

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION SUMMARY FOR BOARD HEARING

In the Matter of the Petition for Redetermination)	
Under the Sales and Use Tax Law of:)	
ERIC BRIAN SCHERZ)	Account Number: SR CH 53-002955
Petitioner)	Case ID 401795
_____)	Brentwood, Contra Costa County

Type of Liability: Responsible person liability

Liability period: 04/01/03 – 04/15/04

<u>Item</u>	<u>Disputed Amount</u>
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Responsible person liability	\$10,034
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	<u>Tax</u>	<u>Penalty</u>
As determined and protested:	None	\$9,902.42
Proposed tax redetermination		\$ 00.00
Interest (tax paid in full before determination was issued)		131.90
Late payment penalties originally assessed against LLC		<u>9,902.42</u>
Total interest and penalty		\$10,034.32
Payments		<u>46.01</u>
Balance Due		<u>\$ 9,988.31</u>

UNRESOLVED ISSUES

Issue 1: Whether petitioner is personally liable as a responsible person under Revenue and Taxation Code section 6829 for the unpaid liabilities of Ask Us First! LLC (SR CH 97-713214). We find that petitioner is liable.

Ask Us First (AUF) was a retailer of printed material until April 15, 2004, when it sold the business to Froyd Salek (SR CH 100-387304), doing business as Axis Print. When it ceased operations, AUF had unpaid tax-related liabilities. The Sales and Use Tax Department (Department) concluded that Mr. Salek was liable as a successor for those liabilities and issued a determination to him in November 2004. Mr. Salek paid the amount of tax due, but submitted a request for relief of the penalties assessed against AUF, which was granted on the grounds that there was no relationship between AUF and Mr. Salek. (Cal. Code Regs., tit. 18, § 1702, subd. (d)(2).) The Department found

that petitioner was liable as a responsible person under section 6829 for the remaining unpaid tax-related liabilities of AUF.

Petitioner contends that he is not liable for AUF's unpaid tax-related liabilities because Mr. Salek assumed those liabilities. Petitioner refers to a specific item in the sales agreement that described an outstanding sales and use tax (SUT) liability of \$110,000.00 to be paid by Mr. Salek . Petitioner also contends that he should not be held liable for any amounts that became due after April 15, 2004, because, when the business was transferred to Mr. Salek, he no longer had control over AUF's accounts receivable or checking account. Petitioner asserts that on April 15, 2004, he and his wife handed over all of AUF's books and records to Mr. Salek, and that Mr. Salek is responsible for all tax-related liabilities originally incurred by AUF.

There is no dispute that two of the four requirements for imposing liability under section 6829 have been met. AUF ceased business operations by April 15, 2004, and petitioner concedes that AUF collected tax reimbursement with respect to its retail sales of tangible personal property. The issues in dispute here are the two remaining requirements for imposing liability under section 6829, whether petitioner was a person responsible for AUF's compliance with the Sales and Use Tax Law and whether petitioner willfully failed to pay the taxes owed by AUF, or cause them to be paid.

Petitioner signed AUF's SUT return for the first quarter 2004 (1Q04) as AUF's president and signed AUF's April 2004 prepayment form, showing that he had a duty to act for AUF in SUT matters for those periods. Also, petitioner personally discussed AUF's tax liabilities with Board staff on January 22, 2004, and requested a payment plan to pay the liability that existed at that time. This contact shows petitioner had direct involvement in SUT matters for AUF. Moreover, there is no dispute, and the available evidence confirms, that petitioner was a managing member of AUF throughout its period of operation. As its managing member and president, petitioner is presumed to have been responsible for complying with the Sales and Use Tax Law on behalf of AUF, and petitioner has not argued otherwise, except for the period after April 15, 2004, when the business was sold to Mr. Salek.

Petitioner contends that he was not a responsible person with respect to the tax due for the 1Q04 and the first 15 days of April 2004. Petitioner states that, on April 15, 2004, a check was issued

by AUF to the purchaser for the balance remaining in AUF's checking account, and all of AUF's books and records were turned over to Mr. Salek. On that basis, petitioner argues that, as of April 15, 2004, he no longer had any control over AUF's accounts receivable or checking account. However, as noted previously, on April 16, 2004, petitioner signed AUF's 1Q04 SUT return and its April 2004 prepayment form. Thus, despite the sale of the business on April 15, 2004, which is prior to the due date of either the 1Q04 return or the April prepayment form, petitioner did act for AUF in SUT matters for 1Q04 and the period April 1, 2004, through April 15, 2004. Petitioner still had an obligation to wrap up AUF's affairs in relation to its operation of the business, including ensuring that it reported and paid the taxes for its last two quarters of operation. Further, we find that petitioner's voluntary decision to turn over all money in AUF's checking account and its books and records to Mr. Salek on April 15, 2004, did not abrogate petitioner's continued responsibility to act for AUF in SUT matters. For all these reasons, we find that petitioner was a person responsible for ensuring AUF's SUT compliance for the period April 1, 2003, through April 15, 2004.

With regard to whether petitioner willfully failed to pay the tax or cause it to be paid, the failure to pay the tax may be willful even if the failure was not the result of a bad purpose or evil motive. The first requirement for willfulness is knowledge. Since petitioner signed the SUT return for 1Q04 and the prepayment form for the period April 1, 2004, through April 15, 2004, which were filed without remittance, it is clear that petitioner knew AUF had not paid its tax-related liabilities for those periods. Further, petitioner communicated directly with Board staff on January 22, 2004, regarding payment of AUF's then-outstanding liabilities, which would have included the liabilities for the second and third quarter 2003. Although there is no specific evidence that petitioner knew AUF owed tax that was not paid for the 4Q03, as a person responsible for overall operations of AUF at that time, he had a duty to know that AUF owed a tax liability for 4Q03, and, if he did not know, only lacked knowledge in reckless disregard of his duty to know. The fact that the sales agreement listed an outstanding tax liability of AUF of \$110,000 is further evidence of petitioner's knowledge. Moreover, petitioner does not argue that he did not know that AUF owed taxes but indicated at the conference that the taxes were not paid because of "cash flow issues." We find that petitioner knew of AUF's unpaid liabilities.

The next requirement for willfulness is that petitioner was able to pay the taxes when due, or cause them to be paid. Here, petitioner admits, and the evidence shows, that he had check-writing authority. Further, we note that AUF paid various suppliers during the period at issue, as detailed in the D&R. Also, AUF reported on its SUT returns that it continued to make sales throughout the liability period, and therefore had funds coming in. Thus, we find that petitioner acted consciously and voluntarily by choosing to pay other liabilities instead of paying AUF's tax-related liabilities. Accordingly, we find that petitioner's failure to pay AUF's tax-related liability for the period April 1, 2003, through April 15, 2004, was willful, and that he is personally liable as a responsible person within the meaning of section 6829 for AUF's unpaid interest and penalties for the period at issue.

We find no merit in petitioner's contention that AUF's successor, and not petitioner, should be held liable. Mr. Salek's successor liability does not preclude a finding that petitioner is personally liable for the same unpaid AUF liabilities because he was a responsible person under section 6829. As for petitioner's argument that Mr. Salek agreed in the sales agreement to assume all debts incurred by AUF, that provision is enforceable only against the other party to the agreement. The parties' agreement is not a valid defense to petitioner's statutory liability to the Board at issue here.

Issue 2: Whether relief of the late-payment penalties originally assessed against AUF is warranted. We find no basis upon which to recommend relief.

The penalties at issue were automatically assessed against AUF because it did not timely pay the tax it reported was due. There is no statutory or regulatory authority for relieving penalties in determinations issued pursuant to section 6829. However, section 6592 provides that late-payment penalties may be relieved if the Board finds that a person's failure to timely pay a return was due to reasonable cause and circumstances beyond the person's control.

Petitioner submitted a declaration signed under penalty of perjury requesting relief of the penalties, which is based on the same grounds addressed above under Issue 1. He provides no explanation for AUF's failure to timely pay the taxes due. Also, we note that petitioner's explanation at the appeals conference, that AUF's failure to timely pay the tax was due to "cash flow issues," does not represent reasonable cause. Accordingly, we find there is no basis upon which to recommend relief of the late-penalty payments assessed against AUF. We further find, for the reasons explained

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above under Issue 1, that Mr. Salek’s contractual assumption of all debts is not a basis to relieve petitioner of his liability as a responsible person under section 6829 for the penalties at issue.

OTHER DEVELOPMENTS

None.

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