

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

C. HARGRAVE¹

) OTA Case No.: 240516308
) CDTFA Case ID: 4-332-725
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)
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OPINION

Representing the Parties:

For Appellant:

Mitchell Stradford, Representative

For Respondent:

Courtney Daniels, Attorney

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, C. Hargrave (appellant) appeals a decision issued by the California Department of Tax and Fee Administration (respondent) denying appellant's petition for redetermination of an October 31, 2022 Notice of Dual Determination (NODD). The NODD is for tax of \$64,940.42, plus applicable interest, and a penalty of \$8,255 for the period April 1, 2021, through May 16, 2022 (liability period).² The NODD reflects respondent's determination that appellant is personally liable for the unpaid tax liabilities of TBS Inglewood, LLC (TBS Inglewood) for the liability period pursuant to R&TC section 6829.

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

ISSUE

Is appellant liable under R&TC section 6829 for the unpaid tax liabilities of TBS Inglewood?³

¹ The evidence indicates that appellant is C. Hargrave, Jr.

² The NODD was timely issued under R&TC section 6829(f), and timeliness of the NODD is not in dispute.

³ As will be explained below, appellant concedes all requirements for the imposition on him of personal liability for the unpaid tax liabilities of TBS Inglewood except the requirement that respondent prove that appellant willfully failed to pay the subject tax liabilities.

FACTUAL FINDINGS

1. TBS Inglewood was a California limited liability company (LLC) that operated a limited-service restaurant franchise, known as The Buffalo Spot, in Inglewood, California.
2. TBS Inglewood's application for a seller's permit identified only appellant as a member and as the person who would have custody and control of TBS Inglewood's books and records. The seller's permit start date was June 13, 2019.
3. In its November 26, 2018 Statement of Information filed with the Secretary of State, TBS Inglewood identified appellant as the CEO and managing member.
4. Appellant concedes that he was responsible for TBS Inglewood's sales and use tax compliance at all times relevant to this appeal.
5. For the liability period, TBS Inglewood reported total quarterly sales of \$252,488 for the second quarter of 2021 (2Q21), \$238,406 for 3Q21, \$222,037 for 4Q21, \$230,670 for 1Q22, and \$112,347 for 2Q22, for total reported sales of \$1,055,948.
6. Appellant concedes that TBS Inglewood collected sales tax reimbursement from its customers on all taxable sales.
7. For the purpose of calculating its worker's compensation insurance premiums, TBS Inglewood reported that it paid wages of \$72,197.35 during a 16-week period from September 30, 2021, to January 19, 2022.
8. TBS Inglewood employed 11 people during the last pay period for which records were provided, the two-week period ending January 19, 2022.
9. TBS Inglewood made payments to Southern California Gas Company on August 24, 2021, and September 2, 2021 in the amounts of \$1,076, and \$1,076.99, respectively.
10. TBS Inglewood paid \$1,271.85 to a vendor (Better Beverages, Inc.) during the liability period.
11. TBS Inglewood paid non-employee compensation of \$5,600 for 4Q21.
12. TBS Inglewood reported cost of goods sold in 2021 totaling \$332,809.
13. TBS Inglewood's bank statements for November 2021 through February 2022 reveal electronic deposits during those four months totaling \$343,082.24, four rent payments totaling \$18,157.56, transfers to a TBS Watts, LLC checking account totaling \$56,200, transfers back into the TBS Inglewood account from the TBS Watts, LLC account totaling \$48,850, transfers to an account registered to "The Buffalo Spot . . . C. Hargrave" totaling \$18,335.74, cash withdrawals of \$1,550, and various payments for

- gasoline, DirecTV service, restaurant meals, Department of Motor Vehicle fees, mobile phone service, and vision care.
14. According to the evidence, TBS Inglewood's unpaid liabilities for the liability period consisted of self-assessed liabilities for 2Q21, 3Q21, 4Q21, and 2Q22 (totaling \$64,940.42), applicable interest, and \$8,255 in penalties. Appellant does not dispute the amount of TBS Inglewood's unpaid tax liabilities.
 15. TBS Inglewood sold its assets for \$35,000 on or about May 16, 2022. TBS Inglewood's landlord was to receive \$10,000 of that amount as overdue rent, and TBS Inglewood was to receive \$1,000 on or about May 16, 2022, and \$2,000 each month thereafter for 12 months.
 16. Upon its sale of its assets, TBS Inglewood ceased business operations that required a seller's permit.
 17. Following the termination of TBS Inglewood's business and its failure to pay the determined liability, respondent investigated appellant and determined that he was personally liable for TBS Inglewood's unpaid tax liability pursuant to R&TC section 6829.
 18. Respondent issued the October 31, 2022 NODD to appellant.
 19. Appellant filed a petition for redetermination.
 20. The parties participated in an appeals conference as part of respondent's internal appeals process, during which appellant confirmed that he was disputing the willfulness element only.
 21. On May 2, 2024, respondent issued the decision, which found that appellant had willfully failed to pay (or willfully failed to cause others to pay) TBS Inglewood's tax liabilities. On that basis, the respondent denied the petition.
 22. This timely appeal followed.

DISCUSSION

As relevant here, individuals may be held personally liable for the unpaid sales and use tax, and the related penalties and interest, of an LLC if the following four conditions are met: (1) the LLC's business has been terminated, dissolved or abandoned; (2) the LLC collected and failed to remit sales tax reimbursement or use tax or failed to pay use tax on its consumption of tangible personal property; (3) the person against whom the liability is asserted (the responsible person) had control, supervision, responsibility, or a duty to act for the LLC concerning its sales and use tax obligations; and (4) the responsible person willfully failed to pay (or willfully failed to cause others to pay) the LLC's tax liabilities. (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); *Appeal of Eichler*, 2022-OTA-029P.)

Here, appellant concedes the first three conditions: (1) that the business of TBS Inglewood has ceased; (2) that TBS Inglewood collected and failed to remit sales tax reimbursement from its customers on retail sales; and (3) that appellant was a person responsible for TBS Inglewood's sales and use tax compliance. Therefore, the disposition of this appeal turns solely on whether appellant willfully failed to pay (or willfully failed to cause others to pay) TBS Inglewood's taxes.

To satisfy the willfulness requirement, respondent must establish by a preponderance of evidence that appellant's failure to pay the taxes (or to cause them to be paid) resulted from an intentional, conscious, and voluntary course of action. (R&TC, § 6829(d); Cal. Code Regs., tit. 18, § 1702.5(b)(2), (d).) Generally, this requires proof that the following three conditions existed when the taxes were due: (1) appellant had actual knowledge that the taxes were due but not being paid; (2) appellant had the authority to pay the taxes or to cause them to be paid; and (3) TBS Inglewood had the ability – usually determined by reference to TBS Inglewood's available funds – to pay the taxes but chose not to do so.⁴ (See Cal. Code Regs., tit. 18, § 1702.5(b)(2)(A)-(C).) Here, appellant concedes the first and second conditions. Consequently, the appeal turns on a single, narrow question: whether appellant had the ability to pay the taxes.

Respondent's decision states appellant argued that TBS Inglewood had only \$10,000 available on and after July 31, 2022, the due date for its sales and use tax return for 2Q22. In his request for appeal filed with OTA, appellant argues that respondent failed to establish that appellant willfully failed to pay the amounts due by TBS Inglewood for 2Q22; and, specifically, he argues that respondent failed to establish that TBS Inglewood had the ability to pay the amounts due on or after July 31, 2022. While appellant has not addressed taxes due for periods prior to 2Q22, OTA will examine willfulness in the context of the liability period.

OTA recognizes that the period at issue in this appeal was a difficult time for the hospitality industry. Governor Newsom declared a state of emergency due to the COVID-19 pandemic on March 4, 2020; and on March 19, 2020, the governor issued a stay-at-home order, which was not rescinded until June 11, 2021. Yet, appellant was able to remain in business throughout that time and beyond.

⁴ A failure to pay a tax liability (or to cause it to be paid) may be willful even though such failure was not with a bad purpose or motive. (Cal. Code Regs., tit. 18, § 1702.5(b)(2).)

The evidence shows that TBS Inglewood made retail sales until the business was sold on or about May 16, 2022. It employed 11 people during the last pay period for which records were provided, the two-week period ending January 19, 2022, and paid \$72,197.35 in wages during the 16-week period from September 30, 2021, to January 19, 2022. TBS Inglewood paid for rent. It paid vendors and other costs of operation. TBS Inglewood reported total quarterly sales of \$252,488 for 2Q21, \$238,406 for 3Q21, \$222,037 for 4Q21, \$230,670 for 1Q22, and \$112,347 for 2Q22, for a total of \$1,055,948, and it collected sales tax reimbursement from its customers on taxable sales. That sales tax reimbursement alone should have been sufficient to pay the sales taxes due, but there must have been other funds, as demonstrated by the following:

- TBS Inglewood had no unpaid tax liabilities for 1Q22.
- TBS Inglewood received regular transfers from the TBS Watts account, withdrew \$550 in cash, and paid additional amounts for goods and services apparently unrelated to the restaurant during the first two months of that quarter alone.⁵
- Even after TBS Inglewood sold the business, it continued to receive \$2,000 a month for 12 months.

OTA finds that respondent has shown through evidence that TBS Inglewood had sufficient funds to pay the taxes when due but chose to use those funds for other purposes. Consequently, and given appellant's concessions regarding the other conditions for imposing liability under R&TC section 6829, OTA also finds that appellant willfully failed to pay (or willfully failed to cause others to pay) the subject taxes of TBS Inglewood for the liability period, and that appellant is liable under R&TC section 6829 for the unpaid tax liabilities of TBS Inglewood.

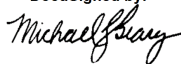
⁵ OTA calculates that the transfers into appellant's account from the TBS Watts account exceeded the transfers in the other direction by just over \$27,000 in January and February 2022.

HOLDING


Appellant is liable under R&TC section 6829 for the unpaid tax liabilities of TBS Inglewood.


DISPOSITION

Respondent's action denying appellant's petition for redetermination is sustained.

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Michael F. Geary
Administrative Law Judge

We concur:

DocuSigned by:

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Andrew Wong
Administrative Law Judge

DocuSigned by:

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Amanda Vassigh
Administrative Law Judge

Date Issued: 5/7/2025