

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of: S. FRANCO)))))	OTA Case No. 230413039 CDTFA Case ID: 2-381-218
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OPINION

Representing the Parties:

For Appellant:	James Brunette, Enrolled Agent
For Respondent:	Courtney Daniels, Attorney Chad Bacchus, Attorney Jason Parker, Chief of Headquarters Ops.

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, S. Franco (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)¹ denying appellant’s petition for redetermination of a Notice of Dual Determination (NODD) dated October 28, 2020. The NODD is for tax of \$89,709.41, plus applicable interest, and penalties totaling \$9,090.46 for the period April 1, 2016, through November 25, 2017 (liability period). The NODD reflects CDTFA’s determination that appellant is personally liable for the unpaid sales and use tax liabilities of Slamwich Co., LLC (Slamwich).

Office of Tax Appeals (OTA) Administrative Law Judges Teresa A. Stanley, Suzanne B. Brown, and Josh Lambert held an oral hearing for this matter electronically on January 15, 2025. At the conclusion of the hearing, OTA closed the record, and this matter was submitted for an Opinion.

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

Is appellant personally liable for the unpaid liabilities of Slamwich pursuant to R&TC section 6829?

FACTUAL FINDINGS

1. Slamwich was a California limited liability company, dba Beach Hut Deli, that operated a restaurant in Fresno, California. Slamwich held a seller's permit effective from June 22, 2015, through November 25, 2017. Appellant and his spouse held a 49 percent interest, and T. Frazier held a 51 percent interest, in Slamwich.
2. Slamwich filed its Articles of Organization with the California Secretary of State (SOS) on May 29, 2013, stating that all its members managed Slamwich. Slamwich filed a Statement of Information with the SOS on May 31, 2013, stating that appellant and T. Frazier were member-managers of Slamwich.
3. Slamwich filed a Statement of Information on April 28, 2015, stating that appellant was the sole member-manager of Slamwich. Slamwich filed amended Articles of Organization on May 5, 2015, reporting that Slamwich will be managed by one manager. Appellant signed the form as Slamwich's manager. Appellant testified at the oral hearing that these changes were made for the purpose of obtaining a loan without requiring T. Frazier to personally guarantee the loan. Appellant stated that they intended to change the documents back to joint ownership after he obtained a loan to pay the sales taxes.
4. Slamwich collected sales tax reimbursement on its sales of tangible personal property. Appellant stated in a Responsible Person Questionnaire (questionnaire) dated January 7, 2018, that Slamwich collected sales tax reimbursement from customers. A Slamwich receipt dated November 18, 2016, shows sales tax was included as a separate line item. The receipt also identifies T. Frazier as Slamwich's owner.
5. Appellant stated in his questionnaire that he was responsible for Slamwich's sales and use tax compliance² and that he prepared or possessed tax returns, sales records, invoices, journals, and other financial records. Appellant prepared and filed Slamwich's sales and use tax returns throughout the entire liability period, for the second quarter of 2016

² Appellant also stated that R. Franco and T. Frazier were responsible for sales and use tax compliance.

- (2Q16), 3Q16, 4Q16, 1Q17, 2Q17, 3Q17, and part of 4Q17. For these quarters, Slamwich's sales and use tax returns reported tax due but did not include payment.
6. Appellant was an authorized signer for Slamwich's business checking account.³ Throughout the liability period, appellant signed Slamwich's business checks to pay for rent, utilities, payroll, supplies, and other business expenses. During the liability period, Slamwich made payments totaling \$106,105.29 to its landlord, payments totaling \$112,474.88 to a vendor, and payments to its employees.
 7. On December 1, 2017, appellant notified CDTFA that Slamwich had terminated its business operations effective November 25, 2017.
 8. On October 28, 2020, CDTFA issued appellant the NODD.
 9. Appellant filed a petition for redetermination with CDTFA. On February 28, 2023, CDTFA issued a decision denying the petition for redetermination.
 10. Appellant filed this timely appeal.
 11. At the oral hearing, appellant, G. Coronado, and R. Beltran testified that the other member of Slamwich, T. Frazier, was regularly involved in the business operations and that they were aware he was part of Slamwich's leadership.

DISCUSSION

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.) Although the sales tax is imposed on the retailer, there are situations when other persons may also be held personally liable for a retailer's unpaid tax liabilities. As relevant here, R&TC section 6829 provides that a person is personally liable for the tax, penalties, and interest owed by a business entity if all of the following four elements are met: (1) the business has been terminated, dissolved, or abandoned; (2) the business 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 had a duty to act for the business in complying with the Sales and Use Tax Law; and (4) the person willfully failed to pay taxes due from the business or willfully failed to cause such taxes to be

³ R. Franco and T. Frazier were also authorized signers.

paid. (R&TC, § 6829; Cal. Code Regs., tit. 18, § 1702.5.) CDTFA must prove these elements by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 1702.5(d).) More than one person may be held personally liable for the same primary liability if the requirements for imposing such liability on each person are satisfied, although CDTFA may only collect the liability once. (See R&TC, § 6829.)

Here, Slamwich closed out its seller's permit effective November 25, 2017. Appellant does not dispute the termination of the business. Therefore, the first element is satisfied.

Slamwich filed sales and use tax returns reporting sales tax due for each quarter of the liability period. Appellant stated in a questionnaire that Slamwich collected sales tax reimbursement from its customers, and a receipt issued during the liability period separately stated sales tax. Therefore, the second element is satisfied.

Throughout the liability period, appellant was a member and manager of Slamwich. Appellant signed several documents, such as SOS statements, as an owner, manager, or member. Appellant signed checks making payments for Slamwich's rent, supplies, and payroll. Appellant filed sales and use tax returns and communicated with CDTFA regarding Slamwich's tax liabilities. Therefore, the third element is satisfied.

Appellant primarily asserts that the evidence shows that he did not meet the fourth requirement; he did not willfully fail to pay or to cause Slamwich's tax obligations to be paid.

The final requirement for a person to be held personally liable pursuant to R&TC section 6829 is that the person must have willfully failed to pay or to cause to be paid the liabilities at issue. For these purposes, "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).) In order to show willfulness, CDTFA must establish all of the following:

- (A) On or after the date the taxes came due, the responsible person had actual knowledge that 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 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).)

Appellant prepared and filed Slamwich's sales and use tax returns for each quarter of the liability period in which Slamwich reported tax due but did not submit payment. Moreover, appellant discussed Slamwich's tax liabilities with CDTFA. Thus, appellant had actual knowledge throughout the liability period that Slamwich's taxes were due but not being paid. Therefore, OTA finds that the first requirement of willfulness has been met.

With respect to the second requirement of willfulness, appellant was an authorized signer of Slamwich's business checking account. Appellant also signed Slamwich's business checks to pay for its expenses, including rent, payroll, and supplies. Furthermore, appellant stated in the questionnaire that he was a person responsible for Slamwich's sales and use tax compliance, that he was authorized to sign Slamwich's business checks, and that he prepared Slamwich's tax returns. Therefore, OTA finds that appellant had the authority to pay taxes or to cause them to be paid, and that the second requirement of willfulness has been met.

With respect to the third requirement of willfulness, Slamwich had funds available during the liability period to pay taxes but chose not to do so, as evidenced by payments Slamwich made to its landlord, suppliers, and employees. Additionally, Slamwich collected sales tax reimbursement but failed to remit it to CDTFA. Thus, the evidence demonstrates that Slamwich had the ability to pay taxes due during the liability period but chose not to do so. Therefore, OTA finds that the final requirement of willfulness has been met.

Appellant contends that he was not willful in failing to pay sales tax, in part because T. Frazier, a 51 percent owner, directed him to pay whatever was needed to keep the business doors open. Appellant contends that, therefore, at T. Frazier's direction, appellant paid rent and ensured that vendors' bills were satisfied so Slamwich could continue to obtain food and beverages to continue operating. Appellant argues that T. Frazier took an unlawful distribution by redirecting loan funds intended to be paid to Slamwich for his own personal use. Appellant asserts that T. Frazier's behavior directly led to Slamwich's failure to pay its taxes, and that T. Frazier set up appellant to be the "fall guy" for Slamwich's unpaid tax liabilities. Appellant contends that he attempted to obtain a loan to pay Slamwich's sales tax liabilities, but T. Frazier

refused to comply with the lender's requirements for obtaining the loan. Instead, appellant argues, T. Frazier took steps to remove his name from all the business records and falsely claimed on a questionnaire that his involvement with Slamwich was only as a lender.

Here, the evidence establishes that T. Frazier was the majority owner of Slamwich, who throughout the liability period had management authority, was responsible for sales and use tax compliance, and had the authority to sign business checks.⁴ However, more than one person may be held personally liable under R&TC section 6829 if all four elements are satisfied as to that person. Consequently, T. Frazier's potential liability is not relevant to this appeal.

Appellant's allegations that T. Frazier, who was the one with business experience, directed appellant to pay the landlord and other obligations to keep the doors open, and to obtain a personal loan to pay the taxes, fail to establish that appellant lacked the authority to pay the taxes due. Although OTA is sympathetic to the fact that appellant trusted the majority owner and followed T. Frazier's instructions, it does not relieve appellant of personal responsibility for Slamwich's tax obligations. A failure to remit sales tax reimbursement may be willful even if the failure was not done with a bad purpose or motive; thus, appellant's argument does not affect the outcome of OTA's legal analysis. Therefore, OTA finds that appellant willfully failed to pay or to cause Slamwich's obligations to be paid.


⁴ The evidence also shows that T. Frazier misled CDTFA when he completed a questionnaire stating that he was just a lender.

HOLDING

Appellant is personally liable for Slamwich’s unpaid sales and use tax liabilities for the liability period under R&TC section 6829.


DISPOSITION

CDTFA’s action is sustained.


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Teresa A. Stanley
Administrative Law Judge

We concur:

Signed by:


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Suzanne B. Brown
Administrative Law Judge

Signed by:


CB1F7DA37831416...
Josh Lambert
Administrative Law Judge

Date Issued: 3/28/2025