

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Petition for Redetermination under the Sales and Use Tax Law of
Hosmer Chandler McKoon

Appearances:

Petitioner: Dennis Connelly, Attorney
Sales and Use Tax Department: Robert Stipe, Tax Counsel IV
Appeals Division: David H. Levine, Tax Counsel IV

MEMORANDUM OPINION

This opinion considers the statutory limitation period for issuing a notice of determination for “responsible person” liability pursuant to Revenue and Taxation Code section 6829. We address only whether the determination here was timely issued, having found that all conditions for imposing liability under section 6829 on petitioner were satisfied. We conclude that the limitation period for issuing such a determination is eight years unless the responsible person files a sales and use tax return on his or her own behalf.

Petitioner was corporate president and sole owner of MPS Photographic Services, Inc. (MPS). The seller’s permit of MPS was closed out effective May 28, 1999, and its assets were sold at auction on June 23, 1999. MPS had liabilities due at the time of its termination that were incurred during the prior year for which it filed nonremittance and partial remittance returns. When a corporation closes out with an outstanding balance of tax due, the Sales and Use Tax Department (Department) works to collect such amounts. The first step is to try to collect such amounts from the assets of the corporation, and generally, only after those efforts are exhausted, does the Department consider whether to pursue any individual for responsible person liability under section 6829.¹ That is what occurred here.

Department collectors worked with petitioner in the attempt to obtain payment of the corporation’s debts. On July 9, 2004, after concluding that the collection effort against the corporation was unsuccessful, the Department issued the notice of determination against petitioner, personally, that we consider herein. Petitioner asserts that the determination is barred because it was issued more than three years after the corporation filed returns for the periods for which the liability was incurred. The Department contends that the notice was timely because the notice was issued to petitioner for his own personal liability, and petitioner did not file sales and use tax returns on his own behalf for the period in which he incurred this liability.

We start, of course, with the statute imposing the subject liability, section 6829, which imposes a dual liability on a responsible person for the debt incurred by a separate business

¹ Virtually all such assessments are issued to individuals, although section 6829 permits the imposition of this dual liability on any “person” meeting the conditions of the statute. (See Rev. & Tax. Code, § 6005 for the definition of “person” for purposes of the Sales and Use Tax Law.)

entity such as a corporation.² Liability imposed by section 6829 is “collected by determination and collection in the manner provided in Chapter 5 (commencing with Section 6451) and Chapter 6 (commencing with Section 6701).” (Rev. & Tax. Code, § 6829, subd. (e).) Thus, the provisions we must apply to ascertain whether the dual liability determination here was timely are the standard provisions that were designed for determinations issued to taxpayers who are primarily liable for the tax.

Persons who make taxable sales or use of tangible personal property owe the tax due on or before the last day of the month following the quarterly period in which the taxes were imposed (i.e., generally when the sale or use occurred). (Rev. & Tax. Code, § 6451.)³ Such persons are specifically required to file returns to report their tax liability. (Rev. & Tax. Code, § 6452, subd. (b).) Those returns are due by the date the tax is due, that is, by the last day of the month following the quarter during which the tax was imposed. The limitation period for issuing a determination to a person is based on the due date of that person’s returns (Rev. & Tax. Code, § 6487), which in turn is based on the period in which the liability was incurred (Rev. & Tax. Code, § 6452, subd. (a)).

Where a person files a timely return for a given quarter, a determination for amounts due from that person for that quarter must be issued to that person within three years of the due date of the return. (Rev. & Tax. Code, § 6487, subd. (a).) Where a person files a late return for a given quarter, a determination for amounts due from that person for that quarter must be issued to that person within three years of the date the late return was filed. (*Ibid.*) Where a person does not file any return for a given quarter, a determination for amounts due from that person for that quarter must be issued to that person within *eight* years of the due date of the return. (*Ibid.*)

In contrast to the due date of the tax owed by a corporation selling or consuming tangible personal property, a responsible person *cannot* be held liable under section 6829 until the business who sold or used the property is terminated, without regard to when the corporation incurred the tax debt. (Rev. & Tax. Code, § 6829, subd. (a).) This fact is *determinative* of when the statute of limitations begins to run for section 6829 liability. Such liability is imposed during the quarter in which the business terminates, meaning that such liability is due by the last day of the following month. (Rev. & Tax. Code, § 6451.) Thus, the return for that liability is required by that due date (Rev. & Tax. Code, § 6452), meaning in turn that the limitation period begins to run on that date as well (Rev. & Tax. Code, § 6487, subd. (a)).

The only remaining question is whether any return filed by the corporation is attributable to a *different* person, that is, to the responsible person, such that the three-year limitation period of section 6487 is applicable to the responsible person’s liability under section 6829. Except when there is fraud, the limitation period for issuing a determination *always* runs based on the due date or actual filing date of the return. (Rev. & Tax. Code, § 6487, subd. (a).) Thus, if a three-year limitation period applies to the issuance of a determination under section 6829

² Below we refer to “business” to represent the business enterprise engaged in the selling activity generating the subject tax liability. (See Cal. Code Regs., tit. 18, § 1702.5, subd. (b)(3).) We refer to “corporation” to represent the entity owning that business. Although we use “corporation” because the entity here was a corporation, the same analysis would apply with respect to any other type of entity covered by section 6829.

³ The Board may also place a person on other than a quarterly basis. (Rev. & Tax. Code, § 6455.) If it does so, the tax imposed on that person is due, and that person’s return must be filed, in accordance with reporting basis specified by the Board. Here, we refer only to the default quarterly reporting, which is how MPS reported, and which is how anyone else must report unless the Board specifically directs otherwise.

because the corporation filed a timely return, that would mean that such limitation period began to run on the due date of the corporation's return. However, as explained immediately above, the limitation period for issuing a determination under section 6829 cannot commence prior to the time that the liability can be lawfully imposed, which means that the corporation's filing of its own returns cannot be attributed to the responsible person for these purposes.⁴

The more fundamental flaw in this argument is simply that a return filed by a corporation to report its liability under the Sales and Use Tax Law cannot be regarded as a return filed by a wholly different person. Here, each of the subject returns was clearly filed only on behalf of MPS to report MPS's own liability for the sale and use of tangible personal property. Even for the three returns signed by petitioner, he did so on behalf of the corporation. This separation of identities is presumably the very reason petitioner incorporated the business, that is, so that the corporation and petitioner would be separate persons. In any event, regardless of his reasons for incorporating the business, MPS and petitioner are viewed as separate persons for purposes of the Sales and Use Tax Law. (Rev. & Tax. Code, § 6005.) Thus, the return filed by MPS cannot be regarded as having been filed to report petitioner's own personal liability under section 6829, or perhaps more accurately, to report that petitioner was claiming to have no liability under section 6829 at all.⁵

We conclude that petitioner did not file a return in his own name for any of the quarters during which MPS accrued the liability, and specifically did not file a return in his own name for the second quarter 1999 during which his liability under section 6829 accrued. Accordingly, we further conclude that the limitation period for issuing the determination to him under section 6829 was eight years, and that it began running on July 31, 1999, the due date of such liability.

We recognize that the nature of this liability is such that few persons acknowledge it, and that fewer still would voluntarily report and pay the liability even if such requirement were clearly explained to them. Rather, it seems far more likely that the reason a person might choose to file a return as a result of section 6829 is for the purpose of obtaining a three-year limitation period, and starting it running. Nevertheless, any person who is potentially liable under section 6829 may file a return showing no amount due for this purpose. Such a return should clearly state its purpose, and include all relevant information (such as that it is filed to report an amount due under section 6829, or no amount due, the identity and seller's permit number of the applicable corporation, and the period for which the return is filed). We do not now adopt a specific form for a section 6829 return, but we note that a return with no information at all except, for example, the person's name plus the claim that he or she has no liability, would at best result in further inquiry from the Department.

⁴ Under the argument that the corporation's returns can be attributed to the responsible person, the true limitation period (i.e., from the date on which the liability became due and owing by the responsible person to the last date on which the determination for such liability could be issued) would be less than three years for any quarter other than the quarter of termination and, indeed, would often result in the expiration of the limitation period before a determination could ever be lawfully issued to the responsible person.

⁵ An argument that the return of the corporation should be attributed to a person the Department asserts is liable under section 6829 is essentially a concession that the person was responsible and is personally liable for the debts of the corporation. Since we conclude that a return filed by the corporation cannot be regarded for these purposes as a return filed by the individual, we also conclude that the fact the corporation filed a return is not alone a concession by any individual that he or she is a responsible person liable under section 6829.

In summary, we conclude that the law as currently written requires a responsible person to file a separate return in his or her own name for the section 6829 liability, which means that the return must cover the quarter during which the business terminated. When such a return is filed, the limitation period for issuing a determination under section 6829 is three years from the last day of the month following the quarter of termination or three years from the filing of the return, whichever is later. When such a return is not filed, the limitation period for issuing a determination under section 6829 is eight years from the last day of the month following the quarter of termination. Here, petitioner did not file a return for his section 6829 liability, and the Department issued the determination before the eight-year limitation period expired. Therefore, that determination was timely.

Adopted at Sacramento, California on May 31, 2007.

Betty T. Yee _____, Chairwoman

Bill Leonard _____, Member

Michelle Steel _____, Member

Judy Chu, Ph.D. _____, Member

Marcy Jo Mandel _____, Member*

*For John Chiang, pursuant to Government Code section 7.9.