Docusign Envelope ID: 205A33A5-F803-86C6-82D7-C5A55F19E28B

OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **A. SILVA (VALDEZ SILVA, INC.)**	OTA Case No.: 241017687 CDTFA Case ID: 5-024-888

OPINION

Representing the Parties:

For Appellant: A. Silva

For Respondent: Sunny Paley, Attorney

For Office of Tax Appeals: Oliver Pfost, Attorney

G. TURNER, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, A. Silva (appellant) appeals a decision issued by the California Department of Tax and Fee Administration (respondent) denying appellant's administrative protest of a Notice of Dual Determination (NODD) with a Notice Service Date of May 31, 2023.[1] The NODD is for tax of $121,361.53, plus applicable interest, and penalties totaling $47,993.03 for the period May 28, 2019, through April 30, 2022. The NODD reflects respondent's determination that appellant is personally liable as a responsible person under R&TC section 6829 for the unpaid sales tax liabilities of Valdez Silva Inc. (VSI), a California Sub-S corporation doing business as Supreme Autos.

Subsequently, CDTFA conducted a reaudit that deleted the liability for the periods after February 28, 2022; this reduced appellant's tax liability from $121,361.53 to $115,966.53, and reduced the penalties from $47,993.03 to $47,453.53.

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

[1] As discussed below, on May 5, 2022, respondent obtained actual knowledge that the business operations of Valdez Silva, Inc., had terminated. Thus, the NODD was timely issued within the three years after the last day of the calendar month following the close of the quarterly period in which respondent obtained actual knowledge of the termination of business operations. (See R&TC, § 6829(f).)

ISSUE

Whether appellant is personally liable as a responsible person pursuant to R&TC section 6829 for the unpaid sales tax liabilities of VSI for the period May 28, 2019, through February 28, 2022 (liability period).

FACTUAL FINDINGS

1. VSI operated a used car dealership in Salinas, California. It held a California seller's permit with a start date of May 28, 2019.
2. Appellant held the position of CEO with VSI and F. Valdez held the position of CFO, secretary, and director, according to a Statement of Information filed with the California Secretary of State in November of 2019. Appellant and F. Valdez were each 50 percent shareholders in VSI, as reported on a 2019 Schedule K-1 issued by the corporation to each shareholder.
3. On May 5, 2022, appellant notified respondent that VSI closed the dealership in April of 2022. California DMV records obtained by respondent indicate the dealership closed on April 20, 2022. Based on this information, respondent closed VSI's seller's permit with an effective end date of April 30, 2022.
4. When respondent closed the seller's permit, VSI had unpaid sales tax liabilities consisting of: (1) a self-assessed late-filing penalty of $1,333.30 for the fourth quarter of 2019 (4Q19); (2) reported but unremitted tax of $12,645.27 and a self-assessed late-filing penalty of $2,250.00 for 4Q20; (3) reported but unremitted tax of $56.00 and a self-assessed late-filing penalty of $511.90 for the period February 1, 2021, through February 28, 2021; (4) reported but unremitted tax of $791.00 and a self-assessed late-filing penalty of $1,423.20 for the period May 1, 2021, through May 31, 2021; (5) reported but unremitted tax of $1,947.00 and a self-assessed late-filing penalty of $755.00 for the period June 1, 2021, through June 30, 2021; (6) reported but unremitted tax of $2,906.00 and a self-assessed late-filing penalty of $926.80 for the period July 1, 2021, through July 31, 2021; (7) reported but unremitted tax of $13,462.00 and a self-assessed late-filing penalty of $1,687.20 for the period September 1, 2021, through September 30, 2021; (8) reported but unremitted tax of $11,807.00 and a self-assessed late-filing penalty of $1,986.00 for the period October 1, 2021, through October 31, 2021; (9) reported but unremitted tax of $2,507.00 and a self-assessed late-filing penalty of $1,019.90 for the period November 1, 2021, through November 30, 2021; (10) respondent-assessed tax deficiency of $69,679.13, a 40 percent penalty of $27,821.14,

and a finality penalty of $6,967.91 for the period April 1, 2019, through June 30, 2021;[2] (11) a failure-to-file penalty of $375.74 for the period January 1, 2022, through January 31, 2022;[3] (12) respondent-assessed tax deficiency of $165.20, a failure-to-file penalty of $378.92 and a finality penalty of $16.52 for the period February 1, 2022, through February 28, 2022;[4] and (13) respondent-assessed tax deficiency of $5,395.00 and a failure-to-file penalty of $539.50 for the period April 1, 2022, through April 30, 2022.[5]

5. Following the closure of VSI's seller's permit, respondent investigated appellant's potential liability as a responsible person pursuant to R&TC section 6829 for VSI's unpaid liabilities.

6. The evidence respondent compiled during its investigation included the following documentation bearing appellant's name, signature, title, and/or position:

    a. Statements of Information filed with the California Secretary of State, one filed November 18, 2019, and the other filed November 6, 2020, identifying appellant as the CEO of VSI.

    b. A California DMV record showing that appellant and F. Valdez possessed DMV-issued dealer licenses for the dealership in Salinas, effective August 15, 2019. The same DMV record identifies appellant and F. Valdez as owners.

    c. VSI's bookkeeper, B. Ramirez, identified appellant as the CEO of VSI, in a document submitted to respondent, dated November 5, 2021.

---

[2] On April 11, 2022, respondent issued VSI a Notice of Determination for tax of $70,457.00 and applicable interest, a credit of $777.87, and a 40 percent penalty of $27,821.14 for the period May 28, 2019, through June 30, 2021. R&TC section 6597 requires the imposition of a penalty, commonly referred to as the 40 percent penalty, when a taxpayer collects sales tax reimbursement but fails to remit it to the state, if certain thresholds are exceeded.

[3] On October 5, 2022, respondent issued VSI a Notice of Determination for tax of $10,286.62, interest of $71.46, a credit of $11,011.00, and failure-to-file penalty of $1,028.66 for the period January 1, 2022, through January 31, 2022. After applying the credit of $11,011.00, the remaining balance was $375.74.

[4] On October 5, 2022, respondent issued VSI a Notice of Determination for tax of $3,789.20, interest of $32.65, a credit of $3,624.00, and failure-to-file penalty of $378.92 for the period February 1, 2022, through February 28, 2022. After applying the credit of $3,624.00, the remaining balance was $576.77, which does not include the finality penalty.

[5] On June 13, 2023, respondent issued VSI a Notice of Determination for tax of $5,395.00 and applicable interest, and a failure-to-file penalty of $539.50 for the period April 1, 2022, through April 30, 2022.

d. A registration update provided to respondent, signed by appellant and F. Valdez, identifying appellant by the title of "president," dated September 11, 2020.

e. A 2019 Schedule K-1, filed with VSI's federal income tax return, identifying appellant as a 50 percent shareholder in VSI.

f. An amended sales and use tax return for 1Q20, signed by appellant under the title of president, dated February 7, 2022.

g. An application for a payment plan, submitted to respondent, signed by appellant under the title of president, dated September 14, 2020.

7. Respondent received a completed responsible person questionnaire[6] signed by F. Valdez. On the questionnaire, F. Valdez stated VSI collected sales tax reimbursement from customers and the tax was included in the total price shown on the customer's receipt or invoice. F. Valdez further stated that he and appellant were responsible for VSI's sales and use tax compliance.

8. As evidenced by respondent's call log and notes taken by respondent's employees following the conversations, respondent and appellant were in communication about VSI's unpaid sales tax liabilities during the liability period.

a. The first recorded conversation respondent had with appellant occurred on August 19, 2021. Appellant and respondent discussed unpaid sales tax and unfiled returns. Appellant stated VSI was behind on submitting sales tax to respondent due to the number of "buybacks" from customers. Appellant also stated VSI needed a payment plan to clear the accounts receivable, i.e., sales tax liabilities, on the account. Appellant stated F. Valdez was in charge of sales tax compliance. There are four more conversations with appellant recorded in respondent's call log, the final dated May 5, 2022. The remaining conversations concerned the same or similar issues as the conversation on August 19, 2021, that is, sales tax compliance, unfiled returns, collection activity, and payment plans.

9. Respondent determined VSI collected sales tax reimbursement for the liability period based on the following:

a. F. Valdez's responsible person questionnaire, which stated VSI collected sales tax reimbursement.

[6] A responsible person questionnaire is a document issued by respondent to individuals associated with a business—such as corporate officers, bookkeepers, or tax return preparers—that requests information relevant to its responsible person investigation.

b. A phone conversation with F. Valdez on September 14, 2020, in which F. Valdez stated sales tax reimbursement was collected from customers, as evidenced by respondent's call log and notes.

c. A phone conversation with appellant on May 5, 2022, in which appellant stated sales tax reimbursement was collected from customers, as evidenced by respondent's call log and notes.

d. An internal memorandum, prepared by respondent's audit staff, describing evidence the auditors gathered during the audit, indicating VSI collected sales tax reimbursement but failed to pay it to the state. Respondent's auditors concluded VSI had total unremitted sales tax reimbursement of $69,554 for the period October 1, 2019, through December 31, 2020, January of 2021, and March to June of 2021, based on a review of vehicle deal jackets.[7]

10. Respondent determined VSI had funds available to pay sales tax during the liability period, based on the following:

a. VSI paid its landlord rent totaling $49,400 between 2019 and 2021, as evidenced by a document submitted to respondent by VSI's landlord.

b. VSI paid employee wages totaling $139,405 between October 1, 2019, to December 31, 2021, as evidenced by wage reports issued by the California Employment Development Department (EDD).

c. Form 1099-K data indicating Paymentech LLC processed payments to VSI totaling $26,120 in 2019, $48,468 in 2020, and $232,000 in 2021.

11. On May 31, 2023, respondent timely issued its NODD based on its determination that appellant was personally liable for VSI's sales tax liabilities pursuant to R&TC section 6829.

12. On June 7, 2023, respondent received a $1,221 payment from the California DMV in connection with VSI. Respondent applied $1,110 of the $1,221 payment to VSI's self-assessed sales tax liability for the month of October of 2021, reducing the tax balance from $11,807 to $10,697. Respondent applied the remaining $111 of the $1,221 payment to VSI's self-assessed late-filing penalty for October of 2021, reducing the penalty balance from $1,986 to $1,875.

13. On August 7, 2023, respondent received a $1,119 payment from the California DMV in connection with VSI. Respondent applied $451.26 of the $1,119 payment to VSI's

[7] Car dealers routinely use deal jackets, which contain various documents related to a sale, including but not limited to the vehicle sales contract, vehicle purchase invoice, and the Report of Sales.

self-assessed sales tax liability for the month of June of 2021, reducing the tax balance from $1,947 to $1,495.74. Respondent applied the remaining $375.74 to the failure-to-file penalty it assessed for the month of January of 2022, reducing the penalty balance from $375.74 to $0.

14. Appellant filed a petition for redetermination on June 13, 2023. The next day, respondent issued a letter rejecting the petition for failing to provide the specific grounds on which the petition was made, meaning appellant did not explain why he disagreed with the NODD. On July 6, 2023, appellant filed a new petition for redetermination, backdated June 13, 2023, which respondent accepted as an administrative protest.[8]

15. Respondent's Appeals Bureau issued a Decision finding appellant personally liable as a responsible person for the period May 28, 2019, through February 28, 2022, but not for the period April 1, 2022, through April 30, 2022.[9] The revision is based on respondent's determination that VSI's creditor, or creditors, took possession of the vehicles on the lot in April of 2022. The Decision otherwise denied appellant's administrative protest.

16. This timely appeal followed.

DISCUSSION

R&TC section 6829 provides, in pertinent part, that a person is personally liable for the unpaid tax, penalties, and interest owed by a corporation, if all of the following elements are met: (1) the corporation's business has been terminated, dissolved, or abandoned; (2) the corporation collected sales tax reimbursement on its sales of tangible personal property and failed to remit such tax reimbursement to respondent when due; (3) the person had control or supervision of, or was charged with the responsibility for, the filing of returns or the payment of tax, or had a duty to act for the corporation in complying with the Sales and Use Tax Law; and (4) the person willfully failed to pay taxes due from the corporation or willfully failed to cause such taxes to be paid. (R&TC, § 6829(a), (c); Cal. Code Regs, tit. 18, § 1702.5(a), (b).) For corporate officers, respondent must prove these elements by a preponderance of the evidence. (Cal. Code Regs, tit. 18, § 1702.5(d).) To meet the preponderance standard, respondent must establish that the circumstances it asserts are more likely than not to be correct. (*Appeal of Monzon*, 2025-OTA-150P.)

[8] Under regulations promulgated by respondent and applicable at the time the second petition was filed, if a taxpayer files a petition for redetermination after the 30-day time period specified in R&TC section 6561, respondent may accept it as an administrative (late) protest. (Cal. Code Regs, tit. 18, § 5220.)

[9] There is no tax liability for the period March 1, 2022, through March 31, 2022.

Appellant is identified as the CEO or president of VSI in documents filed with the California Secretary of State, the California DMV, and with respondent, thus making him a corporate officer. Therefore, respondent must prove the elements of R&TC section 6829 liability by a preponderance of the evidence. (Cal. Code Regs, tit. 18, § 1702.5(d),(e).)

In his appeal, appellant states he is not a responsible person because his business partner, F. Valdez, was responsible for VSI's sales tax compliance. However, R&TC section 6829 holds responsible persons dually liable based on their own conduct in failing to cause the defunct business to remit sales tax reimbursement collected from its customers. (*Appeal of Farrell*, 2023-OTA-095P.)[10] Liability for the business' non-compliance is not limited to only one person, or to the most culpable person. Instead, OTA reviews respondent's actions to see if the statutory requirements for imposing responsible person liability are satisfied with respect to appellant, and not whether another person could be, or should be, held personally responsible for all or part of the same liabilities. Thus, if respondent establishes the four elements of responsible person liability as to appellant, then appellant will be held personally liable for the entire sum of unpaid sales tax liabilities of VSI.

Termination

The termination of the business of a corporation includes the discontinuance or cessation of all business activities for which the corporation was required to hold a seller's permit. (Cal. Code Regs., tit. 18, § 1702.5(b)(3).) Here, appellant notified respondent that the dealership permanently closed in April of 2022. Respondent obtained records from the California DMV confirming that the dealership closed on April 20, 2022. Thereafter, respondent closed VSI's seller's permit, effective April 30, 2022. This evidence is sufficient to demonstrate that VSI discontinued or ceased the business activities for which it was required to hold a seller's permit and is therefore terminated.

Sales Tax Reimbursement

Personal liability may be imposed only if the corporation included sales tax reimbursement in, or added sales tax reimbursement to, the selling price of tangible personal property sold in the conduct of its business. (R&TC, § 6829(c).) Here, appellant told

[10] In California, *retailers* are generally required to pay the state sales tax. (R&TC, § 6051; *Loeffler v. Target Corp*. (2014) 58 Cal.4th 1081, 1103.) Retailers, however, may choose to be reimbursed for the sales tax by their customers as a condition of the sale. (Cal. Civ. Code, § 1656.1(a); *McClain v. Sav-On Drugs* (2017) 9 Cal.App.5th 684, 692.) That decision, however, burdens the retailer as a constructive trustee for the taxes collected. (*Decorative Carpets, Inc. v. State Bd. of Equalization* (1962) 58 Cal.2d 252, 254.) It is upon this responsibility that R&TC section 6829 is constructed.

respondent in May of 2022 that sales tax reimbursement was collected from customers. In an earlier conversation, in August of 2021, appellant stated VSI was behind on submitting sales tax to respondent due to the number of buybacks from customers. F. Valdez, VSI's CFO, secretary, director, and 50 percent shareholder, stated in a responsible person questionnaire that sales tax reimbursement was collected from customers. F. Valdez later confirmed this practice in a conversation with respondent in September of 2020. This evidence is sufficient to demonstrate VSI included sales tax reimbursement in, or added sales tax reimbursement to, the selling price of tangible personal property sold in the course of its business.

Responsible Person

Personal liability can be imposed only on a responsible person. (R&TC, § 6829(b).) In this context, "responsible person" means any person having control or supervision of, or who was charged with the responsibility for, the filing of returns or the payment of tax or who had a duty to act for the corporation in complying with any portion of the Sales and Use Tax Law when the taxes became due. (*Ibid*.; Cal. Code Regs., tit 18, § 1702.5(b)(1).) As relevant here, personal liability applies only if, when the person was a responsible person for the corporation, the corporation sold tangible personal property and collected sales tax reimbursement on the selling price of the property and failed to remit such tax reimbursement when due. (Cal. Code Regs., tit. 18, § 1702.5(a).) Lastly, simply because a person was an officer, member, manager, employee, director, shareholder or partner of a business is not, in and of itself, sufficient to establish that the person is a "responsible person." (Cal. Code Regs., tit. 18, § 1702.5(b)(1).)

Appellant held the position of CEO with VSI and was a 50 percent shareholder in the corporation. Officers of a corporation have broad implied and actual authority to ensure compliance with the Sales and Use Tax Law, even if that responsibility is delegated to others. (*Appeal of Treyzon*, 2023-OTA-399P, citing *Commercial Sec. Co. v Modesto Drug Co.* (1919) 43 Cal.App. 162, 173.) As CEO, appellant signed and filed an amended sales and use tax return for 1Q20 and applied for a payment plan on behalf of VSI in September of 2020. As CEO, appellant spoke with respondent several times concerning VSI's sales tax compliance. In August of 2021, appellant informed respondent that VSI had collected sales tax reimbursement but had not paid it to the state. In later conversations with respondent, appellant discussed VSI's unpaid sales tax liabilities, unfiled returns, and the need for a payment plan. This evidence is sufficient to demonstrate appellant was a responsible person who had control or supervision of, or who was charged with the responsibility for, the filing of returns or the

payment of tax, and who had a duty to act for VSI as its CEO in complying with the Sales and Use Tax Law when the taxes became due.

Willfulness

"Willfully fails to pay or to cause to be paid" means that the failure was the result of an intentional, conscious, and voluntary course of action. (R&TC, § 6829(d); Cal. Code Regs., tit. 18, § 1702.5(b)(2).) This failure may be willful even if it was not done with a bad purpose or motive. (Cal. Code Regs., tit. 18, § 1702.5(b)(2).) To show willfulness, respondent must establish all of the following:

> (A) On or after the date that the taxes came due, the responsible person had actual knowledge that the taxes were due, but not being paid.
>
> (B) The responsible person had the authority to pay the taxes or to cause them to be paid: (i) on the date that the taxes came due and (ii) when the responsible person had actual knowledge as defined in (A). A responsible person who was required to obtain approval from another person prior to paying the taxes at issue and was unable to act on his or her own in making the decision to pay the taxes does not have the authority to pay the taxes or to cause them to be paid.
>
> (C) When the responsible person had actual knowledge as defined in (A), the responsible person had the ability to pay the taxes but chose not to do so.

(Cal. Code Regs., tit. 18, § 1702.5(b)(2).) Hence, for the willfulness element, respondent must establish that appellant had actual knowledge, authority, and ability to pay. (*Appeal of Monzon, supra*.)

Actual Knowledge

Neither R&TC section 6829 nor Cal. Code Regs., tit. 18, section 1702.5 defines "actual knowledge." In the absence of a specific statutory definition of "actual knowledge," the United States Supreme Court has held that to have actual knowledge of a piece of information, an individual must in fact be aware of it. (*Intel Corp. Investment Policy Committee, et al. v. Sulyma* (2020) 589 U.S. 178, 184.) Actual knowledge may be proven through inference from circumstantial evidence. (*Id.* at 179.) Actual knowledge is distinguishable from constructive knowledge, which is knowledge imputed to an individual who fails to learn something a reasonably diligent person would have learned. (*Id*. at p. 185.)

Evidence OTA has considered in determining whether an individual had actual knowledge that taxes were due but not being paid includes being actively involved in the underlying business, being responsible for the underlying business's sales and use tax matters, awareness the underlying business had an obligation to remit sales tax reimbursement, and

personally filing the sales and use tax returns. (See *Appeal of Eichler*, 2022-OTA-029P.) OTA has also considered an individual's discussion of the underlying business's tax liabilities with respondent as evidence of actual knowledge. (See *Appeal of Treyzon*, *supra*.)

According to respondent's call log and notes summarizing a conversation that occurred on August 19, 2021, appellant demonstrated actual knowledge that the taxes were due but not being paid, stating VSI was behind on submitting sales tax because of the number of buybacks from customers. In four separate conversations, between August of 2021 and May of 2022, appellant spoke with respondent about VSI's sales and use tax compliance, unfiled returns, collection activity, and payment plans. Further, a portion of the overall sales tax liability consists of self-assessed liabilities by VSI, the result of filing non-remittance sales and use tax returns, which demonstrates actual knowledge that VSI was underpaying, or not paying, taxes to the state. This evidence is sufficient to demonstrate appellant was in fact aware VSI had sales tax liabilities accumulating throughout the liability period, and thus had actual knowledge that taxes were due but not being paid.

Authority

Officers of a corporation have broad implied and actual authority to ensure compliance with the Sales and Use Tax Law, even if that responsibility is delegated to others. (*Appeal of Treyzon, supra*.) However, 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. (Cal. Code Regs., tit. 18, § 1702.5(b)(2).)

Appellant was the CEO of VSI during the liability period, which gave him broad implied and actual authority over VSI's sales and use tax compliance. Even if appellant and F. Valdez agreed between themselves that F. Valdez would oversee VSI's sales and use tax compliance, appellant, as CEO, would not be required to obtain F. Valdez's permission to act on behalf of VSI in sales and use tax matters. As discussed above, appellant in fact exercised this authority when he spoke with respondent about VSI's sales and use tax compliance, unfiled returns, collection activity, and payment plans. This evidence is sufficient to demonstrate appellant had the authority to pay the taxes or to cause them to be paid on the date the taxes became due.

Ability to Pay

Determining whether a responsible person had the ability to pay taxes as they became due often turns on whether there is evidence the underlying business had funds available to pay

the taxes as they became due. (See *Appeal of Treyzon, supra*; see also *Appeal of Eichler, supra*.)

VSI paid its landlord rent totaling $49,400 between 2019 and 2021, as evidenced by a document submitted by VSI's landlord. VSI paid employee wages totaling $139,405 between October 1, 2019, to December 31, 2021, as evidenced by wage reports issued by EDD. Third-party tax reports indicate Paymentech LLC processed payments to VSI totaling $26,120 in 2019, $48,468 in 2020, and $232,000 in 2021. Finally, it has been established that VSI collected sales tax reimbursement from its customers during the liability period, from which it follows VSI had possession of the taxes which were to eventually become due. This evidence is sufficient to demonstrate that appellant, a responsible person with authority to pay the taxes, had the ability to pay the taxes as they became due but chose not to.

In summary, respondent has established the four elements of responsible person liability as to appellant, and appellant is personally liable for the unpaid remittance of sales tax of VSI.

HOLDING

Appellant is personally liable as a responsible person pursuant to R&TC section 6829 for the unpaid sales tax liabilities of VSI for the period May 28, 2019, through February 28, 2022.

DISPOSITION

The NODD is modified in accordance with respondent's Appeals Bureau Decision, which found appellant personally liable as a responsible person pursuant to R&TC section 6829 for the period May 28, 2019, through February 28, 2022, but not for the period April 1, 2022, through April 30, 2022. Otherwise, respondent's action is sustained.

Signed by:
Greg Turner
1B8F50433F1D4D5...
Greg Turner
Administrative Law Judge

We concur:

Signed by:
Natasha Ralston
25F8FE08FF56478...
Natasha Ralston
Administrative Law Judge

Signed by:
Suzanne B. Brown
47F45ABE09E34D0...
Suzanne B. Brown
Administrative Law Judge

Date Issued: 8/12/2026