

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:)
GREGORY SCOTT SMITH) Account Number SR GH 53-006050
Petitioner) Case ID 532481
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, that the business collected sales tax reimbursement with respect to its
9 taxable sales, and that, as corporate president, he was a person responsible for oversight of Stars &
10 Stripes' sales and use tax compliance. However, petitioner disputes the final condition for imposing
11 personal liability pursuant to section 6829, that he willfully failed to pay or to cause to be paid taxes
12 due from Stars & Stripes. On that basis, petitioner contends he is not personally liable for Stars &
13 Stripes' unpaid tax liabilities.

14 With respect to willfulness, petitioner argues that he was not aware of the NOD for \$1,010 tax,
15 which represented tax reimbursement collected in excess of the amount of tax reported for the fourth
16 quarter 2006 (4Q06). He has neither conceded nor denied awareness of the fact that the sales and use
17 tax returns for 4Q06 and 1Q07 were filed late with no remittance. Petitioner also asserts that Stars &
18 Stripes did not have the ability to pay the liabilities at issue. Further, petitioner argues that, pursuant to
19 section 547, subdivision (c), title 11 of the United States Code, the Department should have denied Ms.
20 Wu's request to return the \$29,500. On that basis, petitioner claims that it was either Ms. Wu or the
21 Department that willfully failed to pay the liabilities at issue here. In addition, petitioner argues that he
22 cannot be held individually liable for the debts of Stars & Stripes because there is no basis for piercing
23 the corporate veil in this case.

24 _____
25 ¹ The Department also issued an NOD to Amy Elaine Smith (SR GH 53-006056) pursuant to section 6829 for the same
26 unpaid liabilities. Ms. Smith has filed a petition for redetermination (case ID 532485), 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 Personal liability can be imposed on a responsible person under section 6829 only if that person
2 willfully failed to pay or to cause to be paid taxes due from the corporation, which means that the
3 failure was the result of an intentional, conscious, and voluntary course of action (even if without a bad
4 purpose or evil motive). A person is regarded as having willfully failed to pay taxes, or to cause them
5 to be paid, where he or she had knowledge that the taxes were not being paid and had the authority to
6 pay taxes or cause them to be paid, but failed to do so.

7 The first requirement for willfulness is knowledge. With respect to the returns filed with no
8 remittance for 4Q06 and 1Q07, petitioner's wife stated at the conference that she brought those
9 liabilities to petitioner's attention when they were due. With respect to the unremitted tax
10 reimbursement in connection with the 4Q06 return, the Department had notified the corporation about
11 this error via letter dated June 26, 2007. Consequently, we find that petitioner must have been aware
12 of the error.

13 Willfulness also requires that the responsible person must have been able to pay, or cause to be
14 paid, the taxes when due, and petitioner concedes that he had authority to cause the taxes due to be
15 paid. Regarding whether Stars & Stripes had sufficient funds to pay the taxes due, we note that during
16 the applicable periods, Stars & Stripes paid wages, rent, and utilities, and made payments to some of
17 its vendors. Moreover, Stars & Stripes charged and collected sales tax reimbursement on its taxable
18 sales, and thus had those funds available from which to pay its sales tax liabilities. Accordingly, we
19 find that funds were available to pay the sales tax liability, but Stars & Stripes' management chose to
20 pay other creditors instead. In summary, we conclude that all conditions have been satisfied for
21 imposing personal liability on petitioner under section 6829 for the outstanding tax liabilities of Stars
22 & Stripes.

23 With respect to petitioner's argument that the Department could have challenged Ms. Wu's
24 request to return the payments of \$29,500 to the bankruptcy trustee, we find that Ms. Wu's actions in
25 December 2007 have no impact on our finding that petitioner, as a person responsible for Stars &
26 Stripes' sales and use tax compliance, willfully failed to pay the taxes at issue when those taxes
27 became due and payable on January 31, 2007, and April 30, 2007. Further, we are aware of no legal
28 authority, nor does petitioner cite any such authority, that requires the Department to resist such a

1 request from a bankruptcy attorney or that makes the Department responsible for petitioner's liabilities
2 under section 6829. Thus, petitioner is liable for the unpaid tax liabilities, regardless of whether the
3 transfer to the bankruptcy trustee was proper or not.

4 Petitioner's argument that there is no basis for piercing the corporate veil is not germane to this
5 case because his liability is not based on piercing the corporate veil. Petitioner's liability is based on
6 section 6829, which imposes a separate, independent liability on a responsible person, when all four
7 criteria are met, as is the case here.

8 **OTHER MATTERS**

9 At the appeals conference and in a subsequent email, we explained to petitioner that, if he could
10 show that the penalties should be relieved as to the corporation under Revenue and Taxation Code
11 section 6592, the relief would also inure to his benefit. We also provided a form petitioner could use
12 to request relief. However, petitioner has not returned the form or otherwise filed a request for relief,
13 and thus we have no basis to recommend relief of the late-payment and finality penalties.

14
15 Summary prepared by Deborah A. Cumins, Business Taxes Specialist III
16
17
18
19
20
21
22
23
24
25
26
27
28