

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:)
JOHN A. BART) Account Number: SR EHC 53-004058
Petitioner) Case ID 462215
Palm Desert, Riverside County

Type of Liability: Responsible person liability

Liability period: 04/01/06 – 06/15/07

<u>Item</u>	<u>Disputed Amount</u>
Responsible person liability	\$17,682
Tax as determined and protested	\$15,058.17
Interest through 02/29/12	7,085.14
Late payment penalty	2,603.80
Finality penalty	<u>19.60</u>
Total tax, interest, and penalty	<u>\$24,766.71</u>
Monthly interest beginning 03/01/12	<u>\$ 87.84</u>

This matter was scheduled for Board hearing in October 2010, but was postponed at petitioner's request because of a scheduling conflict. It was rescheduled for Board hearing in March 2011, but was postponed for settlement consideration. The hearing was again rescheduled in October 2011, but was postponed at petitioner's request for a medical reason.

UNRESOLVED ISSUE

Issue: Whether petitioner is personally liable as a responsible person for the unpaid liabilities of Premier Billiards and Design pursuant to Revenue and Taxation Code section 6829. We conclude petitioner is personally liable.

Premier Billiards and Design (Premier), a limited liability company, held seller's permit SR EHC 100-755760 from October 1, 2004, through June 15, 2007. Premier sold pool tables and other indoor game equipment. At the time its business terminated, Premier had unpaid liabilities related to six sales and use tax returns filed with no or partial remittance and one Notice of Determination.

1 The Sales and Use Tax Department (Department) determined that Premier's business was
2 terminated on or about June 15, 2007, and that the business had added or included sales tax
3 reimbursement in its retail sales. These are two of the four conditions for imposing personal liability
4 on petitioner for the tax debts incurred by Premier, and they are undisputed. The other two conditions,
5 which petitioner does dispute, are that petitioner must have been responsible for sales tax compliance
6 by Premier, and petitioner must have willfully failed to pay or to cause to be paid taxes due from
7 Premier.

8 The Department concluded that petitioner was a responsible person under section 6829 for
9 various reasons, including the fact that petitioner signed several documents related to the business
10 operation and tax liability, and he discussed Premier's unpaid liabilities with Department staff on
11 various occasions. The Department also determined that taxpayer willfully failed to pay or to cause to
12 be paid Premier's tax liabilities because Premier had funds available at the time the taxes became due
13 and chose to pay other creditors.

14 Petitioner contends that he is not personally liable for Premier's unpaid tax liabilities because
15 California's limited liability company laws prevent the Board from asserting tax liability against him
16 as the manager of Premier; he was only a salaried employee of Premier and not one of its profit-
17 earning members; Premier promised to reimburse and indemnify him for liabilities incurred in
18 connection with his management of Premier; and he is unable to pay the liability.

19 It is undisputed that petitioner had the exclusive right to control and manage Premier during the
20 liability period. There is ample additional evidence of petitioner's direct involvement in and
21 responsibility for Premier's tax compliance for the period at issue, including his signature on several
22 documents related to Premier's sales and use tax obligations. Also, petitioner corresponded with the
23 Department regarding Premier's unpaid sales and use tax liabilities, personally negotiating terms for
24 Premier's payment of those obligations. We find petitioner had the duty and authority to file and pay
25 taxes on Premier's behalf, and he was a responsible person as defined by section 6829.

26 The willfulness condition for imposing liability under section 6829 is satisfied if the
27 responsible person's failure to pay or to cause to be paid the taxes due if the failure was the result of an
28 intentional, conscious, and voluntary course of action (even if without a bad purpose or evil motive).

1 Thus, this condition is satisfied if the person had knowledge that the taxes were not being paid and had
2 the authority and resources to pay the taxes or to cause them to be paid but failed to do so. Petitioner's
3 signatures on various documents, including a sales and use tax prepayment form and an Installment
4 Payment Agreement, as well as his communications with the Department regarding Premier's
5 liabilities, establish that he knew of the subject liabilities. As the person with the exclusive right to
6 control and manage Premier, petitioner obviously had authority to cause the taxes due to be paid.
7 During the applicable periods, Premier was making sales, paid rent, and regularly paid one of its
8 primary suppliers of billiard tables and accessories, thus establishing that Premier had the funds
9 necessary to pay its sales tax liability, but petitioner chose to pay other creditors instead. We therefore
10 conclude that all conditions for imposing personal liability on petitioner pursuant to section 6829 have
11 been satisfied.

12 While it is true that a manager of a limited liability company is afforded broad, general
13 immunities from many instances of liability pursuant to the Corporations Code, section 6829 provides
14 a specific statutory basis for *imposition* of liability on a manager under the circumstances applicable
15 here. Section 6829 expressly provides that liability is imposed under its provisions notwithstanding
16 the applicable provisions in the Corporations Code, and on any responsible person when its
17 requirements are satisfied (i.e., even a salaried employee who is not a member). An indemnity
18 agreement between petitioner and Premier is not relevant to whether petitioner is liable under section
19 6829, nor is his ability to pay. Since all conditions for liability are satisfied, we conclude the petition
20 should be denied.

21 **OTHER DEVELOPMENTS**

22 The amount determined against petitioner includes penalties totaling \$2,623.40, comprised of
23 penalties for late payment of returns of \$2,603.80 and a finality penalty of \$19.60, which were
24 originally assessed against Premier. We explained to petitioner that relief from the penalties could be
25 granted if it were established that Premier's failure to make timely payments was due to reasonable
26 cause and circumstances beyond its control. Although we explained the procedure for requesting relief
27 and provided petitioner a form he could use to make the request, petitioner stated that he did not wish
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1 to request relief from the penalties on behalf of Premier. Accordingly, we have no basis to consider
2 recommending relief of the penalties.

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