

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:)
DAVID A. BARTEL)
Petitioner)
Account Number SR KH 53-005446
Case ID 518470
City and County of San Francisco

Type of Liability: Responsible person liability
Liability period: 07/01/07 – 12/20/07

<u>Item</u>	<u>Disputed Amount</u>		
Responsible person liability	\$217,280		
		<u>Tax</u>	<u>Penalty</u>
As determined		\$270,283.90	\$47,972.00
Adjustment - Appeals Division		- 73,301.90	-27,673.80
Proposed redetermination, protested		<u>\$196,982.00</u>	<u>\$20,298.20</u>
Proposed tax redetermination		\$196,982.00	
Interest through 03/31/12		64,675.71	
Penalty for failure to file prepayment		600.00	
Penalty for late payment of return		<u>19,698.20</u>	
Total tax, interest, and penalty		<u>\$281,955.91</u>	
Monthly interest beginning 04/01/12		<u>\$ 1,149.06</u>	

This matter was scheduled for Board hearing in December 2011, but was postponed at petitioner's request because of a scheduling conflict.

UNRESOLVED ISSUES

Issue 1: Whether petitioner is personally liable as a responsible person for the unpaid liabilities of Tracy Chevrolet, Inc. pursuant to Revenue and Taxation Code section 6829. We conclude petitioner is personally liable for amounts due for the fourth quarter 2007, but not for the third quarter 2007.

Tracy Chevrolet, Inc. (SR KH 99-265467) was a retailer of automobiles from May 1, 1993, through December 20, 1997. At the time its business terminated, Tracy Chevrolet had unpaid liabilities related to returns filed with partial remittance for the third quarter 2007 (3Q07) and 4Q07 and for failure to make a prepayment for November 2007. Although petitioner does not dispute that

1 Tracy Chevrolet's business operations terminated or that the business collected sales tax
2 reimbursement with respect to its retail sales (two of the four conditions for imposing personal liability
3 pursuant to section 6829), petitioner contends he was not responsible for Tracy Chevrolet's sales and
4 use tax compliance for 3Q07. For 4Q07, he contends that his failure to pay the tax due, or cause it to
5 be paid, was not willful.

6 Based on the evidence, taken as a whole, we find that, despite the fact that petitioner was a
7 corporate officer and 50-percent shareholder, he was not responsible for Tracy Chevrolet's sales and
8 use tax compliance when the taxes became due for 3Q07 and thus not liable under section 6829 for
9 those liabilities. Petitioner does not dispute that he became a person responsible for Tracy Chevrolet's
10 sales and use tax compliance when he returned to active involvement in the company in December
11 2007. Accordingly, we find petitioner was responsible for Tracy Chevrolet's sales and use tax
12 compliance on December 24, 2007, when the prepayment for November 2007 became due and on
13 January 31, 2008, when the return for 4Q07 became due.

14 The final condition for imposing personal liability on petitioner for liabilities incurred by
15 Tracy Chevrolet for 4Q07 is that petitioner must have willfully failed to pay or to cause to be paid
16 taxes due from the corporation. A person is regarded as having willfully failed to pay taxes, or to
17 cause them to be paid, where he or she had knowledge that the taxes were not being paid and had the
18 authority and ability to pay taxes or to cause them to be paid, but failed to do so. In a letter dated
19 September 3, 2008, petitioner stated that he took on the task of liquidating Tracy Chevrolet's assets in
20 early December 2007. Accordingly, we find it more likely than not that petitioner was aware of the
21 unpaid liabilities before the November 2007 prepayment became due on December 24, 2007. Since
22 petitioner signed the return for 4Q07, we conclude that he knew the return was filed with only partial
23 remittance. Thus, we conclude that petitioner knew of the corporation's unpaid liabilities for 4Q07.

24 Petitioner asserts that he lacked authority to pay the taxes when they became due because First
25 Hawaiian Bank (FHB) did not allow him to pay them and that the corporation lacked the funds needed
26 to pay its sales and use tax liabilities. Regarding petitioner's authority over the corporation's payment
27 of creditors, we note that another individual, Mr. Stephen Kraut, executed a scheme to defraud FHB.
28 Mr. Kraut has pled guilty to 15 counts of bank fraud, and he has taken full responsibility for the

1 fraudulent activities. As a result of Mr. Kraut's fraud, FHB exercised some oversight of the
2 corporation's finances and, for several months before the business was sold, one or two FHB
3 employees remained at Tracy Chevrolet as part of FHB's activities for ensuring payment of the loan.
4 Petitioner alleges that FHB actually controlled the disbursement of all funds by Tracy Chevrolet,
5 although he states that FHB made every effort to conceal the fact that it was making management
6 decisions since FHB was wary of potential liability for the corporation's unpaid sales taxes. However,
7 FHB's senior vice president has stated that FHB exercised no control over corporate finances and that
8 petitioner did not consult FHB's representative before making payments to creditors.

9 We find that the only influence FHB was able to exert regarding the corporation's payments to
10 creditors was that which petitioner allowed. Until FHB acted on its legal right to take possession of
11 Tracy Chevrolet's finances, petitioner bore no obligation to carry out any instructions FHB may have
12 given petitioner regarding the corporation's payment of creditors, nor is there evidence that FHB gave
13 any such instructions. Thus, we find that petitioner has not shown that FHB actually divested him of
14 the authority to pay Tracy Chevrolet's sales and use tax liabilities and that, instead, final authority for
15 disbursement of Tracy Chevrolet's funds was vested in petitioner.¹ Regarding the question of whether
16 funds were available to pay the sales and use tax liability, since Tracy Chevrolet continued to do
17 business until December 20, 2007, it presumably continued to make some payments to creditors,
18 including wages, utilities, and expenses related to inventory and supplies (petitioner has admitted he
19 paid utilities and other expenses needed to keep the business open). We find that Tracy Chevrolet had
20 the funds available from which it could have paid the taxes but that petitioner chose instead to use
21 those funds to pay other creditors. Accordingly, we find all conditions are satisfied to uphold the
22 assessment against petitioner under section 6829 for the tax, penalties, and interest arising from Tracy
23 Chevrolet's failure to make a prepayment for November 2007 and to pay in full the taxes due for
24 4Q07.

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27 ¹ We note also that petitioner has admitted that he could not recall specifically asking FHB representatives whether he
28 could pay the sales taxes due. Thus, even if he had established that FHB divested him of authority to pay the sales taxes
without its permission, we would find that petitioner failed to make a good faith effort to obtain that permission and thus
should not be relieved of liability under section 6829.

