OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 221211996
	CDTFA Case ID: 107-044
S. SULTANA	

OPINION

Representing the Parties:

For Appellant: Mitchell Stradford, Representative

For Respondent: Vanessa Bedford, Attorney

For Office of Tax Appeals: Corin Saxton, Attorney

K. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6901, S. Sultana (appellant) appeals a decision issued by the California Department of Tax and Fee Administration (respondent)[1] denying appellant's claim for refund for payments made towards a Notice of Determination (NOD) issued on July 12, 2013. The NOD reflects respondent's determination that appellant is personally liable as a responsible person for unpaid taxes of $127,262.32, plus applicable interest, and penalties totaling $42,134.80 that Sultana & Sultana, Inc. (S&S) accrued during the period January 1, 2005, through May 31, 2010 (liability period).[2]

[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 respondent. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to events that occurred before July 1, 2017, "respondent" shall refer to the board.

[2] S&S's liabilities originate from tax, interest, and penalties including: an audit liability for the period January 1, 2005, through June 30, 2008; a liability for the period April 1, 2005, through December 31, 2005; penalties and interest resulting from self-assessed liabilities for the first quarter of 2008 (1Q08), 4Q08, 2Q09, 3Q09, and 4Q09; penalties resulting from the business's failure to make required prepayments of tax for October 2005, November 2005, and November 2008; and penalties and interest resulting from a compliance assessment (an assessment completed without the performance of an audit) for 1Q10. As discussed in greater detail below, appellant disputes that she may be held personally liable for the business's unpaid penalties and interest from periods where the business paid the tax liability prior to its termination but failed to pay the associated penalties and interest.

Appellant waived the right to an oral hearing; therefore, the matter was submitted to the Office of Tax Appeals (OTA) on the written record pursuant to California Code of Regulations, title 18, (Regulation) section 30209(a).

ISSUES

1. Whether appellant is personally liable under R&TC section 6829 for the unpaid liabilities of S&S.
2. Whether adjustments are warranted to the audit liability for the period January 1, 2005, through June 30, 2008 (audit period).

FACTUAL FINDINGS

1. S&S, a California corporation, operated a Shell Oil Products US (Shell) gas station franchise location and mini mart in Pico Rivera, California. S&S sold three grades of gasoline (i.e., regular, midgrade, and premium grade), but not diesel, and sold both taxable and nontaxable products in its mini-mart. As relevant here, appellant was one of two shareholders and owned 81 percent of the business. On or about February 2, 2004, appellant signed a seller's permit application identifying herself as S&S's President. Respondent issued a seller's permit to S&S effective March 11, 2004.
2. S&S did not file Sales and Use Tax Prepayment forms for October 2005 and November 2005. Therefore, respondent imposed failure-to-prepay penalties of $166.89 for October 2005 and $166.89 for November 2005. Respondent included these penalties in appellant's derivative liability. Respondent subsequently deleted the failure-to-prepay penalties for these months.
3. On December 18, 2007, respondent issued to S&S an NOD for $147,114 in tax and applicable interest for the period April 1, 2005, through December 31, 2005. The NOD was based on respondent's determination that the business claimed an incorrect prepaid sales tax rate on its returns for the second quarter of 2005 (2Q05) through 4Q05. Respondent subsequently imposed a penalty of $12,563.10 on S&S for the failure to pay the NOD before it became final (finality penalty).[3] Thereafter, S&S filed amended returns for 3Q05 and 4Q05, which reduced the tax liability by $23,463. According to respondent's Appeals Bureau Decision, S&S made payments of $43,227.68 toward the

[3] Appellant asserts that the tax balance was paid in full prior to the business's termination.

liability. Additionally, respondent received from Shell a payment effective April 26, 2010, which satisfied the tax liability for this period. As a result, only accrued interest and penalties remain for this period.[4]

4. On May 29, 2008, respondent began an audit of S&S for the audit period.[5] S&S did not provide a complete set of books and records. Instead, S&S provided sales tax work sheets and purchase invoices for the audit period. S&S also could not explain how its sales and use tax returns were prepared.

5. Respondent compared the taxable gasoline sales that S&S recorded in its sales tax worksheets to S&S's gasoline purchase invoices for the periods 1Q05, 2006, and 3Q07, through 2Q08 to compute a gasoline book markup of 5.33 percent.[6]

6. S&S did not provide historical sales price data for the audit. As a result, respondent performed a site visit and observed S&S's fuel sales prices on Monday, April 7, 2008, and Monday, April 21, 2008. Respondent compared the observed selling prices to the average per-gallon retail selling price in the Los Angeles area on the observation days, as published by the Energy Information Administration (EIA) of the U.S. Department of Energy.[7] After accounting for the percentage of S&S's gasoline sales that each grade comprised (the sales ratio),[8] respondent calculated a weighted price differential of 2.92 percent. Respondent applied the weighted price differential to EIA average quarterly per-gallon retail selling prices of gasoline (weighted to account for the sales ratio of each grade), to estimate S&S's weighted selling price of gasoline.

[4] The audit methodology associated with the December 18, 2007 NOD is not in dispute. Therefore, OTA does not discuss it further. However, appellant argues that S&S paid the liability prior to the business's termination. Appellant also disputes that she may be held liable for the interest and penalties associated with this NOD.

[5] Although the audit period overlaps with the period included in respondent's December 18, 2007 NOD, the taxable measure is not related.

[6] The gasoline book markup of 5.33 percent included a markup percentage of 7.54 percent for January 1, 2005, through March 31, 2005; a markup percentage of 3.89 percent for January 1, 2006, through December 31, 2006; a markup percentage of 7.83 percent for July 1, 2007, through December 31, 2007, and 6.29 percent for January 1, 2008, through June 30, 2008.

[7] The EIA surveys gasoline stations in various areas one day each week (typically a Monday) and computes an average selling price for that day.

[8] The audit workpapers indicate a 75 percent sales rate for regular gasoline, 10 percent sales rate for mid-grade, and 15 percent sales rate for premium.

7. Respondent scheduled the fuel purchases reported by S&S's vendors to establish audited gasoline purchases. Respondent multiplied appellant's gasoline purchases by the audited average gasoline selling prices, excluding sales tax reimbursement, to establish audited taxable sales of gasoline of $16,357,370. When compared to the taxable sales recorded on appellant's sales tax worksheet, appellant's audited taxable sales of gasoline revealed unreported taxable sales of $294,018.[9]
8. On December 5, 2008, respondent issued to S&S an NOD for the audit period. S&S did not appeal the NOD.
9. On May 24, 2010, respondent closed S&S's seller's permit effective March 31, 2010. According to notes recorded in respondent's Automated Compliance Management System (ACMS), S&S's approximate closure date was confirmed in a conversation with a neighboring business's employee on May 24, 2010. Respondent also received information from Shell on May 13, 2010, that S&S was no longer a dealer and that the business terminated. Additionally, respondent received information that the Franchise Tax Board (FTB) suspended S&S's corporate status effective December 1, 2009.
10. On June 22, 2010, respondent issued a Notice of Levy to Shell. Shell made a payment, which was applied to S&S's liability.
11. On July 12, 2010, respondent issued to S&S an NOD for 1Q10. The NOD was based on a compliance assessment for $23,293 tax, plus applicable interest, and a failure-to-file penalty of $2,329.40.
12. On July 14, 2010, respondent issued a Demand Notice to S&S for payment of its non-remittance return, including $23,546 tax, plus applicable interest, and a failure to file penalty of $2,354.60.
13. After an investigation, respondent found appellant personally liable for the unpaid sales tax liabilities of S&S. During the investigation, respondent determined that S&S collected sales tax on the selling price of tangible personal property based on the following:

[9] Respondent also found unreported gasoline sales based on a comparison of amounts recorded in S&S's sales worksheets to amounts reported in S&S's sales and use tax returns, and unreported mini-mart sales based on a markup test. These audit items are not in dispute and OTA does not discuss them further.

a. Schedule G of S&S's sales and use tax returns revealed sales tax payments during the period 1Q08 through 3Q09;
b. A copy of respondent's Form 1296, Account Update Information, which was completed by respondent's auditor indicates that sales tax reimbursement was collected;[10]
c. S&S's sales invoices separately state sales tax reimbursement amounts collected.

14. Regarding whether appellant was a responsible person for S&S's sales and use tax matters, respondent found the following:
a. Documents obtained from the California Secretary of State's (SOS) office state that appellant was CEO, Director, and President of S&S;
b. Appellant was identified as president and owner during the audit of S&S;
c. A Business Operations Questionnaire completed by employee S. Qudoos identify appellant as the person that signed business checks;
d. Appellant signed forms filed with respondent including Requests for Relief from Penalty on April 14, 2006, and May 31, 2006, and an Authorization Agreement for Electronic Funds Transfer on November 29, 2007, as owner and President;
e. Appellant signed escrow documents on April 4, 2008, and February 16, 2009;
f. Documents obtained from the City of Los Angeles Business License Office identify appellant as S&S's President and owner;
g. Information obtained from the Employee Development Department (EDD) identify appellant as a corporate officer;
h. Shell issued a notice of termination letter to appellant on January 29, 2010, and appellant signed a mutual termination agreement with Shell as president;
i. Respondent memorialized conversations with appellant in ACMS discussing S&S's unpaid liabilities, proposed installment payment agreements, and promises to file amended returns; and

[10] On the Account Update Information form, respondent indicates "Gas pump state tax included."

j. Appellant signed checks issued to the State Board of Equalization on June 23, 2006, June 30, 2006, October 31, 2006; April 30, 2007, and July 30, 2007.

15. Respondent also found that appellant had knowledge and authority to pay or to cause to be paid S&S's unpaid tax liabilities based on her position as one of two corporate officers, including appellant's role as President, CEO, and Director, and appellant's involvement in S&S's sales and use tax matters.

16. Respondent determined that S&S had the ability to pay the liabilities at issue because it made payments to creditors during the liability period. Respondent relied on the following: gross sales reported on S&S's sales and use tax returns for the period 3Q05 through 4Q09; wages reported to EDD as paid for the period 1Q06 through 4Q08; payments made to Shell during the period 2Q05 through 1Q10; income and expenses reported to FTB on S&S's corporate income tax return; and deposits and withdrawals recorded on appellant's monthly corporate checking account bank statements for the period 3Q06 through 2Q09.

17. On July 12, 2013, respondent issued an NOD to appellant for $127,262.32, plus applicable interest, and penalties totaling $42,134.80. In addition to the liabilities discussed above, the NOD included: a penalty and interest stemming from a self-assessed liability for 1Q08; a penalty and interest stemming from self-assessed liability for 4Q08; a penalty stemming from self-assessed liability for November 2008; a penalty and interest stemming from a self-assessed liability for 2Q09; and a penalty and interest stemming from a self-assessed liability for 3Q09.[11]

18. Appellant filed a petition for redetermination protesting the NOD. Respondent issued a decision recommending that the failure-to-prepay penalties of $166.89 for October 2005 and $166.89 for November 2005 be deleted, but otherwise denying the petition. Thereafter, respondent issued an October 5, 2017 Notice of Redetermination reflecting tax due of $120,016, plus applicable interest.

[11] The tax liabilities for these periods have been satisfied, but penalties and interest remain. Appellant asserts that the penalties and interest for these periods were improperly included in the R&TC section 6829 NOD because the tax liabilities were allegedly satisfied before the business terminated.

19. Appellant made payments during the period October 5, 2017, through February 13, 2018, reducing the outstanding liability to $112,391.24.
20. Respondent issued to appellant a February 21, 2018 Notice of Collection Fee imposing a collection cost recovery fee in the amount of $950 pursuant to R&TC section 6833(a) because of appellant's failure to pay (or to timely enter into an installment payment plan to pay) the liability asserted against her in the October 5, 2017 Notice of Redetermination.
21. On February 26, 2018, appellant made a payment of $113,341.24, satisfying the remaining balance. Appellant filed a timely claim for refund for this payment, which respondent denied.
22. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellant is personally liable under R&TC section 6829 for the unpaid liabilities of S&S.

R&TC section 6829 provides, in pertinent part, that a person is personally liable for the unpaid taxes and interest and penalties on those taxes 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 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 corporation in complying with the Sales and Use Tax Law; and (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).)

As a preliminary matter, appellant argues that she cannot be held liable for penalties and interest from periods where S&S paid the tax liability prior to termination but did not pay the penalties and interest. This argument pertains to penalties and interest stemming from the

following liabilities: the audit liability for the period January 1, 2005, through June 30, 2008;[12] the liability for the period April 1, 2005, through December 31, 2005; and self-assessed liabilities for 1Q08, 4Q08, 2Q09, and 3Q09. Appellant asserts that liability under R&TC section 6829 extends to "unpaid taxes and interest and penalties on those taxes" and appellant argues that the inclusion of the phrase "on those taxes" means that a person may only be held liable for interest and penalties on taxes that remain unpaid at the termination of the business.

Here, the penalties and interest at issue are the result of S&S's failure to timely pay its tax liabilities. There is nothing in the Sales and Use Tax Law that provides penalty or interest relief if a corporation merely pays its tax liability. This is true even if the corporation terminates its business after paying the tax. As such, S&S remained liable for penalties and interest on its unpaid tax even after the business terminated. Because S&S had outstanding liabilities in the form of penalties and interest on unpaid taxes, appellant may be held personally responsible for those penalties and interest if the other requirements of R&TC section 6829 are met. In other words, there is nothing in the law that precludes CDTFA from imposing on appellant penalties and interest that arise from S&S's derivative liability, even if S&S paid the tax portion of the liability prior to termination.

Further, a person held liable under R&TC section 6829 may challenge the liability on its merits, including the imposition of penalties. (See *Appeal of Farrell*, 2023-OTA-095P.) A taxpayer may also request interest relief under certain circumstances. (See R&TC, §6593.5) The implication of allowing such a challenge is that the penalties and interest may be included in the responsible person's liability.[13] Appellant has not provided any evidence indicating that the Legislature intended otherwise. Accordingly, OTA finds that appellant may be held personally liable for penalties and interest for periods when S&S paid the tax liability prior to termination.

Next, OTA turns its attention to whether the elements of R&TC section 6829 are met. Here, the only item in dispute is whether respondent has proven that appellant willfully failed to

[12] There is no dispute that this liability was satisfied from funds paid by Shell to respondent. However, appellant asserts that respondent erroneously credited the payment on April 26, 2010, which is after the business terminated its business. Appellant asserts that the payment should have been credited on January 22, 2010, the date that respondent issued a levy notice to Shell, which triggered the payment. OTA notes that January 22, 2010, is prior to the date that S&S terminated its business. However, as discussed above, appellant is liable for S&S's unpaid penalties and interest regardless of whether the tax liability was paid before or after the corporation terminated, if the elements of R&TC section 6829 are met.

[13] On appeal, appellant has not disputed the imposition of penalties or requested interest relief, other than as discussed above. Accordingly, the imposition of penalties and interest is not discussed further.

pay or to cause to be paid S&S's tax liabilities for 4Q09 and 1Q10. The other elements including the termination of the business, whether the business collected sales tax reimbursement on its taxable sales, and whether appellant was a person responsible for the business's sales and use tax matters are not in dispute. Additionally, whether appellant willfully failed to pay or to cause to be paid S&S's sales and use tax liabilities for the period 1Q05 through 3Q09 are not in dispute. Nevertheless, OTA briefly considers whether respondent met its burden of proof with respect to each element.

Element 1 – Termination

The "termination" of the business of a corporation includes discontinuance or cessation of all business activities for which the corporation was required to hold a seller's permit. (Cal. Code Regs., tit. 18, § 1702.5(b)(3).) As discussed, there is no dispute, that S&S's seller's permit was closed effective March 31, 2010, and that the corporation had terminated its business on or before this date. In addition, the evidence shows that S&S discontinued business activities on or about this date. This evidence includes the following: information obtained by respondent from Shell that S&S was no longer a vendor; information obtained from FTB that the business terminated; and information from a neighboring business's employee that the business terminated. As such, OTA finds that this requirement for holding appellant liable pursuant to R&TC section 6829 has been met.

Element 2 – Sales Tax Reimbursement Collected

As relevant here, personal liability can be imposed only to the extent the corporation collected tax reimbursement on its sales of tangible personal property in this state but failed to remit the tax to respondent when due. (R&TC, § 6829(c); Cal. Code Regs., tit. 18, § 1702.5(a).)

Appellant does not dispute that S&S collected sales tax reimbursement on its sales of tangible personal property. Additionally, respondent provided evidence in the form of sales receipts, which separately state charges for sales tax. Respondent also documented that S&S posted signs stating that sales tax was included in the price of gasoline. Thus, OTA finds that this requirement for holding appellant liable pursuant to R&TC section 6829 has been met.

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 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 corporation 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)(a).) As relevant here, personal liability applies only if, when the person was a responsible person for the LLC, the LLC sold tangible personal property 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).)

Here, appellant concedes that she was a responsible person throughout the liability period. In addition, the evidence establishes that appellant was president and CEO of S&S. CEOs are presumed to have broad implied and actual authority to do all acts customarily connected with the business. (See *Commercial Security Co. v. Modesto Drug Co.* (1919) 43 Cal.App.162 173-174.) Further, appellant spoke with respondent regularly regarding S&S's sales and use tax matters and made payments of tax. Thus, OTA finds that the preponderance of the evidence establishes that appellant was a responsible person throughout the liability period; and this requirement has been met.

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 Regs., tit. 18, § 1702.5(b)(2).) To show willfulness, respondent 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).[14] A responsible person who was required to obtain approval from another person prior to paying the taxes at issue and was unable

[14] Appellant does not dispute that she was aware of the liabilities.

> 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.[15]

(Cal. Code Regs., tit. 18, § 1702.5(b)(2).) In summary, for the fourth element, respondent must establish knowledge, authority, and ability to pay.

On appeal, appellant argues that respondent has not met its burden of proving willfulness. Appellant concedes that she had authority to pay or to cause to be paid the business's liabilities. However, appellant argues that respondent has not proven that appellant had actual knowledge of the business's liabilities for 4Q09 and 1Q10. Appellant argues that the language of Regulation 1702.5 intentionally uses the term "actual knowledge" instead of "constructive knowledge." Relying on *Intel Corp. Investment Policy Committee v. Sulyma* (*Sulyma*), 140 S.CT. 768, appellant asserts that respondent is required by Regulation 1702.5 to show "actual knowledge," which appellant interprets to mean that respondent "must establish that [a]ppellant in fact became aware of the unpaid taxes …. not merely that she should have or could have known."

Appellant contends that the earliest date that she could have attained actual knowledge of the business's tax liability for 4Q09 is July 14, 2010, the date that S&S filed a return. For 1Q10, appellant also asserts that the earliest date that she could have obtained attained actual knowledge is July 12, 2010, the date that respondent issued to S&S a compliance assessment. Appellant also asserts that respondent has not proven that S&S had the funds available to pay the liabilities on either of the aforementioned dates. OTA considers the elements of knowledge and ability to pay in turn.

Knowledge

Here, the first sub-element of 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); *Appeal of Eichler*, 2022-OTA-029P.) The term "actual knowledge," means "real knowledge as distinguished from presumed knowledge or knowledge imputed to one."

[15] Appellant does not dispute that the business had the ability to pay the taxes but chose to pay other creditors instead.

(*Sulyma* at 776.)[16] In *Sulyma*, the Court noted that the term "actual knowledge" is distinguished from constructive knowledge by the word "actual." (*Ibid.*) Nevertheless, actual knowledge may be proven through inference from circumstantial evidence. (*Id.* at 779.)

During the liability period, appellant was president and CEO of S&S. Appellant owned 81 percent of S&S's corporate shares and was one of two shareholders. Respondent's records indicate that it regularly discussed S&S's failure to timely pay its tax liabilities with appellant as early as January 10, 2005. Indeed, respondent documented numerous conversations with appellant regarding unpaid liabilities. For example, ACMS records indicate that: on April 14, 2006, appellant went to one of respondent's district offices and discussed errors in S&S's sales and use tax returns; on June 1, 2006, respondent met with appellant and discussed unpaid liabilities for 3Q04, 1Q05, 4Q05, and January 2006; on April 2, 2008, respondent informed appellant of impending collection actions; and on May 28, 2008, appellant discussed the sale of the business pending audit results. Additionally, respondent's ACMS records indicate that appellant met with respondent on June 15, 2009, regarding S&S's liabilities for the period 1Q05, through 2Q08. On July 8, 2009, appellant contacted respondent regarding a payment plan for S&S. These conversations establish that appellant had actual knowledge of S&S's repeated failure to timely pay its liabilities.

With respect to 4Q09 and 1Q10, OTA finds no direct evidence that appellant had actual knowledge of S&S's tax liabilities or that S&S failed to pay its liabilities when due. However, actual knowledge may be proven through inference from circumstantial evidence. (*Sulyma*, *supra*.) Here, OTA finds no evidence that appellant's role within S&S changed during 4Q09 and 1Q10. In other words, appellant remained President and CEO of the business, as well as the majority shareholder (one of two), retaining 81 percent of the business in 4Q09 and 1Q10. The available evidence shows that appellant was aware of S&S's repeated, patterned, failure to pay liabilities when due for all periods prior to 4Q09. Appellant was also extensively involved in S&S's sales and use tax matters, including audit matters, throughout the liability period. Considering the foregoing, OTA finds that it is more likely than not that appellant had actual

[16] In *Sulyma*, the Court considered a statute of limitations question under the Employee Retirement Income Security Act of 1974 (ERISA). In certain contexts, ERISA requires "actual knowledge," without providing a definition for the term. Similarly, Regulation 1702.5 requires actual knowledge that the taxes were due but not being paid for the purpose of holding an individual personally responsible under R&TC section 6829.

knowledge that the business failed to file sales and use tax returns and pay its tax liabilities for 4Q09 and 1Q10 on the filing dates when they became due.

Authority

The second sub-element is that the responsible person had 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. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(B).) Appellant concedes this sub-element and appellant's role within the corporation as its president and an authorized check signer are sufficient to substantiate a finding of authority.

Ability to Pay

The third sub-element is that when the responsible person had actual knowledge, the responsible person had the ability to pay the taxes but chose not to do so. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(C).) Appellant does not dispute that S&S had the ability to pay the taxes at the time they became due; instead, appellant argues that she was not aware of the liabilities for 4Q09 and 1Q10 until July 14, 2010, and July 12, 2010, respectively, at which points the business lacked the ability to pay the taxes due for these two quarters. However, as discussed above, OTA finds that appellant was aware that the 4Q09 return was filed without remittance and that no return was filed for 1Q10. Additionally, the record shows that S&S made payments to Shell, received gasoline, made sales of gasoline, and otherwise continued to operate during 4Q09 and 1Q10. Specifically, the available evidence shows that appellant made payments to Shell totaling $265,310.97 in 4Q09 and $347,642 during 1Q10. Thus, appellant had the ability to pay the taxes at issue when the taxes were due but chose to pay other creditors instead.

In summary, OTA finds that respondent has proven that all of the requirements of R&TC section 6829 have been met and that appellant is personally liable for the amounts at issue.

Issue 2: Whether adjustments are warranted to the audit liability for the period January 1, 2005, through June 30, 2008.

California imposes sales tax on a retailer's retail sales of tangible personal property 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.) In the case of an appeal, respondent has a minimal, initial burden of 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*.)

Appellant contends that the deficiency for reported taxable sales of gasoline should be reduced to zero because the error ratio (i.e., the percentage of unreported gasoline sales to reported gasoline sales)[17] is so low that reported fuel sales should be accepted as correct. Appellant contends that the observation test is unreliable because it only included two days of fuel price observations. Appellant also appears to assert that the audited gasoline sales are overstated because the DOE average prices for the Los Angeles area are unrepresentative of appellant's prices.[18]

Upon audit, S&S could not explain how its returns were prepared, nor could S&S provide a historical record of its gasoline selling prices from which respondent could establish appellant's selling prices for gasoline. For example, appellant did not provide Point of Sale system data, which in the case of a gas station would typically include the sales price per gallon and number of gallons sold for a given time period. Furthermore, the limited book markup respondent performed (with the partial purchase invoices S&S provided) revealed an inconsistent markup percentage that was, on average, lower than that respondent would expect for retail

[17] Appellant states that the error ratio is 1.8 percent; however, the understatement of $294,018 represents an error ratio of 1.9 percent when compared to reported taxable gasoline sales of $15,714,980.

[18] Appellant states that "the Los Angeles fuel sale prices are merely a proxy for the actual selling prices of the business."

gasoline sales.[19] As a result of the incomplete records, there was insufficient information for respondent to verify appellant's recorded gasoline sales by a direct audit method.

To calculate the audit liability, respondent compared the selling prices that S&S posted on Monday April 7, 2008, and Monday April 21, 2008, to the prices published by the EIA on those same days. From this information, respondent calculated a price differential, which accounted for the different grades of gasoline sold by S&S, of 2.92 percent. CDTFA then applied the price differential to historical EIA data to calculate S&S's quarterly average selling price. The EIA information is gathered and published by a federal government agency and constitutes reasonable third-party information from which to formulate appellant's audited selling prices for gasoline. Next, respondent applied S&S's quarterly average selling price to the appellant's fuel purchases to compute audited taxable sales. When compared to reported taxable sales, appellant's audited taxable sales revealed a deficiency that S&S could not explain. On these facts, OTA concludes that respondent has carried its minimal, initial burden and shown that its determination was reasonable and rational. The burden of proof now shifts to appellant to establish that a result differing from respondent's determination is warranted. (*Appeal of Talavera, supra.*)

Appellant has not provided any supporting documentation, such as sales records, in support of appellant's argument that S&S's recorded gasoline sales were accurate. Instead, appellant criticizes the observation test and asserts that the error ratio is low. Appellant contends that respondent's two-day observation test is less than the minimum time established by section 0810.30 of respondent's Audit Manual,[20] which recommends three full observation days to project sales for audits of bars and restaurants.[21] However, OTA has already found that given the lack of records from which a more accurate estimate could be made, it was reasonable and rational for respondent to observe appellant's selling prices and compare them to the available EIA data.

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[19] S&S markup percentage for 2006 was only 3.89 percent, whereas the markup percentage for 1Q05 and 2Q05 was 7.54 percent, and the markup percentage for 3Q07 and4Q07 was 7.83 percent.

[20] Respondent's Audit Manual "is an advisory publication providing direction to respondent staff administering the Sales and Use Tax Law and Regulations." OTA is not required to follow respondent's Audit Manual; however, OTA may look to it for guidance, such as when evaluating the reasonableness of respondent's determination. (*Appeal of Micelle Laboratories*, 2020-OTA-290P.)

[21] The Audit Manual language regarding observation testing is in Chapter 8, entitled "Bars and Restaurants," and does not specifically apply to gasoline sales.

Appellant also argues that the average prices for the Los Angeles area are unrepresentative of appellant's prices. However, the price differential calculated by respondent adjusted the average prices in the local area to appellant's posted selling price. OTA finds that this approach was reasonable and rational, and appellant's argument unavailing, since appellant's prices would likely vary or fluctuate in relation to appellant's local competitors together with fluctuations in the market price of gasoline from the gasoline distributors or wholesalers. Regarding appellant's argument that recorded gasoline sales should be accepted because the error ratio is low, this argument is unavailing because the error ratio's size is in no way indicative of its accuracy. The accuracy of the understatement is to be judged by the methodology on which it is based, and, as noted above, respondent's methodology was reasonable and rational. Appellant has not offered evidence in support of a more accurate estimation. Therefore, appellant has failed to meet its burden of showing that the audited understatement of gasoline sales should be further reduced.

HOLDINGS

1. Appellant is personally liable under R&TC section 6829 for the unpaid liabilities of S&S.
2. Adjustments are not warranted to the audit liability for the period January 1, 2005, through June 30, 2008.

DISPOSITION

Respondent's action denying appellant's claim for refund is sustained.

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Keith T. Long
Administrative Law Judge

We concur:

DocuSigned by:
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Josh Aldrich
Administrative Law Judge

DocuSigned by:
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Kim Wilson
Hearing Officer

Date Issued: 7/17/2024