

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION BOARD HEARING SUMMARY

In the Matter of the Petition for Redetermination)
Under the Sales and Use Tax Law of:)
RAYMOND HARRY SIMMONS)
Petitioner)
Account Number SR AS 53-003182
Case ID 531521
Newport Beach, Orange County

Type of Liability: Responsible person liability
Liability period: 10/01/06 – 01/18/07

<u>Item</u>	<u>Disputed Amount</u>	<u>Tax</u>	<u>Penalty</u>
Responsible person liability	\$161,864		
As determined		\$142,123.00	\$47,774.00
Post-D&R adjustment		<u>00.00</u>	<u>- 28,033.30¹</u>
Proposed redetermination, protested		<u>\$142,123.00</u>	<u>\$19,740.70</u>
Proposed tax redetermination		\$142,123.00	
Interest through 06/30/14		80,464.52	
Failure-to-file penalty		19,740.70	
Finality penalty		<u>28,033.30</u>	
Total tax, interest, and penalty		<u>\$270,361.52</u>	
Monthly interest beginning 07/01/14		<u>\$ 710.61</u>	

This matter was scheduled for Board hearing in February 2014, but petitioner did not respond to the Notice of Hearing and the matter was scheduled for decision on the nonappearance calendar for March 2014. Petitioner subsequently filed a late response to the hearing notice.

UNRESOLVED ISSUES

Issue 1: Whether petitioner is personally liable as a responsible person for the unpaid liabilities of Crenshaw Motors, Inc. pursuant to Revenue and Taxation Code section 6829. We conclude petitioner is personally liable.

¹ Since we have recommended conditional relief of the finality penalty, we have deducted the penalty here. However, in the subsequent table, we show the finality penalty because it will be included in the Notice of Redetermination unless the conditions have been met.

1 Crenshaw Motors, Inc. (Crenshaw) (SR AS 12-013260) operated a Ford dealership. At the
2 time its business terminated, on January 18, 2007, Crenshaw had numerous unpaid liabilities.
3 Petitioner was previously held personally liable for Crenshaw Motor's unpaid liabilities for the period
4 January 1, 2002, through December 31, 2006, and the Notice of Determination (NOD) for that period
5 included the October and November 2006 prepayments for the fourth quarter 2006.² In addition to the
6 liabilities encompassed by the first NOD, Crenshaw had liabilities related to two NOD's, issued for the
7 fourth quarter 2006 (4Q06) and for the period January 1, 2007, through January 18, 2007, for which
8 Crenshaw had not filed returns. The Sales and Use Tax Department (Department) concluded that
9 petitioner was personally responsible for Crenshaw's sales and use tax compliance pursuant to section
10 6829 for all of 4Q06 and for the period January 1, 2007, through January 18, 2007, and it issued the
11 NOD in dispute, which includes the total amount due from Crenshaw for 4Q06, net of the amount
12 included in the earlier NOD, and the amount due from Crenshaw for the first 18 days of January 2007.³

13 Petitioner disputes two of the four conditions for imposing personal liability pursuant to section
14 6829, that he was a responsible person during the period in question and that he willfully failed to pay
15 or to cause to be paid the taxes at issue that were due from Crenshaw. Specifically, petitioner asserts
16 that Ford Motor Credit Company (Ford) took control of Crenshaw in January 2007 and that, as a result,
17 he lacked the necessary control to act on behalf of the corporation when the taxes became due and
18 payable. Therefore, petitioner contends that he is not personally liable for Crenshaw's unpaid tax
19 liabilities for the period October 1, 2006, through January 18, 2007.⁴

20 Petitioner was the sole shareholder and president of Crenshaw. He signed multiple documents,
21 _____

22 ² Petitioner filed an appeal regarding that earlier liability (case ID 415283), and it was scheduled for Board hearing in
23 November 2010, but petitioner did not respond to the Notice of Hearing. The matter was present to the Board on a
nonappearance calendar, and the Board ordered no adjustments.

24 ³ The Department did not issue any other determinations for personal liability pursuant to section 6829 because it found
25 there was insufficient evidence that any other individual was responsible for Crenshaw's sales and use tax compliance.
Specifically, the Department did not issue a dual determination against Ms. Caldwell because she lacked check signing
26 authority. In addition, the Department investigated a Mr. Gary Gear, the corporate secretary, who had check signing
authority, but the Department determined that it did not have any evidence of Mr. Gear's involvement in sales and use tax
27 matters.

28 ⁴ Petitioner also argues that the amounts in the NOD at issue here are duplicated in the NOD for the period January 1, 2002,
through December 31, 2006. However, as explained previously, this NOD includes the portion of Crenshaw's liability for
4Q06 that was not previously determined against petitioner as an individual and Crenshaw's liability for the first 18 days of
2007, which was not included in the previous NOD. Thus, petitioner's assertion of duplication is incorrect, and we will not
address it further.

1 both for the Board and for other entities, as president of Crenshaw. For instance, he signed a waiver of
2 the statute of limitations and an untimely petition for redetermination, which is direct evidence of his
3 involvement with Crenshaw's sales and use tax compliance. Also, petitioner spoke to the Department
4 on multiple occasions regarding Crenshaw's unpaid liabilities. Thus, we find that petitioner was a
5 responsible person as defined by section 6829.

6 With respect to willfulness, personal liability can be imposed on a responsible person under
7 section 6829 only if that person willfully failed to pay or to cause to be paid taxes due from the
8 corporation, which means that the failure was the result of an intentional, conscious, and voluntary
9 course of action (even if without a bad purpose or evil motive). A person is regarded as having
10 willfully failed to pay taxes, or to cause them to be paid, where he or she had knowledge that the taxes
11 were not being paid and had the authority to pay taxes or cause them to be paid, but failed to do so.

12 The first requirement for willfulness is knowledge. The Department contacted petitioner
13 regarding Crenshaw's failure to file returns for 4Q06 and for the period January 1, 2007, through
14 January 18, 2007. Consequently, we find that petitioner knew that Crenshaw had not filed returns for
15 the periods at issue. Also, since the business continued to operate and sell tangible personal property,
16 we find that petitioner, the sole corporate officer in charge of day-to-day operations, was aware that
17 Crenshaw owed taxes for the period.

18 Willfulness also requires that the responsible person must have been able to pay, or cause to be
19 paid, the taxes when due. Petitioner signed a Bank of America Master Agreement dated June 23,
20 2000, which conferred to petitioner the authority to withdraw or direct the funds of Crenshaw's bank
21 account. There is no evidence that petitioner was taken off of the Bank of America Master Agreement
22 or was prevented from remitting the tax (for which Crenshaw had collected reimbursement from its
23 customers). Regarding petitioner's allegation that Ford seized control of the business and petitioner
24 did not have the authority to pay Crenshaw's tax liability, there is no evidence that Ford executed or
25 otherwise perfected any security interest in Crenshaw's bank accounts or other assets. Although
26 petitioner has submitted a copy of a complaint that Ford filed against petitioner on January 11, 2007,
27 that lawsuit was ultimately dismissed by Ford and does not establish that Ford perfected a security
28 interest in Crenshaw's bank account or assets. Accordingly, we find there is no evidence that Ford

1 achieved the necessary control over the corporation's bank account that would have prevented
2 petitioner from paying the tax liabilities. Thus, we find petitioner had the requisite authority to pay
3 Crenshaw's tax liabilities or cause them to be paid. Regarding whether Crenshaw had sufficient funds
4 to pay the taxes due, we note that its bank statements for the period December 30, 2006, through
5 January 19, 2007, reflect deposits of about \$364,000, and there is evidence that Crenshaw paid wages
6 during the liability period. We therefore find that funds were available to pay the sales tax liability, but
7 Crenshaw's management chose to pay other creditors instead. In summary, we conclude that all
8 conditions have been satisfied for imposing personal liability on petitioner under section 6829 for the
9 outstanding tax liabilities of Crenshaw for the period in question.

10 **Issue 2:** Whether petitioner has established reasonable cause sufficient for relieving the failure-
11 to-file penalties originally assessed against Crenshaw. We conclude that he has not.

12 The NOD's issued to Crenshaw included failure-to-file penalties since Crenshaw had not filed
13 returns, and the total amount of those penalties included in the NOD in dispute is \$19,740.70
14 (\$4,998.00 for the period January 1, 2007, through January 18, 2007, and \$14,742.70 for 4Q06, which
15 represents the difference between the penalty for the entire quarter and the amount included in the
16 NOD previously issued to petitioner for the period January 1, 2002, through December 31, 2006).
17 There is no statutory or regulatory authority for relieving failure-to-file penalties in section 6829
18 determinations, but if petitioner could show that the penalty should be relieved as to the corporation
19 under section 6592, the relief would also inure to petitioner's benefit. Petitioner submitted the required
20 declaration signed under penalty of perjury in which he claims that Crenshaw failed to file returns
21 because Ford seized control of the business. As explained above, we find that there is insufficient
22 evidence to support that assertion. Consequently, we reject petitioner's argument and find that
23 Crenshaw's failure to file returns was not due to reasonable cause, and that relief of the failure-to-file
24 penalties is not warranted.

25 **RESOLVED ISSUE**

26 Since Crenshaw did not timely pay the NOD's or file a petition for redetermination, finality
27 penalties totaling \$28,033.30 (\$23,035.30 + \$4,998.00) were added. Petitioner filed a request for relief
28 of the finality penalties. Since Crenshaw ceased operating in January 2007, and the NOD's were not

1 issued until July 10, 2007, we find there was reasonable cause for Crenshaw's failure to timely pay the
2 NOD's. Accordingly, we recommend relief of the finality penalties, if petitioner, within 30 days of the
3 mailing of final action in this appeal, pays the full tax liability at issue.

4 **OTHER MATTERS**

5 None.

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7 Summary prepared by Deborah A. Cumins, Business Taxes Specialist III
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