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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No. EC-08-1082-JuMkH
	)	
TODD S. LATIN,	)	
	)	Bk. No. 04-20507
Debtor,	)	
_____	)	
TODD S. LATIN,	)	
	)	
Appellant,	)	
	)	
v.	)	<b>M E M O R A N D U M<sup>1</sup></b>
	)	
STATE BOARD OF EQUALIZATION,	)	
	)	
Appellee.	)	
_____	)	

Argued and Submitted on January 22, 2009  
at San Francisco, California

Filed - February 11, 2009

Appeal from the United States Bankruptcy Court  
for the Eastern District of California

Honorable David E. Russell, Bankruptcy Judge, Presiding

Before: JURY, MARKELL and HOLLOWELL, Bankruptcy Judges.

<sup>1</sup>This disposition is not appropriate for publication.  
Although it may be cited for whatever persuasive value it may  
have (see Fed. R. App. P. 32.1), it has no precedential value.  
See 9th Cir. BAP Rule 8013-1.

1 Appellant-debtor, Todd S. Latin,<sup>2</sup> appeals the bankruptcy  
2 court's order overruling his objection to the California State  
3 Board of Equalization's ("SBE") proof of claim filed in his  
4 chapter 13 case.<sup>3</sup>

5 The SBE's claim was based on a Notice of Dual Determination  
6 ("Notice"), which was filed prepetition under under Cal. Code  
7 Regs. Tit. 18, § 1702.6,<sup>4</sup> assessing debtor \$76,148.11 for  
8 Roseville Sunrise Restaurant, Inc.'s unpaid sales taxes. The  
9 basis of liability in the Notice was Latin's corporate officer  
10 status. Debtor objected to the claim on the ground that he  
11 resigned as an officer before the time period for which the  
12 taxes were assessed.

13 The bankruptcy court overruled debtor's objection after an  
14 evidentiary hearing, finding him personally liable for the taxes  
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16 <sup>2</sup> Because of debtor's pro se status, we liberally construe  
17 his pleadings. Kashani v. Fulton (In re Kashani), 190 B.R. 875,  
18 883 (9th Cir. BAP 1995).

19 <sup>3</sup> Unless otherwise indicated, all chapter, section and rule  
20 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
21 to the Federal Rules of Bankruptcy Procedure, as enacted and  
22 promulgated prior to October 17, 2005, the effective date of most  
23 of the provisions of the Bankruptcy Abuse Prevention and Consumer  
24 Protection Act of 2005, Pub. L. 109-8, April 20, 2005, 119 Stat.  
25 23 ("BAPCPA"), as debtor's case was filed in advance of the  
26 BAPCPA effective date.

27 <sup>4</sup>Citations to the Cal. Code Regs. Tit. 18, §§ 1500 et al.  
28 will be referred to as "Regs." Reg. § 1702.6, titled "Suspended  
Corporations," imposes personal liability for sales taxes on a  
corporate officer with control over operations or management of a  
closely held corporation during a time which the corporation is  
suspended or any responsible person who fails to pay any taxes  
due from a closely held corporation during a time in which the  
corporation was suspended.

1 not because he was an officer but because he had sufficient  
2 control over the business.

3 At the hearing on debtor's motion for reconsideration, the  
4 court clarified that its ruling was based on responsible person  
5 liability under Reg. § 1702.5<sup>5</sup>, not corporate officer liability  
6 under Reg. § 1702.6, the legal ground for recovery asserted in  
7 the Notice and in the SBE's original proof of claim. Although  
8 the court found that debtor had resigned as a corporate officer,  
9 it reasoned that he was a "de facto officer" because he was  
10 involved in the business after his resignation. The court  
11 denied debtor's motion, concluding that he was a responsible  
12 person within the scope of Reg. § 1702.5 and liable for the  
13 taxes.

14 We hold that the bankruptcy court erred by applying the  
15 incorrect law in making its determination. The SBE's filed  
16 proof of claim did not give fair notice that it sought recovery  
17 against debtor's estate based on Reg. § 1702.5. As further  
18 explained below, analysis under Reg. § 1702.6 imposing personal  
19 liability on corporate officers for unpaid sales taxes is not  
20 identical to an analysis under Reg. § 1702.5, which imposes  
21 personal liability for the same types of taxes on responsible  
22 persons. Accordingly, we conclude that debtor's due process  
23 rights were violated because he was not given an opportunity to  
24 be heard on the responsible person theory of recovery.

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25  
26 <sup>5</sup>Reg. § 1702.5, which is titled "Responsible Person  
27 Liability," imposes personal liability for a corporation's unpaid  
28 sales taxes on a responsible person who willfully fails to pay  
over the taxes to the government.

1 We also conclude that the record supports a determination  
2 in debtor's favor under Reg. § 1702.6, the theory asserted by  
3 the SBE in its proof of claim. The bankruptcy court correctly  
4 placed the burden of proof by a preponderance of the evidence on  
5 debtor to establish that he was not a corporate officer during  
6 the relevant time period. Based on the uncontroverted evidence,  
7 the court found that debtor had resigned as a corporate officer  
8 on April 26, 2001, before the relevant time period. We thus  
9 hold that debtor met his burden of proof on that issue, thereby  
10 defeating an element of the SBE's claim against him under Reg.  
11 § 1702.6 for a significant portion of the time period for which  
12 the taxes were assessed.

13 Accordingly, we REVERSE.

#### 14 I. FACTS

15 Debtor, his father Ed Latin, and business partner Milton  
16 Armistead incorporated Roseville Sunrise Restaurant, Inc. (the  
17 "Corporation") in California in 1996. Debtor served as an  
18 officer until he resigned on April 26, 2001.

19 On May 13, 2003, the SBE issued a Notice based on Reg.  
20 § 1702.6, assessing against debtor the liability for the  
21 Corporation's unpaid sales taxes incurred between April 1, 2001  
22 and September 25, 2002. Debtor sought no redetermination.

23 Debtor filed his chapter 13 petition on January 20, 2004.  
24 The SBE filed its proof of claim, asserting an unsecured  
25 priority claim against debtor's estate based on the  
26 Corporation's unpaid sales taxes. Debtor objected to the claim  
27 on the ground that he did not owe any sales taxes.

1           Thereafter, the parties briefed whether the finality of the  
2 SBE's determination regarding debtor's liability for the sales  
3 taxes precluded the bankruptcy court from redetermining his tax  
4 liability. The SBE conceded that neither California preclusion  
5 law nor the Rooker-Feldman Doctrine was applicable.

6           Debtor also argued that he never received the SBE's Notice  
7 regarding the assessment. The bankruptcy court found, however,  
8 that debtor failed to rebut the presumption that he received the  
9 Notice because the SBE mailed it to his correct home address.

10 The court also found:

11           [I]t is undisputed that corporate officer liability is  
12 the basis for the claim. The SBE asserts that debtor  
13 was an [sic] corporate officer of Roseville Sunrise  
14 Restaurant, Inc., during the period in which it  
15 operated as a suspended Corporation. Debtor disputes  
16 this fact arguing that he surrendered his position as  
17 a corporate officer prior to August 1, 2000. The court  
18 requires evidence to resolve this dispute.

19           The court conducted an evidentiary hearing on November 7,  
20 2007. Debtor presented uncontroverted evidence of his signed  
21 resignation as a corporate officer dated April 26, 2001, and  
22 testified that he resigned for health reasons. The SBE  
23 presented evidence that debtor communicated with the SBE  
24 regarding the Corporation's tax liability and continued to sign  
25 checks issued from the Corporation's general account. Debtor  
26 contended, however, that the signature on some of the checks was  
27 not his.

28           The bankruptcy court overruled debtor's objection,  
explaining its reasoning in a brief oral decision. The court  
acknowledged that the burden of proof, which was preponderance  
of the evidence, was on the taxpayer-debtor. The court found

1 that under this standard, debtor's evidence failed to prove that  
2 he was no longer involved in the business after his resignation.  
3 The court found that debtor's communications with the SBE led it  
4 to believe that it was dealing with someone who had authority to  
5 act on the Corporation's behalf.

6 The court further noted that, under California law,  
7 officers are responsible for a corporation's sales taxes when it  
8 is suspended. The bankruptcy court made no finding that debtor  
9 had resigned as a corporate officer before the time period for  
10 which the taxes were assessed, but stated, "I have no reason to  
11 disbelieve anyone's testimony...."

12 Debtor filed a motion for reconsideration ("Reconsideration  
13 Motion") on November 19, 2007.<sup>6</sup> In his Reconsideration Motion,  
14 debtor argued that he presented uncontroverted evidence of his  
15 resignation as a corporate officer, which was effective upon  
16 written notice to the Corporation's board under California law.  
17 According to debtor, with no evidence to the contrary, he was  
18 not liable for the taxes under Reg. § 1702.6 because he was not  
19 a corporate officer. Debtor also maintained that the court  
20 erred in imposing responsible person liability on him under Reg.  
21 § 1702.5, which was not the legal ground for recovery asserted  
22 in the SBE's proof of claim.

23 At the hearing on debtor's Reconsideration Motion, the  
24 bankruptcy court made oral findings of fact and conclusions of  
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26 <sup>6</sup>In reality, Debtor's Reconsideration Motion was more in the  
27 nature of one for clarification of the court's prior ruling  
28 rather than based on any grounds for reconsideration set forth in  
Fed. R. Civ. P. 60(b), incorporated by Rule 9024.

1 law that supplemented those in its previous ruling. The court  
2 clarified that its prior ruling was based on responsible person  
3 liability under Reg. § 1702.5, not corporate officer liability  
4 under Reg. § 1702.6. The court opined that the issue before it  
5 was who was responsible for the taxes. The court stated that it  
6 did not consider it important whether the SBE relied on Reg.  
7 § 1702.5 or § 1702.6 in its proof of claim, especially since the  
8 SBE was unaware that debtor resigned as an officer until it  
9 conducted discovery. The court found that debtor resigned as an  
10 officer on April 26, 2001, but concluded that he was a "de facto  
11 officer"/responsible party based on the evidence.

12 The court denied debtor's Reconsideration Motion,  
13 acknowledging that its decision "would be different" if the SBE  
14 had proceeded solely under Reg. § 1702.6.

15 Debtor timely appealed. Thereafter, the bankruptcy court  
16 dismissed debtor's case for failure to make plan payments.

## 17 **II. JURISDICTION**

18 Because debtor's chapter 13 case has been dismissed, the  
19 question arises whether this appeal is moot. If an appeal is  
20 moot, we must dismiss if constitutionally moot, Drummond v.  
21 Urban (In re Urban), 375 B.R. 882, 887 (9th Cir. BAP 2007), and  
22 we may dismiss if equitably moot. Clear Channel Outdoor, Inc.  
23 v. Knupfer (In re PW, LLC), 391 B.R. 25, 33-35 (9th Cir. BAP  
24 2008). As discussed below, we conclude that this appeal is not  
25 moot and, therefore, consider the case on the merits.

26 The bankruptcy court had subject matter jurisdiction under  
27 28 U.S.C. § 1334 over this core proceeding under § 157(b)(2)(B).  
28 We have jurisdiction under 28 U.S.C. § 158.

1 **III. ISSUES**

2 A. Whether the dismissal of debtor's chapter 13 case  
3 renders this appeal moot.

4 B. Whether debtor received fair notice of his potential  
5 liability as a responsible person who willfully failed to pay  
6 the Corporation's sales taxes under Reg. § 1702.5.

7 C. Whether the bankruptcy court erred in allowing the  
8 SBE's proof of claim, which was based on corporate officer  
9 liability under Reg. § 1702.6.

10 **IV. STANDARDS OF REVIEW**

11 "Mootness is a question of law reviewed de novo." Nelson  
12 v. George Wong Pension Trust (In re Nelson), 391 B.R. 437, 442  
13 (9th Cir. BAP 2008).

14 We review de novo whether the bankruptcy court violated an  
15 individual's right to due process, which is a mixed question of  
16 law and fact. Duff v. United States Tr. (In re Cal. Fid.,  
17 Inc.), 198 B.R. 567, 571 (9th Cir. BAP 1996). "In reviewing a  
18 mixed question, separate issues of fact are reviewed for clear  
19 error." Id.

20 We review de novo whether the bankruptcy court properly  
21 applied the burden of proof governing tax claims under Reg.  
22 § 1702.6. See Neilson v. United States (In re Olshan), 356 F.3d  
23 1078, 1083 (9th Cir. 2004).

24 We also review legal issues such as the interpretation of  
25 statutes and rules de novo; factual findings are not disturbed  
26 unless they are clearly erroneous. Arnold v. Gill (In re  
27 Arnold), 252 B.R. 778, 784 (9th Cir. BAP 2000).



1 **V. DISCUSSION**

2 **A. Mootness**

3 The bankruptcy court dismissed debtor's chapter 13 case  
4 after he filed this appeal. The order dismissing his case is  
5 now final.

6 The dismissal of a bankruptcy case may render moot those  
7 matters closely connected with a debtor's reorganization, such  
8 as allowing a proof of claim. Bevan v. Social Commc'ns. Sites,  
9 LLC (In re Bevan), 327 F.3d 994, 997 (9th Cir. 2003). We have  
10 an independent obligation to consider mootness sua sponte,  
11 Felton Pilate v. Burrell (In re Burrell), 415 F.3d 994, 997 (9th  
12 Cir. 2005), because we lack jurisdiction, Urban, 375 B.R. at  
13 887, or it may be the case that any remedy may be unjust given  
14 the change in position of third parties, Clear Channel, 391 B.R.  
15 at 33-35.

16 Since only claimants with allowed claims may participate in  
17 a distribution under a debtor's plan, allowing the SBE's claim  
18 is undoubtedly a matter closely connected with debtor's  
19 reorganization.<sup>7</sup> Because debtor's case was dismissed, no  
20 creditor, including the SBE, will receive further distributions  
21 under his plan. But not all matters are "mooted simply because  
22 \_\_\_\_\_

23 <sup>7</sup> Debtor's Second Amended Plan, which was confirmed on  
24 December 3, 2004, listed the SBE's claim as disputed with an  
25 amount of "0." Debtor listed the amount for his monthly plan  
26 payment as "varies": \$4800 for the first six months, \$600 for  
27 eighteen months starting August 2004, \$825 for twenty-four  
28 months, \$1050 for twelve months, and a \$25,000 payment from  
either a refinance or family contribution before the end of the  
sixty-month plan. Despite debtor's treatment of the SBE's claim  
under his plan, his debt for the unpaid sales taxes may not have  
been subject to discharge under §§ 1328(a)(2) and 507(a)(8)(C).

1 they touch on a bankruptcy proceeding or were adjudicated in  
2 it." Bevan, 327 F.3d at 997.

3       Allowing the SBE's claim is a ruling that follows from the  
4 issue being litigated in this appeal: whether debtor should be  
5 held personally liable for the Corporation's unpaid sales taxes  
6 because of his corporate officer status. We conclude that this  
7 determination is ancillary to debtor's bankruptcy. Therefore,  
8 the dismissal of his case does not necessarily cause this appeal  
9 to become moot. Spacek v. Thomen (In re Universal Farming  
10 Indus.), 873 F.2d 1334, 1335 (9th Cir. 1989).

11       Our primary inquiry in all mootness questions is whether we  
12 can give the appellant any effective relief if we decide the  
13 matter on the merits in his favor. If we can grant relief, the  
14 matter is not moot. Burrell, 415 F.3d at 998.

15       Here, the resolution of the merits could affect debtor's  
16 rights because "the allowance...of 'a claim in bankruptcy is  
17 binding and conclusive on all parties or their privies, and  
18 being in the nature of a final judgment, furnishes a basis for a  
19 plea of res judicata.'" Bevan, 327 F.3d at 997. If we affirm,  
20 the bankruptcy court's decision would have a res judicata<sup>8</sup>  
21 effect that debtor would have to confront since his estate has  
22 revested in him.<sup>9</sup> Therefore, we can give debtor effective

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24       <sup>8</sup>"The preclusive effect of a judgment is defined by claim  
25 preclusion and issue preclusion, which are collectively referred  
26 to as 'res judicata.'" Taylor v. Sturgell, \_\_ U.S. \_\_, 128 S.Ct.  
2161, 2171 (2008).

27       <sup>9</sup>Additionally, if debtor files another chapter 13, our  
28 failure to rule would preclude him from challenging any claim

(continued...)

1 relief if we decide the matter on the merits in his favor.

2 We conclude this appeal is not moot, and we retain  
3 jurisdiction over it.

4 **B. The Merits**

5 The bankruptcy court has authority to determine a debtor's  
6 tax liability. See § 505(a)(1). However, if a debtor's tax  
7 liability was contested and adjudicated by a tribunal of  
8 competent jurisdiction before the start of the bankruptcy case,  
9 the bankruptcy court loses its subject matter jurisdiction over  
10 the matter. See § 505(a)(2)(A); Mantz v. State Bd. of  
11 Equalization (In re Mantz), 343 F.3d 1207, 1211 (9th Cir. 2003).  
12 The record shows that debtor did not contest the SBE's  
13 determination of his tax liability before the start of his  
14 case.<sup>10</sup> Accordingly, the bankruptcy court was not required by 28  
15 U.S.C. § 1738<sup>11</sup> to give preclusive effect to the SBE's  
16 determination and had discretion to redetermine debtor's tax  
17 liability under § 505(a)(1). Id.

18 Debtor contends that the bankruptcy court erred in  
19 determining his tax liability and allowing the SBE's claim  
20 primarily for two reasons. First, debtor maintains that the

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21  
22 <sup>9</sup>(...continued)  
23 filed by the SBE based on Reg. § 1702.5 since the bankruptcy  
24 court's order would be final.

25 <sup>10</sup>He claimed he did not receive notice, although the  
26 bankruptcy court ruled he did not rebut the "mailbox rule."

27 <sup>11</sup>This statute provides that judicial proceedings ... "shall  
28 have the same full faith and credit in every court within the  
United States and its Territories and Possessions as they have by  
law or usage in the courts of such State, Territory or Possession  
from which they are taken."

1 bankruptcy court erroneously imposed personal liability on him  
2 under Reg. § 1702.5 instead of Reg. § 1702.6, which was the  
3 original basis for the SBE's claim. As a result of this error,  
4 debtor contends that his due process rights were violated  
5 because he did not have fair notice that his liability for the  
6 taxes would be based on Reg. § 1702.5.

7 Second, debtor argues that the court erred in its ruling  
8 because the record supports a finding that he has no personal  
9 liability for the taxes under Reg. § 1702.6. He contends that  
10 the uncontroverted evidence showed that he resigned as a  
11 corporate officer as of April 26, 2001 and, therefore, he cannot  
12 be liable as an officer for the majority of the time period for  
13 which the taxes were assessed. We address each contention  
14 below.

15 **1. The SBE's Prima Facie Claim Was Based on Reg. § 1702.6**  
16 **and Not Reg. § 1702.5.**

17 Under § 501, a creditor may assert debtor's liability to it  
18 by filing a proof of claim. A proof of claim is deemed allowed  
19 unless a party in interest objects under § 502(a) and  
20 constitutes "prima facie evidence of the validity and amount of  
21 the claim" under Rule 3001(f). See Rule 3007. Filing an  
22 objection to a proof of claim "creates a dispute which is a  
23 contested matter" within the meaning of Rule 9014 and must be  
24 resolved after notice and opportunity for a hearing. See Rule  
25 9014, Adv. Comm. Note (1983).

26 A proof of claim is often analogized to a complaint. Heath  
27 v. Am. Express Travel Related Servs. Co. (In re Heath), 331 B.R.  
28 424, 435 (9th Cir. BAP 2005); see also Rule 3001(a). "[T]he

1 main purpose of the complaint is to provide notice of what  
2 plaintiff's claim is and the grounds upon which the claim  
3 rests....[the] plaintiff must at least set forth enough details  
4 so as to provide a defendant and the court with a fair idea of  
5 the basis of the complaint and the legal grounds claimed for  
6 recovery." Acequia, Inc. v. Clinton (In re Acequia, Inc.), 34  
7 F.3d 800, 814 (9th Cir. 1994) (emphasis in original).

8 The SBE's proof of claim stated that it was for sales and  
9 use taxes for certain years but did not specify the precise  
10 legal grounds claimed for recovery of the taxes from debtor. A  
11 taxing entity's timely proof of claim enjoys prima facie  
12 validity under Rule 3001(f) without supporting documentation.  
13 State Bd. of Equalization v. L.A. Int'l. Airport Hotel Ass'n.  
14 (In re L.A. Int'l. Airport Hotel Ass'n.), 106 F.3d 1479, 1480  
15 (9th Cir. 1997). The record reflects, however, that the SBE's  
16 claim was always based on its determination that debtor was  
17 liable for the taxes under Reg. § 1702.6 because of his  
18 corporate officer status.

19 The SBE's responsive pleading to debtor's objection to its  
20 proof of claim stated that it was based on debtor's corporate  
21 officer liability. The SBE attached a copy of Reg. § 1702.6 to  
22 its pleading. Moreover, the bankruptcy court's Civil Minute  
23 Order, dated August 14, 2007 provides: "[I]t is undisputed that  
24 corporate officer liability is the basis for the SBE's claim."  
25 At the hearing on debtor's Reconsideration Motion, the SBE's  
26 attorney stated on the record that the SBE's proof of claim was  
27 based on its determination under Reg. § 1702.6, and not Reg.  
28 § 1702.5.

1 Further, the SBE did not move to amend its proof of claim  
2 at any time during the proceedings, despite the available  
3 procedure to do so. At the hearing on debtor's Reconsideration  
4 Motion, the SBE's attorney stated that the SBE filed its claim  
5 based on debtor's corporate officer status because it did not  
6 become aware of his resignation as an officer until the matter  
7 went into litigation. Even then, however, it made no attempt to  
8 amend its claim to assert a new theory of recovery based on  
9 responsible person liability under Reg. § 1702.5.

10 While amendment of a proof of claim is discretionary with  
11 the court, long established liberal policy permits amendments to  
12 proofs of claim. Roberts Farms, Inc. v. Bultman (In re Roberts  
13 Farms, Inc.), 980 F.2d 1248, 1251 (9th Cir. 1992). Simply put,  
14 an amendment to its claim could have provided debtor with fair  
15 notice that the SBE sought to recover the taxes from him under  
16 Reg. § 1702.5.<sup>12</sup>

17 In sum, the record shows that the SBE did not explicitly or  
18 implicitly indicate in its pleadings or oral argument an intent  
19 to impose personal liability on debtor for the Corporation's  
20 unpaid sales taxes based on Reg. § 1702.5.

21 **2. Debtor Did Not Have Fair Notice and an Opportunity to**  
22 **Defend Himself Against Liability Under Reg. § 1702.5**

23 Debtor maintains that under these circumstances he  
24 reasonably assumed that he needed to rebut the presumption of

25 \_\_\_\_\_  
26 <sup>12</sup>On the other hand, a fair reading of the transcript on  
27 debtor's Reconsideration Motion shows that the SBE and debtor  
28 were equally surprised when the bankruptcy court clarified that  
its decision was based on responsible person liability under Reg.  
§ 1702.5.

1 the validity of the SBE's claim under Reg. § 1702.6 and not Reg.  
2 § 1702.5. Debtor contends he was prejudiced because he had no  
3 notice or opportunity to prove that he was not liable under Reg.  
4 § 1702.5. We agree.

5 "The fundamental requisite of due process of law is the  
6 opportunity to be heard." Dusenbery v. United States, 534 U.S.  
7 161, 173 (2002). "This right to be heard has little reality or  
8 worth unless one is informed that the matter is pending and can  
9 choose for himself whether to appear or default, acquiesce or  
10 contest." Id. citing Mullane v. Cent. Hanover Bank & Trust Co.,  
11 339 U.S. 306, 314 (1950). In Mullane, 339 U.S. at 314, the  
12 Supreme Court established the due process requirements for  
13 notice:

14 An elementary and fundamental requirement of due  
15 process in any proceeding which is to be accorded  
16 finality is notice reasonably calculated, under all  
17 the circumstances, to apprise interested parties of  
18 the pendency of the action and to afford them an  
19 opportunity to present their objections. (Citations  
omitted.) The notice must be reasonably calculated to  
convey the required information..., and it must afford  
a reasonable time for those interested to make their  
appearance[s].

20 Applying this standard, we conclude that debtor did not  
21 have adequate notice of his potential liability under Reg.  
22 § 1702.5. The lack of fair notice and an opportunity to defend  
23 is underscored by the differences between Reg. §§ 1702.5 and  
24 1702.6, each dealing with a totally independent liability.

25 Reg. § 1702.6, titled "Suspended Corporations," imposes  
26 personal liability for sales taxes on (1) a corporate officer  
27 with control over operations or management of a closely held  
28 corporation during a time that the corporation is suspended, or

1 (2) any responsible person who fails to pay or cause to be paid  
2 any taxes due from a closely held corporation during a time in  
3 which the corporation was suspended. The term "responsible  
4 person" means "any officer ... who is charged with the  
5 responsibility for the filing of returns or the payment of tax  
6 or who has a duty to act for the closely held corporation in  
7 complying with any provision of the Sales and Use Tax Law, and  
8 who derives a direct financial benefit from the failure to pay  
9 the tax liability." Reg. § 1702.6(b) (1) (emphasis added). The  
10 term "control over operations or management" means "the power to  
11 manage or affect day to day operations of the business." Reg.  
12 § 1702.6(b) (3). It is rebuttably presumed that a corporate  
13 officer has control over operations and management of the  
14 closely held corporation. Reg. § 1702.6(b) (3).

15 In contrast, Reg. § 1702.5, titled "Responsible Person  
16 Liability," applies when the sales taxes are not paid upon  
17 termination, dissolution, or abandonment of the corporate  
18 business and contains two requirements: the taxpayer must be  
19 (1) a responsible person who (2) willfully fails to pay the  
20 taxes to the government.

21 The term "responsible person" in Reg. § 1702.5 has a  
22 broader definition than the one provided under Reg. § 1702.6. A  
23 responsible person may be an officer, but also may be a "member,  
24 manager, employee, director, shareholder, or other person having  
25 control or supervision of, or who is charged with the  
26 responsibility for, the filing of returns or the payment of tax  
27 or who has a duty to act for the corporation ... in complying  
28 with any provision of the Sales and Use Tax Law...." Reg.



1 § 1702.5(b)(1).

2 Further, in contradistinction to Reg. § 1702.6, the  
3 touchstone for being a responsible person under Reg. § 1702.5 is  
4 whether the individual being assessed possessed a sufficient  
5 degree of authority over corporate decision-making to make him a  
6 responsible person. In re Pugh, 315 B.R. 889, 897 (Bankr. D.  
7 Nev. 2004) (finding in the context of 26 U.S.C. § 6672 that  
8 whether a party qualifies as a responsible person is a matter of  
9 his status, duty, and authority).

10 Under Reg. § 1702.5(b)(2), willful means "voluntary,  
11 conscious and intentional." The Regulation elaborates: "A  
12 failure to pay or to cause to be paid may be willful even though  
13 such failure was not done with a bad purpose or evil motive."  
14 Id.; See also Tax Code § 6829(d).<sup>13</sup> Whether the responsible  
15 person "willfully refused" to pay the tax is a factual  
16 question.<sup>14</sup> Teel v. United States, 529 F.2d 903, 905 (9th Cir.  
17 1976).

18 In short, the two Regulations contain different  
19 requirements, definitions, and presumptions. Accordingly, the

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21 <sup>13</sup>Reg. § 1702.5 references Tax Code § 6829. Tax Code  
22 § 6829(d) provides: "For purposes of this section willfully  
23 fails to pay or to cause to be paid means that the failure was  
24 the result of an intentional, conscious, and voluntary course of  
25 action...."

26 <sup>14</sup>Moreover, Tax Code § 6829(b) provides: "The officer,  
27 member, manager, partner, or other person shall be liable only  
28 for taxes that became due during the period he or she had the  
control, supervision, responsibility, or duty to act for the  
corporation ... described in subdivision (a), plus interest and  
penalties on those taxes...." (Emphasis added.) The bankruptcy  
court made no finding on the record indicating that it considered  
this subsection of § 6829 in its ruling.

1 evidence needed to defend each of the requirements in the two  
2 Regulations further illustrates the importance of proper notice  
3 because debtor bore the burden of proving by a preponderance of  
4 the evidence that at least one of the requirements was not  
5 present. See Tax Code §§ 6091, 6042<sup>15</sup>; see also S. Coast Co. v.  
6 Franchise Tax Bd., 250 Cal. App. 2d 822 (1967); The Flying Tiger  
7 Line v. State Bd. of Equalization, 157 Cal. App. 2d 85, 99  
8 (1958).

9 Debtor's defense to the Reg. § 1702.6 charge was proof by a  
10 preponderance of the evidence that he was not an officer of the  
11 Corporation during the relevant time period who was in control  
12 over its operations and management or an officer charged with  
13 the responsibility for filing returns or paying the taxes. In  
14 each instance, the taxpayer's liability rests on corporate  
15 officer status. In contrast, Reg. § 1702.5 required evidence to  
16 prove the elements of responsibility and willfulness were not  
17 present.

18 Therefore, based on the differences between the two  
19 Regulations, we respectfully disagree with the bankruptcy  
20

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21 <sup>15</sup> Tax Code § 6091 provides: "For the purpose of the proper  
22 administration of this part and to prevent evasion of the sales  
23 tax it shall be presumed that all gross receipts are subject to  
24 the tax until the contrary is established." Tax Code § 6241  
25 provides: "For the purpose of the proper administration of this  
26 part and to prevent evasion of the use tax and the duty to  
27 collect the use tax, it shall be presumed that tangible personal  
28 property sold by any person for delivery in this State is sold  
for storage, use, or other consumption in this State until the  
contrary is established. The burden of proving the contrary is  
upon the person who makes the sale unless he takes from the  
purchaser a certificate to the effect that the property is  
purchased for resale."

1 court's view that it was not important which Regulation the SBE  
2 relied on for its proof of claim. While debtor raised the  
3 argument regarding his lack of notice in his Reconsideration  
4 Motion, the court did not analyze this argument. Instead, the  
5 transcript of the hearing shows the court simply clarified its  
6 earlier ruling by providing additional findings of fact and  
7 conclusions of law. In the end, debtor never received a  
8 meaningful hearing of his arguments against liability under Reg.  
9 § 1702.5.

10 The SBE contends that debtor had adequate notice that his  
11 "willful" failure to pay the taxes was at issue because it  
12 argued in its opposition to debtor's objection "not only was the  
13 debtor apparently an officer of the corporation, he acted on  
14 behalf of the corporation with regard to the corporation's tax  
15 liability in communications with the SBE." We disagree that  
16 this one sentence buried in a pleading was notice reasonably  
17 calculated to apprise debtor that he faced responsible person  
18 liability under Reg. § 1702.5.

19 Nowhere does the SBE mention Reg. § 1702.5 in any of its  
20 pleadings, and it did not attach a copy of Reg. § 1702.5 to its  
21 opposition as it did a copy of Reg. § 1702.6. Furthermore, the  
22 SBE never argued in the bankruptcy court that debtor's failure  
23 to pay the taxes was "willful" within the meaning of Reg.  
24 § 1702.5, nor did it cite any case law to support that position.

25 In determining debtor's personal liability under Reg.  
26 § 1702.5, the bankruptcy court made no ruling on the willful  
27 element; there was no discussion of that element on the record.  
28 The SBE suggests that we should infer such a finding based on

1 the evidence. However, neither the SBE nor debtor introduced  
2 any evidence on this element. Accordingly, we cannot imply a  
3 finding of willfulness that the record does not support.

4 In sum, we hold debtor's due process rights were violated  
5 when the bankruptcy court imposed personal liability on him for  
6 the Corporation's unpaid sales taxes under Reg. § 1702.5. The  
7 SBE neither relied on nor argued for liability under that  
8 Regulation in connection with its proof of claim. Nor can we  
9 conclude from this record that debtor impliedly consented to  
10 trial on the issue of whether he was a responsible person under  
11 Reg. § 1702.5 just because evidence introduced at the  
12 evidentiary hearing was incidentally relevant to the liability  
13 imposed under both Reg. §§ 1702.5 and 1702.6. See Acequia,  
14 Inc., 34 F.3d at 814 ("Where 'evidence ... allege[d] to have  
15 shown implied consent was also relevant to the other issues at  
16 trial[,] [it] cannot be used to imply consent to try the  
17 [unpleaded] issue.'" (emphasis in original)).<sup>16</sup>

### 18 **3. Liability Under Reg. § 1702.6**

19 Reg. § 1702.6 imposes personal liability on corporate  
20 officers when (1) the officer has control over operations or  
21 management of a closely held corporation during a time which the  
22 corporation is suspended, or when (2) the officer is charged  
23 with the responsibility for the payment of tax.

24 Debtor had the burden of proving that he was not a  
25 corporate officer during the relevant time period for which the  
26

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27 <sup>16</sup>In light of our conclusion, it is unnecessary to address  
28 debtor's arguments regarding his liability as a "de facto"  
officer under Reg. § 1702.5.

1 taxes were assessed. Debtor's uncontroverted evidence met this  
2 requirement when he introduced written evidence of his  
3 resignation and testified that he had resigned for health  
4 reasons.

5 Furthermore, under California law, debtor's resignation  
6 became effective on written notice to the Corporation.<sup>17</sup> As a  
7 general rule, officers may resign at will, and the validity of  
8 their resignation does not depend on its formal acceptance.  
9 Sec. Investors Realty Co. v. Super. Ct. of L.A. County, 101 Cal.  
10 App. 450, 453 (1929).

11 The parties to this appeal cite no law, and we could not  
12 find any, that supported the bankruptcy court's conclusion that  
13 debtor was obligated to notify the SBE of his resignation.  
14 Neither the Tax Code nor the Regulations indicate that such a  
15 notice is mandatory in order to escape personal liability for a  
16 corporation's unpaid sales taxes. Thus, we respectfully  
17 disagree with the bankruptcy court's conclusion that debtor had  
18 to advise the SBE to make his resignation effective.<sup>18</sup>

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20 <sup>17</sup>Cal. Corp. Code § 305(d) provides: "Any director may  
21 resign effective upon giving written notice to the chairman of  
22 the board, the president, the secretary or the board of directors  
23 of the corporation, unless the notice specifies a later time for  
24 the effectiveness of such resignation...." Cal. Corp. Code § 312  
entitled "Officers; election; term; resignation", subsection (b)  
provides in relevant part: "Any officer may resign at any time  
upon written notice to the corporation ...."

25 <sup>18</sup>We also cannot conclude on this record that debtor's  
26 failure to give notice to the SBE regarding his resignation  
27 constituted "fraud" – a term used by the bankruptcy court. Clear  
28 and convincing evidence must be shown to establish civil tax  
fraud under California law. Cal. State Bd. of Equalization v.

(continued...)

1 The court found that debtor had resigned as a corporate  
2 officer based on debtor's written evidence of his resignation  
3 and testimony. Under California law, his resignation was  
4 effective upon written notice. Therefore, the bankruptcy court  
5 should have sustained debtor's objection and disallowed the SBE  
6 claim because it lacked an essential element for imposing  
7 personal liability on debtor for a portion of the Corporation's  
8 unpaid sales taxes.

## 9 VI. CONCLUSION

10 We conclude that the bankruptcy court erred for the reasons  
11 stated above. Debtor did not have fair notice that he faced  
12 liability under Reg. § 1702.5, which was the basis for the  
13 bankruptcy court's allowance of the SBE's claim.<sup>19</sup>

14 We also hold that debtor met his burden of proof that he  
15 was not an officer of the Corporation after April 26, 2001.  
16 Therefore, the SBE's claim, which was based on Reg. § 1702.6,  
17 should have been rejected by the bankruptcy court because an  
18 essential element for imposing personal liability on debtor for  
19 a portion of the Corporation's unpaid sales taxes was not met.

20 Accordingly, we REVERSE.

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21  
22 <sup>18</sup>(...continued)  
23 Renovizor's, Inc. (In re Renovizor's, Inc.), 282 F.3d 1233, 1235,  
24 1241 (9th Cir. 2002). Clear and convincing evidence means  
25 evidence sufficient to support a finding of "high probability."  
26 See Cal. Civ. Code § 3294(a); Waits v. Frito-Lay, Inc., 978 F.2d  
1093, 1105 (9th Cir. 1992), cert. denied, 506 U.S. 1080 (1993).  
We cannot determine from this record whether debtor's silence met  
this heightened standard.

27 <sup>19</sup>We express no opinion as to whether debtor is actually  
28 liable for the Corporation's unpaid sales taxes based on Reg.  
§ 1702.5.