

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:)
 5 VINCENT FRERE) Account Number SR KH 53-004217
 6) Case ID 475376
)
 6 Petitioner) Dayton, Nevada

7 Type of Liability: Responsible person liability

8 Liability period: 04/01/02 – 03/31/05

9 Item Disputed Amount

10 Responsible person liability \$263,694

	<u>Tax</u>	<u>Penalty</u>
12 As determined	\$321,269.81	\$70,008.63
13 Payment made by the corporation	-127,584.64	<u>0.00</u>
13 Protested	<u>\$193,685.17</u>	<u>\$70,008.63</u>
14 Proposed tax redetermination	\$321,269.81	
15 Interest through 3/31/12	194,956.40	
15 Negligence penalty	31,306.28	
16 Late-payment penalty	820.30	
16 Finality penalty	31,306.30	
17 Amnesty double negligence penalty	6,222.81	
17 Amnesty double finality penalty	190.78	
18 Amnesty interest penalty	<u>162.16</u>	
19 Total tax, interest, and penalty	\$586,234.84	
19 Payments ¹	-210,909.46	
20 Balance Due	<u>\$375,325.38</u>	

21 Monthly interest beginning 4/1/12 \$643.77

22 This matter was previously scheduled for Board hearing on September 20, 2011, but was
 23 postponed so we could issue a Supplemental Decision and Recommendation in each of the related
 24 cases of Daniel W. Shulte (case ID 475423) and Robert Wayne Kral (case ID 475458). It was
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26 _____
 27 ¹ In addition to the payment by the corporation noted above, Mr. Robert Wayne Kral, another individual against whom a
 28 determination pursuant to Revenue and Taxation Code section 6829 was issued for the same liability, made a payment of
 \$83,324.82.

1 rescheduled for Board hearing on December 14, 2011, but was postponed because the hearing in the
2 related matters was postponed due to a scheduling conflict.

3 UNRESOLVED ISSUE

4 **Issue:** Whether petitioner is personally liable pursuant to Revenue and Taxation Code section
5 6829 for the unpaid liabilities of Modern Stainless & Design, Inc. for the period April 1, 2002, through
6 March 31, 2005. We conclude petitioner is personally liable.

7 Modern Stainless & Design, Inc. (Modern) held seller's permit SR S KH 99-905743 as a
8 manufacturer of fermentation tanks for the wine and brewing industries. Modern moved its business
9 from California to Nevada in 2004, but continued to make sales in California, then filed for Chapter 7
10 bankruptcy on November 28, 2005. The Sales and Use Tax Department (Department) determined that
11 Modern's business operations terminated on that date, and closed out Modern's seller's permit. For
12 periods prior to the bankruptcy filing, Modern had unpaid liabilities related to an audit for the period
13 April 1, 2002, through December 31, 2004, determined on December 19, 2005, and non-payment of
14 self-declared taxes reported on a first quarter 2005 tax return. The Department issued a Notice of
15 Determination to petitioner for Modern's unpaid liabilities pursuant to Revenue and Taxation Code
16 section 6829.²

17 Petitioner does not dispute that Modern's business has been terminated, or that it collected tax
18 reimbursement on its retail sales or incurred use tax on its consumption of tangible personal property
19 without payment of such tax to the Board. However, petitioner does dispute the other two conditions
20 for imposing personal liability on a person for a corporation's unpaid tax debts, that he was
21 "responsible" and that he willfully failed to pay, or to cause to be paid, the amounts due. Petitioner
22 asserts that he was Modern's CFO/treasurer in name only and that he never acted in that capacity,

23 _____
24 ² The Department also issued determinations for Modern's liabilities pursuant to section 6829 to three other former officers
25 of Modern: Daniel W. Shulte (president and chief operating officer), Robert Wayne Kral (vice president), and Russell W.
26 Kargel (secretary), each of whom filed a timely petition for redetermination. (These determinations were for the period
27 April 1, 2002, through June 30, 2005, one quarter more than the liability asserted against petitioner.) The appeals
28 conferences for these other former corporate officers were held concurrently. We upheld the asserted liability as to each of
them. The Board hearings on the appeals of Mr. Shulte (case ID 475423) and Mr. Kral (case ID 475458) have been
scheduled for the same Board meeting as the hearing for petitioner. Mr. Kargel (case ID 478189) did not request a Board
hearing following the issuance of our D&R in his appeal, which will be finalized after the Board decides the related
appeals.

1 instead devoting his time to set up and install the fermentation tanks. He contends that he was never
2 involved in financial decisions, never prepared the sales and use tax returns, and never signed checks
3 to pay creditors. He notes that the Department performed the audit after he left Modern in May 2005,
4 and the first time any of the corporate officers was aware of the tax liability was in December 2005,
5 when the determination was issued to Modern.

6 Petitioner was Modern's CFO/treasurer during the entire period for which the Department
7 asserted liability against him. The other three corporate officers have stated that all four of them were
8 equally responsible for financial decisions, including sales and use tax matters, and that they all signed
9 Modern's Director's Meeting minutes stating what financial decisions were made by the corporate
10 board and indicating that petitioner took part in the decision making. Although petitioner was not a
11 responsible person when the December 19, 2005 determination was issued to Modern, we find that he
12 was a responsible person at the time the taxes became due.

13 The three other corporate officers have conceded that they were aware of Modern's tax
14 liabilities. Based on their statements, we believe that petitioner participated in financial decisions for
15 Modern along with the three other corporate officers. As such, since the other three corporate officers
16 knew of the tax liabilities, we conclude that petitioner must have been aware of those tax liabilities as
17 well, and that he participated with the other corporate officers in making financial decisions for
18 Modern. During the liability period, Modern made payments for rent, equipment lease, and to one of
19 its suppliers, which is evidence that funds were available to pay the sales tax liability. We conclude
20 that all conditions for imposing responsible person liability on petitioner under section 6829 for the
21 outstanding tax liabilities of Modern have been satisfied.

22 **OTHER MATTERS**

23 The liability asserted against petitioner includes negligence and other penalties imposed against
24 Modern. Petitioner did not contend that Modern was not negligent. For the reasons set forth in the
25 D&R, we conclude that the negligence penalty was properly imposed. Petitioner has not submitted a
26 request for relief of any of the other penalties. The other former officers each requested relief of such
27 penalties, but we found that none of them had established reasonable cause for relief of the penalties.

28 Summary prepared by Pete Lee, Business Taxes Specialist II