

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION FINAL ACTION 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

Since we have now concluded that taxpayer is not personally liable pursuant to Revenue and Taxation Code section 6829, there is no longer any amount in dispute.

	<u>Tax</u>	<u>Penalty</u>
As determined	\$142,123.00	\$47,774.00
Post-D&R adjustment		- 28,033.30
Post-Board hearing adjustment	<u>-142,123.00</u>	<u>- 19,740.70</u>
Balance	<u>\$ 00.00</u>	<u>\$ 00.00</u>

The Board held a hearing in this appeal on June 26, 2014, and allowed 30 days for petitioner to provide additional records and 30 days for the Sales and Use Tax Department (Department) to respond to petitioner’s submission. The Board also requested that the Department contact Ford Motor Credit Company (Ford) to determine the accuracy of petitioner’s statements at the hearing. Based upon the additional information gathered, we now find that petitioner is not liable pursuant to section 6829 for the unpaid tax liabilities of Crenshaw Motors, Inc. (SR AS 12-013260) (Crenshaw). Since we have reversed our position based on the additional evidence and testimony, the final action summary below does not incorporate any of the Board hearing summary. However, for historical reference, we have included the Board hearing summary after the final action summary.

RESOLVED ISSUE

The issue in this case is whether taxpayer is personally liable under section 6829 for the unpaid tax liabilities of Crenshaw for the period October 1, 2006, through January 18, 2007. There is no dispute that the first two elements of liability under section 6829 are met (Crenshaw terminated its business operations, and it collected sales tax reimbursement with respect to its taxable sales). At the

1 Board hearing, petitioner focused his presentation on the sub-element of authority under the willfulness
2 requirement. Accordingly, the key question to be addressed here is whether petitioner had the
3 necessary authority to pay Crenshaw's tax liability or to cause it to be paid after the business closed.

4 At the hearing, the discussion primarily addressed whether Ford installed a "keeper" at
5 Crenshaw Motors' business premises, which allegedly seized complete financial control over the
6 business as of January 2, 2007. At the hearing, the Board directed the Department to contact someone
7 at Ford to determine whether petitioner actually had no authority over Crenshaw as of January 2, 2007.

8 After the hearing, petitioner submitted a copy of a complaint filed by Ford against Crenshaw on
9 January 11, 2007, and served to petitioner on January 17, 2007, along with Ford's Mediation Brief
10 filed in connection with that litigation. According to the mediation brief, as relevant herein, Ford's
11 counsel stated that upon "the filing of the lawsuit, Crenshaw Motors surrendered the Collateral without
12 the need of a court order."

13 In a memorandum dated August 29, 2014, the Department concluded, based on information
14 provided by Ford's legal counsel, that Crenshaw voluntarily allowed a representative of Ford to be
15 placed at the business, and that the representative did not tell the dealership which bills to pay.
16 According to the legal counsel, the representative's primary purpose was to ensure that Ford was paid
17 the wholesale cost of any vehicle that was sold. Also, Ford's counsel confirmed that Ford could not
18 take possession of the dealership's vehicles without a court order. Thus, the Department found that
19 petitioner had the authority to pay the sales taxes and that his failure to pay the taxes or cause them to
20 be paid was willful.

21 Subsequently, the Board's Taxpayer Rights Advocate Office contacted two former employees
22 of Ford, Mr. Jim Saenz and Ms. Lori Santiago, who each provided written statements to the Taxpayer
23 Rights Advocate Office, which were forwarded to the Department. Mr. Saenz states that Crenshaw
24 was closed as of January 7, 2007, and that the liquidation of the business's assets began at that time.
25 He also states that, once the liquidation began, petitioner gave keys, safe combinations, used vehicle
26 titles, as well as control of dealership accounting (including bank accounts) to Ford. Ms. Santiago
27 states that petitioner resigned his Ford franchise in January 2007. She further states that Ford
28 immediately took over the dealership in an effort to mitigate its losses. Further, Ms. Santiago states

1 that Ford seized all incoming mail and had all checks signed over to Ford, including all contract
2 proceeds.

3 By memorandum dated October 10, 2014, the Department continued to recommend that the
4 petition for redetermination be denied because neither Mr. Saenz's nor Ms. Santiago's statements
5 referred to the presence of a "keeper." The Department also noted that petitioner made himself
6 available to endorse any incoming checks to Ford and therefore found that petitioner retained ultimate
7 authority over the business and voluntarily chose to follow the directions of Ford and its
8 representatives. Accordingly, the Department's conclusion remains that there is insufficient evidence
9 to demonstrate that petitioner lacked authority to pay or cause to be paid Crenshaw's tax liability.

10 We first note that both Mr. Saenz and Ms. Santiago indicated in their statements that, once the
11 liquidation began, petitioner gave Ford control of Crenshaw's accounts as well as combinations to any
12 safes; Ford reviewed or seized all incoming mail; and petitioner had no control over the business. The
13 fact that Ford had control over Crenshaw's accounts, was reviewing all incoming mail, and directing
14 petitioner to endorse checks to Ford is an indication that once the liquidation began, petitioner no
15 longer had the control or authority to render payment on behalf of Crenshaw. This is corroborated by
16 Ford's mediation brief, which states that upon "the filing of the lawsuit, Crenshaw Motors surrendered
17 the Collateral without the need of a Court order." In other words, the evidence establishes that
18 petitioner *voluntarily surrendered* control of Crenshaw to Ford, and therefore had the requisite
19 authority for purposes of section 6829 *until that moment*. However, it is also evident that *once he did*
20 *so*, he lacked the authority to pay or to cause Crenshaw's tax liability to be paid.

21 Turning to the date on which the liquidation began, and more precisely the date on which
22 petitioner surrendered his control over the business, Mr. Saenz's statement indicates that the
23 liquidation of the dealership's assets started on January 7, 2007, and Ford's mediation brief states that
24 Crenshaw surrendered the collateral by the date the lawsuit was filed on January 11, 2007. While we
25 cannot confidently make a finding as to the exact date upon which the liquidation began, we find the
26 mediation brief to be more reliable than Mr. Saenz's statement as to the date on which the liquidation
27 began because the brief is contemporaneous with the liquidation, and it is a document of independent
28 significance because it was filed in connection with mediation proceedings. Thus, we find that

1 petitioner surrendered his control over the business on January 11, 2007.

2 Nevertheless, the foregoing analysis does not fully resolve this appeal. Prior to and during the
3 Board hearing in this matter, there was no evidence in the record to corroborate petitioner's assertion
4 that Ford took control of Crenshaw Motors in January 2007, and therefore it appeared that petitioner
5 had control (and was therefore willful) at all relevant times for purposes of section 6829. However, the
6 post-hearing evidence clearly establishes that Ford did acquire control of the business no later than
7 January 11, 2007. Regardless of the exact date upon which Ford took control, it is now self-evident
8 that petitioner no longer had the authority to pay Crenshaw's tax liability for the fourth quarter 2006 or
9 first quarter 2007 *on the respective due dates of the returns* (January 31, 2007 and April 30, 2007).
10 Accordingly, we find that petitioner did not willfully fail to pay Crenshaw's tax liabilities at issue
11 herein, and thus we find petitioner is not liable for Crenshaw's unpaid tax liabilities under section
12 6829.

1 payable. Therefore, petitioner contends that he is not personally liable for Crenshaw's unpaid tax
2 liabilities for the period October 1, 2006, through January 18, 2007.³

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

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

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

21 Willfulness also requires that the responsible person must have been able to pay, or cause to be
22 paid, the taxes when due. Petitioner signed a Bank of America Master Agreement dated June 23,
23 2000, which conferred to petitioner the authority to withdraw or direct the funds of Crenshaw's bank
24 account. There is no evidence that petitioner was taken off of the Bank of America Master Agreement
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26 ³ Petitioner also argues that the amounts in the NOD at issue here are duplicated in the NOD for the period January 1, 2002,
27 through December 31, 2006. However, as explained previously, this NOD includes the portion of Crenshaw's liability for
28 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 or was prevented from remitting the tax (for which Crenshaw had collected reimbursement from its
2 customers). Regarding petitioner's allegation that Ford seized control of the business and petitioner
3 did not have the authority to pay Crenshaw's tax liability, there is no evidence that Ford executed or
4 otherwise perfected any security interest in Crenshaw's bank accounts or other assets. Although
5 petitioner has submitted a copy of a complaint that Ford filed against petitioner on January 11, 2007,
6 that lawsuit was ultimately dismissed by Ford and does not establish that Ford perfected a security
7 interest in Crenshaw's bank account or assets. Accordingly, we find there is no evidence that Ford
8 achieved the necessary control over the corporation's bank account that would have prevented
9 petitioner from paying the tax liabilities. Thus, we find petitioner had the requisite authority to pay
10 Crenshaw's tax liabilities or cause them to be paid. Regarding whether Crenshaw had sufficient funds
11 to pay the taxes due, we note that its bank statements for the period December 30, 2006, through
12 January 19, 2007, reflect deposits of about \$364,000, and there is evidence that Crenshaw paid wages
13 during the liability period. We therefore find that funds were available to pay the sales tax liability, but
14 Crenshaw's management chose to pay other creditors instead. In summary, we conclude that all
15 conditions have been satisfied for imposing personal liability on petitioner under section 6829 for the
16 outstanding tax liabilities of Crenshaw for the period in question.

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

19 The NOD's issued to Crenshaw included failure-to-file penalties since Crenshaw had not filed
20 returns, and the total amount of those penalties included in the NOD in dispute is \$19,740.70
21 (\$4,998.00 for the period January 1, 2007, through January 18, 2007, and \$14,742.70 for 4Q06, which
22 represents the difference between the penalty for the entire quarter and the amount included in the
23 NOD previously issued to petitioner for the period January 1, 2002, through December 31, 2006).⁴
24 There is no statutory or regulatory authority for relieving failure-to-file penalties in section 6829
25 determinations, but if petitioner could show that the penalty should be relieved as to the corporation
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27 ⁴ For 4Q06, the amount of penalty at issue of \$14,742.70 represents the failure to file penalty of \$23,035.30, net of the 6
28 percent penalty for failure to make a timely prepayment of \$8,292.60 which previously had been determined against
petitioner.

1 under section 6592, the relief would also inure to petitioner's benefit. Petitioner submitted the required
2 declaration signed under penalty of perjury in which he claims that Crenshaw failed to file returns
3 because Ford seized control of the business. As explained above, we find that there is insufficient
4 evidence to support that assertion. Consequently, we reject petitioner's argument and find that
5 Crenshaw's failure to file returns was not due to reasonable cause, and that relief of the failure-to-file
6 penalties is not warranted.

7 **RESOLVED ISSUE**

8 Since Crenshaw did not timely pay the NOD's or file a petition for redetermination, finality
9 penalties totaling \$28,033.30 (\$23,035.30 + \$4,998.00) were added. Petitioner filed a request for relief
10 of the finality penalties. Since Crenshaw ceased operating in January 2007, and the NOD's were not
11 issued until July 10, 2007, we find there was reasonable cause for Crenshaw's failure to timely pay the
12 NOD's. Accordingly, we recommend relief of the finality penalties, if petitioner, within 30 days of the
13 mailing of final action in this appeal, pays the full tax liability at issue.

14 **OTHER MATTERS**

15 None.

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