

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
R. BRANZUELA

) OTA Case No. 231014523
) CDTFA Case ID: 0-132-007
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OPINION

Representing the Parties:

For Appellant:

James Dumler, Representative

For Respondent:

Jason Parker, Chief of Headquarters Ops.

For Office of Tax Appeals:

Corin Saxton, Attorney

K. WILSON, Hearing Officer: Pursuant to Revenue and Taxation Code (R&TC) section 6561, R. Branzuela (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)¹ denying appellant's timely petition for redetermination of a Notice of Dual Determination (NODD) issued on January 21, 2016. The NODD is for tax of \$24,905.43, plus applicable interest, and penalties of \$3,218.20 for the period January 1, 2011, through September 30, 2011 (liability period). The NODD reflects CDTFA's determination that appellant is personally liable as a responsible person for the unpaid sales taxes, plus applicable interest, and penalties that Veracom Automotive Group, LLC (Veracom) accrued during the liability period.

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, section 30209(a).

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

ISSUE

Whether appellant is personally liable as a responsible person for Veracom's unpaid sales taxes, applicable interest, and penalties during the liability period.

FACTUAL FINDINGS

1. Veracom, dba Veracom Mitsubishi, operated two business locations in San Mateo, California, as a retailer of new and used vehicles with auto services.²
2. On April 15, 2013, CDTFA issued a Notice of Determination (NOD) to Veracom for \$32,182 in tax and applicable interest,³ based on CDTFA's review of California Department of Motor Vehicles (DMV) records and Veracom's sales and use tax returns.⁴
3. Veracom was managed by two members: appellant and P. Branzuela.
4. Entries in CDTFA's Automated Compliance Management System (ACMS) indicate that Veracom's business was still operating on May 16, 2013, when appellant called CDTFA, and on June 8, 2013, when CDTFA visited the 885 N. San Mateo Drive location.⁵ However, an ACMS entry reflects that on July 11, 2013, CDTFA made a field visit to Veracom's 790 N. San Mateo Drive location and observed that the business was no longer operating as a Mitsubishi dealership and was instead a Ford dealership operating under a different seller's permit. An ACMS entry indicates that during this visit, CDTFA spoke with appellant, who informed CDTFA that no Mitsubishi inventory remained, and that both locations belong to another business entity.⁶ On July 12, 2013, CDTFA visited

² Veracom's seller's permit lists 790 N. San Mateo Drive as its only business location. Although the record is unclear as to when Veracom opened a second business location, a screenshot from CDTFA's database shows 885 N. San Mateo Drive as the business location.

³ After the NOD became final, a penalty of \$3,218.20 was imposed on May 30, 2013, pursuant to R&TC section 6565 for failure to pay an NOD once it becomes due and payable.

⁴ In a March 8, 2013 letter, CDTFA informed Veracom that DMV records show taxable sales of \$433,769 for the liability period; however, Veracom only reported taxable sales of \$84,842 for the liability period. Appellant does not dispute the deficiency measure CDTFA identified.

⁵ ACMS was a software program CDTFA used to document communications between staff and taxpayers or their representatives. ACMS entries indicate that during the May 16, 2013 call, appellant told CDTFA that although business was decreasing, appellant intended to make sales in the near future and later, and during the June 8, 2013 visit, appellant asked CDTFA what would happen if appellant closed the business.

⁶ The ACMS entry indicates that during this visit, appellant told CDTFA that both business locations belong to Veracom Ford. The record is unclear as to the ownership of Veracom Ford.

the 885 N. San Mateo Drive location and confirmed that the business no longer operated as a Mitsubishi dealership. Based on these field visits, CDTFA closed out Veracom's seller's permit on July 12, 2013, effective June 30, 2013.⁷

5. Following the closure of Veracom's seller's permit, CDTFA investigated appellant's potential responsible person liability under R&TC section 6829. CDTFA found, and it is undisputed, that Veracom charged sales tax reimbursement on its taxable sales and that appellant was responsible for the filing of sales and use tax returns or the payment of tax. In addition, CDTFA determined that appellant had knowledge of the unpaid taxes at the time the returns were filed, and, based on records from the California Employment Development Department (EDD) (showing that Veracom paid over \$600,000 in wages during first quarter of 2011 (1Q11) through 2Q13), Veracom had the ability to pay the taxes at the time the returns were filed.
6. As a result of this investigation, CDTFA determined that appellant was personally responsible for Veracom's sales tax liabilities under R&TC section 6829, and CDTFA issued the above-mentioned NODD.
7. On February 17, 2016, appellant filed a timely petition for redetermination.
8. On September 14, 2023, CDTFA issued a decision denying the petition for redetermination.
9. This timely appeal followed.

DISCUSSION

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 and failed to remit such tax reimbursement to CDTFA 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

⁷ While not entirely clear from the record, it appears CDTFA chose the June 30, 2013 effective date because it coincided with the end of the calendar quarter and because the business was open June 8, 2013, during the prior field visit.

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).)

Elements of R&TC section 6829

Appellant does not dispute that CDTFA established elements (1), (2), and (3) of R&TC section 6829, as described above; therefore, only element (4) is in dispute, which is whether appellant willfully failed to pay the liability or to cause it to be paid. Appellant argues that he did not obtain knowledge of the liabilities at issue until April 15, 2013, when the business received an NOD for unreported taxable sales based on DMV records.⁸ Appellant argues that the business of the LLC was closed and without assets as of 1Q13, and, consequently, no funds were available to satisfy the liability as of the date of the billing. Therefore, appellant argues that CDTFA has failed to show that the required element of willfulness has been met.

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, 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).) In summary, for the fourth element (willfulness), CDTFA must establish knowledge, authority, and ability to pay.

Here, appellant concedes that he had knowledge of the liability and authority to pay the

⁸ Appellant’s briefing incorrectly states that the NOD was issued April 13, 2013.

taxes at the time CDTFA issued the April 15, 2013 NOD, and the only dispute is whether the business had the ability to pay the taxes at that time. Although appellant asserts that the business had closed and was without assets as of 1Q13, this assertion is contradicted by ACMS entries showing that the business was operating during CDTFA's field visit on June 8, 2013.⁹

Furthermore, EDD records show that Veracom paid wages of \$92,071.29 during 2Q13, and given that this amount is comparable to the amount of wages Veracom paid in the two prior quarters,¹⁰ it is evident that, throughout 2Q13, Veracom paid wages. Therefore, OTA finds that appellant had the knowledge, authority and ability to pay the taxes (i.e., as of the April 15, 2013 NOD).¹¹

Accordingly, OTA finds that CDTFA 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.

⁹ Even if the business had closed as of 1Q13, the requirement of ability to pay can be met if there is evidence that either: (1) funds were available following the closure of business, or (2) if it is shown that appellant knew of the underreporting at the time the quarterly returns were due and nevertheless caused the collected funds available to be paid to other creditors such as employees. Knowledge of the underreporting could be shown, for example, by demonstrating the appellant filed the report of sale forms to report the sales to DMV and reported a different amount to CDTFA.

¹⁰ Veracom paid wages of \$95,867.11 in 4Q12 and \$90,189.63 in 1Q13.

¹¹ Implicit in appellant's argument is the contention that appellant was unaware of the liability at the time the returns were filed; however, given OTA's finding that the business had the ability to pay the liability at the time appellant had knowledge, there is no need to address CDTFA's finding that appellant was aware of the liability at the time the taxes became due with the filing of the quarterly returns.

HOLDING

Appellant is personally liable as a responsible person for Veracom's unpaid sales taxes, applicable interest, and penalties during the liability period.


DISPOSITION

CDTFA's action in denying appellant's petition for redetermination is sustained.


Signed by:


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Kim Wilson
Hearing Officer

We concur:

DocuSigned by:


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Suzanne B. Brown
Administrative Law Judge

DocuSigned by:


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Sheriene Anne Ridenour
Administrative Law Judge

10/24/2024
Date Issued: _____