

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION BOARD HEARING SUMMARY

3 In the Matter of the Petition for Redetermination)
 4 Under the Sales and Use Tax Law of:) Account Number SR KH 53-005446
 5 DAVID A. BARTEL) Case ID 518470
 6 Petitioner) City and County of San Francisco

7 Type of Liability: Responsible person liability

8 Liability period: 07/01/07 – 12/20/07

9 Item Disputed Amount

10 Responsible person liability \$43,964

	<u>Tax</u>	<u>Penalty</u>
11 As determined	\$270,283.90	\$47,972.00
12 Post D&R adjustment	- 73,301.90	-27,673.80
13 Post Board hearing adjustment	<u>-157,560.00</u>	<u>-15,756.00</u>
14 Proposed redetermination, protested	<u>\$ 39,422.00</u>	<u>\$ 4,542.20</u>
15 Proposed tax redetermination	\$ 39,422.00	
16 Interest	13,173.47	
17 Penalty for failure to file prepayment	600.00	
18 Penalty for late payment of return	<u>3,942.20</u>	
Total tax, interest, and penalty	\$57,137.67	
Payments	<u>- 57,137.67¹</u>	
Balance due	<u>\$ 00.00</u>	

19 The Board heard this matter on March 20, 2012, and concluded that petitioner was personally
 20 liable pursuant to Revenue and Taxation Code section 6829 for the tax debts incurred by Tracy
 21 Chevrolet, Inc. (SR KH 99-265467) during the fourth quarter 2007 (4Q07). Petitioner filed a timely
 22 petition for rehearing. We recommended that the Board revise its prior decision and substantially
 23 reduce the liability, and, with that adjustment, deny the petition for rehearing. The Board granted the
 24 petition for rehearing. Our recommendation explained below includes the adjustments we
 25 recommended in our analysis of the petition for rehearing.

26 _____
 27 ¹ On April 27, 2012, petitioner paid \$283,104.97. Thus, if the Board approves this recommendation to revise its decision,
 28 that would result in an overpayment of \$225,967.30. A claim for refund of that overpayment will be timely if it is filed
 within six months from the date the determination becomes final. (Rev. & Tax. Code § 6902, subd. (a)(1).)

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 he is personally liable for amounts due for the period December 7, 2007, through December 20, 2007, only.

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 3Q07 and 4Q07 and for failure to make a prepayment for November 2007. Although petitioner does not dispute that Tracy Chevrolet's business operations terminated or that the business collected sales tax reimbursement with respect to its retail sales (two of the four conditions for imposing personal liability pursuant to section 6829), petitioner contends he was not responsible for Tracy Chevrolet's sales and use tax compliance prior to December 7, 2007, and that his failure to pay any amount due for the period he was responsible was not willful. Petitioner further contends that the \$10,000.00 paid with the return for 4Q07 represents the entire amount of taxes due for the period he was responsible.

Based on the evidence, taken as a whole, we find that, despite the fact that petitioner was a corporate officer and 50-percent shareholder, he was not responsible for Tracy Chevrolet's sales and use tax compliance for the portion of the liability period prior to December 7, 2007. We conclude that the most reasonable interpretation of the specific wording of California Code of Regulations, title 18, section 1702.5, subdivision (a), is that petitioner cannot be held liable under section 6829 for the taxes incurred by Tracy Chevrolet for sales made prior to December 7, 2007.² However, we reject petitioner's argument that the \$10,000 partial payment made with the 4Q07 return covered all sales tax incurred by Tracy Chevrolet for the period petitioner was responsible. Since we have no specific information from which to determine the actual amount of sales tax incurred on and after December 7, 2007, we have computed average daily sales tax of \$2,939.25 (\$238,080 tax reported for 4Q07 ÷ 81 days of operation), and sales tax due for the period petitioner was a responsible person of \$41,150

² We believe that the statutory language and logic support the Board's decision after the prior hearing. Nevertheless, despite our misgivings about the interpretation we propose, we find that this interpretation of the wording of the regulation results in a far less strained interpretation of the actual words used in that regulation than any alternative interpretation.

1 (\$2,939.25 x 14). Also, we have computed that \$1,728 of the \$10,000 paid with the 4Q07 return was
2 applicable to the period December 7, 2007, through December 20, 2007, and that the unpaid tax for
3 that period is \$39,422.

4 Before the petition for rehearing was filed, petitioner disputed his personal liability with respect
5 to 4Q07 on the basis that his failure to pay Tracy Chevrolet's sales and use tax liability for that quarter
6 was not willful. Petitioner asserted that he lacked authority to pay the taxes when they became due
7 because First Hawaiian Bank (FHB) did not allow him to pay them and that the corporation lacked the
8 funds needed to pay its sales and use tax liabilities. Regarding petitioner's authority over the
9 corporation's payment of creditors, we note that another individual, Mr. Stephen Kraut, executed a
10 scheme to defraud FHB. Mr. Kraut has pled guilty to 15 counts of bank fraud, and he has taken full
11 responsibility for the fraudulent activities. As a result of Mr. Kraut's fraud, FHB exercised some
12 oversight of the corporation's finances and, for several months before the business was sold, one or
13 two FHB employees remained at Tracy Chevrolet as part of FHB's activities for ensuring payment of
14 the loan. Petitioner alleges that FHB actually controlled the disbursement of all funds by Tracy
15 Chevrolet, although he states that FHB made every effort to conceal the fact that it was making
16 management decisions since FHB was wary of potential liability for the corporation's unpaid sales
17 taxes. However, FHB's senior vice president has stated that FHB exercised no control over corporate
18 finances and that petitioner did not consult FHB's representative before making payments to creditors.

19 We find that the only influence FHB was able to exert regarding the corporation's payments to
20 creditors was that which petitioner allowed, and that petitioner has not shown that FHB actually
21 divested him of the authority to pay Tracy Chevrolet's sales and use tax liabilities.³ Regarding the
22 question of whether funds were available to pay the sales and use tax liability, since Tracy Chevrolet
23 continued to do business until December 20, 2007, it presumably continued to make some payments to
24 creditors, including wages, utilities, and expenses related to inventory and supplies (petitioner has
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26 ³ We note also that petitioner has admitted that he could not recall specifically asking FHB representatives whether he
27 could pay the sales taxes due. Thus, even if he had established that FHB divested him of authority to pay the sales taxes
28 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.

1 admitted he paid utilities and other expenses needed to keep the business open). We find that Tracy
2 Chevrolet had funds available from which it could have paid the taxes but that petitioner chose instead
3 to use those funds to pay other creditors. Accordingly, we find all conditions are satisfied to uphold
4 the assessment against petitioner under section 6829 for the tax incurred on sales made during the
5 period December 7, 2007, through December 20, 2007, and we have estimated the unpaid amount of
6 tax for that period at \$39,422.00.

7 **Issue 2:** Whether the payment from escrow, which was applied to Tracy Chevrolet's liabilities
8 for 3Q07, should have been applied to liabilities for 4Q07. We find the payment was properly applied.

9 Petitioner argues that the Department should have applied a March 18, 2008 payment from
10 escrow to Tracy Chevrolet's liabilities for 4Q07, rather than to liabilities for 3Q07. However, there
11 was no instruction accompanying the payment to apply the payment to the 4Q07 liability, and we find
12 that the Department was entitled to apply the payment to the earlier liability. (See CPPM § 707.020
13 (we note also that Tracy Chevrolet and petitioner were aware how the Department had applied the
14 payment, and there was no objection from either one, petitioner not having made this argument until
15 after we issued the D&R concluding that he should not be held liable for the 3Q07 liability).)

16 **Issue 3:** Whether relief of the penalties for a late prepayment and late payment of a return is
17 warranted. We find relief is not warranted.

18 Petitioner requested relief of the penalties in a letter dated July 9, 2012, on the basis that the
19 failure to make timely payments was due to fraudulent activity by Mr. Kraut, who actively hid or
20 altered records that impeded the detection of his embezzlement until after he left Tracy Chevrolet. The
21 letter states that it was only after Mr. Kraut's admission and a thorough investigation that the extent of
22 the embezzlement and the non-compliance was determined. We find that Mr. Kraut's embezzlement is
23 not a reasonable basis for Tracy Chevrolet's failure to make timely payments, in particular, as to the
24 payment of taxes we find were incurred, and for which tax reimbursement was collected, while
25 petitioner was the responsible person. Accordingly, we find there is no basis for relief of the penalties.

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