OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:

J. BASS

OTA Case No.: 240817258
CDTFA Case ID: 4-530-774

OPINION

Representing the Parties:

For Appellant: J. Bass

For Respondent: Mari Guzman, Attorney

For Office of Tax Appeals: Nguyen Dang, Attorney

K. WILSON, Hearing Officer: Pursuant to Revenue and Taxation Code (R&TC) section 6561, J. Bass (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA) denying appellant's timely petition for redetermination of a Notice of Dual Determination (NODD) issued on January 3, 2023. The NODD is for tax of $36,103, plus applicable interest, and a penalty of $3,610.30 for the periods third quarter of 2018 (3Q18), 4Q18, and 3Q19 (liability period). The NODD reflects CDTFA's determination that appellant is personally liable for the unpaid tax liabilities of Carfinance Centers, LLC (CFC) for the liability period pursuant to R&TC section 6829.

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, (Regulation) section 30209(a).

ISSUES

1. Whether appellant has shown that adjustments are warranted to the audit liability.
2. Whether appellant is personally liable as a responsible person for CFC's unpaid sales tax, applicable interest, and penalty during the liability period.

FACTUAL FINDINGS

1. CFC, a member-managed LLC, was formed on October 10, 2017, and operated a used car dealership located in Oceanside, California. CFC's seller's permit application was

completed by appellant with an effective start date of October 25, 2017. CFC, appellant and D. Bass obtained a Department of Motor Vehicles (DMV) retail license, effective April 4, 2018.

2. On August 5, 2019, CDTFA notified CFC that according to DMV records, CFC had 46 taxable transactions totaling an estimated $616,300 for 3Q18, whereas CFC only reported $291,500 on its 3Q18 sales and use tax return (SUTR), resulting in a difference of $324,750.
3. On November 21, 2019, appellant, acting on behalf of CFC, faxed CDTFA a list of 19 vehicle sales which appellant claimed had been repossessed. CDTFA verified, using DMV's Quickweb, that CFC had issued Certificates of Repossession for seven of the vehicles and removed the sales of these vehicles from its proposed deficiency.
4. On December 13, 2019, CDTFA issued a Notice of Determination (NOD) to CFC for the 3Q18 in the amount of $20,237.36 which consisted of $18,538 in tax, plus applicable interest.
5. Based on a similar method of verifying taxable vehicle sales using DMV sales data, CDTFA determined that CFC had also underreported its taxable sales for 4Q18. In addition, despite appellant making its first quarterly prepayment on August 24, 2019, CFC filed a 3Q19 SUTR reporting zero taxable sales. CDTFA therefore used DMV sales data to reconstruct CFC's taxable sales for this quarter.
6. On October 8, 2020, and April 29, 2021, CDTFA issued NODs to CFC for 4Q18 for $1,448 in tax and 3Q19 for $18,117 in tax, respectively, plus applicable interest.[1]
7. CFC did not pay or petition any of the NODs for the liability period and they became final (that is, they became due and payable).[2]
8. Following the termination of CFC's business and its failure to pay the NODs for the liability period, CDTFA conducted a dual determination investigation to ascertain whether any of CFC's members or employees could be held personally liable for the CFC's unpaid tax liability for the liability period pursuant to R&TC section 6829.

[1] CDTFA applied the 3Q19 prepayment made of $2,000 to the liability which reduced that tax amount from $18,117 to $16,117.

[2] The NODs issued to CFC do not reflect any penalties. The penalty amount included in the NODD issued to appellant therefore appears to be a finality penalty, which is a 10-percent penalty imposed upon a person (in this case CFC) for failing to pay the liability stated in the NOD on or before the date it becomes final. (R&TC, § 6565.)

9. During CDTFA's dual determination investigation, CDTFA found the following:
    a. Appellant was a founding member of CFC, its vice president and general manager.
    b. Appellant was involved in vehicle sales, made CFC's sales tax prepayments, filed CFC's quarterly SUTRs, and initiated electronic payment of its tax liabilities.
    c. On December 31, 2019, CFC notified CDTFA that it terminated business operations on November 30, 2019. CDTFA later confirmed using DMV's website that CFC's vehicle dealer license was closed on this same date.
    d. Despite the reported termination date of November 30, 2019, DMV sales data indicated that CFC made nine additional vehicle sales through May 1, 2020.
    e. On October 31, 2018, appellant filed and paid CFC's business license renewal with the City of Oceanside.
    f. The commercial month-to-month rental agreement signed by appellant as tenant on April 30, 2019, as an individual doing business as Car Finance Center and Schwarz, lessor, states: "This document memorializes the agreement of the parties made on August 23, 2017, by and between, [appellant]. . . and [Schwarz]" for the property located at [CFC's address in Oceanside, California].
    g. Appellant was listed as a representative for CFC with Employment Development Department (EDD). CDTFA confirmed with EDD that wages were paid to employees during 1Q19 and 2Q19.
    h. On November 29, 2019, appellant filed a Secretary of State Statement of Information on behalf of CFC.
10. On November 17, 2022, CDTFA discussed the payment of CFC's unpaid taxes with appellant for the liability period. CDTFA informed appellant that it was conducting an investigation to determine whether appellant could be held personally liable for those taxes.
11. Upon completing its dual determination investigation, CDTFA determined that appellant should be held personally liable for CFC's unpaid tax liability.
12. On January 3, 2023, CDTFA issued the NODD to appellant reflecting this determination.
13. Appellant petitioned the NODD, and in response, CDTFA issued a decision affirming its NODD.
14. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellant has shown that adjustments are warranted to the audit liability.

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.) For the purpose of the proper administration of the Sales and Use Tax Law and to prevent the evasion of the sales tax, the law presumes that all gross receipts are subject to tax until the contrary is established. (R&TC, § 6091.) It is the retailer's responsibility to maintain complete and accurate records to support reported amounts and to make them available for examination. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).)

If CDTFA is not satisfied with the amount of tax reported by the taxpayer, or if any person fails to make a return, CDTFA may determine the amount required to be paid on the basis of any information which is in its possession or may come into its possession. (R&TC, §§ 6481, 6511.) In the case of an appeal, CDTFA has a minimal, initial burden of showing that its determination was reasonable and rational. (*Appeal of Talavera*, 2020-OTA-022P.) Once CDTFA has met its initial burden, the burden of proof shifts to the taxpayer to establish that a result differing from CDTFA's determination is warranted. (*Ibid*.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid*.)

Here, CDTFA conducted a desk audit of CFC based on information provided by DMV for the 3Q18 reporting period. CDTFA found that according to DMV records, CFC had 46 taxable transactions totaling an estimated $616,300 for 3Q18, whereas CFC only reported $291,500 on its SUTR, resulting in a difference of $324,750. Appellant provided CDTFA with a list of 19 vehicle sales which CFC claimed had been repossessed. CDTFA verified, using DMV's Quickweb, that CFC had issued Certificates of Repossession for seven of the vehicles and removed the sales of these vehicles out of the questioned 46 vehicles from its proposed deficiency. CDTFA determined that CFC had also underreported its taxable sales for 4Q18. In addition, despite appellant making its first quarterly prepayment on August 24, 2019, CFC filed a 3Q19 SUTR reporting zero taxable sales. CDTFA therefore used DMV sales data to reconstruct CFC's taxable sales for this quarter. OTA finds that the evidence establishes a reasonable and rational basis for CDTFA's calculation of the audit liability.

Appellant argues that more than half of the $36,103 tax amount "did not exist" and were the result of "reports of sales to the DMV that were voided." Appellant asserts that "customers returned cars to vendors Next Gear Capital, Westlake Auto Flooring, AFS Auto Flooring, [and] AFC Auto Flooring in 2019 under receivership." Appellant contends that "evidence provided from the banks showing the vehicle VIN numbers used for the 2019 tax liability were rescinded so the vehicles could be returned to the vendors as title would never be conveyed." Therefore, appellant argues that CFC did not have additional taxable sales.

It is appellant's burden to show error in the determination, and appellant must point to an error in the determination and provide proof of the error. (*Appeal of Talavera, supra*.) Appellant cannot carry its burden simply by asking OTA to find unidentified errors in CDTFA's determination. (*Appeal of Amaya*, 2021-OTA-328P.) The burden is on appellant to prove that: (1) the tax assessment is incorrect, and (2) the proper amount of the tax. (*Appeal of AMG Care Collective*, 2020-OTA-173P.) Appellant has failed to meet that burden. Therefore, OTA finds that no adjustment to the NODD is warranted.

<u>Issue 2: Whether appellant is personally liable as a responsible person for CFC's unpaid sales tax, applicable interest, and penalty during the liability period.</u>

Individuals may be held personally liable for the unpaid sales and use tax and the related penalties and interest, owed by an LLC if all the following 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 individual had control, supervision, responsibility or a duty to act on behalf of the LLC concerning its sales and use tax obligations (referred to as a "responsible person"); and (4) the individual was willful in failing to pay or causing to be paid the LLC's taxes. (R&TC, § 6829; Cal. Code Regs., tit. 18, § 1702.5.) Moreover, more than one person may be held liable under R&TC section 6829 for the same primary liability, as long as the requirements for imposing such liability on each person are satisfied. (See R&TC, § 6829.)

<u>*Burden of Proof*</u>

Generally, CDTFA bears the burden of proving that the above four requirements for imposing personal liability have been met by a preponderance of evidence. (Cal. Code Regs., tit. 18, § 1702.5(d).) However, for an individual who is not an officer or an owner of an LLC, CDTFA must establish these requirements by clear and convincing evidence.[3] (Cal. Code Regs., tit. 18, § 1702.5(e).) The parties disagree as to whether appellant was an owner of CFC during the liability period, and thus, dispute the quantum of evidence necessary to establish

[3] An LLC's operating agreement may provide for the appointment of officers with the titles, powers, and duties as specified in the articles of organization or operating agreement or as determined by the managers or members of the LLC. (Corp. Code, § 17704.07(u).)

personal liability in this case.[4] Appellant bears the burden of proof as to this issue. (Cal. Code Regs., tit. 18, § 30219(a) [except where expressly provided by law, the burden of proof is on an appellant with respect to all factual issues].)

Appellant admits he was a founding member of CFC and one of its principal owners in 2017 and 2018 but claims that he was only its general manager and not an owner in 2019.[5] Appellant provides several documents which he asserts are conclusive evidence that he was not an owner of CFC in 2019. The first is a "Carfinance Centers LLC Meeting Minutes" dated January 10, 2018, which states that another individual, D. Bass, was the sole owner of the LLC. Appellant also provides what appears to be an undated screenshot of CFC's bank account details, showing D. Bass as the sole authorized signer on the account and that the account was closed on September 30, 2021. Finally, appellant provides a notarized DMV Statement of Facts form dated May 7, 2019, in which D. Bass states she is the only owner and member of CFC.

CDTFA responds that these documents are contradicted by appellant's statement made during his appeal with CDTFA that he was no longer an owner of CFC on June 30, 2018, and in his opening brief in which appellant admits to being an owner in 2018, and evidence showing that appellant continued to hold himself out as an owner of CFC during the liability period. CDTFA provides a signed lease agreement dated April 30, 2019, for CFC's business premises which states that appellant was the tenant and "the sole proprietors [sic] operating under the name of Car Finance Center," and is signed by appellant as "[J.] Bass, individually, doing business in California as Car Finance Center." CDTFA also points out that it was not notified of any change in CFC's ownership.

Appellant has not provided a credible explanation for why CFC did not notify CDTFA of the change in ownership, why DMV was not notified of the change in ownership until May 7, 2019, or why appellant signed a lease agreement representing himself as CFC's sole owner over a year after he was purportedly no longer an owner of CFC. Appellant merely asserts, without any corroborating evidence, that it took some time to update CFC's records after the change in ownership and that the lease was erroneously executed because the attorney for the lessor was confused by the fact that appellant had allegedly begun to operate a

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[4] To the extent appellant argues that personal liability may only be imposed on individuals with an ownership interest in the LLC, appellant is mistaken. As previously discussed, personal liability may be imposed on non-owners so long as CDTFA provides clear and convincing evidence that the requirements of R&TC section 6829 have been met.

[5] Although appellant filed CFC's 4Q17 return and its prepayments for 1Q18 as vice president, there is no evidence he retained that position as an officer of the CFC after filing CFC's 1Q18 return, where appellant lists his title as manager. CDTFA does not contend that appellant was an officer of CFC in 2019.

U-Haul franchise and another car dealership on a portion of CFC's business premise. These explanations are unconvincing. Informing DMV or CDTFA of a change in CFC's ownership is not a significant or time-consuming undertaking. Regardless of the reasons for the errors, it makes little sense for appellant to sign a lease that was obviously and improperly prepared, and which might make appellant personally liable for the tenant obligations under the lease.

Another concern here is that it is difficult to ascertain whether the provided meeting minutes or DMV Statement of Facts form reflect a legitimate transfer of ownership or an attempt by appellant to create the illusion of one to escape liability for CFC's unpaid taxes. As CDTFA notes, there are numerous inconsistencies in the timeline provided by appellant for the transfer, which in turn are contradicted by the evidence provided. Appellant also provided no explanation for why he would surrender his ownership in CFC for what appears to be no consideration, nor has appellant provided any credible evidence showing that any of the actual burdens and benefits of ownership transferred to D. Bass. Although appellant established that he was not a signer on CFC's bank account at some indeterminate point in time, this does not automatically imply that he was no longer a member of CFC, as members are not necessarily signers on an entity's bank account or vice versa.

In considering the totality of the evidence presented, OTA finds that appellant has failed to establish that he was not an owner of CFC for purposes of imposing personal liability under R&TC section 6829. Consequently, CDTFA's burden of proof in this matter is a preponderance of evidence.

Termination of CFC's business

The termination of the business of an LLC includes discontinuance or cessation of all business activities for which the LLC was required to hold a seller's permit. (Cal. Code Regs., tit. 18, § 1702.5(b)(3).) Every person conducting business in this state as a seller is required to obtain a seller's permit for each place of business. (R&TC, § 6066(a).) Although CFC notified CDTFA and DMV that it had ceased business operations on November 30, 2019, sales data obtained from DMV shows that the business continued to make retail vehicle sales through May 1, 2020, and consequently, that it had not terminated until that date. Therefore, this element is met.

Collection of tax reimbursement

Appellant admits CFC generally collected sales tax reimbursement in the regular course of business but argues that it did not collect sales tax reimbursement with respect to CDTFA's deficiency assessments for some of the vehicle sales included in 3Q18 and all of the vehicle sales that occurred in 3Q19 because these sales were rolled back.

A “roll back” is where a vehicle is purchased, used, and then returned to the dealer prior to the issuance of title. (CDTFA’s Audit Manual, § 0607.75.)[6] In the case of a roll back, vehicle transfer fees remain due to DMV, and the Report of Sale is not voided. (*Ibid*.; see also Veh. Code, § 5901(d).) This means that roll backs continue to appear as retail vehicle sales in DMV sales data used by CDTFA to reconstruct CFC’s taxable sales, despite the sales being unwound and the vehicles ultimately returned to the dealer.

Appellant asserts he provided CDTFA with proof that the unreported vehicle sales for 3Q18 were rolled back and that CDTFA had, as a result, deleted the proposed deficiency for that quarter. Appellant further claims that CFC was forced into receivership in 3Q19 and that the receiver rolled back all of CFC’s vehicle sales prior to finalizing the financing for the sales. Appellant provides seven reassignment notices and a repurchase demand email, indicating that CFC had sold eight vehicles under a retail installment sales contract in July and August 2019, that these contracts were then sold to two third-party lenders, and that CFC was required to repurchase all the vehicle contracts.[7]

Appellant’s contentions are without merit. The record indicates that in response to appellant’s November 21, 2019 submission, CDTFA reduced, but did not cancel, its proposed deficiency for 3Q18. The record further indicates that CDTFA issued an NOD to CFC for 3Q18 in the amount of $20,237.36 which consisted of $18,538 in tax, plus applicable interest. The reassignment letters regarding vehicle sales in 3Q19 do not indicate why funds were requested from CFC, whether due to receivership or simply repossession from nonpayment on the loans. In fact, two of the reassignment letters show dates in August 2020 and November 2020, which are evidence that tax was collected in 3Q19 on vehicle sales and funding for the sales was not requested to be returned until 2020. Although appellant provided some evidence that CFC was requested to repurchase several of the contracts it sold, appellant has not established that CFC repossessed any vehicles or issued refunds to its customers following a repurchase of the contracts. No deduction is allowable in the event that property sold on credit is repossessed

[6] CDTFA’s Audit Manual “is an advisory publication providing direction to CDTFA’s staff administering the Sales and Use Tax Law and Regulations.” (CDTFA Audit Manual.) CDTFA’s Audit Manual has not been adopted pursuant to a formal rulemaking process. (*Appeal of Micelle Laboratories, Inc.*, 2020-OTA-290P.) While CDTFA’s Audit Manual may provide guidance to OTA, it does not constitute binding legal authority. (*Appeal of Amaya*, *supra*.)

[7] The evidence provided are reassignment letters and a repurchase demand email showing amounts due for five of the contracts in September 2019, one contract in October 2019, one contract in August 2020, and one contract in November 2020 for an unspecified amount.

except where the entire consideration paid by the purchaser is refunded to him or where a credit for a worthless account is allowable. (Cal. Code Regs., tit. 18, § 1641(d).)

Absent any evidence that CFC's unreported vehicle sales for the liability period were in fact rolled back, based on appellant's admission that CFC charged and collected tax reimbursement in the ordinary course of business, OTA finds that sales tax reimbursement was collected. Therefore, this requirement has been met.

Responsible Person

Personal liability can be imposed only on a responsible person, and there may be more than one responsible person. (R&TC, § 6829) 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)(1).) Holding the position of general manager is evidence that he had broad implied and actual authority to do all acts customarily connected with the business, including ensuring its compliance with the Sales and Use Tax Law, even if that responsibility is delegated to others. (See *Commercial Sec. Co. v Modesto Drug Co*. (1919) 43 Cal.App. 162, 173.)

Appellant does not dispute that he was a responsible person as defined in the regulation up until he was purportedly no longer a member of CFC. However, the record is not clear when appellant shifted from member to general manager of CFC. Appellant references multiple dates in which he was or was not an owner and/or member of CFC. In appellant's opening brief, he states, "I was the owner in 2017 and 2018 during the transition period to new ownership." According to the "CarFinance Centers LLC Meeting Minutes," dated January 10, 2018, appellant was not listed as an owner but the "General Manager" of the dealership. Appellant contends that D. Bass took over and was the sole owner of CFC on July 27, 2018, as shown on the Bank of America evidence that D. Bass opened the account for CFC on that date. Yet, appellant filed and paid CFC's business license renewal on October 31, 2018, as well as signed the lease as tenant on April 30, 2019, as an individual doing business as Car Finance Center. In the lease, Schwarz, lessor, states: "This document memorializes the agreement of the parties made on August 23, 2017, by and between, [appellant]. . . and [Schwarz]" for the property located at CFC's address in Oceanside, California. Appellant was listed as CFC's representative with EDD. CFC's DMV records show appellant as an owner and salesperson.

The evidence shows appellant opened the seller's permit for CFC, made CFC's prepayments and return payments for the liability period, filed its SUTRs for the liability period, filed and paid for the renewal of CFC's business license on October 31, 2018, and signed and renewed the one-year lease for CFC's business location on April 30, 2019. Additionally, appellant acted on behalf of CFC when he communicated with CDTFA on August 27, 2019, October 10, 2019, November 7, 2019, and November 21, 2019, regarding CFC's proposed deficiency for 3Q18. Appellant was a responsible person for sales and use tax purposes for the liability period. Therefore, this requirement has therefore been met.

Willfulness

To establish that an individual willfully failed to pay or cause to be paid the LLC's taxes, CDTFA must establish that the failure was the result of an intentional, conscious and voluntary course of action. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(A)-(C).) In other words, CDTFA must prove that the following three conditions were concurrently met on or after the date that the taxes became due: (1) the responsible person had actual knowledge that the taxes were due but not being paid; (2) the responsible person had the authority to pay the taxes or to cause them to be paid; and (3) 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)(A)-(C).) A failure to pay or cause to be paid may be willful even though such failure was not done with a bad purpose or motive. (Cal. Code Regs., tit. 18, § 1702.5(b)(2).)

Sales and use taxes are due and payable to CDTFA on or before the last day of the month following each reporting period. (R&TC, §§ 6451, 6455.) Here, CFC had a quarterly reporting obligation. CFC was therefore required to pay its taxes by the end of the month following each quarterly period, and thus, CDTFA must establish that all three elements of willfulness were met on or after this date for each quarter of the liability period.

Actual knowledge of CFC's unpaid taxes

CDTFA contends appellant had actual knowledge that CFC was underreporting its taxable vehicle sales for the liability period based on his extensive involvement in CFC as its founding member, general manager, responsible person, and vehicle salesperson. CDTFA asserts that in preparing CFC's sales and use tax returns, appellant presumably used the sales reports submitted to the DMV, which establishes that appellant knowingly underreported CFC's taxable vehicle sales.

The evidence is sufficient to establish that appellant knowingly underreported CFC's vehicle sales for the liability period, as appellant filed DMV reports of CFC's actual vehicle sales and failed to report all of the vehicle sales on the SUTRs during the liability period. Moreover, CDTFA informed CFC on August 5, 2019, that it failed to report the sale of 46 vehicles during 3Q18 based on DMV data. Appellant responded on November 21, 2019, with a list of only 19 unwound sales, 12 of which could not be verified by CDTFA and for which appellant failed to offer any substantiating evidence. After initially responding, appellant made no further effort to follow up with CDTFA. On December 4, 2019, CDTFA notified appellant that without further documentation, an NOD would be issued. Under these circumstances, since appellant was responsible for filing the 3Q18 SUTR and there is a lack of evidence to show that the unreported sales were rolled back or repossessed, appellant knew or should have known, after submitting his response for only a portion of the unreported sales, that CFC had underreported its vehicle sales and that a deficiency assessment would soon be forthcoming.

On October 7, 2020, CDTFA issued the NOD to CFC for 4Q18. Even though the underreporting in 4Q18 did not amount to a significant liability, appellant had knowledge of the actual vehicle sales and was the person who reported more taxable sales to DMV than reported taxable sales to CDTFA. Despite CDTFA's attempts to contact appellant on January 28, 2020, April 28, 2021, and November 16, 2022, it wasn't until November 17, 2022, when appellant responded to CDTFA's calls. During the November 17, 2022 conversation, CDTFA again notified appellant of the outstanding sales tax liability. Since appellant filed CFC's 4Q18 SUTR on January 31, 2019, appellant knew that the vehicle sales reported to CDTFA were less than reported to DMV.

For the 3Q19 deficiency, appellant filed CFC's SUTR reporting $0 taxable sales despite filing its first prepayment for this quarter and reporting a substantial number of retail vehicle sales to DMV. As discussed above, appellant's contention that CFC's sales for this quarter were rolled back is not supported by the evidence. Moreover, unlike CFC's 3Q18 and 4Q18 deficiencies which were based on underreporting, the 3Q19 deficiency was due to CFC's failure to report and remit any of the sales tax reimbursement it had collected. Given appellant's extensive involvement in CFC's operations as a salesperson, general manager, and the person responsible for its sales and use tax matters, appellant must have known under these circumstances that CFC had not paid its sales and use tax liability for 3Q19 as the taxes became due on October 31, 2019. Accordingly, OTA finds appellant had actual knowledge of the underreported taxable sales of CFC.

Authority to pay

The record indicates that during the liability period, appellant was a member and/or general manager of CFC and the individual who signed the returns and initiated payment of CFC's electronic return payments and prepayments throughout the liability period. Additionally, appellant wrote checks for CFC's July rent and business license renewal on June 29, 2018, and October 31, 2018, respectively. As an owner and/or general manager of CFC, appellant does not dispute that he had the authority to pay CFC's liabilities while the business was operating. Therefore, appellant had the authority to pay CFC's expenses.

Ability to pay

A business had the ability to pay its taxes if it had funds available but chose to pay other expenses instead. (See, e.g., *Appeal of Treyzon*, 2023-OTA-399P; *Appeal of Eichler*, 2022-OTA-029P.) CFC continued to pay rent, employees, suppliers, and other business expenses. Although CFC notified CDTFA and DMV that it had ceased business operations on November 30, 2019, sales data obtained from DMV shows that the business continued to make retail vehicle sales on which sales tax was collected through May 1, 2020, and consequently, that it had continued to operate in some capacity for six additional months after its reported termination date. This indicates that appellant had the ability and the available funds from continuing sales to pay the taxes owed but instead elected to use the tax reimbursement CFC had collected to fund other aspects of the business operations through May 1, 2020.

Appellant argues he lacked the ability to pay CFC's taxes after CFC was forced into receivership in 3Q19. Appellant provides three documents to support this claim. First, is a screenshot from the California Secretary of State website showing that as of June 26, 2025, there were numerous UCC-1 financing statements filed against CFC's assets. Second, is a Receivable Detail Report issued by NextGear Capital dated October 29, 2019. The report shows CFC had financed the purchase of 22 inventory vehicles from May 8, 2019, through August 23, 2019, and that its "repo account" had an amount due of $5,700 as of September 16, 2019. Third, is a screenshot from the Superior Court of California, County of San Diego on June 26, 2025, showing that five civil lawsuits were filed against CFC in 2020.

While the evidence suggests that CFC may have been in some financial trouble, it is insufficient to show that CFC was placed in receivership prior to the date appellant obtained actual knowledge that CFC's taxes had not been paid. Moreover, appellant did not provide any court order or documentary evidence indicating that CFC was placed in receivership or the date the alleged receivership was established. An individual's failure to produce evidence which is within his or her control gives rise to the presumption that such evidence, if produced, would be unfavorable to his or her appeal. (*Appeal of Bindley*, 2019-OTA-179P.)

In conclusion, OTA finds appellant had knowledge of CFC's unpaid taxes for the liability period, and that appellant had the authority, ability and funds to pay those taxes while CFC was operating. Appellant was therefore willful in failing to pay CFC's tax liabilities, and thus, CDTFA has established that all the requirements for imposing personal liability upon appellant pursuant to R&TC section 6829 have been met.

HOLDINGS

1. Appellant has not shown that adjustments are warranted to the audit liability.
2. Appellant is personally liable as a responsible person for CFC Center's unpaid sales tax, applicable interest, and penalty during the liability period.

DISPOSITION

CDTFA's action denying appellant's petition are sustained.

Signed by:
Kim Wilson
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Kim Wilson
Hearing Officer

We concur:

Signed by:
Josh Lambert
CB1F7DA37831416...
Josh Lambert
Administrative Law Judge

DocuSigned by:
Steven Kim
5DD7EE644397430...
Steven Kim
Administrative Law Judge

Date Issued: 6/24/2026