

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION SUMMARY FOR BOARD HEARING

In the Matter of the Administrative Protest)
Under the Sales and Use Tax Law of:)
BRENT BOLTHOUSE) Account Number: SR AS 53-003401
Taxpayer) Case ID 470152
Santa Monica, Los Angeles County

Type of Liability: Responsible person liability

Liability period: 07/01/00 – 09/30/02

<u>Item</u>	<u>Disputed Amount</u>
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Responsible person liability	\$51,974
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	<u>Tax</u>	<u>Penalty</u>
As determined and protested:	<u>\$39,025.65</u>	<u>\$12,948.54</u>
Proposed tax redetermination	\$39,025.65	
Interest through 5/31/11	32,084.04	
Penalties for late filing or late payment of returns	2,963.60	
Failure to file penalties	5,467.60	
Finality penalties	<u>4,517.34</u>	
Total tax, interest, and penalty	\$84,058.23	
Payments	- 5,537.97	
Balance Due	<u>\$78,520.26</u>	
Monthly interest beginning 6/1/11	<u>\$ 195.34</u>	

This matter was scheduled for Board hearing on April 27, 2011, but was postponed at taxpayer's request because of a scheduling conflict.

UNRESOLVED ISSUES

Issue 1: Whether taxpayer is personally liable as a responsible person for the unpaid liabilities of The Coffee House, LLC (SR AS 97-535496), pursuant to Revenue and Taxation Code section 6829. We conclude taxpayer is personally liable.

The LLC operated an upscale restaurant from May 1999 through September 2002. At the time its business terminated, the LLC had unpaid liabilities related to sales and use tax returns that were filed late for the period July 1, 2000, through December 31, 2000, and related to three notices of

1 determinations issued because the LLC failed to file sales and use tax returns for the period October 1,
2 2001, through September 30, 2002.

3 The Sales and Use Tax Department (Department) determined that the LLC's business was
4 terminated on or about September 30, 2002, and that the business collected sales tax reimbursement on
5 its retail sales. These are two of the four conditions for imposing personal liability on taxpayer for the
6 tax debts incurred by The Coffee house, and they are not disputed. The other two conditions, which
7 taxpayer does dispute, are that taxpayer must have been responsible for sales tax compliance by the
8 LLC, and taxpayer must have willfully failed to pay or cause to be paid taxes due from the LLC.

9 Taxpayer was a managing member of the LLC, and although taxpayer has stated that there
10 were other members of the LLC, no other members were listed on the seller's permit application or
11 various other documents. The Department concluded that taxpayer was a responsible person under
12 section 6829 because he signed various documents, listed in the D&R, either as managing member,
13 manager, or owner of the LLC, and because taxpayer communicated with the Department regarding
14 sales and use tax matters for the LLC several times throughout the liability period. The Department
15 also determined that taxpayer willfully failed to pay, or cause to be paid, the LLC's tax liabilities
16 because the LLC had funds available at the time the taxes became due and chose to pay other creditors.

17 Taxpayer contends that he was not responsible for the LLC's sales and use tax compliance and
18 that the business's failure to timely pay the tax-related liabilities was not willful. Specifically,
19 taxpayer alleges that he is an actor, not a business operator, and that his sole connection with the LLC
20 was to invest in it along with several other members. Further, taxpayer alleges that the LLC hired an
21 accountant to manage the affairs of the business, including the supervision of the employees, who were
22 responsible for the reporting and paying sales taxes. Taxpayer alleges that he had no knowledge of the
23 tax deficiencies because that responsibility was delegated to the accountant. Taxpayer asserts that his
24 occasional interaction with the Department regarding unpaid tax liabilities is not evidence that he was
25 actively involved in the business operations. With regard to whether the LLC's failure to pay the
26 liabilities was willful, taxpayer states that the business intended to pay off its debts, including the
27 outstanding tax liabilities, with proceeds from the sale of the business, which were never received.

1 Where there remains a liability for penalty and interest in connection with tax already paid by
2 the LLC (e.g., for the third quarter 2000, the LLC paid the tax due, but did so late, incurring a penalty
3 of \$1,522.00 and interest of \$90.06), taxpayer contends that he should not be liable for such penalty
4 and interest, based on wording in section 6829 that that an individual can be held “personally liable for
5 any unpaid taxes and interest and penalties on those taxes,” and to two letters from the legislative
6 history file for section 6829. Taxpayer argues that section 6829 was intended to requirement payment
7 of interest and penalties related only to amounts of tax that were not paid by the LLC.

8 Taxpayer also contends that, for the periods when no returns were filed, the estimated amount
9 of taxable sales is excessive. However, taxpayer states he can provide no records to document this
10 contention. In the absence of evidence, we have no basis to recommend an adjustment to the amount
11 of the determination and thus do not address this contention further.

12 To be held personally liable for the LLC’s unpaid tax-related liabilities, taxpayer must have
13 been an individual having control or supervision of, or charged with the responsibility for the LLC’s
14 sales and use tax compliance when the amounts at issue became due. In this regard, taxpayer signed
15 documents related to the formation of the LLC and was clearly identified as the sole manager of the
16 LLC on those documents. He also signed several documents with the Board over the entire liability
17 period and signed the agreement to sell the LLC in 2003. On all these documents, taxpayer identified
18 himself as the president, owner, CEO, or member manager of the LLC. In addition, Sysco Food
19 Services identified taxpayer as an individual and additional debtor on its Notices of Judgment Liens
20 and Releases filed against the LLC. Further, taxpayer’s current accountant identified taxpayer as the
21 person who had control, supervision, responsibility or duty to act for the LLC in sales and use tax
22 matters when the business terminated. Notes in Board records regarding collection activities indicate
23 that the Department spoke to a manager who stated he had no authority regarding payment of sales and
24 use tax, and that the manager directed the Department to taxpayer. In accord is information gathered
25 from the Internet, as described in the D&R. We find there is ample evidence that taxpayer was a
26 responsible person as defined by section 6829.

27 With respect to willfulness, personal liability can be imposed on taxpayer under section 6829
28 only if he willfully failed to pay or to cause to be paid taxes due from the LLC, which means that the

1 failure was the result of an intentional, conscious, and voluntary course of action (even if without a bad
2 purpose or evil motive). A person is regarded as having willfully failed to pay taxes, or to cause them
3 to be paid, where he or she had knowledge that the taxes were not being paid and had the authority to
4 pay taxes or cause them to be paid, but failed to do so.

5 The first requirement for willfulness is knowledge. In this case, taxpayer communicated
6 directly with the Department regarding the LLC's payment of sales tax liabilities on numerous
7 occasions, and he indicated he was in the process of making arrangements to pay the outstanding
8 liabilities. Those communications with the Department are clear evidence that taxpayer had
9 knowledge of the amount of taxes due. In addition, taxpayer personally delivered checks to the Board,
10 which is additional strong evidence of his knowledge of the LLC's sales and use tax liabilities.

11 Willfulness also requires that the responsible person must have been able to pay, or cause to be
12 paid, the taxes when due. We find, for the same reasons discussed above, that taxpayer had authority
13 to cause the taxes due to be paid. Regarding whether the LLC had sufficient funds to pay the taxes
14 due, we note that during the applicable periods, the LLC was making sales, on which it was collecting
15 sales tax reimbursement, and it made payments to vendors and suppliers during the period at issue. We
16 find that funds were available to pay the sales tax liability, but the LLC's management chose to pay
17 other creditors instead. With respect to taxpayer's assertion that he intended to pay the liabilities at
18 issue with proceeds from the sale of the business, which were never received, we note that the LLC
19 was obligated to pay taxes on or before the last day of the month following the quarterly period during
20 which the sales occurred. The fact that taxpayer may have expected to receive funds from the sale of
21 the business, long after the taxes were due, has no bearing on the question of whether the LLC
22 willfully failed to pay the taxes *when due*, choosing to pay other creditors instead. In summary, we
23 conclude that all conditions have been satisfied for imposing personal liability on taxpayer under
24 section 6829 for the outstanding tax-liabilities of the LLC.

25 Finally, we reject taxpayer's assertion that he cannot be held personally liable for any interest
26 and penalties due for periods for which there is currently no unpaid tax. Taxpayer appears to argue
27 that a late payment of tax by the corporation or LLC negates a responsible person's liability for the
28 accompanying penalty and interest. However, the *late* payment of taxes after penalty and interest had

1 already been incurred merely reduced taxpayer's potential liability, and did not remove that liability
2 from the ambit of section 6829.

3 **Issue 2:** Whether taxpayer has established reasonable cause sufficient for relieving the late-
4 filing, late payment, failure-to-file, and finality penalties originally assessed against the LLC. We
5 conclude that he has not.

6 Although we explained at the appeals conference that taxpayer could file a request for relief of
7 these penalties on behalf of the LLC, as well as in subsequent correspondence, and provided a form
8 taxpayer could use to do so, taxpayer has not submitted the requisite statement under penalty of
9 perjury. Accordingly, we have no basis to consider recommending relief of the penalties.

10 **OTHER DEVELOPMENTS**

11 None.

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