

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

In the Matter of the Appeal of:

**R. HIGGINS<sup>1</sup>**

) OTA Case No.: 230914347  
) CDTFA Case ID: 1-329-911  
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**OPINION**

Representing the Parties:

For Appellant:

R. Higgins

For Respondent:

Amanda Jacobs, Supervising Attorney

K. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, R. Higgins (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)<sup>2</sup> denying appellant's timely petition for redetermination of a Notice of Dual Determination (NODD) issued on July 16, 2019. The NODD is for tax of \$491,083.29, plus applicable interest, and penalties<sup>3</sup> totaling \$33,455.99 for the period October 1, 2007, through August 12, 2016 (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).

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<sup>1</sup> In its Opinions, the Office of Tax Appeals uses the first initial of a given name to identify individual appellants. However, R. Higgins (appellant) also uses his middle name "J—" as an alias. As such, OTA considers the evidence relating to "J— Higgins" as relevant to appellant.

<sup>2</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.

<sup>3</sup> These penalties included derivative penalties originally imposed upon Forbco Management Corporation. On appeal, appellant has not raised any contentions with respect to these penalties. As such, OTA considers them not in dispute and will not discuss the penalties further.

ISSUE

Whether appellant is personally liable for the unpaid liabilities of Forbco Management Corporation (Forbco) under R&TC section 6829.

FACTUAL FINDINGS

1. Forbco, a California corporation doing business as Sizzler Restaurants,<sup>4</sup> operated a restaurant chain under a seller's permit with an effective start date of January 1, 1973. At various times during the liability period, Forbco owned up to 14 Southern California locations.
2. During the liability period, appellant held the positions of CEO, CFO, and president, as evidenced by documents such as Forbco's filings with the California Secretary of State (SOS), Forbco's sales and use tax returns, records obtained from the Cities of Ontario,<sup>5</sup> Covina, and Pasadena, the County of San Bernardino, and various leasing documents.
3. Appellant prepared Forbco's non-remittance and partial remittance sales and use tax returns throughout the liability period. Forbco failed to pay its self-assessed tax liabilities totaling \$491,083.29.
4. During the liability period, appellant signed business checks issued to Forbco's suppliers and lessors.
5. According to CDTFA's records, on or about August 22, 2016, CDTFA received a tax payment associated with Forbco's sale of fixtures and equipment from Capitol City Escrow. Thereafter, CDTFA contacted Capitol City Escrow and confirmed that Forbco filed for bankruptcy and terminated operations. Based on the foregoing, CDTFA closed Forbco's seller's permit effective August 12, 2016.
6. Following Forbco's dissolution, CDTFA opened an investigation into whether appellant could be held personally liable for Forbco's unpaid liabilities pursuant to R&TC section 6829.
7. During CDTFA's investigation, appellant completed a CDTFA-1508, *Responsible Person Questionnaire*. In the questionnaire, appellant stated that he became Forbco's president in 1999, that his job duties and responsibilities included "overseeing daily restaurant

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<sup>4</sup> A Notice of Business Change signed by appellant as president and dated February 10, 2015, indicates that Forbco changed the business name from Sizzler Family Steak Houses to Sizzler Restaurants during the liability period.

<sup>5</sup> It is unclear from the record whether the City of Ontario identified appellant as the business owner beginning in 1982, or if appellant's father R.F. Higgins was the owner at that time.

operations, customer service, quality control and overall business operations.” Appellant also stated that sales tax was included as a separate item on the customer’s receipt or invoice, that he was responsible for Forbco’s sales and use tax compliance, and that he was authorized to sign business checks on Forbco’s behalf.

8. CDTFA also found that Forbco collected sales tax reimbursement based on the following:
  - a. Forbco’s sales invoices provide separately stated sales tax reimbursement amounts.
  - b. On June 11, 2018, appellant provided a declaration signed under penalty of perjury confirming that Forbco collected sales tax reimbursement from its customers.
9. Regarding whether appellant was responsible for Forbco’s sales and use tax matters, CDTFA found the following:
  - a. Forbco filed Statements of Information with the SOS’s office on November 7, 2013, and July 26, 2016, identifying appellant as the corporation’s CEO and CFO.
  - b. Appellant completed and signed a CDTFA-82, *Authorization for Electronic Transmission of Data*, form dated April 20, 2012, as Forbco’s president; and a CDTFA-345, *Notice of Business Change*, form on February 10, 2015, as Forbco’s president.
  - c. Appellant signed lease agreements, on behalf of Forbco, including the following: a lease agreement for Forbco’s Fountain Valley location dated December 18, 2012, as president and individual personal guarantor; and a lease agreement for Forbco’s Covina location dated December 20, 2014, as president and vice president.
  - d. Appellant filed declarations with the United States Bankruptcy Court on February 7, 2011, and August 24, 2011, identifying himself as Forbco’s president. The declarations also state that appellant is responsible for overseeing the day-to-day financial operations and financial performance of the business and that appellant is involved in supervising all aspects of Forbco’s financial affairs..
  - e. Appellant’s June 11, 2018 declaration, states that: appellant was the corporation’s president during the first quarter of 2011 (1Q11) until the business closed; appellant became responsible for the business’s financial affairs

beginning in 1Q11 due to his father's illness and death; appellant made the decision as to which bills to pay beginning in 2011; appellant negotiated payment plans with CDTFA when the business failed to timely pay its sales tax liability; and appellant made all of Forbco's financial decisions beginning in 2011 until the date the business closed.

- f. Appellant spoke with CDTFA per CDTFA's Automated Compliance Management System (ACMS) during the period July 7, 2009, through April 18, 2018. These conversations took place in person and by telephone and included the negotiation of installment payment agreements, promises to pay, discussions about unfiled returns, and statements by appellant informing CDTFA that payments were made for various periods.
10. CDTFA also found that appellant had knowledge of and authority to pay, or to cause to be paid, Forbco's outstanding liabilities based on appellant's position as corporate president, the fact that appellant filed Forbco's sales and use tax returns, written declarations by appellant, and statements that appellant had authority to sign checks on Forbco's behalf.
  11. Finally, CDTFA found that appellant had the ability to pay the liabilities at issue because it made payments to creditors during the liability period. CDTFA obtained documents and created a schedule detailing the following:
    - a. Information obtained from the Employment Development Department (EDD) which indicates that Forbco paid employee wages totaling \$20,775,653.69 during the period 1Q08 through 3Q16;
    - b. Forbco made payments totaling \$1,277,236.43 to its supplier, Family Tree Produce, during the period 1Q10 through 3Q15;
    - c. Forbco issued checks totaling \$14,976.76 to its supplier, US Foods, during 4Q13 and 1Q14;
    - d. Forbco made payments totaling \$614.36 to its supplier, Chikato Bros Ice, during the period 3Q09 through 1Q12;
    - e. Forbco made payments totaling \$1,490.11 to its supplier, Air Gas, during the period 4Q11 through 1Q16;
    - f. Forbco made lease payments totaling \$96,922.79 during the period 4Q13 through 3Q16;
    - g. Forbco made a payment of \$669 to the County of San Bernardino Department of Public Health in 2Q16;

- h. Forbco made payments totaling \$10,765.04 to the City of Pasadena during the periods 2Q08 through 2Q12;
  - i. Forbco made payments totaling \$902 to the City of Covina during the periods 1Q15 and 1Q16;
  - j. Forbco made payments totaling \$2,500 to the Los Angeles Department of Public Health during the periods 3Q14 and 1Q16;
  - k. Forbco made payments totaling \$1,557,068.55 to utility company, Southern California Edison, during the period 1Q08 through 3Q16;
  - l. Forbco made payments totaling \$45,233.06 to utility company, SoCal Gas, during the period 1Q11 through 1Q15; and
  - m. Forbco made payments totaling \$11,090.64 to the City of Ontario Water Department during the period 4Q13 through 2Q16.
12. On July 15, 2019, CDTFA issued the aforementioned NODD. Appellant filed a timely petition for redetermination disputing the liability.
  13. On August 17, 2023, CDTFA issued a decision denying appellant's petition for redetermination.
  14. This timely appeal followed.

### DISCUSSION

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 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 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).) CDTFA bears the burden of proving, by a preponderance of the evidence, that the requirements of R&TC section 6829 have been satisfied. (Cal. Code Regs., tit. 18, § 1702.5(d).)

On appeal, appellant generally asserts that he cannot be held personally liable for Forbco's unpaid liabilities under R&TC section 6829.<sup>6</sup> However, appellant has not made any

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<sup>6</sup> Appellant's opening brief requests 120 days to prepare an additional brief. By letter dated October 6, 2023, OTA provided appellant until January 8, 2024, to file a supplemental brief. Appellant did not provide a supplemental brief or otherwise respond.

specific arguments as part of this appeal. Thus, OTA considers whether CDTFA has met its burden of proving each element of R&TC section 6829 by a preponderance of the evidence.

#### 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).) Here, CDTFA was informed by Capitol City Escrow on August 22, 2016, that Forbco terminated operations. Additionally, CDTFA received a tax payment from the sale of Forbco’s fixtures and equipment, which occurred in conjunction with Forbco’s termination. Appellant has not raised any argument disputing these facts. 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 CDTFA when due. (R&TC, § 6829(c); Cal. Code Regs., tit. 18, § 1702.5(a).)

Here, appellant provided information stating that Forbco collected sales tax reimbursement on multiple occasions. For example, appellant signed a June 11, 2018 declaration under penalty of perjury indicating that Forbco collected sales tax reimbursement. Appellant also completed a *Responsible Person Questionnaire* in which he confirmed that Forbco collected sales tax reimbursement on its sales. Additionally, CDTFA obtained sales invoices that separately state charges for sales tax. Thus, the evidence establishes that Forbco collected sales tax reimbursement, and 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 corporation, the corporation 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, a review of the record shows that appellant was actively involved in Forbco's sales and use tax matters throughout the liability period. For example, appellant prepared and filed Forbco's sales and use tax returns for the entire liability period. This fact is strong evidence that appellant was responsible for Forbco's sales and use tax matters beginning at least by October 1, 2007. Additionally, appellant held discussions with CDTFA, which were memorialized in CDTFA's ACMS program during the period July 7, 2009, through April 18, 2018, detailing appellant's promises to make payments, the negotiation of installment payment agreements with appellant, meetings with appellant and appellant's father, and statements by appellant that Forbco was unable to pay its tax liabilities.

Additional documentary evidence also identifies appellant as a responsible person including the following: the June 11, 2018 declaration, which appellant signed under penalty of perjury stating that appellant was responsible for all of Forbco's financial affairs; a *Responsible Person Questionnaire*, in which appellant identifies himself as a person responsible for Forbco's sales and use tax compliance; and Forbco's bankruptcy filings, in which appellant identifies himself as the person responsible for the preparation of Forbco's books and records.

Based on the overwhelming evidence, OTA finds that appellant was charged with the responsibility of making tax payments of tax and had a duty to act for the corporation in complying with any portion of the Sales and Use Tax Law at all relevant times. As such, OTA concludes that CDTFA has met its burden with respect to this element.

#### 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, 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, CDTFA must establish knowledge, authority, and ability to pay.

#### Knowledge

The first requirement 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.)

Here, appellant prepared and filed Forbco's non-remittance and partial remittance returns. Therefore, appellant necessarily knew that Forbco's self-assessed taxes were unpaid when they became due. Additionally, the record reflects that CDTFA continuously discussed Forbco's outstanding liabilities with appellant over a period of nine years (July 7, 2009, through April 18, 2018). Finally, appellant's June 11, 2018 declaration and Forbco's bankruptcy filings indicate that appellant made Forbco's financial decisions. OTA notes that appellant has not provided any argument or evidence to dispute these facts. Thus, OTA finds that there is sufficient evidence to show that appellant had actual knowledge that Forbco's sales and use taxes were due and unpaid.

#### Authority

The second requirement for willfulness 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 that the unpaid taxes were due. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(B).)

Here, appellant identified himself as the person responsible for Forbco's sales and use tax matters. Further, the evidence shows that appellant regularly spoke with CDTFA regarding Forbco's liabilities, including promising to make payment and negotiating an installment payment agreement. Additionally, appellant's June 11, 2018 declaration states that he "signed all the checks on behalf of the business." OTA finds no evidence, contemporaneous or otherwise, that appellant was required to obtain someone else's approval to make payments of tax. OTA also finds no evidence that appellant's authority as president was limited. Thus, OTA finds that appellant had the requisite authority.



Ability to Pay

The third requirement is that when the responsible person had actual knowledge that taxes were due, but not being paid, 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).)

Here, Forbco collected sales tax reimbursement on its sales of tangible personal property, as evidenced by appellant's *Responsible Person Questionnaire* and Forbco's customer invoices. Appellant further corroborated this fact in his June 11, 2018 declaration, which states that the "business collected sales tax from its customers." Furthermore, wage information CDTFA obtained from EDD indicates that during the liability period, Forbco paid wages totaling \$20,775,653.69. Forbco also paid suppliers, utilities, and local fees during the liability period, including \$1,277,236.43 to Family Tree Produce, and \$1,557,068.55 to Southern California Edison. Finally, CDTFA's ACMS notes dated July 7, 2010, document a conversation in which appellant stated that he used sales tax revenue to make purchases, pay vendors, and pay bills over a period of between 2008 and 2010. Based on the foregoing, OTA finds sufficient evidence that appellant had the ability to pay the taxes but chose not to do so throughout the liability period.

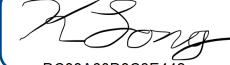
In sum, OTA finds that appellant is personally responsible for the unpaid tax liabilities of Forbco since all of the elements required under R&TC section 6829 have been met.

HOLDING

Appellant is personally liable for the unpaid liabilities of Forbco under R&TC section 6829.

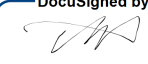
DISPOSITION

CDTFA's decision denying appellant's petition for redetermination is sustained.

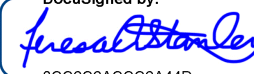
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Keith T. Long  
Administrative Law Judge

We concur:

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Andrew Wong  
Administrative Law Judge

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Teresa A. Stanley  
Administrative Law Judge

Date Issued: 4/8/2025