

FEB 11 2009

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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NOT FOR PUBLICATION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.)	MEMORANDUM¹
)	
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.

¹This 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,² 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.³

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, § 1702.6,⁴ 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
15

16 ² 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 ³ 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 ⁴Citations 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. § 1702.5⁵, 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.

25
26 ⁵Reg. § 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, 2007.⁶ 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
25

26 ⁶In 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.⁷ 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 ⁷ 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 judicata⁸
21 effect that debtor would have to confront since his estate has
22 revested in him.⁹ Therefore, we can give debtor effective

24 ⁸ "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 ⁹ 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.¹⁰ Accordingly, the bankruptcy court was not required by 28
15 U.S.C. § 1738¹¹ 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

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

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

27 ¹¹This 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. § 1702.5.¹²

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 ¹²On 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).¹³ Whether the responsible
15 person "willfully refused" to pay the tax is a factual
16 question.¹⁴ 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

21 ¹³Reg. § 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 ¹⁴Moreover, 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, 6042¹⁵; 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

21 ¹⁵ 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)).¹⁶

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

27 ¹⁶In 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.¹⁷ 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.¹⁸

20 ¹⁷Cal. 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 ¹⁸We 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.¹⁹

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.

21 _____
22 ¹⁸(...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 ¹⁹We express no opinion as to whether debtor is actually
28 liable for the Corporation's unpaid sales taxes based on Reg.
§ 1702.5.