

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:)
JACEK PASTERNAK) Account Number SR CH 53-005064
Petitioner) Case ID 493152
Dublin, Alameda County)

Type of Liability: Responsible person liability

Liability period: 04/01/07 – 12/31/07

<u>Item</u>	<u>Disputed Amount</u>
Responsible person liability	\$32,903
Interest	\$13,169
Tax as determined and protested	\$24,384.26
Interest through 08/31/16	13,168.59 ¹
Late payment penalty	<u>8,518.90</u>
Total tax, interest, and penalty	<u>\$46,071.75</u>
Monthly interest beginning 09/01/16	<u>\$121.92</u>

This matter was scheduled for Board hearing in October 2015, but petitioner did not respond to the Notice of Hearing. Thus, the matter was scheduled for decision on the nonappearance calendar. Petitioner subsequently filed a late response to the Notice of Hearing, and the matter was rescheduled for Board hearing in January 2016. It was deferred at the request of the Legal Department's Tax and Fees Division to conduct further review of the related matter, Case ID 526562. Upon further review, petitioner's liability for the period April 1, 2005, through June 30, 2008 (Case ID 526562) was cancelled due to a lack of sufficient evidence demonstrating that petitioner was willful in his failure to pay the taxes due for that audit period. This matter was rescheduled for Board hearing in May 2016, but it was deferred at the request of the Business Tax and Fee Department (Department), formerly the Sales and Use Tax Department, for additional time to process adjustments.

¹ We recommend relief of accrued interest of \$2,194.56 for the period July 9, 2013, through December 30, 2014. The amount of interest shown here is net of the amount to be relieved.

UNRESOLVED ISSUES

1
2 **Issue 1:** Whether petitioner is personally liable as a responsible person for the unpaid liabilities
3 of Espectro Corporation pursuant to Revenue and Taxation Code section 6829. We conclude
4 petitioner is personally liable.

5 Espectro Corporation (Espectro) (SR CH 100-504482) operated as a construction contractor
6 and a seller and installer of windows, doors, and shutters. At the time its business terminated, and as
7 herein relevant, Espectro had unpaid liabilities related to two returns filed with no or partial remittance.
8 The Department concluded that petitioner was personally responsible for Espectro's sales and use tax
9 compliance pursuant to section 6829, and it issued the NOD in dispute.²

10 Petitioner disputes only one of the four conditions for imposing personal liability pursuant to
11 section 6829, that he willfully failed to pay or to cause to be paid taxes due from Espectro.
12 Specifically, petitioner argues that he had no knowledge that taxes were not being paid when due, and
13 that Espectro was not financially able to pay taxes for the fourth quarter 2007 (4Q07) due to
14 insolvency. Thus, petitioner contends he is not personally liable for Espectro's unpaid tax liabilities.

15 With respect to willfulness, personal liability can be imposed on a responsible person under
16 section 6829 only if that person willfully failed to pay or to cause to be paid taxes due from the
17 corporation, which means that the failure was the result of an intentional, conscious, and voluntary
18 course of action. A person is regarded as having willfully failed to pay taxes, or to cause them to be
19 paid, where he or she had knowledge that the taxes were not being paid and had the authority to pay
20 taxes or cause them to be paid, but failed to do so.

21 The first requirement for willfulness is knowledge. With respect to the liabilities for returns
22 filed with no or partial remittance for 2Q07 and 4Q07, petitioner informed the Department during the
23 audit that he personally prepared and filed all sales and use tax returns. Since he, by his own
24 admission, was the person who prepared and filed the non-remittance returns, he clearly had actual
25

26 ² The Department also investigated whether Frank Kilby and Damian Pasternak were personally liable for the amounts at
27 issue. However, it found there was insufficient evidence to establish that either individual was involved in or had any
28 knowledge regarding sales and use tax matters for Espectro during the liability periods. The Department did not identify
any other potentially responsible persons.

1 knowledge that the tax for those quarters was not being paid when he filed the returns. Consequently,
2 we find that petitioner knew that Espectro had unpaid tax liabilities.

3 Willfulness also requires that the responsible person must have had the authority to pay, or
4 cause to be paid, the taxes when due. According to petitioner, he was in charge of Espectro and was
5 responsible for sales and use tax matters. Also, he signed at least some of the sales and use tax returns,
6 and he signed corporate checks. We find that petitioner had the authority to pay the taxes or cause
7 them to be paid, and he has not argued otherwise. Regarding whether Espectro had funds available to
8 pay the taxes due, we note that during the applicable periods, Espectro was a going business. Although
9 petitioner has asserted that Espectro did not pay the tax due with the return for 4Q07 because the
10 company was insolvent, we note that the "Asset Purchase Agreement" that documented the sale of the
11 business (dated February 15, 2008) lists assets of over \$979,000, including \$478,118 in current assets.
12 In addition, Espectro continued in business after 4Q07, reporting gross sales of over \$2 million for
13 1Q08 and over \$1 million for 2Q08. Further, Espectro paid wages for those two quarters of \$236,068
14 and \$137,047, respectively. Moreover, we infer from these facts that Espectro continued to pay
15 suppliers and to pay for rent, utilities, and other operational costs. Accordingly, we find that funds
16 were available to pay the sales tax liability, but petitioner chose to pay other creditors instead. In
17 summary, we conclude that all conditions have been satisfied for imposing personal liability on
18 petitioner under section 6829 for the outstanding tax liabilities of Espectro that remain at issue.

19 **Issue 2:** Whether petitioner has established reasonable cause sufficient for relieving the late
20 payment penalties originally assessed against Espectro. We conclude that he has not.

21 There is no statutory or regulatory authority for relieving these penalties in section 6829
22 determinations, but if petitioner could show that the penalties should be relieved as to the corporation
23 under Revenue and Taxation Code section 6592, the relief would also inure to petitioner's benefit.

24 Petitioner submitted the required declaration signed under penalty of perjury, stating that the
25 housing crash caused Espectro's business to fail and that Espectro had to let employees go. As a
26 result, petitioner states that none of the staff was sufficiently knowledgeable about bookkeeping and
27 tax accounting to assist him with sales and use tax matters. Petitioner also states that he is 58 years old
28 and in poor health, and that he has inadequate funds to pay the amounts in dispute.

