

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
R. ACHACOSO

) OTA Case No. 230112407
) CDTFA Case ID: 3-194-046
)
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)
)

OPINION

Representing the Parties:

For Appellant: R. Achacoso
For Respondent: Vanessa Bedford, Attorney
Cary Huxsoll, Attorney
Jason Parker, Chief of Headquarters Ops.
For Office of Tax Appeals: Daniel Cho, Attorney

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, R. Achacoso (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA) denying appellant’s petition for redetermination of a Notice of Dual Determination (NOD) dated September 30, 2021. The NOD is for tax of \$23,146.53, plus applicable interest, and penalties totaling \$3,730.02¹ for the period April 1, 2019, through December 2, 2019 (liability period). The NOD reflects that CDTFA concluded that appellant is personally liable for the unpaid liabilities of Reggie & David Enterprises, LLC (R&D).

Office of Tax Appeals (OTA) Administrative Law Judges Teresa A. Stanley, Sheriene Anne Ridenour, and Suzanne B. Brown held an oral hearing for this matter in

¹ A request for relief of penalty based upon reasonable cause and circumstances beyond the taxpayer's control must be in writing, identify the penalty from which relief is sought, state the specific facts upon which the request is based, and be signed by the taxpayer requesting relief under penalty of perjury. (Cal. Code Regs., tit. 18, §35048(b)(1).) Appellant did not file a request for relief of penalties, signed under penalty of perjury. As a result, there is no basis to relieve Reggie & David Enterprises, LLC’s penalties, and this Opinion will not address the penalties any further.

Sacramento, California, on June 18, 2024. At the conclusion of the hearing, the record was closed, and this matter was submitted for an opinion.

ISSUE

Is appellant personally liable for the unpaid liabilities of R&D?

FACTUAL FINDINGS

1. R&D operated a BurgerIM franchise restaurant beginning on January 3, 2018, and terminated its business operations as of December 2, 2019. On January 6, 2020, appellant filed a Notice of Closeout with CDTFA, which he signed as a managing member of R&D.
2. CDTFA closed R&D's seller's permit with an effective closeout date of December 2, 2019.
3. With respect to the liability period, appellant electronically filed R&D's sales and use tax return for the second quarter of 2019 (2Q19) as Managing Director, reporting a tax liability of \$10,360. Appellant remitted a payment of \$800 with the return.
4. R&D did not file a sales and use tax return for 3Q19 or the period October 1, 2019, through December 2, 2019 (4Q19).² Because of R&D's failure to file these sales and use tax returns, CDTFA estimated R&D's sales tax liabilities for these periods and issued two Notices of Determination to R&D on February 16, 2021.³ R&D did not file a petition for redetermination, and the liabilities went final on March 18, 2021.
5. CDTFA found appellant to be a person responsible for R&D's liability based, in part, on the following: (1) appellant signed an Official Inspection Report by the County of Santa Clara as Owner on January 2, 2020; (2) on a California Secretary of State Statement of Information filed on June 4, 2020, appellant was listed as Manager or Member, as well as agent for service of process; (3) appellant electronically filed R&D's 2Q19 sales and use tax return as a Managing Director; (4) on a Business Operations Questionnaire dated January 3, 2020, appellant stated that he was a Managing Member with authority to sign business checks; (5) appellant discussed R&D's sales and use tax

² This incomplete quarter is referred to as 4Q for ease of reference.

³ Appellant does not dispute the estimated amounts.

liabilities with CDTFA on multiple occasions from May 30, 2019, through February 20, 2020;⁴ (6) appellant signed, as Managing Director, a Payment Plan Agreement with CDTFA on October 7, 2019; (7) appellant was listed as a majority partner of R&D on R&D's 2018 federal income tax return; and (8) appellant was listed as the primary owner on R&D's Alcoholic Beverage Control license.

6. Relevant communications between appellant and CDTFA included:
 - a. A January 3, 2020 conversation with CDTFA wherein appellant confirmed that R&D owed a tax liability for 3Q19 and 4Q19 and stated that he was aware of R&D's current outstanding tax balance of approximately \$11,200.
 - b. A February 4, 2020 conversation with CDTFA wherein appellant informed CDTFA that he would file R&D's sales and use tax returns for 3Q19 and 4Q19 and acknowledged that his failure to file those returns would result in an estimated sales tax bill from CDTFA.
 - c. Appellant informed CDTFA that he would file a delinquent 1Q19 return.
 - d. Also on February 4, 2020, appellant informed CDTFA that all the investors (LLC members) had the authority to sign checks from the business account.
 - e. Appellant signed checks payable to CDTFA and authorized CDTFA to withdraw funds from R&D's checking account.
7. CDTFA further determined that: appellant had knowledge of the unpaid liabilities; appellant had the authority to act on behalf of R&D; and R&D had funds available to pay the unpaid liabilities but did not do so. Specifically, CDTFA provided evidence that:
 - a. Appellant filed R&D's sales and use tax return for one quarter during the liability period.
 - b. Appellant signed checks on behalf of R&D.
 - c. R&D paid wages to its employees for 1Q19 through 2Q19.
 - d. R&D received credit card payments in 3Q19.
 - e. R&D collected sales tax reimbursement on the sales of tangible personal property.

⁴ These communications were recorded in CDTFA's Centralized Revenue Opportunity System (CROS). Most of the CROS comments refer to the caller as "she" or "her," and once as "Ms. Reggie." The caller verified appellant's identity using information such as his social security number, and it is reasonable to conclude that the caller had full authority, as appellant's agent, to discuss R&D's sales tax liabilities. Appellant does not disavow or claim to be unaware of these communications, and this Opinion will refer to them as communications between CDTFA and appellant.

- f. R&D issued checks to two individuals during 3Q19.
 - g. R&D's bank account statements for 3Q19 and 4Q19 show R&D had funds in its bank account.
8. Based on its investigation, CDTFA issued the September 30, 2021 NOD to appellant.
9. Appellant filed a timely petition for redetermination.
10. During the appeal with CDTFA, appellant conceded that the business terminated, sales tax reimbursement was collected on the sale of tangible personal property, and that appellant was a person responsible for sales and use tax matters. However, appellant argued he was not the only individual responsible for R&D's unpaid liabilities, and he was not willful.
11. On December 8, 2022, CDTFA issued a Decision denying appellant's petition for redetermination.
12. This timely appeal followed.
13. Appellant testified at the oral hearing that R&D was a limited liability company (LLC) managed by multiple members and that another member (Sajith) set payment priorities. Appellant also testified that the franchisor, BurgerIM, used false assurances and deceptive practices to lure franchisees, and as a result R&D suffered substantial financial losses, including appellant's life savings which resulted in a bankruptcy discharge.

DISCUSSION

R&TC section 6829 provides that a person is personally liable for the tax, penalties, and interest owed by a business entity, such as an 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; (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).) CDTFA must prove these elements by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 1702.5(d); *Appeal of Treyzon*, 2023-OTA-399P.)

Here, appellant concedes that: R&D's business terminated on December 2, 2019; R&D collected sales tax reimbursement on its sales of tangible personal property during the liability period; and appellant was one of the people responsible for R&D's sales and use tax compliance during the liability period. Therefore, the only remaining issue is whether appellant willfully failed to pay, or to cause to be paid, R&D's tax liabilities.

“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).) To establish willfulness, CDTFA must establish all 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).
- 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.

(Ibid.)

Knowledge

The first requirement for willfulness is that the responsible person had actual knowledge that the taxes were due, but not being paid. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(A).) Here, appellant filed R&D's 2Q19 sales and use tax return but did not remit the full payment with that return. In addition, appellant communicated with CDTFA on multiple occasions discussing R&D's unpaid liabilities, which included the liabilities at issue in this appeal. Specifically, in a January 3, 2020 conversation with CDTFA, appellant confirmed that R&D owed a tax liability for 3Q19 and 4Q19. In addition, appellant stated that he was aware of R&D's current outstanding tax balance of approximately \$11,200. During a February 4, 2020 conversation with CDTFA, appellant informed CDTFA that he would file R&D's sales and use tax returns for 3Q19 and 4Q19, and appellant acknowledged that his failure to file those returns would result in an estimated sales tax bill from CDTFA. Based on the foregoing, appellant had actual

knowledge that R&D's taxes were due but not paid for the liability period. Therefore, CDTFA has established this requirement.

Authority

The second requirement of willfulness is that the responsible person had the authority to pay the taxes or to cause them to be paid (i) on the date that the taxes became due and (ii) when the responsible person had actual knowledge as defined above. (Cal. Code Regs., tit 18, § 1702.5(b)(2)(B).) 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. (*Ibid.*) Here, CDTFA provided evidence that appellant filed R&D's 2Q19 sales and use tax returns. In addition, CDTFA communicated with appellant on multiple occasions regarding R&D's sales tax liabilities, and in those communications, appellant informed CDTFA that he would file R&D's 3Q19 and 4Q19 sales and use tax returns. Appellant also entered into a payment plan agreement on behalf of R&D. On February 4, 2020, appellant informed CDTFA that all the investors (LLC members) had the authority to sign checks from the business account. Finally, CDTFA provided copies of a check signed by appellant, and appellant authorized CDTFA to withdraw funds from R&D's checking account. All this evidence indicates that appellant had the authority to pay R&D's taxes.

On appeal, appellant argues that the business decisions were based on votes by the members of the LLC, and therefore appellant did not have the authority to unilaterally pay R&D's tax liabilities. In support of this argument, appellant provided R&D's Articles of Incorporation and a group text message of a meeting minutes. Appellant explains that the Articles of Incorporation demonstrate that appellant was not the only managing member of the LLC and that the group text message showed that he did not make decisions for the LLC. Appellant also asserts that the business failed and thus could not pay its debts because the franchisor defrauded R&D, which led to bankruptcy.

While the Articles of Incorporation contain a provision that authorizes the creation of a group of managers to operate the business, there is no indication that the managers were required to consult each other regarding the payment of R&D's tax liabilities. On the contrary, it appears that appellant had the authority to make these decisions without the approval of any other individual. For example, appellant filed and paid (at least partially) R&D's 2Q19 sales and use

tax return and liability and informed CDTFA that he would file a delinquent 1Q19 return. The record does not reflect that appellant had to seek approval from another manager before filing and paying these liabilities. Similarly, appellant entered into a payment plan agreement with CDTFA, and during the discussions with CDTFA, appellant did not mention that he was required to seek another individual's approval to make a payment towards R&D's sales tax liabilities. As a result, the evidence indicates that appellant did not have to seek the approval of any other individual with respect to the payment of R&D's tax liabilities.

Regarding the group text message, the message does not support appellant's assertion. The group text message appears to be a summary of what was discussed at a previous meeting, and there is no explanation or details regarding who developed the list of payment priorities, although at the hearing appellant identified that person as Sajith. Even if the list of payment priorities was created by another person, it does not show that appellant lacked authority to make a different decision or that appellant was being directed how to act. Hence, the evidence in the record demonstrates that appellant had the requisite authority to pay R&D's tax liabilities, and this group text message does not establish otherwise.

Regarding appellant's argument that all the LLC members were managing members, R&TC section 6829 allows for more than one responsible person to be found personally liable. Whether another LLC member is also a responsible person does not affect OTA's analysis of whether appellant is personally responsible for the LLC's unpaid liabilities. It is not OTA's role to determine whether a person is more or less responsible for the LLC's unpaid liabilities. Instead, the law requires OTA to determine whether, based on a preponderance of the evidence, the elements for imposing responsible person liability are met for appellant, and irrespective of whether some other person could be or was also held personally responsible for the same liabilities. (R&TC, § 6829; Cal. Code Regs., tit 18, § 1702.5(b)(1).)

Lastly, as previously discussed above, appellant was aware of the tax liabilities at the time that the taxes were due. There is no indication that appellant's authority changed at any time during the liability period or after the business terminated its operations. Therefore, OTA concludes that appellant had the authority to pay, or to cause to be paid, R&D's tax liabilities when the taxes became due and when appellant was aware of the tax liabilities.

Ability to Pay

The third requirement is that when the individual had actual knowledge, the individual had the ability to pay the taxes but chose not to do so. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(C).) Here, CDTFA provided the following evidence: (1) R&D collected sales tax reimbursement on the sales of tangible personal property; (2) R&D issued checks to two individuals during 3Q19; (3) R&D paid wages to its employees for 1Q19 through 2Q19; (4) R&D's bank account statements for 3Q19 and 4Q19 show R&D had funds in its bank account; and (5) a summary of credit card payments shows payments that R&D received for 3Q19. All this evidence establishes that R&D had funds available to pay the taxes.

On appeal, appellant contends that R&D did not have the ability to pay the liability because the business suffered substantial financial losses due to false assurances by the franchisor. Appellant asserts that R&D was not profitable, and the funds were used for other purposes based on priorities set by another LLC member. In support of this argument, appellant provided some news articles that discussed the nature of the business and how a U.S. senator requested that the franchisor be investigated for fraud. Appellant also argues that CDTFA's evidence did not account for the withdrawals from the bank account that were used to pay the business's debts.

Appellant's arguments fail to recognize the nature of R&TC section 6829 liability, which is that the business collected tax reimbursement that it failed to remit. Appellant concedes that the business collected tax reimbursement on the sale of tangible personal property, and CDTFA provides R&D's sales and use tax returns that establish that the business made sales, which would mean that R&D had collected the sales tax reimbursement for such sales. These funds were collected to satisfy the sales tax on sales of tangible personal property and should have been remitted with R&D's sales and use tax returns, but appellant failed to remit the collected sales tax reimbursement. Furthermore, R&D's bank statements and R&D's payments to other individuals and entities also establish that R&D had the ability to pay the tax liability. R&D's decision to use these funds for any other purpose (regardless of the reason) does not change the fact that the funds were available. As a result, appellant's arguments pertaining to the business's profitability and the withdrawal of funds, including the collected sales tax reimbursement, to pay off other debts do not establish that the business did not have the available funds. Therefore, this last requirement of willfulness was established.

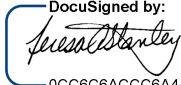
Based on the foregoing, OTA concludes that CDTFA has established all of the elements of R&TC section 6829. Appellant’s final argument is that he declared bankruptcy and was discharged of this debt. However, OTA does not have jurisdiction to determine whether a liability has been or should have been discharged in bankruptcy. (Cal. Code Regs., tit. 18, § 30104(k).) Therefore, this argument does not have any bearing on this appeal, and appellant is liable for the unpaid liabilities of R&D pursuant to R&TC section 6829.⁵

HOLDING

Appellant is personally liable for the unpaid liabilities of R&D.

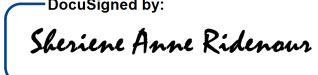
DISPOSITION

CDTFA’s action is sustained in full.

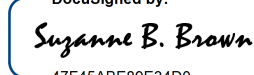
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 Teresa A. Stanley
 Administrative Law Judge

We concur:

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 Sheriene Anne Ridenour
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 Suzanne B. Brown
 Administrative Law Judge

Date Issued: 8/8/2024

⁵ To the extent that appellant argues his own financial hardship should affect the outcome of this appeal, financial hardship is not part of the legal analysis here. While OTA sympathizes with appellant, there is no legal authority for OTA to grant relief on that basis. OTA notes that once this appeal is final, appellant may avail himself of any options CDTFA may make available to taxpayers suffering financial hardship. (See, e.g., <https://www.cdtfa.ca.gov/services/trouble-paying-taxes.htm>.)