

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:)
DAVOOD BEHDADNIA) Account Number: SR AS 53-003214
) Case ID 421809
Petitioner) Tarzana, Los Angeles County

Type of Liability: Responsible person liability

Liability period: 01/01/99 – 06/30/05

<u>Item</u>	<u>Disputed Amount</u>	
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Responsible person liability	\$41,547	
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	<u>Tax</u>	<u>Penalty</u>
As determined:	\$25,467.65	\$20,087.44
Adjustment: Appeals Division	<u>-2,964.21</u>	<u>-1,043.43</u>
Proposed redetermination, protested	<u>\$22,503.44</u>	<u>\$19,044.01</u>
Proposed tax redetermination	\$22,503.44	
Interest through 10/31/10	42,371.90	
Negligence Penalties	8,618.29	
Amnesty negligence penalty	628.57	
Finality penalties	8,618.20	
Amnesty finality penalty	636.99	
Amnesty interest penalty	<u>541.96</u>	
Total tax, interest, and penalties	<u>\$83,919.35</u>	

Monthly interest beginning 11/1/10	<u>\$131.27</u>
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This matter was previously scheduled for Board hearing on February 23, 2010, but petitioner did not respond to the Notice of Hearing. Accordingly, the Board Proceedings Division (BPD) informed petitioner that this matter would be presented to the Board for decision without oral hearing. Subsequently, petitioner's representative contacted BPD requesting an oral hearing before the Board, and asked that the hearing be postponed to a later date due to a scheduling conflict. This matter was rescheduled for Board hearing on June 17, 2010, but petitioner again failed to respond to the Notice of Hearing. Thus, the Board Proceedings Division informed petitioner that this matter would be presented to the Board for decision without oral hearing. Subsequently, petitioner's representative once again contacted BPD to request that petitioner be given an oral hearing before the Board.

UNRESOLVED ISSUES

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2 **Issue 1:** Whether petitioner is personally liable as a responsible person for the unpaid liabilities
3 of Century Home Health Care of America, Inc. (Century), SR AS 99-825954, pursuant to Revenue and
4 Taxation Code section 6829. We conclude petitioner is personally liable.

5 Century was a seller of medical supplies, and its seller's permit was closed out effective
6 September 30, 2006. According to the Secretary of State, Century was dissolved on March 12, 2007.
7 At the time Century's business was terminated, it had unpaid liabilities that originated from two
8 Notices of Determination (NOD's) issued to it based on audits for the periods January 1, 1999, through
9 December 31, 2001 (first audit), and July 1, 2002, through June 30, 2005 (second audit).

10 The Sales and Use Tax Department (Department) determined that petitioner is personally liable
11 for Century's unpaid liabilities pursuant to Revenue and Taxation Code section 6829. The Department
12 found that: (1) statements filed with the Secretary of State identify petitioner as Century's secretary on
13 April 19, 1996, and its chief financial officer (CFO) no later than October 12, 2006; (2) petitioner
14 signed Century's seller's permit application as its secretary and vice president, and signed various
15 other documents, including several of Century's sales and use tax returns (SUTR's), waivers of the
16 statute of limitations, checks made payable to the Board, and a claim for refund, which he signed as
17 Century's CFO; and (3) petitioner had telephone communications with the Department regarding
18 Century's liabilities and collection issues in 2005, 2006, and 2007, during which petitioner identified
19 himself as Century's vice president.

20 There are four conditions for imposing personal liability on petitioner for the tax debts incurred
21 by Century. Petitioner does not dispute that Century's business has terminated or that it included sales
22 tax reimbursement in the selling price of tangible personal property. It appears that petitioner does not
23 dispute that he was a responsible person for Century's sales and use tax compliance, focusing his
24 argument on lack of willfulness (the fourth requirement for imposing personal liability under section
25 6829), but we note that the evidence as set forth in more detail in the D&R shows that petitioner was a
26 responsible person for these purposes. We therefore address petitioner's argument that he did not
27 willfully fail to pay or to cause to be paid the taxes due.
28

1 For these purposes, “willfully fails to pay or to cause to be paid” means that the failure was the
2 result of an intentional, conscious, and voluntary course of action. (Rev. & Tax. Code, § 6829,
3 subd. (d).) This failure may be willful even if it was not done with a bad purpose or evil motive. (Cal.
4 Code Regs., tit. 18, § 1702.5, subd. (b)(2).) A person is regarded as having willfully failed to pay
5 taxes, or cause them to be paid, where he or she had knowledge that the taxes were not being paid (or
6 lacked knowledge in reckless disregard of his or her duty to know) and had the authority to pay taxes
7 or cause them to be paid, but failed to do so.

8 Petitioner contends Century had no money and was unable to pay its liabilities. Petitioner also
9 states he did not take wages from Century for the last three years, which he claims is supported by
10 financial statements he has provided. Additionally, petitioner argues that, as a corporate officer, he
11 was responsible to make every effort to keep Century alive. Based upon this premise, petitioner
12 contends his decision to pay wages, and thereby retain Century’s employees, shows he was doing
13 everything he could do to keep Century’s business alive and does not establish that the failure to pay
14 taxes was willful. Further, petitioner cites the fact that Century made regular payments towards the
15 first audit liability between January 4, 2003, and August 26, 2006, as evidence that he did not act
16 willfully.

17 Since Century collected sales tax reimbursement during the liability period, it should have had
18 at least this money on hand to pay the taxes when they became due. Further, the evidence shows that
19 Century made sales through September 2006, and thus, it is reasonable to conclude that Century paid
20 operating expenses during the liability period, including wages, utilities, and payments to vendors.
21 Thus, we find Century had money available to pay the Board when the taxes at issue became due, but,
22 instead of paying the Board, paid other creditors.

23 As for whether petitioner knew or should have known of Century’s tax liabilities, we find that
24 petitioner should have had personal knowledge of the outstanding liabilities at issue based on his status
25 with Century (that is, as CFO, vice president, and secretary), in addition to the fact that he signed
26 SUTR’s in which taxes were underreported and had telephone communications with the Department in
27 which payments, penalties, and other collection issues were discussed. Thus, we find that petitioner
28 knew or should have known about the outstanding liabilities at issue.

1 With respect to the first audit period, although Century did make partial payments towards the
2 tax liability, those payments do not show that the failure to pay the tax when the SUTR's were filed
3 was not willful. Further, the evidence indicates that Century had the funds to pay the entire liability for
4 the first audit period, but instead of doing so, chose to pay other creditors, both when the taxes were
5 due with returns *and* when the NOD became due and payable. As to the second audit period, petitioner
6 had knowledge from the first audit that Century was underreporting its taxable sales and not
7 maintaining sufficient records. Despite such knowledge, petitioner did not correct or cause to be
8 corrected those deficiencies and failed to pay or cause to be paid the taxes due with SUTR's, while
9 Century continued paying other creditors. In fact, petitioner's own argument that he had the duty to try
10 to keep Century going and therefore acted in good faith by paying what taxes Century could pay while
11 still paying necessary expenses is an admission that petitioner made a voluntary, intentional, and
12 conscious decision to pay or cause Century to pay other expenses despite his knowledge that Century
13 had outstanding debts to the Board. We find that petitioner willfully failed to pay or to cause to be
14 paid the taxes due, and that he is personally liable pursuant to section 6829 for the tax debts incurred
15 by Century.

16 **Issue 2:** Whether the negligence penalties included in the responsible person determination
17 issued to petitioner should be deleted. We find no basis for removing the negligence penalties.

18 Petitioner has not presented any arguments with respect to the negligence penalties. For the
19 first audit period, Century failed to maintain and provide the necessary records, and its understatement
20 of taxable sales was 112.6 percent. For the second audit period, after being notified of its reporting and
21 recordkeeping errors during the first audit, petitioner still understated its taxable sales by 48.6 percent.
22 While not as large a percentage of error as the underreported measure in the first audit period, an
23 understatement of 48.6 percent for the second audit period is still indicative of a standard of care well
24 below that of a reasonably prudent business person especially since Century did not remedy the
25 reporting errors or recordkeeping issues identified in the first audit. We find the negligence penalty
26 was properly imposed for both audit periods.

27 **Issue 3:** Whether petitioner should be relieved of the finality and amnesty penalties imposed
28 on Century. We find that petitioner has failed to establish a basis for relieving these penalties.

1 There is no statutory or regulatory authority for relieving petitioner of these penalties, but if he
2 could show that the penalties should be relieved as to Century under Revenue and Taxation Code
3 section 6592, such relief would also inure to petitioner's benefit. Petitioner has submitted a declaration
4 under penalty of perjury requesting relief of the finality penalties, on the grounds that Century's
5 business was closed because of a lack of business, and there was no money to pay the tax due.

6 We do not accept petitioner's assertion with respect to the first audit, since we conclude that
7 Century had funds available when the NOD for that liability became final on December 15, 2002,
8 before Century's seller's permit was closed out. With respect to the second audit, there is some
9 question as to whether Century had funds available to pay this NOD when it became final on
10 December 10, 2006, after the seller's permit was closed out. We note, however, that the corporation
11 was not dissolved until four months later. In any event, we conclude that petitioner has failed to
12 establish reasonable cause to relieve the finality penalties.

13 With respect to the amnesty program, Century did not incur any amnesty penalties for the first
14 audit period because the NOD was issued before the amnesty period, and petitioner timely applied for
15 amnesty and entered into an amnesty installment payment agreement. Petitioner did not participate in
16 the amnesty program with respect to the NOD issued for the second audit period, and petitioner has
17 submitted a declaration under penalty or perjury requesting relief of the amnesty penalties. That
18 request is based on the grounds that Century could not pay the second audit liability because sales were
19 very slow, the business was closed, and there was no money in Century's account to pay the tax
20 liability. Another argument petitioner raised at the appeals conference but did not include in his signed
21 declaration is that Century did not apply for amnesty for the second audit period because the NOD was
22 issued after the end of the amnesty period.

23 Century could have avoided imposition of the amnesty interest penalty by timely applying for
24 amnesty and entering into a qualified installment payment plan. Also, Century's business was not
25 closed by the amnesty period, and Century was not prevented from complying with the amnesty
26 provisions for this reason. Further, even if Century's sales were suffering at the time of the amnesty
27 period, slumping sales would not have prevented Century from reporting its understated sales for the
28 amnesty-eligible quarters in the second audit period by March 31, 2005. Simply reporting those

