

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 230212624
S. CHERRY)	CDTFA Case ID: 2-416-463
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OPINION

Representing the Parties:

For Appellant: S. Cherry

For Respondent: Courtney Daniels, Attorney

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, S. Cherry (appellant) appeals a decision issued by the California Department of Tax and Fee Administration (respondent)¹ denying appellant’s petition for redetermination of a Notice of Determination (NOD) dated September 25, 2020.² The NOD is for tax of \$8,057, plus applicable interest, and penalties of \$2,206 for the period January 1, 2016, through September 30, 2017 (liability period).³ The NOD is based on respondent’s determination that appellant is personally liable as a person responsible for unpaid sales taxes, plus applicable interest, and penalties incurred by Bottles & Wood II, LLC (B&W) for the liability period.

¹ Sales and use taxes (and other business taxes and fees) were formerly administered by the State Board of Equalization (board). In 2017, the California Legislature transferred most of the board’s administrative (i.e., non-adjudicatory) functions to respondent effective July 1, 2017. (Gov. Code, § 15570.22.) When this Opinion refers to events that occurred before July 1, 2017, “respondent” refers to the board.

² Respondent issued a February 25, 2022 Decision denying appellant’s appeal, an August 15, 2022 Supplemental Decision affirming the denial, and a January 12, 2023 Second Supplemental Decision again affirming the denial. This Opinion uses the term “decision” to refer collectively to the Decision, the Supplemental Decision, and the Second Supplemental Decision.

³ In this Opinion, all dollar amounts are rounded to the nearest dollar, which may cause some totals to vary by insignificant amounts.

Appellant waived the right to an oral hearing, thereby submitting the matter to the Office of Tax Appeals (OTA) on the basis of the written record pursuant to California Code of Regulations, title 18, section 30209(a).

ISSUES⁴

1. Is appellant personally liable, pursuant to R&TC section 6829, for the unpaid sales and use tax liabilities of B&W?
2. Are adjustments to B&W's liability warranted?⁵

FACTUAL FINDINGS

1. B&W operated a retail store in San Diego, California, selling items made from repurposed glass and wood. Its seller permit was effective from May 1, 2014, through September 30, 2017. B&W filed its sales and use tax returns (SUTRs) annually through 2016 and quarterly thereafter.
2. A Statement of Information signed by appellant and filed with the Secretary of State on March 2, 2015, identifies appellant as the CEO of B&W. The same document identifies Z. Waxenberg as a manager or member.⁶ B&W's most recent Statement of Information, signed by accountant K. Jennings and filed with the Secretary of State on October 6, 2015, identifies appellant as CEO and manager or sole member and does not refer to Z. Waxenberg.
3. B&W filed non-remittance SUTRs for the liability period.
4. Respondent maintains computerized notes (Notes) to memorialize communication between compliance staff and taxpayers regarding collections and related matters. Several of these Notes refer to at least two instances when appellant stated that he was in

⁴ During respondent's internal appeals process, appellant requested relief of the penalties. Respondent informed appellant that appellant needed to file a statement signed under penalty of perjury setting forth facts to establish that B&W's failure to report the tax due was due to reasonable cause and circumstances beyond its control and occurred notwithstanding the exercise of ordinary care and in the absence of willful neglect. (See R&TC, § 6592(a).) Appellant did not submit the required statement, and, therefore, respondent could not consider appellant's request for relief on the penalties. Appellant has still not filed the required statement under penalty of perjury. Consequently, OTA also cannot consider the issue of penalty relief.

⁵ OTA will address this issue only if it answers Issue 1 in the affirmative.

⁶ Respondent's computerized records memorializing communications between its compliance staff and B&W, the earliest of which is dated June 20, 2016, contain no reference to communications with Z. Waxenberg during the relevant times.

- or had been to Mexico, and the B&W bank statements that are in OTA's record⁷ show multiple cash withdrawals at automatic teller machines (ATMs) in Rosarito, Mexico and San Diego, California.⁸ Those withdrawals totaled approximately \$6,850 in May 2017.
5. By letter dated August 30, 2017, appellant informed respondent it was in the process of winding down the business. According to a Note dated September 14, 2017, appellant informed respondent that the business was closing at the end of the month. On the basis of this information, respondent closed appellant's seller's permit effective September 30, 2017.
 6. At the time B&W ceased operations, its unpaid sales and use tax liabilities consisted of the following: \$8,057 in tax, which B&W self-reported on its SUTRs but did not remit to the state for 2016 and the third quarter of 2017 (3Q17); and \$2,205.70 in penalties imposed because B&W failed to timely file its SUTRs for 2016, 1Q17, and 3Q17.
 6. Appellant informed respondent in a July 28, 2020 letter that B&W charged sales tax to customers as a separate line item on the receipt or invoice.
 7. On August 3, 2020, respondent had a telephone conversation with B&W's former bookkeeper, who informed respondent that:
 - appellant alone ran the business while the bookkeeper was employed by B&W;
 - appellant granted the former bookkeeper access to B&W's QuickBooks software and authorized the former bookkeeper to file B&W's SUTRs based on the QuickBooks data;
 - QuickBooks indicated that B&W charged its customers sales tax; and
 - Only appellant had check signing authority during the relevant period.
 8. There are no Notes memorializing conversations of substance between respondent's compliance staff and any other person. Respondent's conversations with appellant were about (among other things): appellant's assurances that B&W's late returns for 2016 (annual), 1Q17, and 2Q17 would be filed; B&W's overdue returns; a possible need for B&W to file amended returns; B&W's requests for payment plans; B&W's asserted inability to make payments; and B&W's submission of financial documentation.

⁷ The statements are for May and June 2017.

⁸ These locations are less than 40 miles apart.

9. On June 7, 2017, appellant signed a power of attorney on behalf of B&W as CEO.
10. Appellant negotiated with respondent to secure installment payment agreements on behalf of B&W. The agreements covered 2015, 2016, and 1Q17.
11. According to Employment Development Department (EDD) records, B&W paid \$193,286 in wages for work performed by employees during 2016.
12. B&W's profit and loss statement for 2Q17 shows income from sales totaling \$168,092, net income from sales of \$39,764, and "other income" of \$2,235. Paid operating expenses included \$20,359 in facilities expenses (rent, utilities, etc.), \$1,535 in advertising and promotion expenses, \$4,298 in selling expenses (commissions and fees), \$3,674 for vehicle expenses, \$34,150 for payroll expenses, and \$1,208 for supplies.
13. On the basis of information learned during its investigation, respondent concluded that:
 - B&W had ceased doing business;
 - B&W collected sales tax reimbursement from its customers during the liability period;
 - appellant was a person responsible for B&W's sales and use tax compliance during the liability period; and
 - appellant willfully failed to pay, or willfully failed to cause B&W to pay, the liabilities described above.
14. On September 25, 2020, respondent issued a timely NOD to appellant based on its finding that appellant is personally liable for B&W's sales tax liabilities pursuant to R&TC section 6829.⁹
15. Appellant timely filed a petition for redetermination contesting the NOD in its entirety.
16. The parties participated in an appeals conference as part of respondent's internal appeals process.
17. Respondent denied appellant's petition for redetermination.
18. This timely appeal followed.

⁹ The NOD was timely because respondent issued it within three years of October 31, 2017, the last day of the calendar month following the quarterly period in which respondent obtained actual knowledge of the business termination. (See R&TC § 6829(f).)

DISCUSSION

Issue 1: Is appellant personally liable, pursuant to R&TC section 6829, for the unpaid sales and use tax liabilities of B&W?

R&TC section 6829 provides, in pertinent part, that a person is personally liable for the unpaid tax, penalties, and interest owed by an LLC, if all of 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 (TPP) and failed to remit such tax reimbursement to respondent when due; (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 had 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).) Respondent must prove these elements by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 1702.5(d).)

Termination

The "termination" of the business of an LLC includes discontinuance or cessation of all business activities for which the LLC was required to hold a seller's permit. (Cal. Code Regs., tit. 18, § 1702.5(b)(3).) Appellant informed respondent by email sent September 14, 2017, that the business was closing at the end of the month, and there is no dispute that B&W's business activities have ceased. Therefore, the termination requirement has been satisfied.

Collection of Sales Tax Reimbursement

As relevant here, personal liability can be imposed only to the extent the LLC collected tax reimbursement on its sales of TPP in this state. (R&TC, § 6829(c); Cal. Code Regs., tit. 18, § 1702.5(a).) Appellant informed respondent in a July 28, 2020 letter that B&W collected sales tax reimbursement. B&W's former bookkeeper informed respondent that QuickBooks showed that B&W charged customers sales tax reimbursement. Yet, in his appeal to OTA, appellant states that had respondent reviewed all invoices and bank statements to verify amounts collected, ". . . the outcome would have been substantially different."

Appellant and the former bookkeeper state that B&W collected sales tax reimbursement in connection with its retail sales. That evidence is sufficient to satisfy the sales tax collection

requirement. In this appeal, appellant had the opportunity to provide evidence to the contrary, but did not do so.

Person Responsible

Personal liability can be imposed only on a responsible person, and there may be more than one responsible person. (R&TC, § 6829(b).) In this context, “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 LLC in complying with any portion of the Sales and Use Tax Law when the taxes became due. (*Ibid.*; Cal. Code Regs., tit 18, § 1702.5(b)(1).) As relevant here, personal liability applies only if, when the person was a responsible person for the LLC, the LLC sold TPP and collected sales tax reimbursement on the selling price of the property and failed to remit such tax reimbursement when due. (Cal. Code Regs., tit. 18, § 1702.5(a).)

Although appellant does not specifically deny that he was a person responsible for B&W’s sales and use tax matters, he asserts that: he did not complete any sales and use tax documents; he signed blank forms that were completed by an incompetent bookkeeper under the direction of someone else;¹⁰ and all tax forms were prepared by professionals over whom appellant had no control.¹¹

The evidence shows that appellant was a person responsible for B&W’s sales and use tax matters during the liability period. According to the Statement of Information signed by accountant K. Jennings and filed with the Secretary of State on October 6, 2015, less than three months before the start of the liability period, appellant was the CEO and manager or sole member of B&W. There were no subsequent reported changes to those responsibilities. B&W’s former bookkeeper identified appellant as the person in charge of the business who granted the bookkeeper access to QuickBooks data and instructed the bookkeeper to rely on that data to prepare and file SUTRs. Respondent’s Notes are replete with instances of appellant’s communications with respondent’s compliance staff between June 20, 2016 and April 2, 2020.

¹⁰ Appellant does not identify the person under whose direction the returns were allegedly prepared.

¹¹ Appellant also asserts that a review of B&W’s state income tax returns would establish appellant did not have financial control or control over tax related matters; however, appellant has not provided the returns on which he relies, and it is unclear how these returns could support appellant’s position. Thus, OTA gives this argument no further consideration.

There is no evidence in OTA's record regarding any other person communicating with respondent regarding B&W's sales and use tax matters in a manner that even suggested the person had authority over such matters. On the basis of the above evidence, OTA finds that appellant was a person responsible for B&W's sales and use tax compliance. Appellant's assertions to the contrary find no support in OTA's record. Therefore, the responsible person requirement has been met.

Willfulness

The final requirement is that the evidence establishes that appellant willfully failed to pay taxes due or willfully failed to cause such taxes to be paid. In this context, "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).) A failure may be found willful even if it was not done with a bad purpose or motive. (Cal. Code Regs., tit. 18, § 1702.5(b)(2).) To show willfulness here, the evidence must establish that on or after the date that the taxes came due, appellant had *actual knowledge* that the taxes were due, but not being paid and, at the same time, appellant had the *authority* and the *ability* to pay the taxes or to cause them to be paid. (Cal. Code Regs., tit. 18, § 1702.5(b)(2).)

The first requirement for willfulness is that the responsible person has actual knowledge that the taxes were due, but not being paid. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(A); *Appeal of Eichler*, 2022-OTA-029P.) Appellant was the CEO and manager or sole member of the LLC, and the only person authorized to sign B&W checks, during the liability period. He had access to the QuickBooks database and was the one who granted access to the bookkeeper. In the evidentiary record in this appeal, the earliest documented contact between appellant and respondent's compliance staff was on June 20, 2016, when appellant was already negotiating a payment plan that called for an immediate payment of \$2,000 and monthly payments thereafter of \$2,100. That payment plan must have been for 2015 or earlier since B&W did not file its SUTR for 2016 until over a year later. B&W untimely filed its 2016 SUTR on June 23, 2017, the day after a documented telephone conversation between appellant and respondent's compliance staff during which respondent informed appellant that B&W would have to file its returns for 2016 and 1Q17 before respondent would discuss a possible payment plan.¹² Similar

¹² The 1Q17 return would have been due on April 30, 2017. (R&TC, § 6452.)

communications between appellant and respondent continued throughout the period in question. On the basis of the evidence, OTA finds that appellant had actual knowledge that B&W was not paying its taxes for the liability period.

The second requirement is that the responsible person has authority to pay the taxes or to cause them to be paid. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(B).) This authority must coincide with the first requirement, knowledge, meaning that the person must have the authority to pay the taxes known to be due. (*Ibid.*) The evidence described above shows that appellant controlled B&W during the time in question and had complete authority over day-to-day operations, including reporting and paying sales and use tax. In addition, respondent's Notes indicate that appellant was in Mexico when substantial amounts of cash was withdrawn in Mexico from the B&W accounts just a few months before appellant notified respondent that he was about to wind down and close the business. Given the evidence that shows appellant was in control of B&W's operations and finances, OTA attributes these withdrawals to appellant and considers this further persuasive evidence of appellant's complete authority to control B&W's money. OTA finds that the evidence establishes appellant's authority, at all relevant times, to pay B&W's sales and use tax liabilities or cause them to be paid.

The third requirement for willfulness is that when the responsible person had actual knowledge that taxes were due and the authority to pay the taxes, that person also had the ability to pay the taxes but chose not to do so. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(C).) Appellant argues that B&W lacked funds to pay its tax liabilities and points to B&W's default on its lease, loan, and payroll obligations. However, OTA has already found that B&W collected sales tax reimbursement on all taxable sales during the liability period. That money was available to satisfy B&W's tax obligations; but appellant, the person in charge, chose to use those funds for other things.

The evidence does not show where or on what B&W or appellant spent the sales tax reimbursement that it collected from its customers. The evidence establishes that B&W paid \$193,285 in wages for 2016. It also paid its overhead expenses, which included, for 2Q17, facilities expenses (rent, utilities, etc., totaling \$20,359), advertising and promotion expenses (\$1,535), commissions and fees (\$4,298), vehicle expenses (\$3,674), payroll expenses (\$34,150), or supplies (\$1,208), totaling \$65,224. In addition, the May 2017 and June 2017 bank statements show deposits or credits totaling \$71,127 and withdrawals or debits totaling \$75,906. The

withdrawals included cash from ATMs in Mexico totaling \$2,545, checks in even hundred amounts totaling \$4,000, and transfers to appellant totaling \$4,700.¹³

Appellant did not explain the withdrawals or debits, and he did not identify the payees on the thousands of dollars in checks drawn on B&W's account.¹⁴ Also, B&W's profit and loss statement for 2Q17 shows net income of \$41,999, and appellant has not explained why that money was not used to pay taxes. On the basis of the foregoing evidence, OTA finds that B&W had funds available to pay the tax liability during the liability period but chose to use the money for other things. Accordingly, OTA finds that the ability requirement has been met and that the evidence shows that appellant willfully failed to pay the taxes or cause them to be paid when due.

In summary, OTA finds that the evidence establishes all of the elements required for the imposition of liability on appellant as a person responsible for the unpaid liabilities of B&W under R&TC section 6829.

Issue 2: Are adjustments to B&W's liability warranted?

California imposes sales tax on a retailer's retail sales of TPP sold in this state measured by the retailer's gross receipts, unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, §§ 6012, 6051.) For the purpose of the proper administration of the Sales and Use Tax Law and to prevent the evasion of the sales tax, the law presumes that all gross receipts are subject to tax until the contrary is established. (R&TC, § 6091.) It is the retailer's responsibility to maintain complete and accurate records to support reported amounts and to make them available for examination. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).)

If respondent is not satisfied with the amount of tax reported by the taxpayer, or in the case of a failure to file a return, respondent may determine the amount required to be paid on the basis of any information which is in its possession or may come into its possession. (R&TC, §§ 6481, 6511.) When there is an appeal to OTA, respondent has a minimal, initial burden of

¹³ One of the transfers (\$2,950) was to a checking account belonging to Reclamation Sciences, Inc. According to EDD records, wages to B&W were reported under the account of that company.

¹⁴ B&W's May 2017 bank statement shows 26 checks totaling almost \$20,000, and included two checks for \$300, one check for \$400, two checks for \$1,000, and two checks for \$1,200. Its checks for June 2017 total over \$12,500 and include checks for \$700, \$1,600, \$200, and \$1,500.

showing that its determination was reasonable and rational. (*Appeal of Talavera*, 2020-OTA-022P.) Once respondent has met its initial burden, the burden of proof shifts to the taxpayer to establish that a result differing from respondent's determination is warranted. (*Ibid.*)

Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid.*)

Here, the taxes included in the disputed liability were self-assessed by B&W. There is no evidence that B&W filed amended returns. Basing a determination of tax liability on amounts the taxpayer reported as taxable is patently reasonable and rational. The burden thus shifts to appellant.


Appellant argues that respondent has failed to provide and examine source documents containing the actual amounts claimed, billed for, and collected by B&W. Appellant also asserts that a review of each and every invoice issued by B&W and a verification of amounts collected through a review of bank statements would justify a different outcome. These are unsupported assertions. Appellant has failed to provide any evidence to show that B&W had incorrectly reported taxable sales. Because appellant has failed to carry its burden of proving that B&W's SUTRs overstated taxable sales, OTA finds that adjustments to the determined liability are not warranted.

HOLDINGS


1. Appellant is personally liable, pursuant to R&TC section 6829, for the unpaid sales taxes, plus applicable interest, and penalties incurred by B&W for the liability period.
2. Adjustments to B&W’s liability are not warranted.


DISPOSITION

Respondent’s action in denying appellant’s petition for redetermination is sustained.

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 Michael F. Geary
 Administrative Law Judge

We concur:

DocuSigned by:

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 Natasha Ralston
 Administrative Law Judge

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 Teresa A. Stanley
 Administrative Law Judge

Date Issued: 2/2/2024