

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:)
AMY ELAINE SMITH) Account Number SR GH 53-006056
Petitioner) Case ID 532485
Auburn, Placer County)

Type of Liability: Responsible person liability

Liability period: 10/01/06– 03/31/07

<u>Item</u>	<u>Disputed Amount</u>
Responsible person liability	\$39,848
Tax as determined and protested	\$36,137.39
Interest through 04/30/14	18,916.65
Late payment penalties (returns)	3,609.30
Finality penalty	<u>101.00</u>
Total tax, interest, and penalty	\$58,764.34
Payments	<u>- 9,977.70</u>
Balance Due	<u>\$48,786.64</u>
Monthly interest beginning 05/01/14	<u>\$ 130.80</u>

This matter was scheduled for Board hearing in November 2013, but was postponed at petitioner's request as a result of family illness.

UNRESOLVED ISSUE

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

Stars & Stripes Telecom, Inc. (Stars & Stripes) (SR GH 99-698104) began selling cellular phone systems in April 1995. The seller's permit was closed out effective March 31, 2007, but we find, based on the available evidence, that the business operations terminated August 16, 2007. At the time its business terminated, Stars & Stripes had unpaid liabilities related to two returns filed with no remittance and one Notice of Determination (NOD) relating to unremitted tax reimbursement in the amount of \$1,010. The corporation filed for Chapter 7 bankruptcy on August 27, 2007. On

1 August 31, 2007, the Sales and Use Tax Department (Department) received four cashier checks,
2 totaling \$29,500, from Stars & Stripes. However, after receiving a request from the Chapter 7 trustee's
3 accountant, the Department determined that those funds should be returned to the Chapter 7 trustee,
4 Carol Wu, pursuant to section 549, subdivision (a), of title 11 of the United States Code. Accordingly,
5 the Department transferred the \$29,500 to Ms. Wu on December 19, 2007.

6 The Department concluded that petitioner was personally responsible for Stars & Stripes' sales
7 and use tax compliance pursuant to section 6829.¹ Petitioner concedes that Stars & Stripes' business
8 operations were terminated and that the business collected sales tax reimbursement with respect to its
9 taxable sales. However, petitioner disputes the remaining two conditions for imposing personal
10 liability pursuant to section 6829, that she was responsible for Stars & Stripes' sales and use tax
11 compliance and that she willfully failed to pay or to cause to be paid taxes due from Stars & Stripes.
12 Thus, petitioner contends she is not personally liable for Stars & Stripes' unpaid tax liabilities.

13 With regard to whether petitioner was responsible for Stars & Stripes' sales and use tax
14 compliance, petitioner argues that she did not have control over the decision to pay or not pay bills. As
15 support, petitioner submitted a declaration, signed under penalty of perjury by her husband, Mr. Smith,
16 stating that petitioner was merely charged with making the payments at his direction.

17 With respect to willfulness, petitioner concedes she was aware that the fourth quarter 2006
18 (4Q06) and 1Q07 returns were filed late with no remittance, but states she was not aware of the \$1,010
19 in unremitted, over-collected tax reimbursement when the 4Q06 return was filed. She also states that
20 she never received the Department's statement showing that Stars & Stripes over-collected tax
21 reimbursement for 4Q06. With regard to authority to pay, petitioner states that, although she discussed
22 with Mr. Smith what bills to pay, she did not have authority to pay the liabilities at issue because Mr.
23 Smith decided which bills would be paid. Further, petitioner argues that, pursuant to section 547,

24 _____
25 ¹ The Department also issued an NOD to Gregory Scott Smith (SR GH 53-006050) pursuant to section 6829 for the same
26 unpaid liabilities. Mr. Smith has filed a petition for redetermination (case ID 532481), which is scheduled for hearing
27 concurrently with this matter. The Department also investigated whether Dwight Wolfe, a shareholder identified as the
28 company's president on its application for seller's permit, should be held personally liable. However, the Department's
investigation revealed that Mr. Wolfe was not an officer, merely a shareholder, and there was no evidence that he was
involved in the operations of the business. Thus, the Department had no evidence on which to conclude that Mr. Wolfe was
responsible for Stars & Stripes' sales and use tax compliance. The Department did not identify any other persons who
might be liable under section 6829 for these liabilities.

1 subdivision (c), title 11 of the United States Code, the Department should have denied Ms. Wu's
2 request to return the \$29,500. On that basis, petitioner claims that it was either Ms. Wu or the
3 Department that willfully failed to pay the liabilities at issue here. In addition, petitioner argues that
4 she cannot be held individually liable for the debts of Stars & Stripes because there is no basis for
5 piercing the corporate veil in this case.

6 With respect to petitioner's assertion that she was not responsible for Stars & Stripes' sales and
7 use tax compliance, we note she signed multiple returns, including the nonremittance returns for 4Q06
8 and 1Q07 at issue here. Also, the Department's records show that petitioner discussed sales and use
9 tax issues with the Department. Her signatures on returns and discussions with the Department are
10 direct evidence that petitioner was involved in Stars & Stripes' sales and use tax compliance. Further,
11 it is undisputed that it was petitioner's job to file the sales and use tax returns. Consequently, we find
12 that petitioner is a responsible person within the meaning of section 6829, notwithstanding her
13 assertion that she did not have authority to determine which liabilities would be paid.

14 Personal liability can be imposed on a responsible person under section 6829 only if that person
15 willfully failed to pay or to cause to be paid taxes due from the corporation, which means that the
16 failure was the result of an intentional, conscious, and voluntary course of action (even if without a bad
17 purpose or evil motive). A person is regarded as having willfully failed to pay taxes, or to cause them
18 to be paid, where he or she had knowledge that the taxes were not being paid and had the authority to
19 pay taxes or cause them to be paid, but failed to do so.

20 The first requirement for willfulness is knowledge. Petitioner concedes that she was aware the
21 4Q06 and 1Q07 returns were filed without remittance. With respect to the over-collection of tax
22 reimbursement for 4Q06, the Department had notified the corporation about this error via letter dated
23 June 26, 2007. Consequently, we find that petitioner must have been aware of the error.

24 Willfulness also requires that the responsible person must have been able to pay, or cause to be
25 paid, the taxes when due. It is undisputed that petitioner had check signing authority. Also, petitioner
26 discussed payment arrangements with the Department, and the evidence indicates that petitioner
27 participated in the decision-making process regarding Stars and Stripes' tax liabilities and which debts
28

1 use to request relief. However, petitioner has not returned the form or otherwise filed a request for
2 relief, and thus we have no basis to recommend relief of the late-payment and finality penalties.

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

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28