STATE BOARD OF EQUALIZATION
SALES AND USE TAX APPEAL

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:	)	
JOHN RAY JAMES FORD	)	Account Number: SR JH 53-002866 Case ID 436515
Taxpayer	)	Eureka, Humboldt County

Type of Liability: Responsible person liability

Liability period: 06/12/01 – 08/31/01

Item	Disputed Amount
Responsible person liability	$54,325

	Tax	Penalty
As determined:	$71,112.00	$26,006.03
Adjustment – Sales and Use Tax Department	- 31,787.00	-11,006.19
Proposed redetermination, protested	$39,325.00	$14,999.84

Redetermined tax	$ 39,325.00
Interest through 5/31/10	28,362.34
Late payment penalty (6/12/01 - 6/30/01)	1,383.50
Failure-to-file penalty (7/1/01 - 8/31/01)	3,932.50
Finality penalty (7/1/01 – 8/31/01)	3,932.50
Amnesty interest penalty	5,751.34
Total tax, interest, and penalty	$82,687.18
Payments	9,733.26[1]
Balance Due	$72,953.92
Monthly interest beginning 6/1/10	$ 172.62

This matter was previously scheduled for Board hearing on November 18, 2009, and was rescheduled on March 24, 2010, but was postponed both times at the request of the Sales and Use Tax Department (Department) for additional investigation and review.

[1] All payments were amounts collected by the Department by levy. Taxpayer has filed a claim for refund which is timely for payments totaling $6,104.00. However, the claim is not ripe for consideration because the tax due for one or more entire reporting periods has not been fully paid. Taxpayer has not filed a claim for refund for the remaining payments (amounts collected by levy), which total $3,629.26. The dates of those payments were June 9, 2008, November 20, 2008, and January 9, 2009. In order to be timely, a claim for refund of those payments must be filed within three years from the date of levy. (Rev. & Tax. Code, § 6902.3.)

UNRESOLVED ISSUES

Issue 1: Whether taxpayer is personally liable as a responsible person for the unpaid liabilities of Niles Nissan, dba Performance Nissan (SR JH 97-788224), pursuant to Revenue and Taxation Code section 6829. We conclude taxpayer is personally liable.

Niles Nissan, a corporation, was a retailer of automobiles from June 12, 2001, through August 31, 2001. According to Board records, prior to June 12, 2001, the business had operated under the same dba and at the same location as a sole proprietorship owned by Julie Pauline Fischer (SR JH 97-718176). However, according to the Secretary of State's records, Niles Nissan has been incorporated since May 26, 1995, although its corporate status is presently suspended.

According to court documents provided by taxpayer, Jack Frank originally owned 100 percent of Niles Nissan's stock but sold all of it to Ms. Fischer on April 17, 2000, who transferred it back to Mr. Frank in May 2001. Then, in June 2001, Mr. Frank sold 100 percent of the corporate stock to taxpayer. During the period she owned stock, Ms. Fischer was also an officer and director of Niles Nissan. She resigned as an officer and director on June 11, 2001, the effective date of close-out for the seller's permit issued to her as a sole proprietor. After Ms. Fischer resigned, taxpayer and his wife, Sonia Ford, became the corporate officers for Niles Nissan, and Ms. Fischer was employed by the business as a bookkeeper.

Niles Nissan filed a return for the period June 12, 2001, through June 30, 2001, but it did not timely pay the tax, and the Department applied a late-payment penalty of $1,383.50. Niles Nissan did not file a return for the period July 1, 2001, through August 31, 2001, and the Department issued a Notice of Determination for tax of $71,112.00 and a failure-to-file penalty of $7,111.20. Since that determination was not paid timely, the Department applied a finality penalty of $7,111.20. Also, an amnesty interest penalty of $10,400.13 was added to the determination because Niles Nissan did not participate in the amnesty program. Upon further review of this matter in March 2010, the Department concluded that its calculation of the amount due for the period July 1, 2001, through August 31, 2001, included sales made in June 2001 that Niles Nissan had already reported with its second quarter 2001 return. Accordingly, by memorandum dated April 1, 2010, the Department recommends a reduction of tax and penalty from $71,112.00 and $26,006.03, respectively, to $39,325.00 and $14,999.84.

The Department determined that Niles Nissan's business was terminated on or about August 31, 2001, and that the business had included sales tax reimbursement in its retail sales. These are two of the four conditions for imposing personal liability on taxpayer for the tax debts incurred by Niles Nissan, and they are undisputed. The other two conditions, which taxpayer does dispute, are that taxpayer must have been responsible for sales tax compliance by Niles Nissan, and taxpayer must have willfully failed to pay or cause to be paid taxes due from Niles Nissan.

The Department concluded that taxpayer was responsible for managing financial affairs of Niles Nissan, including the filing of sales and use tax returns. The Department noted that taxpayer signed Niles Nissan's seller's permit application as its owner and was listed therein as an officer. In addition, taxpayer signed Niles Nissan's Statement by Domestic Stock Corporation dated June 11, 2001, as its president and was identified therein as its chief executive officer (CEO), chief financial officer (CFO), director, and agent for service of process. Also, taxpayer was the only person authorized to sign checks for Niles Nissan's corporate bank account. The Department found that taxpayer had been willful in his failure to pay Niles Nissan's outstanding sales and use tax liabilities because, during the period at issue, Niles Nissan's debits and payments to various creditors, as recorded in its checking account, exceeded $3 million.

Taxpayer contends that he was not a responsible person for Niles Nissan and that he did not willfully fail to pay the liabilities at issue. Although taxpayer purchased 100 percent of the common stock of Niles Nissan, he contends that he had never owned a business and was predominantly a salesperson. It was for that reason, according to taxpayer, that Ms. Fischer remained employed by Niles Nissan as its bookkeeper. Although taxpayer concedes that he was the only authorized signatory on Niles Nissan's bank account, he asserts that Ms. Fischer decided which bills to pay, and he had no control over the company's books. Taxpayer asserts that Ms. Fischer and Mr. Frank were the responsible persons for Niles Nissan, not taxpayer.

Taxpayer asserts that he blew the whistle to Bank One, Arizona, N.A. (Bank One), who held a promissory note issued by Niles Nissan, when he discovered that the previous owners had kept two sets of financial statements. Taxpayer contends that, at the end of September 2001, Bank One took possession of Niles Nissan's property, leaving taxpayer unable to pay Niles Nissan's tax liabilities. To

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support his contentions that Ms. Fischer and Mr. Frank were the responsible persons and that Bank One seized all of Niles Nissan's assets, taxpayer has provided various documents related to legal action taken by Bank One against Mr. and Mrs. Frank regarding the defaulted promissory note.

At the time the taxes at issue became due, taxpayer was Niles Nissan's president, CFO, vice-president, and treasurer. He was the only authorized signatory on the bank account for Niles Nissan, he signed Niles Nissan's seller's permit application and a check issued on August 1, 2001, to the Board, and he is identified as Niles Nissan's president, CEO, and CFO on many documents. We find this evidence establishes that taxpayer was a person with the requisite control, supervision, responsibility, or duty to act for the corporation in sales and use tax matters when the liabilities at issue became due. Further, a president has broad implied and actual authority to do all customary acts connected with the business, which would include the duty to ensure that the corporation was in compliance with the Sales and Use Tax Law.

We find that the evidence does not support taxpayer's contention that Ms. Fischer and Mr. Frank were the persons responsible for Niles Nissan's payment of sales and use taxes for the liability period at issue here. Although Ms. Fischer may have decided which bills to pay, it was ultimately taxpayer's responsibility to ensure that Niles Nissan was in compliance with the Sales and Use Tax Law. As for taxpayer's argument that Mr. Frank was a responsible person, it appears that taxpayer relies primarily on the fact that Bank One initiated a civil action against Mr. Frank rather than taxpayer. We find that Bank One initiated that civil action because Mr. and Mrs. Frank were the personal guarantors on the promissory note in default. Bank One's action is not evidence that Mr. Frank was a responsible person during the period at issue. Moreover, even if the evidence proved that Ms. Fischer or Mr. Frank was a responsible person for Niles Nissan, that conclusion would not preclude a finding that taxpayer was also a responsible person. We find that taxpayer was a responsible person during the time the taxes became due.

With respect to the willfulness requirement, willfulness means that the failure was the result of an intentional, conscious, and voluntary course of action. This failure may be willful even if it was not done with a bad purpose or evil motive. A person is regarded as having willfully failed to pay taxes, or cause them to be paid, where he or she had knowledge that the taxes were not being paid (or lacked

knowledge in reckless disregard of his or her duty to know) and had the authority to pay taxes or cause them to be paid, but failed to do so.

Taxpayer was aware that Niles Nissan included sales tax reimbursement in its retail sales. He had a duty to know whether the tax liabilities were being timely paid and, if he lacked such knowledge, it was the result of a reckless disregard of his duty to know. The evidence supports a finding that Niles Nissan had funds from which to pay the taxes since it did pay for other business expenses during the relevant period of $3,082,405, which was in excess of the amount at issue. We find the available evidence does not support taxpayer's contention that Bank One took possession of Niles Nissan's business assets in September 2001, leaving Niles Nissan unable to pay its bills, including the liabilities at issue. Rather, we find that taxpayer could have caused the tax liabilities at issue here to be paid, but he did not do so even though funds were available and taxpayer was the only person with check-signing authority. Thus, we find that taxpayer willfully failed to pay or to cause to be paid the subject taxes due, and that he is liable under section 6829 for the liabilities at issue.

Issue 2: Whether taxpayer has established reasonable cause sufficient to relieve the late-payment, failure-to-file, and finality penalties assessed against Niles Nissan. We conclude that taxpayer has not done so.

There is no basis for relief of penalties under section 6829, but if penalties owed by a corporation and imposed on a responsible person under section 6829 are relieved as to the corporation, then that relief would also inure to the benefit of the person liable under section 6829. Thus, a person being held liable under section 6829 for penalties imposed on a corporation may submit a statement under penalty of perjury requesting relief on the corporation's behalf pursuant to Revenue and Taxation Code section 6592. Although we explained these provisions and provided a form that taxpayer could use to request relief of the penalties on behalf of Niles Nissan, no such request has been submitted. Accordingly, we have no basis upon which to consider recommending relief of the penalties.

AMNESTY

Whether taxpayer has established reasonable cause to relieve the amnesty interest penalty incurred by Niles Nissan. We conclude that taxpayer has not.

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An amnesty interest penalty was imposed against Niles Nissan because the corporation failed to apply for amnesty, or pay the tax and interest due, by March 31, 2005. The amount of that penalty was $10,400.13, and it has been reduced to $5,751.34 in the recent adjustments. Similar to the discussion above, we explained how taxpayer could submit a request for relief of the amnesty interest penalty on behalf of Niles Nissan, but taxpayer has not done so. Accordingly, we have no basis upon which to consider recommending relief of the penalties.

OTHER DEVELOPMENTS

None.

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