy petition as Bootleggers' director. CDTFA is listed as a creditor.
6. In the Statement of Financial Affairs addended to the bankruptcy petition, appellant, T. Rowe, and J. Rowe are each identified as having a 33 percent ownership interest in Bootleggers. The Statement of Financial Affairs also identified R. Robinson as the accountant or bookkeeper who maintained the corporation's books from February 2016 to October 2018. The Statement of Financial Affairs also shows Bootleggers reported gross revenue totaling \$1,417,910 for fiscal year ending June 30, 2017, \$1,285,213 for fiscal year ending June 30, 2018, and \$300,998 for the period July 1, 2018, through October 9, 2018.
7. CDTFA received notice on October 9, 2018, that Bootleggers had filed for bankruptcy. That same month, CDTFA spoke with Bootleggers' bankruptcy attorney, A. Asebedo,

who stated that Bootleggers closed the restaurant on October 7, 2018. CDTFA closed Bootleggers' seller's permit effective October 7, 2018.

8. Bootleggers filed non-remittance sales and use tax returns (SUTRs) for the first quarter of 2017 (1Q17), 2Q17, and 2Q18. For these quarters, CDTFA imposed a late payment penalty pursuant to R&TC section 6591 for failing to pay the tax when due. Appellant's name appears as the preparer on the 1Q17 and 2Q17 SUTRs, and R. Robinson's name appears as the preparer on the 2Q18 SUTR.³
9. On July 31, 2019, Bootleggers filed a Certificate of Dissolution with the California Secretary of State.
10. On July 11, 2017, T. Rowe signed a Responsible Person Questionnaire (questionnaire). On July 18, 2020, appellant signed a questionnaire. In their responses, both appellant and T. Rowe indicated that sales tax reimbursement was collected from the restaurant's customers, and the tax was included as a separate item on the customer's receipt. In appellant's response, she indicated that T. Rowe was responsible for Bootleggers' sales and use tax compliance, and although she was authorized to sign business checks, she was a "second signature only." In T. Rowe's response, he stated both he and appellant were responsible for Bootleggers' sales and use tax compliance, and both he and appellant were authorized to sign business checks.
11. In June 2021, CDTFA spoke with C. Franklin, the restaurant's landlord. CDTFA entered the following note into its Automated Compliance Management System (ACMS)⁴ concerning this conversation:

I asked [C. Franklin] if he remembered who he dealt with at [Bootleggers] and who made the lease/rent payments to him? He said [T. Rowe and appellant.] [Appellant] paid most of the bills and when [T. Rowe] died she took over completely then shut down. I asked if [appellant] paid him even before [T. Rowe] went into the hospital? [C. Franklin] said yes, he thinks [appellant] was part owner.

³ Appellant's name also appears as the preparer on Bootleggers' 3Q17, 4Q17, 1Q18, 3Q18, and 4Q18 SUTRs.

⁴ ACMS is a software program used by CDTFA to document communications between compliance staff and taxpayers or their representatives.

12. In June 2021, CDTFA spoke with R. Robinson. CDTFA entered the following note into ACMS concerning this conversation:

I asked [R. Robinson] what role [appellant] played in the business? She said [appellant] was an owner along with [T. Rowe.] [R. Robinson] went on to say that [appellant] made sure orders for supplies were made, worked on the website, and instructed some of the business operations. I asked if [appellant] was there actively the last two years? [R. Robinson] said yes. I let [R. Robinson] know she [is] shown as filing a return during the liability period (2Q18) and asked where she got the figures and who instructed her to file it? [R. Robinson] said it was either [appellant] or [T. Rowe] and that she was given access to QuickBooks.
13. In June 2021, CDTFA spoke with former Bootleggers employee G. Allen. CDTFA entered the following note into ACMS concerning this conversation:

[G. Allen] stated she was a waitress [at Bootleggers] from October 2010 to October 2018. I asked if the business charged sales tax to customers. She said yes and confirmed it was charged separately on the receipt. I asked if she knew who [appellant] was and if so, what role did she play in the business? She said she knew her well and that [appellant] was [T. Rowe's aunt] and operated as a manager. She was unsure if [appellant was] an owner. She went on to say [appellant] managed staff, ordered inventory from vendors and wrote payroll checks to them. I asked if [appellant] was there throughout her employment? She said yes.
14. In July 2021, CDTFA spoke with appellant on approximately four occasions. According to the ACMS notes of the conversations, appellant indicated that she mostly did payroll and made orders, and that T. Rowe was more active in the business. The ACMS notes indicate that appellant confirmed she was a partial owner, and that she was a signer on Bootleggers' bank account. Appellant stated that they hired a bookkeeper, and appellant took over completely towards the end. Appellant also indicated that the IRS had billed her and she had to refinance her house to pay the IRS bill.
15. CDTFA obtained Form 1099-K data⁵ that shows Bootleggers received payments of \$331,106 in 1Q17, \$345,755 in 2Q17, and \$124,391 in 2Q18.
16. CDTFA obtained Bootleggers' bank statements for two quarters. For 2Q17, bank statements show Bootleggers had \$299,163.68 in deposits and \$299,425.66 in payments.

⁵ Form 1099-K is an IRS form which shows amounts paid to the merchant by customers using some type of payment card (i.e., credit card or debit card) or third-party network (e.g., PayPal).

- For 3Q17, bank statement show Bootleggers had \$207,556.19 in deposits and \$207,366.30 in payments.
17. CDTFA obtained Bootleggers' California Employment Development Department (EDD) wage history, which shows that it paid \$137,604.86 in wages for 1Q17, \$163,259.47 for 2Q17, and \$129,830.66 for 2Q18.
 18. On August 23, 2021, CDTFA issued appellant a timely NOD as a responsible person under R&TC section 6829 for Bootleggers' unpaid sales tax, penalties, and interest for the period January 1, 2017, to June 30, 2018.
 19. Appellant timely filed a petition for redetermination of the NOD, disputing CDTFA's determination that she was personally liable for Bootleggers' unpaid liabilities. In a statement signed under penalty of perjury, appellant requested relief from the penalties imposed on Bootleggers pursuant to R&TC section 6591 and which were included by CDTFA in appellant's liability under R&TC section 6829.
 20. On July 8, 2022, CDTFA issued its Decision denying appellant's petition for redetermination.
 21. Appellant timely filed this appeal with OTA.

DISCUSSION

Issue 1: Whether appellant is personally liable under R&TC section 6829 for the unpaid sales and use tax liabilities of Bootleggers.

R&TC section 6829 provides, in pertinent part, that a person is personally liable for the unpaid tax, penalties, and interest owed by a corporation if all of the following elements are met: (1) the corporation's business has been terminated, dissolved, or abandoned; (2) the corporation collected sales tax reimbursement on its sales of tangible personal property and failed to remit such tax reimbursement to CDTFA; (3) the person had control or supervision of, or was charged with 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; (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); *Appeal of Farrell*, 2023-OTA-095P.) CDTFA has the burden of proving each element, and the applicable standard of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 1702.5(d); *Appeal of Eichler*,

2022-OTA-029P.) To meet the preponderance of the evidence standard, a party must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Appeal of Belcher*, 2021-OTA-284P.)

Element 1 – Termination of the Business & Element 2 – Collection of Sales Tax Reimbursement

Appellant concedes, and the evidence shows, that Bootleggers closed the restaurant on or around October 7, 2018, and the corporation itself dissolved on July 31, 2019. Thus, OTA finds that the first element is met. Appellant concedes, and the evidence shows, that Bootleggers collected sales tax reimbursement. Thus, OTA finds the second element is met.

Appellant disputes, however, CDTFA’s determination as to the third and fourth elements, namely, whether appellant was a responsible person, and whether appellant willfully failed to pay, or willfully failed to cause to be paid, Bootleggers’ sales tax liabilities.

Element 3—Responsible Person

Personal liability can be imposed only on a responsible person. (R&TC, § 6829(b).) In this context, “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 tangible personal property, collected sales tax reimbursement, and failed to remit it to CDTFA. (R&TC, § 6829(c); Cal. Code Regs., tit. 18, § 1702.5(a).)

Appellant disputes CDTFA’s determination, arguing that she was not responsible for Bootleggers’ sales and use tax compliance.

Appellant’s principal argument is that she did not prepare and file the 1Q17 and 2Q17 SUTRs despite being identified as the preparer on the returns. Specifically, appellant contends someone submitted the SUTRs under her name without her knowledge. In support of her contention, appellant points out that the SUTRs were signed using her nickname and not her full name, which she would not have done had she actually prepared and filed the SUTRs. Appellant elaborates that other forms were filled out by T. Rowe using appellant’s name without appellant’s knowledge, such as the loan application with American Express. Appellant explains that T. Rowe was experiencing personal difficulties during the years at issue which led him to

make some extremely bad decisions, and he attempted to shift some of the blame for those bad decisions to appellant without her knowledge. For this reason, appellant argues T. Rowe's statements as to appellant's alleged involvement in sales and use tax matters are not credible. Second, appellant argues she retired from Bootleggers in 2013, and that she verbally agreed with T. Rowe to "stay on" for two days a week without compensation to oversee beer and wine inventory and purchasing and to review payroll without any financial responsibility. Third, appellant argues Bootleggers employees, such as R. Robinson and G. Allen, were not privy to the financial affairs of the corporation, and therefore their statements as to appellant's involvement in sales and use tax matters are not credible. Fourth, appellant states she and her sister, J. Rowe, filed the bankruptcy petition because they were the only two surviving members of the corporation, T. Rowe having then recently passed away.

Regarding appellant's principal argument that she did not actually prepare and file the SUTRs, appellant has not provided evidence that corroborates her assertion that T. Rowe, or some other individual, prepared and filed those returns using her name without her knowledge. Likewise, appellant has not provided evidence that corroborates T. Rowe applied for a business loan in appellant's name without her knowledge, or filed other forms in such a manner. Without evidence supporting her allegation that someone appropriated her identity to file SUTRs without her knowledge, OTA is not persuaded the SUTRs for 1Q17 and 2Q17 were completed by anyone other than appellant herself. On the contrary, the available evidence (i.e., interviews with former employees, the restaurant's landlord, R. Robinson, and the questionnaires completed by T. Rowe and appellant) indicates appellant was actively managing the business during the liability period. Appellant's assertion that she retired in 2013 but stayed on to two days a week to do inventory and payroll is inconsistent with the evidence. Moreover, corporate officers and general managers are presumed to have broad implied and actual authority to do all acts customarily connected with the business, including ensuring its compliance with Sales and Use Tax Law, even if that responsibility is delegated to others. (See *Commercial Sec. Co. v. Modesto Drug Co.* (1919) 43 Cal.App. 162, 173, quoting *Stevens v. Selma Fruit Co.* (1912) 18 Cal.App. 242.) As a one-third owner and corporate director, appellant had broad implied and actual authority to do all acts customarily connected with the business, including ensuring its compliance with Sales and Use Tax Law. Not only is this authority implied by her position within the corporation, but the

available evidence also shows appellant exercised this authority (e.g., managed staff, worked with vendors, and filed Bootleggers' bankruptcy petition).

The documentation shows, by a preponderance of the evidence, that appellant had control or supervision over the filing of Bootleggers' SUTRs for 1Q17, 2Q17, and 2Q18, and is therefore a responsible person for Bootleggers' sales and use tax compliance. Accordingly, OTA finds the third element has been met.

Element 4—Willfulness

The fourth element for responsible person liability 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 reiterates the arguments she made against being a responsible person as also evidence of not having willfully failed to pay. Namely, she did not actually prepare and file the 1Q17 and 2Q17 SUTRs, she retired in 2013, and the statements made by former employees and T. Rowe about her involvement are not credible or trustworthy. Additionally, appellant contends she was an authorized user for Bootleggers' bank account as a “second signer” only.

Knowledge

Here, appellant had knowledge of the unpaid taxes during the time she was a responsible person because appellant signed and filed the 1Q17 and 2Q17 non-remittance returns. Concerning the non-remittance SUTR for 2Q18, the evidence shows that R. Robinson prepared

and filed the return at the direction of appellant or T. Rowe. Since these returns were filed without remittance of sales tax reimbursement, these actions show appellant had actual knowledge the taxes were due but not being paid. Further, Bootleggers was a small corporation with only two officers active in the business operation during the liability period, appellant and T. Rowe. Since appellant took control of the business in August 2018, appellant, more likely than not, knew the 2Q18 taxes were due but not being paid. Also, appellant filed, or caused to be filed, Bootleggers' bankruptcy petition listing CDTFA as a creditor. Based on the foregoing, OTA finds that CDTFA met its burden of proving that appellant had actual knowledge that the taxes were due but not being paid during the period 1Q17, 2Q17, and 2Q18.

Authority

During the same period, appellant was the director and one-third owner of the corporation that operated the restaurant. Appellant had the authority to pay the taxes or to cause them to be paid on the date the taxes came due. This conclusion is supported by the questionnaires and the evidence of appellant's July 2021 conversation with CDTFA. This is further supported by C. Franklin's statement; that is, appellant or T. Rowe made Bootleggers' rent payments to him. It is also supported by statements made by G. Allen. OTA finds that CDTFA met its burden of proving that appellant had the authority to pay while also having the requisite knowledge.

Ability to Pay

During the quarters at issue, Bootleggers paid \$137,604.86 in wages for 1Q17, \$163,259.47 for 2Q17, and \$129,830.66 for 2Q18. According to Bootleggers' Statement of Financial Affairs, Bootleggers had gross revenue or income as follows: \$1,417,910 for the period July 1, 2016, through June 30, 2017; \$1,285,213 for the period July 1, 2017, through June 30, 2018; and \$300,998 for the period July 1, 2017, through October 7, 2018. For 2Q17, bank statements show Bootleggers had \$299,163.68 in deposits and \$299,425.66 in payments. For 3Q17, bank statement show Bootleggers had \$207,556.19 in deposits and \$207,366.30 in payments. According to Form 1099-K data, Bootleggers received credit card or merchant services payments of \$331,106 in 1Q17, \$345,755 in 2Q17, and \$124,391 in 2Q18. Moreover, Bootleggers collected sales tax reimbursement but did not remit it for the quarters at issue, and thus Bootleggers had those funds available to pay the tax liabilities. Based on the foregoing, CDTFA has shown that appellant had the ability to pay the taxes as they became due, but elected

to pay others (e.g., wages, vendors, landlord). OTA finds that CDTFA met its burden to prove that appellant had the ability to pay the taxes.

Based on the foregoing, OTA finds that appellant is personally liable under R&TC section 6829 for the unpaid sales tax liabilities of Bootleggers for 1Q17, 2Q17, and 2Q18.

Issue 2: Whether appellant has shown reasonable cause to relieve the late payment penalties.

For the quarters at issue, Bootleggers incurred late payment penalties totaling \$4,735.40. CDTFA included these penalties in the NOD it issued to appellant.

There is no statutory or regulatory authority for relieving penalties in R&TC section 6829 determinations; however, R&TC section 6592 provides that certain penalties may be relieved if the failure to pay was due to reasonable cause and circumstances beyond the corporation's control, and occurred notwithstanding the exercise of ordinary care and in the absence of willful neglect. (R&TC, § 6592(a).) 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 on which the person bases the claim for relief. (R&TC, § 6592(b).)

The person subject to the penalties is the corporation. Thus, if reasonable cause is shown why Bootleggers failed to pay tax, then the late payment penalties against the corporation may be relieved and, consequently, appellant's derivative liability for the penalties would be relieved.


Here, appellant has submitted a signed statement under penalty of perjury setting forth the facts upon which she bases the claim for relief. (R&TC, § 6592(b).) In her request, appellant states she was not a responsible party for filing and paying the taxes. Her nephew, T. Rowe, who is deceased, was the responsible party. Appellant states she had to take over the business when T. Rowe was hospitalized and she caused the corporation to file for bankruptcy. In other words, appellant offers the same or similar arguments for relief from the penalties she provided against CDTFA's determination as to her personal liability under R&TC section 6829. This panel has already discussed these arguments and concluded that CDTFA has shown, by a preponderance of the evidence, that appellant is personally liable under R&TC section 6829. Otherwise, appellant does not provide a specific argument addressing why there is reasonable cause for Bootleggers, the corporation itself, to have failed to pay its taxes. Thus, OTA finds no basis to relieve the penalty.

HOLDINGS

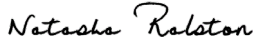
1. Appellant is personally liable under R&TC section 6829 for the unpaid sales tax liabilities of Bootleggers.
2. Appellant has not shown reasonable cause to relieve the late payment penalties.


DISPOSITION

CDTFA’s action is sustained.

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 Josh Aldrich
 Administrative Law Judge

We concur:

DocuSigned by:

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 Natasha Ralston
 Administrative Law Judge

DocuSigned by:

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 Andrew J. Kwee
 Administrative Law Judge

Date Issued: 9/18/2023