

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:)
GASTON A. ALVAREZ)) Account Number: SR EH 53-003485
)) Case ID 434595
Petitioner) Murrieta, Riverside County

Type of Liability Responsible person liability

Liability period 01/01/05 – 03/31/06

<u>Item</u>	<u>Disputed Amount</u>
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Responsible person liability	\$28,745
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	<u>Tax</u>	<u>Penalty</u>
As determined, protested	<u>\$23,174.21</u>	<u>\$5,570.90¹</u>
Proposed tax redetermination	\$23,174.21	
Interest through 10/31/10	12,649.89	
Penalties for late payment of returns	<u>5,570.90</u>	
Total tax, interest, and penalty	<u>\$41,395.00</u>	
Monthly interest beginning 11/1/10	<u>\$135.18</u>	

This matter was previously scheduled for Board hearing on June 18, 2010, but was postponed so that it could be heard concurrently with a related account.

UNRESOLVED ISSUES

Issue 1: Whether petitioner is personally liable as a responsible person, pursuant to Revenue and Taxation Code section 6829, for the unpaid liabilities of The Young and the Restofus (Y&R). We conclude petitioner is personally liable.

Y&R was a retailer of women’s clothing from January 1, 2004, through September 30, 2006. Although Y&R began its business operations in California on January 1, 2004, it did not apply for a seller’s permit until April 11, 2006. Y&R’s seller’s permit application was signed by petitioner as

¹ The penalties exceed 10 percent of the tax assessed to petitioner because the corporation had paid some of the tax before the determination was issued to petitioner.

1 Y&R's vice-president, and seller's permit SR EH 100-733048 was issued to Y&R on April 12, 2006,
2 with an effective start date of January 1, 2004. Between April 19, 2006, and April 27, 2006, Y&R
3 filed sales and use tax returns (SUTR's) for, as relevant herein, the period January 1, 2005, through
4 March 31, 2006.² The SUTR's for the first quarter 2005 (1Q05) and 1Q06 were filed with no
5 remittance, and the SUTR's for the 2Q05, 3Q05, and 4Q05 were filed with partial remittances. At the
6 time its business terminated, Y&R had unpaid liabilities for each of those five quarters.

7 The Sales and Use Tax Department (Department) determined that Y&R's business was
8 terminated on or about September 30, 2006, and that the business had added or included sales tax
9 reimbursement in its retail sales. These are two of the four conditions for imposing personal liability
10 on petitioner pursuant to section 6829 for the tax debts incurred by Y&R, and they are undisputed.
11 The other two conditions, which petitioner does dispute, are that petitioner must have been responsible
12 for sales tax compliance by Y&R, and he must have willfully failed to pay or cause to be paid taxes
13 due from Y&R.

14 The Department concluded that petitioner was a responsible person under section 6829 based
15 on various facts, including that: 1) petitioner signed Y&R's seller's permit application, several of its
16 SUTR's, and its federal income tax return for the year 2005, identifying himself on each of these
17 documents as the vice-president or senior vice-president of Y&R; 2) petitioner signed several Y&R
18 checks; and 3) petitioner discussed Y&R's tax liabilities with Department staff on various occasions
19 during May, June, and July 2006. The Department also determined that petitioner willfully failed to
20 pay, or cause to be paid, Y&R's tax liabilities because Y&R had funds available at the time the taxes
21 became due and chose to pay other creditors.

22 Petitioner contends that he is not personally liable for Y&R's unpaid tax liabilities because he
23 was not involved with Y&R beyond April or May 2006 and, prior to that time, he did not have the
24 authority to decide which of Y&R's liabilities to pay. Specifically, petitioner contends that he was
25 forced out of the business in April or May 2006 by Y&R's president, Martin Hudler, and that
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28 ² The Board's computer records indicate that SUTR's were also filed for 2004 and fully paid.

1 Mr. Hudler took complete control over the business from that point forward.³ Petitioner further
2 contends that, although he played an active role in Y&R prior to April or May 2006, he did so only
3 under the direction of Mr. Hudler, who sent petitioner an email every Monday directing petitioner as to
4 which creditors should be paid, and when.⁴ Petitioner notes that Y&R's bank account was in Oregon,
5 where Mr. Hudler resided prior to April or May 2006, and asserts that the location of the bank account
6 supports his contention that Mr. Hudler had control over Y&R's finances. Petitioner states that the
7 only time he made decisions regarding which creditors to pay was when Mr. Hudler had surgery,
8 although petitioner cannot recall when the surgery occurred. In addition, petitioner states that, when he
9 left the business in April or May 2006, Y&R had significant assets, and he does not understand why
10 Y&R did not pay its outstanding tax-related liabilities.

11 We find that petitioner's signing of SUTR's for 1Q04 through 2Q05, 4Q05, and 1Q06, and his
12 participation in discussions with Department staff during May, June, and July 2006 establish that
13 petitioner was, at a minimum, responsible for sales and use tax matters for Y&R from April through
14 July 2006. As for periods prior to April 2006, petitioner has not presented any argument or evidence
15 that his responsibilities and duties for Y&R were substantially different during that earlier period. In
16 fact, as noted previously, petitioner stated at the appeals conference that he played an active role in
17 Y&R's financial matters prior to April or May 2006. Accordingly, we find petitioner had the control,
18 supervision, responsibility, or duty to act for Y&R in sales and use tax matters throughout the period at
19 issue and was thus a responsible person for Y&R as defined by section 6829.

20 Willfulness for these purposes means that the failure was the result of an intentional, conscious,
21 and voluntary course of action. This failure may be willful even if it was not done with a bad purpose
22 or evil motive. A person is regarded as having willfully failed to pay taxes, or cause them to be paid,
23 where he or she had knowledge that the taxes were not being paid (or lacked knowledge in reckless
24 disregard of his or her duty to know) and had the authority to pay taxes or cause them to be paid, but
25 failed to do so. Petitioner's signing of SUTR's filed with no or partial remittance is clear evidence that

27 ³ A dual determination under Revenue and Taxation Code section 6829 was also issued to Mr. Hudler for the same liability
28 at issue in this appeal.

⁴ Although petitioner agreed at the conference to provide at least one copy of such an email, he has not done so.

1 petitioner knew that Y&R had unpaid tax liabilities for those quarters, and that knowledge is confirmed
2 even further by his discussions with Department staff regarding Y&R's outstanding tax liabilities.

3 While we have no direct evidence that petitioner knew, at the time the SUTR's for 2005 became due,
4 that the taxes were due but not paid, we note that petitioner has offered no explanation for Y&R's
5 failure to apply for a seller's permit or file any SUTR's until April 2006. Moreover, as a person
6 charged with the responsibility for ensuring Y&R's compliance with SUT matters, we find that, if
7 petitioner lacked knowledge that taxes were due, but unpaid, for 2005, he lacked that knowledge only
8 in reckless disregard of his duty to know. Consequently, we find that petitioner also knew, or should
9 have known, that Y&R owed tax for 1Q05 through 1Q06 at the time tax became due for those quarters.

10 Willfulness also requires that the responsible person must have been able to pay, or cause to be
11 paid, the taxes when due. Petitioner's argument on this element is that Mr. Hudler had sole discretion
12 as to which bills would be paid and that petitioner acted only at Mr. Hudler's direction. However, we
13 provided petitioner an opportunity to present documentation to support this assertion but petitioner has
14 provided none, nor is there any indication in the entries in the Board's ACMS system which document
15 petitioner's contacts with Board staff that petitioner lacked the authority to make payment decisions for
16 Y&R, or that he otherwise had to consult Mr. Hudler prior to making decisions with regard to
17 payments or payment plans. Accordingly, we find that petitioner had authority to cause the taxes due
18 to be paid.

19 Regarding whether Y&R had sufficient funds to pay the taxes due, we note that Y&R paid one
20 supplier over \$49,000 between June 13, 2005, and April 17, 2006. In addition, Y&R's bank statements
21 reflect payments totaling over \$30,000 from January 1, 2006, through May 31, 2006. Since Y&R was
22 paying a supplier and other creditors, and remained in business until September 30, 2006, it is
23 reasonable to conclude that Y&R was also paying the other necessary operating expenses of the
24 business during the entire liability period. Also, Y&R was making substantial sales, as evidenced by
25 its reported gross receipts. Accordingly, we find that Y&R had the funds available to pay its tax
26 liabilities, but chose to pay other creditors instead. Thus, we find that petitioner's failure to pay
27 Y&R's taxes, or cause them to be paid, was willful. In summary, we conclude that all conditions have
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1 been satisfied for imposing personal liability on petitioner under section 6829 for the outstanding tax
2 liabilities of Y&R.

3 **Issue 2:** Whether petitioner has established reasonable cause sufficient for relieving the
4 penalties for late payment of returns originally assessed against Y&R. We conclude that he has not.

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

8 Petitioner submitted the required declaration signed under penalty of perjury in which he requests
9 relief from the penalties for the same reasons addressed under Issue 1. Petitioner's request for relief

10 does not address why Y&R failed to timely pay the taxes and determination at issue but instead
11 reiterates petitioner's contention that he should not be held personally liable. Accordingly, petitioner

12 has not established reasonable cause for Y&R's late payments of amounts due, as reported on SUTR's,
13 and we find no basis for relief from the penalties at issue.

14 **OTHER DEVELOPMENTS**

15 None.

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17 Summary prepared by Rey Obligacion, Retired Annuitant
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