STATE BOARD OF EQUALIZATION
SALES AND USE TAX APPEAL

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:	
RANDY CHRISTOPHER IRVINE	Account Number SR KH 53-013370 Case ID 855188
Petitioner	Placerville, El Dorado County

Type of Liability: Responsible person liability

Liability period: 10/01/11 – 12/31/11

Item	Disputed Amount
Responsible person liability	$15,014

Tax, as determined and protested	$13,648.54
Interest through 10/31/16	3,946.58
Late-payment penalty	1,365.70
Total tax, interest, and penalty	$18,960.82
Monthly interest beginning 11/01/16	$ 68.24

UNRESOLVED ISSUES

Issue 1: Whether petitioner is personally liable for the unpaid tax liabilities of Missouri Station Market, Inc. (Missouri Station Market) (SR KH 97-199749) for the period October 1, 2011, through December 31, 2011. We find that petitioner is personally liable.

Missouri Station Market operated a gas station and grocery store from February 1, 1998, through December 31, 2011. Following its closure, Missouri Station Market did not file its sales and use tax return for the fourth quarter 2011 (4Q11) until July 2012, and it failed to remit the tax reported on that return. The Business Tax and Fee Department (Department) determined that petitioner was personally responsible, pursuant to Revenue and Taxation Code section 6829, for the unpaid tax liabilities of Missouri Station Market, and it issued a Notice of Determination to petitioner for Missouri Station Market's unremitted tax for 4Q11, accrued interest, and a 10-percent penalty for late filing/late payment of a return.

Petitioner disputes only one of the four conditions for imposing personal liability pursuant to section 6829; petitioner contends that he did not willfully fail to pay or cause to be paid taxes due from

Missouri Station Market. Petitioner argues that his failure to pay the liability was not willful because he needed to use the sales tax reimbursement collected by Missouri Station Market to pay employees and to purchase goods and gasoline from distributors. According to petitioner, his failure to remit sales tax reimbursement was not voluntary because he was "forced to choose between damaging those most vulnerable to economic setback" and paying Missouri Station Market's tax liability. Petitioner further contends that, presumably, section 6829 was intended to punish those who attempted to unjustly enrich themselves by avoiding paying their tax debts and hiding behind the corporate structure, and asserts that he was not enriched by hiding behind the corporate structure since he stopped paying himself and his wife a fair salary and was eventually forced into filing Chapter 7 bankruptcy. Petitioner also argues that, by not participating in his Chapter 7 bankruptcy, the Department waived its right to collect from him. Although petitioner concedes that the liability was not discharged in his Chapter 7 bankruptcy in January 2013, he argues that the Department could have filed a claim in the bankruptcy proceedings for the amount assessed against him, and recovered that amount from approximately $95,000 worth of assets owned by the business at the time of the bankruptcy proceedings.

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 course of action, regardless of whether there was evil motive or intent. A person is regarded as having willfully failed to pay taxes, or to cause them to be paid, where he or she had knowledge that the taxes were not being paid and had the authority to pay taxes or cause them to be paid, but failed to do so.

The first requirement for willfulness is knowledge, meaning that the person knew that the taxes were not being paid; here, petitioner concedes that he was aware that the taxes were not being paid. The next requirement is authority to pay taxes or to cause them to be paid, and petitioner concedes that he had the authority to pay taxes or to cause them to be paid. Furthermore, petitioner does not dispute that Missouri Station Market had funds available to pay the taxes but chose to pay other creditors instead. We find that petitioner's decision to use available funds to pay other creditors instead of paying Missouri Station Market's tax liability for 4Q11 clearly establishes that his actions were willful

pursuant to the requirements of section 6829, and conclude that all of the requirements for imposing personal liability pursuant to section 6829 have been met.

Regarding petitioner's assertion that the Legislature did not intend to extend responsible person liability to individuals who did not abuse the corporate structure for self-enrichment purposes, we note that section 6829 simply requires that the failure to pay the tax be "an intentional, conscious, and voluntary course of action" before personal liability may be imposed. Further, California Code of Regulations, title 18, section (Regulation) 1702.5, subdivision (b) adds that "a failure to pay or to cause to be paid may be willful even though such failure was not done with a bad purpose or evil motive." Because there is no statutory or regulatory language requiring that fraudulent intent be established before personal liability is imposed, we reject petitioner's assertion that potential corporate abuse and his current assets should have been considered in determining whether his failure to pay Missouri Station Market's tax liability for 4Q11 was willful.

Regarding petitioner's argument that the Department waived its right to collect from petitioner because it did not file a claim in petitioner's personal bankruptcy, we note that, according to the Department, petitioner's bankruptcy filing stated that it was a no-asset bankruptcy and that no funds would be available for distribution to unsecured creditors. The Department stated that if petitioner had filed a Chapter 7 asset case, it would have filed a contingent claim and expedited an investigation into petitioner's section 6829 liability. In any case, because we are not aware of any legal authority that prevents the Board from asserting liability against a "responsible person" pursuant to section 6829 under the circumstances at issue here, we conclude that petitioner's argument lacks merit.

Based on our finding that all of the elements of section 6829 have been met, we conclude that petitioner is personally liable for the unpaid tax liabilities of Missouri Station Market for 4Q11.

Issue 2: Whether relief of the penalty incurred by Missouri Station Market for late filing/late payment of the 4Q11 return is warranted. We conclude that relief is not warranted.

There is no statutory or regulatory authority for relieving this penalty in section 6829 determinations, but if petitioner could show that the penalty should be relieved as to the corporation under Revenue and Taxation Code section 6592, the relief would also inure to petitioner's benefit. Petitioner submitted the required declaration signed under penalty of perjury in which he claims that

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tax for 4Q11 was not paid timely because Missouri Station Market did not have the ability to make this payment. No explanation is given as to why the return was not filed timely.

There is no dispute that Missouri Station Market made the sales it reported on its 4Q11 return and collected sales tax reimbursement from its customers. As discussed under the issue of willfulness, we find that Missouri Station Market had the funds to pay the liabilities at issue but used those funds to pay other creditors. Moreover, even if Missouri Station Market lacked the funds required to pay the tax at the time the return at issue became due, a lack of funds would not establish reasonable cause or circumstances beyond Missouri Station Market's control sufficient to grant relief of the late-payment penalty. Additionally, petitioner has not offered argument or evidence to show reasonable cause for Missouri Station Market's failure to timely file its 4Q11 return. Therefore, we conclude that petitioner has failed to establish reasonable cause to relieve the penalty.

OTHER MATTERS

None.

Summary prepared by Lisa Burke, Business Taxes Specialist III

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