

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeals of: ) OTA Case Nos.: 18011923, 18011924  
**K. CHRISTIAN** ) CDTFA Case IDs: 561673, 576750  
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**OPINION**

Representing the Parties:

For Appellant: K. Christian  
For Respondent: Amanda Jacobs, Attorney  
Chad Bacchus, Attorney  
Jason Parker, Chief of Headquarters Ops.

For Office of Tax Appeals: Corin Saxton, Attorney

J. LAMBERT, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 6561, K. Christian (appellant) appeals a Decision and Recommendation (D&R) issued by respondent California Department of Tax and Fee Administration (CDTFA).<sup>1</sup> CDTFA’s D&R partially denied appellant’s administrative protest of CDTFA’s Notice of Determination (NOD) and appellant’s claim for refund for payments made towards the NOD. The NOD reflects CDTFA’s determination that appellant is personally liable for the unpaid sales tax liabilities of Eco Building Systems, Inc., doing business as Ecocrete Inc. (Eco), under R&TC section 6829. The NOD consisted of tax of \$613,041.04, plus applicable interest, and penalties of \$82,003.42, for the period October 1, 2001, through March 31, 2003.

After the issuance of the NOD, CDTFA deleted appellant’s liabilities incurred for periods other than for the second quarter of 2002 (2Q02) and 3Q02, which is April 1, 2002, through September 30, 2002 (liability period). In its D&R, CDTFA agreed to relieve interest that accrued for the periods May 1, 2011, through July 31, 2014, December 1, 2014, through

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<sup>1</sup> 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.

March 31, 2015, and November 1, 2015, through June 30, 2016. The D&R also recommended conditional relief of the amnesty interest penalties for 2Q02 and 3Q02.

Office of Tax Appeals (OTA) Administrative Law Judges Josh Lambert, Andrew J. Kwee, and Josh Aldrich held an oral hearing for this matter in Cerritos, California, on October 11, 2023. At the conclusion of the hearing, the record was closed, and this matter was submitted for decision.

### ISSUES

1. Whether appellant is personally liable under R&TC section 6829 for the unpaid tax liabilities of Eco for the liability period.
2. Whether CDTFA properly conditioned relief of the amnesty interest penalty upon either payment of the taxes within 30 days after CDTFA notifies appellant of the final action in this appeal or entering into an installment payment plan within 30 days after CDTFA notifies appellant of the final action in this appeal.

### FACTUAL FINDINGS

1. Appellant was president of Eco, a Delaware corporation.<sup>2</sup> Eco was initially based in the Bakersfield area, where it built and sold modular housing.
2. In January of 1998, Eco moved its manufacturing plant to Chula Vista and began producing factory-built school buildings. Initially, Eco supplied modular buildings to Cypress Modular (Cypress), which had contracts with various school districts to supply school buildings.
3. In 2001, Cypress withdrew from its business of manufacturing school buildings for California customers and assigned to Eco a contract with the Chula Vista Elementary School District (CVESD). All of Eco's sales of buildings were based on this contract (the CVESD/Cypress contract). The record only contains two pages of the CVESD/Cypress contract: a February 1996 cover page for "School District Construction Contract Documents," and a bid form to CVESD stating that the bid "includes all applicable taxes and costs."

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<sup>2</sup> At the hearing, appellant testified that he had his "own money in the company." Therefore, it appears that appellant had an ownership interest/was a shareholder in Eco.

4. Mr. E. Blackhall was Eco's controller and a CPA who prepared Eco's sales and use tax returns.
5. In a prior audit, CDTFA audited Eco for the period October 1, 1997, through December 31, 2000 (audit period), identifying deficiencies that are not at issue in this appeal. According to the audit workpapers, appellant represented Eco during the audit, and concurred with the audit findings. The audit workpapers state that "[s]ales tax was added to the selling price of taxable sales."
6. Available correspondence between Eco and its school district customers, corporate documents,<sup>3</sup> invoices, and purchase orders do not reference sales tax.
7. Appellant signed Eco's non-remittance returns for 2Q02 and 3Q02.
8. On the 2Q02 and 3Q02 returns, Eco reported the liability at issue in this appeal on line 23 "Remaining Tax," and the transactions at issue on line 12, "Transactions subject to state tax." The returns included a note stating "Factory built school bldgs [sic] Reg 1521" next to the claimed nontaxable transactions (\$2,303,756) for 2Q03 and "Factory built school" next to the claimed nontaxable transactions (\$5,893,593) for 3Q02. Both returns were prepared and signed by hand (i.e., pen and paper) and appellant reported \$0 in payments and prepayments for the period covered by the return. The line for a paid preparer's signature is left blank. Appellant signed the returns on the line for "Your signature."<sup>4</sup>
9. The evidence includes invoices signed by appellant and communications with CDTFA discussing the payment of liabilities and negotiating an installment payment agreement. According to entries in CDTFA's Automated Compliance Management System (ACMS)<sup>5</sup> from May 2002 to June 2002, appellant discussed Eco's tax liability with CDTFA over the phone on multiple occasions.
10. Eco terminated its business on March 31, 2003.

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<sup>3</sup> This includes balance sheets and profit and loss statements, board meeting agendas, a 2002 Cost Reduction Program, and an October 24, 2002 memo from appellant to the Board of Directors.

<sup>4</sup> The language on the return states: "I hereby certify that this return, including any accompanying schedules and statements, has been examined by me and to the best of my knowledge and belief is a true, correct and complete return."

<sup>5</sup> ACMS was a software program used by CDTFA to document communications between staff and taxpayers or their representatives.

11. In response to a CDTFA questionnaire dated June 7, 2004, Mr. R. Savona, CEO of Eco, stated that he believed sales tax reimbursement was collected from customers in most cases, but this would need to be verified with appellant and Mr. Blackhall.
12. In a June 21, 2004 letter to CDTFA, Eco's controller, Mr. Blackhall, stated that Eco "collected sales tax from its customers – California School Districts."
13. CDTFA determined that appellant was liable for Eco's unpaid sales tax liabilities under R&TC section 6829, and therefore issued the above-referenced NOD to appellant.
14. Appellant filed an untimely petition for redetermination that CDTFA accepted as an administrative protest (late protest). CDTFA subsequently deleted appellant's R&TC section 6829 liability for 4Q02 and 1Q03.
15. An October 2016 declaration executed by Eco's director of engineering, Mr. J. Starlin, states that he and other Eco employees (not including appellant) were actively involved with the contractual negotiations and pricing issues related to the governing contract used to sell modular school buildings to the various school districts, and, to the best of his knowledge, sales tax was not included within the sales price of the modular buildings nor was sales tax ever mentioned or discussed with the school district customers.
16. CDTFA issued a D&R recommending relief of interest for the periods May 2011 through July 2014, December 2014 through March 2015, and November 2015 through June 2016. The D&R also recommended relief of the amnesty interest penalties for 2Q02 and 3Q02, conditioned on appellant paying the taxes and interest arising from these periods within 30 days from the notice of redetermination, or entering into a qualifying payment plan for the same within 30 days from the notice of redetermination.<sup>6</sup> In the D&R, CDTFA found appellant is personally liable for Eco's unpaid sales tax liabilities for the liability period.
17. This timely appeal followed.

### DISCUSSION

#### Issue 1: Whether appellant is personally liable under R&TC section 6829 for the unpaid tax liabilities of Eco for the liability period.

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<sup>6</sup> The precedential Opinion of *Appeal of Pabla, et al.* (SBE Memo.) 2005 WL 2377713 states "there is no redetermination issued to the taxpayer" in response to a late protest, and the instant appeal involves a late protest. Therefore, as discussed in Issue 2, this should be 30 days after CDTFA notifies appellant of the final action in this appeal, as opposed to the issuance of a notice of redetermination.

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 of the following four 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 when due 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 (was a responsible person); and (4) the person willfully failed to pay taxes due from the corporation or willfully failed to cause such taxes to be paid (willfulness). (R&TC, § 6829(a), (c); Cal. Code Regs., tit. 18, § 1702.5(a), (b).) CDTFA must prove the elements of R&TC section 6829 by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 1702.5(d).)

The elements in dispute with regard to R&TC section 6829 are whether Eco collected sales tax reimbursement on its sales of tangible personal property, and whether appellant willfully failed to pay the liability or cause it to be paid. As to the other elements of R&TC section 6829, appellant concedes that Eco terminated its business on March 31, 2003, and that appellant was a responsible person (elements 1 and 3).

#### Element 2 - Collected Sales Tax Reimbursement

CDTFA contends that Eco collected sales tax reimbursement on its sales of tangible personal property and failed to remit such tax reimbursement to CDTFA. CDTFA notes that the bid form for the CVESD/Cypress contract states that the bid “includes all applicable taxes and costs.” Next, CDTFA notes that the audit workpapers for the period October 1, 1997, through December 31, 2000, state that “[s]ales tax was added to the selling price of taxable sales.” Lastly, CDTFA notes that Eco’s controller, Mr. Blackhall, a CPA who prepared Eco’s sales and use tax returns, stated in a June 21, 2004 letter to CDTFA that Eco “collected sales tax from its customers - California School Districts.”

In response, appellant acknowledges that there “was one sentence buried on page 15 of the contract which stated that ‘all taxes’ are included in the price”; however, appellant argues that there “was zero mention of sales tax in [the CVESD/Cypress contract].” Furthermore, appellant submitted a declaration executed by Eco’s director of engineering, Mr. Starlin, who states that he and other Eco employees (not including appellant) were actively involved with the

contractual negotiations and pricing issues related to the governing contract used to sell modular school buildings to the various school districts, and, to the best of his knowledge, sales tax was not included within the sales price of the modular buildings nor was sales tax ever mentioned or discussed with the school district customers. Additionally, appellant provides correspondence between Eco and its school district customers, corporate documents,<sup>7</sup> invoices, and purchase orders which do not reference sales tax, and appellant asserts this documentation proves that Eco did not collect sales tax reimbursement. At the hearing, appellant testified that he was unaware that Eco had a tax liability, and he further testified that it did not collect tax reimbursement from its buyers.

The bid form states that the bid amount is to include all applicable taxes and costs. Therefore, the bid form indicates it was a lump-sum contract, which means tax would be included with the sales price. (See Cal. Code Regs., tit. 18, § 1521(a)(8).) This indicates that the purchase orders and invoices would not need to separately state the tax amount, and that sales tax was included in the sales price. In addition, the audit workpapers for the period October 1, 1997, through December 31, 2000, state that “[s]ales tax was added to the selling price of taxable sales.” Although appellant asserts that sales tax is not referenced elsewhere in the CVESD/Cypress contract, appellant has not provided a copy of this contract.

Additionally, Eco’s controller, Mr. Blackhall, stated that Eco collected sales tax from its customers—California School Districts. Although appellant states that Mr. Blackhall modified this statement in a December 2016 discussion with appellant’s representative, the written statement Mr. Blackhall submitted to CDTFA approximately two years after the liability period is more reliable than appellant’s summary of a telephone conversation with Mr. Blackhall approximately 14 years following the liability period. As a CPA who was responsible for preparing Eco’s sales and use tax returns, it stands to reason that Mr. Blackhall knew whether Eco collected sales tax reimbursement. This inference is supported by a June 7, 2004 questionnaire completed by Eco’s CEO, Mr. Savona. Therein, Mr. Savona stated that he believed sales tax reimbursement was collected in most cases, but this would need to be verified

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<sup>7</sup> Appellant provided balance sheets and profit and loss statements, board meeting agendas, a 2002 Cost Reduction Program, and an October 24, 2002 memo from appellant to the Board of Directors.

with appellant and Mr. Blackhall, which corroborates Mr. Blackhall's statement and the inference that Mr. Blackhall was aware of Eco's sales tax reimbursement collection practices.<sup>8</sup>

With respect to the declaration of Mr. Starlin, OTA acknowledges that his position as director of engineering likely required a breadth of knowledge on various aspects of Eco's business, but it does not appear this was a position that necessarily entailed knowledge of Eco's sales tax reimbursement collection practices. Furthermore, it is not apparent why Eco employees such as Mr. Starlin would have participated in the CVESD/Cypress contract negotiations when appellant concedes that, because Eco assumed the CVESD/Cypress contract, Eco was "clearly not instrumental in negotiating its terms." Consequently, Mr. Blackhall's statement that Eco collected sales tax reimbursement is more convincing than Mr. Starlin's statement to the contrary.

In response to the statement in the audit workpapers that sales tax was added to the selling price of taxable sales, appellant asserts that during the audit period, which was before 2001, Eco was primarily manufacturing homes, not schools, and Eco included sales tax in the purchase price.<sup>9</sup> Appellant argues that Eco's business model changed after the audit period and Eco assumed the Cypress contract and sold school buildings directly to school districts. Therefore, appellant asserts that after 2001 Eco did not collect sales tax reimbursement on these sales because Eco believed these sales were nontaxable. However, the liability at issue consists solely of sales tax that Eco reported to CDTFA on sales that appellant reported as "taxable" on Eco's sales and use tax returns. Therefore, appellant's assertion is contradicted by the non-remittance sales and use tax returns (i.e., submitted without payment of the reported sales tax) for the liability period that appellant signed. Accordingly, such reasoning that Eco did not collect sales tax because it believed its sales to school districts were nontaxable contradicts the reporting on the sales and use tax returns.

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<sup>8</sup> CDTFA issued an R&TC section 6829 NOD to Mr. Savona for the same liabilities at issue here. However, CDTFA issued a D&R on November 14, 2015 granting Mr. Savona's petition for redetermination. The record does not contain a copy of the D&R issued for that appeal. Given that Mr. Blackhall stated that Eco collected sales tax reimbursement, Mr. Savona's statement that Mr. Blackhall was knowledgeable of such matters was an adverse statement because Mr. Savona's statement, if true, would be a concession that one of the elements for holding him personally liable for Eco's liability under 6829 liability would have been satisfied, and, as such, OTA finds it to be reliable.

<sup>9</sup> Although appellant states it was primarily engaged in the business of manufacturing homes during the audit period, the audit report states that appellant was in the business of manufacturing school buildings.

In addition, during the hearing, appellant conceded that it did collect sales tax on retail sales to customers other than school districts. There is no supporting documentation to identify the measure of reported transactions that represent sales to school districts, versus admittedly taxable retail sales to other customers. However, the returns included a note stating “Factory built school bldgs [sic] Reg 1521” next to the claimed nontaxable transactions (\$2,303,756) for 2Q03 and “Factory built school” next to the claimed nontaxable transactions (\$5,893,593) for 3Q02. In total, during 2Q02, appellant reported approximately 50 percent of its sales as taxable retail sales, and during 3Q02 appellant reported approximately 32 percent of its sales as taxable retail sales. Appellant reported the remaining transactions as nontaxable “Factory built school [buildings.]” Thus, even if OTA were to accept appellant’s contention that Eco did not collect sales tax reimbursement from school districts on sales of factory-built school buildings, there is still sufficient evidence to conclude that Eco collected sales tax on known retail sales (representing the self-assessed liabilities).

Accordingly, CDTFA has shown that Eco collected sales tax reimbursement on its sales of tangible personal property and failed to remit such tax reimbursement to CDTFA.

#### Element 4 - 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

Appellant argues that he was unaware of the liabilities and believed the sales to be nontaxable. However, appellant signed the 2Q02 and 3Q02 returns which reported taxable sales, and which were filed with CDTFA, without remitting any payment of tax. Appellant also asserts that if taxes were due, he would have assumed a remittance of tax would be included with the filed return. Appellant testified at the hearing that he was named on Eco's checking account, along with Mr. Savona and Mr. Foster, and that they did not need approval from each other to sign checks. Appellant did not authorize any payments himself and could verify any payments made from Eco's business account and determine if no payment had been made. In addition, appellant represented Eco during the audit with CDTFA. This evidence shows that appellant was aware of the liability and knew that it was not paid.

Furthermore, appellant concedes that he 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. In addition, the evidence includes invoices signed by appellant and communications with CDTFA discussing the payment of liabilities and negotiating an installment payment agreement. As a result, the evidence shows that financial matters for Eco went through appellant and that appellant had actual knowledge that Eco's 2Q02 and 3Q02 tax liabilities were due, but not being paid, on or after the date the taxes became due.

### Authority

Appellant testified at the hearing that he had check signing authority for Eco and was named on Eco's checking account, along with Mr. Savona and Ms. Foster, who worked in the accounting department of Eco, and that appellant did not need approval to sign checks.<sup>10</sup> Therefore, appellant testified that he had unrestricted and independent check signing authority. Accordingly, appellant effectively concedes that he had the authority to pay the taxes or to cause them to be paid.

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<sup>10</sup> Appellant testified that Ms. Foster had a limit of \$25,000 per check which required a second signature of either appellant or Mr. Savona, and Mr. Savona could sign checks without needing approval.

### Ability to Pay

Eco had funds available to pay the taxes, but chose to use those funds, including sales tax reimbursement collected from customers, to pay other creditors instead of remitting the taxes to CDTFA. From 4Q01 through 3Q02, Eco reported total and taxable sales of \$30,505,219 and \$9,670,850, respectively. Eco paid \$1,398,923 in wages to its employees during 2Q02, \$4,000,000 to vendors and other creditors between August 14, 2002, and November 14, 2002, and \$87,687.10 to its landlord on May 2, 2003. Eco paid out approximately \$640,000 after September 30, 2002, much of that in checks made out to “Cash.” Therefore, Eco had funds available to pay the taxes but chose to use available funds, including tax reimbursement collected from its customers, for other purposes.

Based on the foregoing, appellant is personally liable under R&TC section 6829 for Eco’s unpaid liabilities for the liability period.

Issue 2: Whether CDTFA properly conditioned relief of the amnesty interest penalty upon either payment of the taxes within 30 days after CDTFA notifies appellant of the final action in this appeal or entering into an installment payment plan within 30 days after CDTFA notifies appellant of the final action in this appeal.

Enacted on August 16, 2004, the amnesty program provided for the imposition of various increased penalties and interest for taxpayers who failed to enter into a qualifying installment payment plan or fully pay outstanding liabilities due as of January 1, 2003, by May 31, 2005. (R&TC, § 7073.) Eco did not participate in the amnesty program, and, pursuant to R&TC section 7073, CDTFA imposed amnesty interest penalties of \$20,143.84 and \$21,132.89 for 2Q02 and 3Q02, respectively. However, because the amnesty program did not even begin until years after Eco ceased business operations and all of Eco’s assets had been sold off for the benefit of secured creditors, CDTFA found that the amnesty interest penalties should be relieved due to reasonable cause pursuant to R&TC section 6592. CDTFA conditioned this relief on either payment in full of the taxes and interest arising out of amnesty-eligible periods within 30 days from the final action of this appeal or entering into a qualifying payment plan for the same within 30 days from the final action of this appeal.

Appellant argues that a more reasonable condition is 90 to 120 days after a final decision is rendered in this appeal. In *Appeal of Pabla, et al.* (SBE Memo.) 2005 WL 2377713 (*Pabla*),

the Board of Equalization (board) addressed whether it is appropriate to consider a request for relief of the penalty imposed under R&TC section 6565 for failing to pay the amount of a determination before it becomes final (finality penalty) where the decision on the request for relief under R&TC section 6592 will be issued before the tax is paid. The board concluded that it is appropriate to consider a request for relief of the finality penalty before the tax is paid, but that the penalty should not be relieved unless and until the tax due is paid within a stated period. (*Ibid.*)

As noted in *Pabla, supra*, there is no redetermination issued to the taxpayer in response to a late protest. In such circumstances, paying the tax within 30 days of the notice of a final action in this appeal places the taxpayer with a late protest on essentially the same basis as a taxpayer filing a timely petition for redetermination, on whom the finality penalty will be imposed if the determined tax is not paid within 30 days of the notice of redetermination. The instant appeal also involves a late protest. However, this appeal involves relief under R&TC section 6592 for the amnesty interest penalty under R&TC section 7073, as opposed to the finality penalty under R&TC section 6565. R&TC section 7073 provides that certain requirements must be met within 60 days after the conclusion of the tax amnesty period (March 31, 2005) to participate in the program. However, appellant did not participate in the amnesty program and that 60-day time period expired almost two decades ago.


There is no evidence that CDTFA provides to other taxpayers who filed a timely petition for redetermination anything other than 30 days from a notice of redetermination to pay the tax and interest in order to be granted relief from the amnesty interest penalty. However, in this appeal, CDTFA has granted 30 days for appellant, who filed a late protest. In its D&R, CDTFA provided for a 30-day period from the notice for redetermination, though appellant filed a late protest and would not receive a notice of redetermination. This indicates that CDTFA would grant 30 days in such circumstances for a taxpayer who did not file a late protest. Therefore, granting more than 30 days may fail to place appellant on essentially the same basis as a taxpayer filing a timely petition for redetermination. Accordingly, by analogy, the 30-day period as applicable to the finality penalty as described in *Pabla, supra*, may be applied in these circumstances so that taxpayers filing late protests and timely petitions for redetermination are placed on the same basis. Therefore, CDTFA's 30-day condition is reasonable.

HOLDINGS

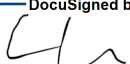
1. Appellant is personally liable under R&TC section 6829 for the unpaid liabilities of Eco for the liability period.
2. CDTFA properly conditioned relief of the amnesty interest penalty upon either payment of the taxes within 30 days after CDTFA notifies appellant of the final action in this appeal or entering into an installment payment plan within 30 days after CDTFA notifies appellant of the final action in this appeal.

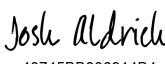
DISPOSITION

Relief of the amnesty interest penalties is conditioned upon appellant either paying the taxes and interest arising from these periods within 30 days after CDTFA notifies appellant of the final action in this appeal or entering into an installment payment plan within 30 days after CDTFA notifies appellant of the final action in this appeal. CDTFA’s actions deleting appellant’s liabilities incurred for periods other than for 2Q02 through 3Q02, and in relieving interest for the periods May 2011 through July 2014, December 2014 through March 2015, and November 2015 through June 2016, but otherwise denying the petition for redetermination and claim for refund, are sustained.

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 Josh Lambert  
 Administrative Law Judge

We concur:

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 Andrew J. Kwee  
 Administrative Law Judge

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 Josh Aldrich  
 Administrative Law Judge

Date Issued: 11/14/2023