

**CALIFORNIA STATE BOARD OF EQUALIZATION**

**APPEALS DIVISION FINAL ACTION SUMMARY**

In the Matter of the Administrative Protest )  
 and Claim for Refund under the )  
 Sales and Use Tax Law of: ) Account Number SR FH 53-003588  
 ) Case ID's 467919, 760227  
 JEFFREY SCOTT MANKINS )  
 Taxpayer ) Portland, Oregon

Type of Liability: Responsible person liability

Liability period: 04/01/06 – 03/14/07

Item Disputed Amount

Responsible person liability	\$26,840		
		<u>Tax</u>	<u>Penalty</u>
As determined		\$30,115.52	\$6,024.05
Post-D&R adjustment		- 5,404.79	- 3,794.85 <sup>1</sup>
Determination, as adjusted		\$24,710.73	\$2,229.20
Less payment by the corporation		- 100.00	00.00
Balance, protested		<u>\$24,610.73</u>	<u>\$2,229.20</u>
Adjusted tax		\$24,710.73	
Interest through 09/30/14		13,609.56	
Failure-to-file penalties		2,229.20	
Finality penalty		<u>2,471.07</u>	
Total tax, interest, and penalty		\$43,020.56	
Payments		- 8,373.45	
Balance Due		<u>\$34,647.11</u>	
Monthly interest beginning 10/01/14		<u>\$ 81.69</u>	

This matter was scheduled for Board hearing in June 2014, but petitioner did not respond to the Notice of Hearing. Thus, the matter was scheduled for decision on the nonappearance calendar, but it was removed from the Consent calendar at the request of Member Mandel and has been re-scheduled on the Adjudicatory calendar.

<sup>1</sup> Since we recommend conditional relief of the finality penalty, as addressed under "Resolved Issues," we have included the amount of the finality penalty as an adjustment here. However, the finality penalty is shown in the table below, since the conditions for relief have not yet been met.

## UNRESOLVED ISSUES

**Issue 1:** Whether taxpayer is personally liable as a responsible person for the unpaid liabilities of Mako Automotive, Inc. pursuant to Revenue and Taxation Code section 6829. We conclude taxpayer is personally liable for amounts that became due prior to March 14, 2007.

Mako Automotive, Inc. (Mako) (SR FH 100-605424) operated an automotive repair facility from September 2005 through March 14, 2007. At the time its business terminated, Mako had unpaid liabilities related to a Notice of Determination (NOD) issued because Mako had not filed sales and use tax returns for the period April 1, 2006, through March 14, 2007. The Sales and Use Tax Department (Department) concluded that taxpayer was personally responsible for Mako's sales and use tax compliance pursuant to section 6829.<sup>2</sup>

Taxpayer disputes only one of the conditions for imposing personal liability pursuant to section 6829, that he willfully failed to pay or to cause to be paid taxes due from Mako. On that issue, he concedes that he had the requisite knowledge that the taxes were due and were not being paid, but he argues that he did not have the authority to pay the taxes or to cause them to be paid and that Mako did not have the funds to pay the taxes. As a result, taxpayer contends that he is not personally liable for Mako's unpaid tax liabilities.<sup>3</sup>

With respect to willfulness, personal liability can be imposed on a responsible person under section 6829 only if that person willfully failed to pay or to cause to be paid taxes due from the corporation, which means that the failure was the result of an intentional, conscious, and voluntary

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<sup>2</sup> The Department did not issue a dual determination to any other individuals because the Department believed that there was insufficient evidence to demonstrate that any other individual was personally liable for Mako's unpaid liabilities pursuant to Revenue and Taxation Code section 6829. The Department stated that it did investigate the only other officer listed on the seller's permit, Janet Mankins (taxpayer's then-wife), but that Department staff were unable to obtain sufficient evidence to support issuing a dual determination to her. In addition, on February 16, 2006 Mako entered into an agreement with R Plan B, LLC to form a partnership, Action Automotive Group, LLC (Action Automotive). We asked the Department if it attempted to collect Mako's liabilities from the partnership, Action Automotive; the Department responded that it did not because the Department concluded that Mako and Action Automotive were two separate entities, and as such, the Department believed that Action Automotive was not responsible for Mako's liabilities.

<sup>3</sup> Taxpayer also contends that Janet Mankins, R Plan B and its members David and Leanne Harvick, as well as the partnership, Action Automotive, should be held liable. We note that this contention does not impact our analysis of whether taxpayer is personally liable, since more than one party can be held liable as a responsible person pursuant to section 6829. Taxpayer also contends that he should not be held liable because he has no funds to pay the amount determined. We note that there is no statutory or regulatory provision that affords taxpayer reduction or relief from tax liabilities on the ground that he cannot afford to pay.

1 course of action (even if without a bad purpose or evil motive). A person is regarded as having  
2 willfully failed to pay taxes, or to cause them to be paid, where he or she had knowledge that the taxes  
3 were not being paid and had the authority to pay taxes or cause them to be paid, but failed to do so.

4 The first requirement for willfulness is knowledge. As noted previously, taxpayer concedes  
5 that he knew Mako had taxes that were due and unpaid.

6 Willfulness also requires that the responsible person must have been able to pay, or cause to be  
7 paid, the taxes when due. It is undisputed that prior to February 16, 2006, taxpayer controlled Mako  
8 and had authority to pay its taxes. On February 16, 2006, Mako (an LLC with taxpayer and his wife as  
9 its only members) entered into an agreement with R Plan B, LLC (an LLC with only David and  
10 Leanne Harvick as members) to form a partnership, Action Automotive Group, LLC (Action  
11 Automotive). Thus, taxpayer was one of four principals in Action Automotive. According to the  
12 partnership agreement, after February 16, 2006, all partnership decisions had to be made by Action  
13 Automotive, but we note that as one of four principals in that partnership, we believe taxpayer  
14 necessarily had at least some degree of control over Mako's financial decisions. For example, on June  
15 23, 2006, taxpayer and his wife advised their attorney that Mako's tax return for the first quarter 2006  
16 was due, and Board records show it was paid by Action Automotive (albeit late, on June 26, 2006).

17 Thus, we find that, while the partnership agreement may have required taxpayer to get authorization to  
18 pay the taxes, he did have the ability to obtain such authorization and cause the taxes to be paid. There  
19 is no evidence showing that taxpayer attempted to reach agreement with Action Automotive or  
20 otherwise direct the payment of taxes due for the second, third, and fourth quarters of 2006 or the first  
21 quarter of 2007. Therefore, we find there is insufficient evidence to conclude that the partnership, or  
22 the partnership agreement, extinguished taxpayer's authority to pay taxes during the liability period.

23 Next, the Department advises that R Plan B and the Harvicks sued taxpayer (and Mako) in a  
24 May 25, 2006, complaint, which alleged that taxpayer was not adhering to the original partnership  
25 agreement with Action Automotive and that taxpayer was diverting funds for his own use. The  
26 complaint included a request for a temporary restraining order (TRO) and the dissolution of Action  
27 Automotive. A TRO was issued on May 26, 2006, which as herein relevant restrained taxpayer from  
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1 “withdrawing or distributing funds from any bank account held in the name of Action Automotive  
2 Group, LLC, Mako Automotive, Inc. or Balboa Transmission.”

3 Taxpayer relies on the TRO and asserts that it remained in place until Mako filed for  
4 bankruptcy on March 13, 2007, and that it prevented him from paying the taxes when due. However,  
5 we note that the TRO lists an expiration date of June 6, 2006, and taxpayer has provided no evidence  
6 that the TRO remained in place after that date. We also note that according to the Department, the  
7 litigation resulted in the severing of the Action Automotive partnership in 2006, and taxpayer’s  
8 retaining control over Mako. The fact that taxpayer filed bankruptcy on behalf of Mako on March 13,  
9 2007, and stated that he and Mrs. Mankins retained possession of Mako’s books and records,  
10 corroborates taxpayer’s retention of control over Mako. Thus, we reject taxpayer’s contention, and  
11 conclude that he controlled Mako before and after the temporary (10 day) restraining order.

12 Regarding whether Mako had sufficient funds to pay the taxes due, we note that Mako’s  
13 bankruptcy documents dated March 13, 2007, show payments to creditors during the previous 90 days  
14 totaling \$54,040.19. Thus, we find that funds were available to pay the sales tax liability, but Mako’s  
15 management chose to pay other creditors instead. In summary, we conclude that all conditions have  
16 been satisfied for imposing personal liability on taxpayer under section 6829 for the outstanding tax  
17 liabilities of Mako that became due prior to March 14, 2007. In that regard, we note the D&R  
18 recommends that taxpayer not be held liable for amounts that became due after March 13, 2007, the  
19 date that Mako filed Chapter 7 bankruptcy. The D&R thus finds that taxpayer is personally liable only  
20 for the amount of tax that Mako should have reported on its January prepayment form, which the  
21 Department had previously computed at \$2,985.30. During the preparation of this matter for the Board  
22 hearing, the Department noted an error in the estimation of the amount of taxable measure for January.  
23 Accordingly, the Department recommended that the estimated amount of tax Mako should have  
24 reported and paid with its January prepayment be reduced to \$2,418.73. We concur, and we  
25 recommend that adjustment, which has been incorporated into the figures stated herein.

26 Since we recommend no further adjustments, and the amount paid does not exceed the amount  
27 due, we recommend denial of the claim for refund filed April 16, 2013.

28 **Issue 2:** Whether taxpayer has established reasonable cause sufficient for relieving the failure-  
to-file penalties originally assessed against Mako. We conclude that he has not.



1 2007. The Department also concluded that taxpayer was liable for a 6 percent late-prepayment penalty  
2 associated with the amount of tax, which the Department computed at \$179.12. Although we  
3 concurred with the Department and made that recommendation in the D&R, we have reconsidered that  
4 position during our preparation of this matter for the Board hearing. Since Mako did not timely file  
5 and pay the sales and use tax return for the period January 1, 2007, through March 14, 2007, a failure-  
6 to-file penalty was applied for the amount of tax due for that period. Thus, Mako did not incur a  
7 6 percent penalty for failure to file a timely prepayment because that penalty applies only if the  
8 taxpayer makes a prepayment before the return itself becomes due or timely files and pays the  
9 quarterly return. (Rev. & Tax. Code, §§ 6476, 6477.) Since Mako was not liable for the 6 percent  
10 penalty, that penalty cannot be assessed in the NOD against taxpayer because even if a person is liable  
11 under section 6829, the responsible person is not held liable for amounts that are not due from the  
12 corporation.

13 **OTHER MATTERS**

14 None.

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