

## 1 CALIFORNIA STATE BOARD OF EQUALIZATION

## 2 APPEALS DIVISION BOARD HEARING SUMMARY

3 In the Matters of the Petition for )  
 4 Redetermination and Claim for Refund )  
 4 Under the Sales and Use Tax Law of: )  
 5 ) Account Number: SR EH 53-003124  
 5 TIMOTHY O. FINNERTY ) Case ID 417833  
 6 )  
 6 TIMOTHY O. FINNERTY and 21<sup>st</sup> CENTURY ) Account Number: SR EH 100-206567  
 7 OIL-FRONT COMPANY, dba ARCO AM/PM ) Case ID 417777  
 7 Gas Station/Convenience )  
 8 )  
 9 Petitioner/Claimants ) Temecula, Riverside County

10 Type of Liability: Responsible person liability

11 Type of Business: Retailer of gasoline and groceries

12 Liability period: 7/1/04 – 3/23/05 (Case ID 417833)

13 Claim period: 8/24/04 – 7/20/05 (Case ID 417777)

14 <u>Item</u>	<u>Disputed Amounts</u>
15 Penalties	\$ 3,113.15 (Case ID 417833)
15 Claimed refund	\$88,163.33 (Case ID 417777)

	<u>Tax</u>	<u>Penalties</u>
17 As determined	\$17,561.00	\$3,113.15
18 Less concurred	<u>-17,561.00</u>	<u>0.00</u>
19 Balance, protested	<u>\$ 0.00</u>	<u>\$3,113.15</u>

20 Proposed tax redetermination \$17,561.00

21 Interest through 2/29/12 10,397.19

22 Penalty for failure to make a prepayment 234.75

23 Penalty for late payment of returns 2,878.4024 Total tax, interest, and penalties \$31,071.3425 Monthly interest beginning 3/1/12 \$102.44

26 These matters were previously scheduled for Board hearing on October 28, 2011, but were  
 27 postponed due to the postponement of a related case (William Blaine Riggle, case IDs 417558, 41755).

## 28 UNRESOLVED ISSUES

29 **Issue 1:** Whether petitioner has established that a refund is warranted because payments made  
 30 with personal funds were misapplied to the corporation's past liabilities. We conclude that he has not.

1 Petitioner Timothy Finnerty filed a “joint” claim for refund on behalf of himself and 1st  
2 Century Oil-Front Company (Front) for \$88,163.33 on August 17, 2007.<sup>1</sup> We find that the applicable  
3 statute of limitations has expired with respect to \$57,755.45 of this claim, but the claim remains timely  
4 as to \$30,407.88.

5 Front operated an ARCO gas station under seller’s permit SR EH 100-206567 from June 1,  
6 2003, through June 23, 2005. Petitioner, a former corporate officer and stockholder, had sold all of his  
7 stock to William Zures, President, on April 14, 2003, and at that time ended his involvement in the  
8 business. Mr. Zures also owned other gas stations. On May 25, 2004, Mr. Zures passed away, and the  
9 Zures estate began to close or transfer to others the gas stations that had negative cash flows.

10 Petitioner, who in 2003 had personally guaranteed to pay Arco for the loan to build the site, agreed to  
11 assume responsibility for Front. Petitioner opened a checking account in the name of Front, with an  
12 initial deposit of \$55,000 allegedly from his own funds, in July 2004, and took over business  
13 operations on August 1, 2004. At the time, Front was paying delinquent tax liabilities for periods prior  
14 to July 2004, and continued to incur additional liabilities for failing to file current tax returns and  
15 prepayments. The Department contacted petitioner regarding bringing the account current. Petitioner  
16 agreed to file the July 2004 prepayment, remit \$44,000.00, and provide financial documents for  
17 consideration of a payment plan. No payment plan was implemented, but petitioner made payments  
18 from Front’s checking account.

19 The Department occasionally took further collection action against Front. Payments, both  
20 voluntary and involuntary, totaled \$126,331.99, of which \$77,626.99 was applied to satisfy Front’s  
21 delinquent liabilities for periods prior to July 2004. Petitioner attempted to keep Front’s account  
22 current, but he failed to file the July 2004 prepayment, filed the 4<sup>th</sup> quarter 2004 tax return late, and  
23 filed the January 1 through March 23, 2005 tax return without a remittance. The Department  
24 established liabilities against Front for the non-filed prepayment, late-filed tax return, and the tax  
25 return filed without a remittance. It also determined that petitioner was personally liable for these  
26

27 \_\_\_\_\_  
28 <sup>1</sup> Despite the reference to “joint” and to Front’s seller’s permit number in the claim, our understanding is that petitioner is seeking a refund for himself, and not seeking any refund to be paid to Front, rather than to him personally.

1 unpaid liabilities of Front within the meaning of Revenue & Taxation Code section 6829, subdivision  
2 (a), and issued a Notice of Determination to petitioner.

3         Petitioner contends that he intended to pay tax amounts to the Board from his personal funds  
4 during his responsible period (i.e., after August 1, 2004) to cover the tax he admittedly owed, but  
5 instead the Department intentionally misapplied the money to Front's prior period liabilities.  
6 Petitioner also contends that he made those payments under the threat that the Department would close  
7 the business. Petitioner states that he operated the business with his own funds as a manager and  
8 independent contractor, not as an officer or owner, from August 2, 2004, until the business closed on  
9 March 23, 2005. Petitioner claims that since he did not have an ownership interest in Front, he should  
10 not have been held responsible for the corporation's prior liabilities. Petitioner argues that all of the  
11 payments were from his personal funds and should be applied to the liability incurred during his  
12 operation of the business, with the balance refunded to him.

13         We reviewed Front's account and found that no portion of the tax liability has been overpaid.  
14 Those liabilities were based on the sales reported on Front's tax returns. The evidence shows that the  
15 Department made routine collection efforts, Front made voluntary payments to satisfy its liabilities  
16 before collection efforts were initiated, the voluntary payments were made with checks drawn on  
17 Front's checking account, and the Department applied the payments to the oldest liabilities first. We  
18 find that there is no evidence that the Department erroneously or illegally computed or collected the  
19 liability.

20         Petitioner's argument is that he is a third-party claimant whose funds were wrongfully applied  
21 to the liabilities of another person. The facts are not in dispute. Petitioner took over the business  
22 operations of Front around August 1, 2004, and opened a checking account in the name of Front.  
23 Petitioner knowingly and voluntarily caused Front to pay its delinquent corporate tax liabilities from  
24 the corporation's bank account. Furthermore, petitioner had a personal financial obligation for the site  
25 of the business, and thus had an incentive to keep the business open and work with the Department to  
26 bring the account current. We find no evidence of any threat or duress by the Department. Since the  
27 payments were made from Front's checking account, we conclude petitioner made the payments on  
28 Front's behalf with corporate funds, not petitioner's personal funds (regardless of the original source of

1 the corporate funds), which were properly applied to Front's liabilities. We find further that there is no  
2 overpayment available for refund.

3 **Issue 2:** Whether petitioner has established reasonable cause to relieve the penalties incurred  
4 by Front that have been passed through to petitioner as a responsible person. We conclude that he has  
5 not done so.

6 Front's unpaid liabilities assessed against petitioner include the following penalties: \$234.75  
7 for failure to file a prepayment return for July 2004, \$1,122.30 for filing the 4th quarter 2004 tax return  
8 late (two days), and \$1,756.10 for filing the tax return for the period January 1 through March 23,  
9 2005, late and without remittance.

10 Petitioner contends that he had a credit balance with the Board, and that no payments were late  
11 or tax liabilities unpaid during his period of responsibility. Petitioner states that he was not given  
12 access to Front's books and records for periods prior to August 2004, thus he was unaware of the July  
13 2004 tax prepayment amount owing until it was too late. Petitioner asserts that he was not operating  
14 the store as the corporation, so he did not communicate the sales he made to Front. Therefore, Front  
15 had no knowledge of the sales made or taxes due, collected, or paid during petitioner's responsibility  
16 period. Petitioner did not believe that he made any late payments to the Board because he had paid  
17 amounts exceeding the amounts for which he considered himself responsible.

18 We reject petitioner's allegation that he had a credit balance with the Board. Petitioner was  
19 directly involved in discussions with the Department, and understood that the early payments were for  
20 Front's delinquent liabilities, not its future liabilities. We also reject petitioner's assertion that he  
21 operated independently from the corporation. Petitioner took over the business operation on behalf of  
22 Front. Under his control, Front made the sales, collected the sales tax reimbursement, and recorded the  
23 sales from which sales tax liabilities were reported. In fact, petitioner reported the sales made during  
24 his responsibility period on Front's sales and use tax returns. Finally, none of petitioner's reasons  
25 address why Front's failure to make timely payments was due to circumstances beyond its control.

#### 26 **OTHER DEVELOPMENTS**

27 None.

28 Summary prepared by Pete Lee, Business Taxes Specialist II