2026-OTA-313
Nonprecedential

OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **E. ARSLAN**	OTA Case No. 221211998 CDTFA Case ID: 2-900-449

OPINION

Representing the Parties:

For Appellant: Mitchell Stradford, Representative

For Respondent: Jason Parker, Chief of Headquarters Ops.

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, E. Arslan (appellant) appeals a decision issued by the California Department of Tax and Fee Administration (respondent) denying appellant's petition for redetermination of a June 14, 2021 Notice of Dual Determination (NODD) for tax of $148,511.79, plus applicable interest, and penalties of $29,702.41, for the period April 10, 2015, through December 31, 2017 (liability period).[1] The NODD reflects respondent's determination that appellant is personally liable for the unpaid tax liabilities of Cali Ventures LLC (Cali Ventures) 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).

ISSUES

1. Should Cali Ventures' tax liability be cancelled?
2. If Cali Ventures' liability should not be cancelled, is appellant personally liable for Cali Ventures' unpaid tax liabilities pursuant to R&TC section 6829?

[1] As discussed further below, the penalties consist of a negligence penalty and finality penalty, both of which were incurred by Cali Ventures LLC and included in appellant's liabilities under Revenue and Taxation Code section 6829.

FACTUAL FINDINGS

The Notice of Determination (NOD) issued to Cali Ventures

1. Cali Ventures owned and operated three ZPizza restaurant franchises located in California: one in Brea, one in Ladera Ranch, and one in San Clemente.
2. Appellant managed Cali Ventures' books and records and was the sole person responsible for Cali Ventures' sales and use tax compliance.
3. It is undisputed that prior to July or August of 2017, the address of record for Cali Ventures was on Newhope St., Garden Grove, CA (the Newhope Street address).[2]
4. On July 31, 2017, an escrow company faxed a document to respondent.[3] The document identified Cali Ventures as the seller of the Brea ZPizza location and provided a "forwarding address" for Cali Ventures on Garrison Loop, Ladera Ranch, CA (the Garrison Loop address), and the "location of books and records" as the Brea ZPizza sublocation address. The document, which also identified the purchaser, did not refer to the other two ZPizza locations owned and operated by Cali Ventures.
5. On or about August 2, 2017, respondent mailed a *Notice of Requirements in the Sale of a Business* to the escrow company, Cali Ventures, and the purchaser. Cali Ventures' copy was mailed to the Garrison Loop address.
6. A "partial" Closeout Worksheet dated August 2, 2017, which appears to refer to the closeout of the Brea ZPizza sublocation only, states that the Garrison Loop address was the new or forwarding address for Cali Ventures.[4]
7. On August 7, 2017, respondent spoke to appellant on the telephone, informed him that respondent needed to review Cali Ventures' books and records, and sent an email to appellant to confirm what books should be provided.
8. According to respondent's decision, on August 8, 2017, respondent informed the escrow company (and Cali Ventures' Brea sublocation) by letter that a tax clearance would not be issued in the absence of a security deposit because Cali Ventures' account had been selected for audit.

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[2] By "address of record," this Opinion refers to the address that respondent identifies in its records' as a taxpayer's mailing address.

[3] The document appears to be a request for a tax clearance.

[4] The document has the handwritten notation "Partial" at the top of the form. While the date at the bottom of the form is illegible, the form indicates that the information was entered into respondent's system on August 2, 2017. In the section for "Identification of Account," "CaliVentures LLC" appears on the first line and "ZPizza Brea" appears on the third line.

9. When appellant did not provide books and records to respondent by August 15, 2017, respondent sent another email to appellant to follow up. When appellant still did not respond by August 18, respondent again called appellant, who stated that he had not received any emails but would look in his "junk" folder. Appellant also stated that he would provide the list of records to his accountant.

10. According to entries made in respondent's Assignment Activity History (414Z), which audit staff used to log activity on audits, on August 24, 2017, respondent notified appellant by letter that an audit would be required before a tax clearance would be issued. Subsequent entries indicate that respondent's further attempts to reach appellant by telephone were unsuccessful.[5]

11. According to the audit workpapers, on September 13, 2017, respondent mailed a document request to Cali Ventures at both the Newhope Street address and the Garrison Loop address; and on December 20, 2017, respondent mailed another document request to Cali Ventures at the Newhope Street address, the Garrison Loop address, and both the San Clemente and Ladera Ranch sublocation addresses. Audit comments entered on both dates state that the Newhope Street address remained Cali Ventures' address in respondent's computerized record system.

12. According to 1099-K data that respondent obtained, non-cash payments (by credit card, debit card, and third-party payment system such as Apple Pay) made to Cali Ventures during the audit period totaled $2,659,646, including sales tax reimbursement (sales tax) and tips, as follows (2Q15 = the second quarter of 2015, etc.):

			1Q16	$185,313	1Q17	$ 377,712
	2Q15	$ 14,360	2Q16	$277,551	2Q17	$ 391,021
	3Q15	$ 97,565	3Q16	$268,249	3Q17	$ 371,366
	4Q15	$104,569	4Q16	$250,182	4Q17	$ 321,858
Annual Totals		$216,394		$981,295		$1,461,957

13. For the liability period, Cali Ventures reported total sales of $967,355 and claimed deductions totaling $96,978, $39,424 for exempt sales of food products and $57,554 for sales tax included in reported total sales.[6] Cali Ventures reported no sales for 2015, $95,000 in sales for 2016, and $38,745 for 1Q17 and 2Q17 combined. For 3Q17 through 4Q17, Cali Ventures reported total sales of $782,056 and taxable sales totaling

[5] The 414Z does not indicate the address to which respondent mailed the August 24, 2017 letter or the telephone number respondent used in its attempts to reach appellant.

[6] The sales and use tax returns in the record show reported total sales of $973,355.

$742,632, for the first time claiming deductions for exempt food sales and sales tax included in reported total sales.[7]

14. Respondent determined that the 80-80 rule applied to Cali Ventures' sales and, therefore, all of its sales were subject to tax.[8] Consequently, respondent disallowed the claimed deductions for exempt food sales.

15. Respondent audited Cali Ventures for the liability period. Cali Ventures provided no books or records for the audit. Respondent obtained monthly sales reports from the franchisor. These reports document sales reported by each of Cali Ventures' ZPizza locations to the franchisor. Using these records, respondent calculated total sales reported by Cali ventures to its franchisor of $3,177,293, including sales tax and tips, for the liability period, as follows:[9]

	2Q15	$147,807	1Q16	$ 325,889	1Q17	$ 505,663
	3Q15	$106,065	2Q16	$ 294,097	2Q17	$ 402,057
	4Q15	$123,525	3Q16	$ 278,630	3Q17	$ 380,846
			4Q16	$ 263,195	4Q17	$ 349,499
Annual Totals		$377,397		$1,161,811		$1,638,065

16. Respondent concluded that the franchisor provided the most reliable sales data. Respondent adjusted those amounts to exclude sales tax and tips, leaving audited total sales for the liability period of $2,785,618. Respondent gave Cali Ventures credit for $909,801 in sales tax paid, resulting in audited unreported taxable sales of $1,875,817 for the liability period.

17. Respondent issued the NOD based on these findings, and on April 26, 2018, it mailed an NOD to Cali Ventures at the Newhope Street address. The NOD was for tax of $148,511.79, plus applicable interest, and a negligence penalty of $14,851.23, for the

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[7] For 3Q17, appellant reported total sales of $416,775 and taxable sales of $397,830; and for 4Q17, appellant reported total sales of $365,281 and taxable sales of $344,802.

[8] Although sales of cold food to-go generally qualify for the exemption for food products pursuant to R&TC section 6359(a), if over 80 percent of a retailer's gross receipts are from the sale of food products, and over 80 percent of the retailer's sales of food products are subject to tax, all food products furnished in a form suitable for consumption on the seller's premises, including cold food sold to-go, are subject to tax unless the retailer keeps a separate accounting of its sales to-go of cold food in a form suitable for consumption on the retailer's premises. (R&TC, § 6359(f); Cal. Code Regs., tit. 18, § 1603(c)(1)(A).) Respondent's regulations refer to this as the 80-80 rule.

[9] Amounts in this table are rounded. Also, the total is different from the total referred to in the decision (i.e., $3,097,795). Without the audit workpapers, OTA cannot determine the cause of the difference; nevertheless, the difference does not affect the calculations below because OTA uses the determined unreported taxable sales amount, which appellant does not dispute.

period April 10, 2015, through December 31, 2017. The NOD mailed to the Newhope Street address was not returned as undeliverable.

18. Cali Ventures timely filed a petition for redetermination dated May 1, 2018. Appellant signed the petition, which stated that Cali Ventures could not timely provide books and records for audit due to a computer problem and requested an appeals conference. With the petition, Cali Ventures also filed a copy of a power of attorney (POA), which identified Ardavan Yeganegi of “A Yagane [*sic*] Financial Services” as Cali Ventures’ representative.

19. On June 28, 2018, respondent processed Cali Ventures’ *Notice of Closeout* dated June 7, 2018. This document states that Cali Ventures’ business closed effective December 31, 2017, and that the business was not sold. It also provided a “forwarding address” on Garrison Loop, Ladera Ranch that differed from the Garrison Loop address by one digit. According to respondent, this forwarding address thus became Cali Ventures’ updated address of record.

20. On May 9, 2019, respondent held an appeals conference as part of its internal appeals process. Cali Ventures did not appear.

21. On August 15, 2019, respondent issued a decision denying Cali Ventures’ petition (the Cali Ventures decision). Respondent mailed the Cali Ventures decision to the Newhope Street address and to Cali Ventures’ representative at the address provided in the POA. On October 23, 2019, respondent mailed a Notice of Redetermination to Cali Ventures’ updated address of record.

22. When Cali Ventures failed to timely pay the redetermined liability or further appeal the Cali Ventures decision, respondent assessed a $14,851.18 penalty under R&TC section 6565 (finality penalty).[10] Cali Ventures’ tax liability has not been paid.

The NODD issued to appellant

23. Following the termination of Cali Ventures’ business, respondent investigated and concluded that appellant was liable for Cali Ventures’ unpaid tax liabilities.

24. On June 14, 2021, respondent issued the NODD to appellant.

25. Appellant filed a timely petition for redetermination dated June 28, 2021.

[10] Cali Ventures’ appeal options included a request for reconsideration filed with respondent, or an appeal filed with OTA.

26. On June 29, 2022, the parties participated in an appeals conference as part of respondent's internal appeals process; and on November 3, 2022, respondent issued its decision denying the petition.
27. This timely appeal to OTA followed.

DISCUSSION

Issue 1: Should Cali Ventures' tax liability be cancelled?

R&TC section 6486 requires respondent to give written notice of its determination to a retailer. Such notice can be accomplished by mail. (R&TC, § 6486(a).) Service by mail is deemed sufficient if the notice is properly mailed (i.e., in a sealed envelope with postage paid) to the retailer's address of record.[11] (*Ibid*.) As relevant here, if respondent fails to give such written notice within three years after the last day of the calendar month following the quarterly period for which the amount is proposed to be determined or within three years after the return is filed, whichever period expires later, the determination is barred by the statute of limitations. (R&TC, § 6487(a).)

While several of respondent's publications inform taxpayers that it is the taxpayer's obligation to notify respondent regarding any address change (see, for example, *Your California Seller's Permit* (Publication 73)), OTA has found no statute or regulation that specifically prescribes how taxpayers are to notify respondent regarding a change of address.

Here, appellant asserts that Cali Ventures notified respondent regarding the change to its mailing address long before the NOD was mailed to appellant's former address. Appellant contends that the NOD should have been cancelled as prescribed by respondent's *Compliance*

[11] An NOD may also be served by personal delivery. (R&TC, § 6486(b).)

Policy and Procedures Manual (CPPM), section 703.030, and that Cali Ventures' timely petition for redetermination is irrelevant.[12]

It is not necessary for OTA to decide whether respondent's mailing of the NOD to the Newhope Street address complied with R&TC section 6486 because it is undisputed that Cali Ventures received actual notice of the determination, as evidenced by its timely-filed petition for redetermination. Cali Ventures' petition is dated May 1, 2018, three months before the statute of limitations would have barred the NOD for the earliest reporting period at issue. It is well established that defective service can be waived, either by express agreement or by voluntarily appearing and contesting the merits of the matter. (*Altafulla v. Ervin* (2015) 238 Cal.App.4th 571, 577–578.) To find otherwise would place form above substance. (See *Fireman's Fund*

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[12] Appellant relies on the following language from CPPM, section 703.030:

> If the NOD issued to the address of record is returned to [respondent] after mailing, the only basis to deem the service of the NOD as 'invalid' is if there was an error on the part of [respondent]. If the NOD is received as returned mail and the taxpayer had notified [respondent] prior to the NOD being issued of a change of address, either in writing or in another manner documented in [respondent]'s records, but [respondent] failed to update its records accordingly, the NOD should be cancelled and, if the statute of limitations period has not expired, a new NOD issued to the correct address.
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> **However, if the bill item is final, it must be reversed and** all transactions related to it must be cancelled (e.g., reversing estimated returns, reducing the original audit to $0, unlinking bill items in a dual collection case). The new NOD must relate to a new bill item to properly tie to the correct billing timeline (i.e., new finality date). Team members may need to request assistance with reversing bill items from the Return Analysis Unit, Return Processing Branch, Collections Support Bureau, Appeals and Data Analysis Branch, or Petitions Section, depending on the type of billing. Team members must ensure that the NOD is tied to the appropriate bill item.
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> Team members must verify and timely update [respondent's] records to reflect the address change information received from a taxpayer as soon as they become aware of the new address. When the NOD contains one or more periods for which the statute of limitations is close to expiring and the NOD was mailed to an invalid address, the statute for some periods could expire before a new NOD can be issued and mailed to the correct address. This could mean [respondent] is unable to include some periods on the NOD. For example, when the NOD is cancelled and rebilled, periods falling outside the statute of limitations (and not subject to a waiver signed by the taxpayer) must be eliminated. Additionally, a note should be entered regarding the source from which the information was obtained.
>
> Every effort should be made, using any resources available to [respondent] for locating people, to verify the address of the taxpayer prior to issuing the NOD. If there is reason to believe that the taxpayer is at an address that has not been confirmed, the NOD should be issued to both the address of record and to the address where [respondent] believes that taxpayer receives mail. Additional addresses may be entered into the system to generate multiple copies of the NOD to the same taxpayer.
>
> Team members in the office responsible for the account should ensure that all reports, including reaudits and adjusted field billing orders, include verified, up-to-date addresses for all partners and corporate officers. Registration records should always be updated in the system prior to the transmission of such reports.

(Original bold.)

Ins. Co v. Sparks Const. Co.(2004) 114 Cal. App. 4th 1135, 1148.) On this basis, OTA finds that Cali Ventures' timely filing of a petition for redetermination to commence its appeal of the NOD months before the statute of limitations would have barred the NOD rendered moot any argument that appellant may have had later regarding defective service of the NOD. Consequently, Cali Ventures' liability should not be cancelled. Although this is dispositive of the issue, OTA will briefly address appellant's argument that respondent's CPPM requires cancellation of Cali Venture's tax liability.

Respondent's CCPM describes itself as "an advisory publication providing direction to staff administering the Sales and Use Tax Law and Regulations." It does not purport to be, and it is not, legal authority binding on OTA. Furthermore, the language upon which appellant relies does not address possibly defective service of an NOD followed by a timely petition for redetermination, both occurring well before expiration of the limitations period. Therefore, contrary to appellant's argument, Cali Ventures' timely petition well before the statute of limitations expired is not only relevant to this discussion, it distinguishes the instant facts from those discussed in the CPPM and demonstrates why appellant's argument lacks merit.

<u>Issue 2: Is appellant personally liable for Cali Ventures' unpaid tax liabilities pursuant to R&TC section 6829?</u>

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 on behalf of 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.)

Here, appellant concedes the first three conditions: (1) that Cali Ventures' business has ceased; (2) that Cali Ventures collected sales tax reimbursement from its customers on retail sales; and (3) that appellant was a person responsible for Cali Ventures' sales and use tax compliance. Furthermore, appellant does not contest the audit methodology or the determined amount of the liability. Therefore, the disposition of this appeal turns solely on whether appellant willfully failed to pay (or willfully failed to cause others to pay) Cali Ventures' 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) appellant had the ability – usually determined by reference to Cali Ventures' available funds – to pay the taxes but chose not to do so.[13] (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(A)-(C).) Here, appellant concedes that he had the authority to pay Cali Ventures' taxes when due. However, appellant contends that he did not have actual knowledge that taxes were due and not being paid until he learned of the issuance of the NOD and filed Cali Ventures' petition for redetermination on May 1, 2018, and that, by then, Cali Ventures had no ability (i.e., funds) to pay the taxes.

Regarding knowledge, appellant concedes that he managed Cali Ventures' books and records and was responsible for its sales and use tax compliance. The evidence shows that appellant filed Cali Ventures' sales and use tax returns. OTA infers from appellant's concession and the provided evidence that appellant was also aware of the reports made by each location to the franchisor, and he certainly would have been aware of amounts deposited to Cali Ventures' bank account(s) for non-cash payments made by customers. Consequently, OTA finds that appellant knew that for 2Q15 through 4Q15, when appellant reported to respondent that Cali Ventures made no taxable sales, he was reporting to the franchisor that Cali Ventures made sales (including sales tax and tips) totaling over $377,000. The large discrepancies between amounts reported to the franchisor and amounts reported to respondent continued until appellant filed Cali Ventures' returns for 3Q17 and 4Q17. In both of those returns, appellant reported more sales than he reported to the franchisor, a likely result of having been informed that Cali Ventures was about to be audited.[14]

In addition, the fact that for 3Q17 and 4Q17 appellant reported in Cali Ventures' returns substantially more in sales to respondent than he reported to the franchisor — $66,761 for 3Q17 and $42,504 for 4Q17 — is evidence that appellant underreported sales to the franchisor. Also,

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[13] 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).)

[14] Both of these returns were filed after respondent notified appellant that he needed to provide Cali ventures' books and records, and after respondent notified the escrow company and Cali Ventures that an audit would be required before respondent could issue a tax clearance.

a comparison of sales reported to the franchisor versus 1099-K data indicates that for seven of the 11 quarters at issue, over 90 percent of sales were non-cash sales. The average was almost 95 percent. It seems unlikely that only approximately 5 percent of sales in a pizza restaurant would be paid with cash. One logical explanation for an unusually low cash sales percentage would be a failure to report cash sales. The fact that the cash sales percentage was substantially lower in some quarters (9.7 percent for 2Q15, 56.86 percent for 1Q10, 74.69 percent for 1Q17 and 84.65 percent for 4Q15), and the absence of evidence to explain the 10-85 percent differences is also consistent with a failure to report cash sales.

Finally, a comparison of 1099-K data to amounts appellant reported to respondent reveals that for every quarter, except 3Q17 and 4Q17, appellant reported taxable sales that were just a small fraction of the non-cash payments that were deposited into Cali Ventures' bank account(s). On the basis of the evidence, OTA finds that appellant knew, at the time Cali Ventures filed its returns, that Cali Ventures was consistently and substantially underreporting its taxable sales. The only remaining question is whether appellant had the ability to pay the taxes when they were due.

The evidence shows that appellant collected sales tax reimbursement from its customers. Those funds alone would have been sufficient to pay the taxes when due. Cali Ventures operated three restaurants during the liability period. It had sufficient funds to pay substantial amounts in rent and payroll, and would have had to pay additional operating expenses. The evidence establishes that Cali Ventures had the ability to pay its sales and use taxes when due for the liability period but chose to use available funds for other purposes. While the above findings are dispositive, OTA will further address appellant's two main arguments, both of which are at least implicitly rejected above.

First, appellant argues, citing *Intel Corp. Investment Policy Committee, et al. v. Sulyma* (2020) 589 U.S. 178 (*Sulyma*), that the evidence does not show that appellant *actually* knew that Cali Ventures was not paying its taxes when due. The same opinion recognizes that a finding of actual knowledge can be based on circumstantial evidence or evidence of willful blindness. (*Sulyma*, *supra*, at pp. 189-190, citing *Global-Tech Appliances, Inc. v. SEB S. A.* (2011) 563 U.S. 754, 769.) As explained above, OTA finds that the evidence here is sufficient to show actual knowledge.

Second, appellant asserts that he was not aware of the liability until he learned of the issuance of the NOD shortly before he filed Cali Ventures' petition, and that the evidence does not prove otherwise. As already discussed, the evidence does prove otherwise. Moreover, the liability at issue here did not spring into existence when respondent completed its audit, made its findings, and issued the NOD. Rather, the liability for each reporting period was born the moment appellant underreported— and in this case, knowingly underreported— taxable sales.

On the basis of the evidence, OTA finds that appellant is personally liable for Cali Ventures' unpaid tax liabilities pursuant to R&TC section 6829.

HOLDINGS

1. Cali Ventures' liability should not be cancelled.
2. Appellant is personally liable for Cali Ventures' unpaid tax liabilities pursuant to R&TC section 6829.

DISPOSITION

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

DocuSigned by:
Michael Geary
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Michael F. Geary
Administrative Law Judge

I concur:

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Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

G. TURNER, concurring in the result.

Here, appellant's liability stems solely from Cali Ventures LLC's (CVLLC) unpaid taxes. Appellant asserts the liability at issue here should be cancelled because the California Department of Tax and Fee Administration (CDTFA) failed to comply with the notice requirements of Revenue and Taxation Code (R&TC) section 6486 in sending a written notice of their determination to CVLLC. While there may be sufficient evidence in the record to find CDTFA's compliance with R&TC section 6486 wholly lacking,[1] even assuming that to be the case does not invalidate the Notice of Deficiency (NOD), at least here. The majority conclude that appellant's timely filed petition for redetermination evidences appellant's actual knowledge of the NOD and therefore constitutes a waiver of any alleged defects by CDTFA in compliance with R&TC section 6486. However, that position creates a catch-22: to challenge the veracity of the notice taxpayers must file a petition, but if filing the petition waives any challenge to a defect of the notice, the requirements of R&TC section 6486 are for all intents and purposes, meaningless.

In California civil proceedings, such as what was at issue in *Altafulla v. Ervin* (2015) 238 Cal.App.4th 571 cited by the majority, a defect in notice or service constitutes a jurisdictional issue for the court under the Code of Civil Procedure. (See e.g., Code Civ. Proc. § 410.5) A general appearance speaks to that very issue. Consequently, it should be no surprise that a general appearance would by implication waive any objection to the jurisdiction of the court. Plus, there are separate procedures for defendants to challenge process for lack of jurisdiction. (See e.g., Code Civ. Proc. § 418.10(a)(1).)

R&TC section 6486, however, mandates *written* notice of an NOD, which must include the amount and periods at issue. The very logic that *some* notice that is not in writing can

[1] CDTFA concedes it received and acknowledged CVLLC's notice of a change in address, yet nevertheless mailed the NOD to appellant's old Garden Grove address. CDTFA argues, however, the new address was not used due to CVLLC's non-responsiveness during audit, making CDTFA unable to confirm the new address. A taxpayer's non-responsiveness does not render an address invalid, nor does the Compliance Policy and Procedure Manual (CPPM) support ignoring an address CDTFA acknowledges appellant provided as a new address months prior to the issuance of the NOD.

satisfy the express terms of R&TC section 6486 is lacking. CDTFA essentially acknowledges this point in its own guidance.[2]

Perhaps more importantly, and what differentiates section 6486 from a jurisdictional question in a civil proceeding, is that section 6486 serves as the statutory due process requirement to inform the taxpayer of the amount of the tax deficiency and the period for which it covers. Due process requires the government provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." (*Jones v. Flowers* (2006) 547 U.S. 220, 226 citing *Mullane v. Central Hanover Bank & Trust Co* (1950) 339 U.S. 306, 314). The legislature has expressed the means for complying with those requirements by enacting section 6486. Because this notice requirement affects due process rights, section 6486 is subject to strict construction. (*Sass v. Cohen* (2020) 10 Cal.5th 861.)[3] There is no expression in section 6486 suggesting that actual knowledge of the mere existence of a NOD is sufficient notice and the assumption that filing a petition is objective fact of appellant's knowledge of all that CDTFA is obligated to provide in the written notice is an assumption I am not willing to embrace. Such construction leaves section 6486 essentially toothless.

Nevertheless, CDTFA's alleged failure to comport with the demands of section 6486 does not cancel the determination at least whereas here the statute of limitations remained open at the time of appellant's filing of their petition. Because section 6486 denotes the conditions under which CDTFA satisfies due process and the statute of limitations, waiving compliance with that section is more appropriately treated as CDTFA's failure to satisfy the statute of limitations. Because the defense of the statute of limitations is a personal privilege that must be raised in the petition or is waived (*Hall v. Chamberlain* (1948) 31 Cal.2d 673,

[2] See Annotation 465.0560 (12/1/1997). Where CDTFA cannot establish that it gave written notice of its determination as required by R&TC section 6486 nor present evidence the taxpayer *actually received the NOD*, the NOD is appropriately cancelled where the statute of limitations has expired on its issuance. The slight nuance of Compliance Policy and Procedures Manual (CPPM) section 703.030 is that it suggests cancelation of the NOD when CDTFA becomes aware of its own failure to comply with section 6486 by returned mail. The CPPM nevertheless recognizes that the failure to satisfy section 6486 by supplying written notice warrants cancellation of the NOD.

[3] Strict construction is one "that is informed by the text of [the statute], the language of surrounding pertinent provisions, and the animating purpose of the statute." (*Sass*, *supra*, at pp. 871-872.)

679.),[4] I would similarly treat allegations of CDTFA's failure to give proper notice under section 6486 as an affirmative defense, raised in the petition or waived.

Here, while CDTFA provides a form "Petition for Redetermination" (CDTFA-416 Rev. 10 (1-18)), which appellant relied on to initiate a timely challenge to the determination, there is space on the form to specify any grounds on which the petition is based. Appellant did not specify the failure of adequate notice as one of the grounds for the petition. While I depart from the majority's view that mere filing of the petition constituted a waiver of the allegedly defective notice, appellant's failure to raise the issue as an affirmative defense in the petition for redetermination did constitute a waiver and therefore the Office of Tax Appeals has no basis to grant relief on that basis.

Signed by:
Greg Turner
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Greg Turner
Administrative Law Judge

Date Issued: 11/4/2025

[4] See *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898. Federal procedure similarly concludes that the defense of the statute of limitations is waivable (see *Adler v. Commissioner* (1985) 85 T.C. 535, 540; see also *Amesbury Apartments, Ltd. v. Commissioner* (1990) 95 T.C. 227, 240-241; *Heckman v. Commissioner*, T.C. Memo. 2014-131), though, federal procedure is strengthened by explicit recognition that the statute of limitations is an affirmative defense. (See Tax Ct. R. 39.) Nevertheless, the statute of limitations as merely an affirmative defense is a long-established feature of both civil and criminal proceedings. (See *U.S. v. Cook* (1872) 84 U.S. 168, 181 [the statute of limitations is "a matter of defense and must be pleaded or given in evidence by the accused."].)