

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION SUMMARY FOR BOARD HEARING

3 In the Matter of the Petition for Redetermination)
 4 Under the Sales and Use Tax Law of:)
 5 JOSEPH PETER FRUMENTI) Account Number: SR CH 53-003608
 6 Petitioner) Case ID 437274
)
) Orinda, Contra Costa County

7 Type of Liability: Responsible Person Liability

8 Liability Period: 5/1/01 - 3/31/03

9 Item Disputed Amount

10 Responsible Person Liability \$36,005

	<u>Tax</u>	<u>Penalty</u>
11 As determined	\$28,949.32	\$8,522.38
12 Adjustment – Appeals Division		<u>-1,466.31</u>
13 Proposed redetermination, protested	<u>\$28,949.32</u>	<u>\$7,056.07</u>

14 Proposed tax redetermination	\$28,949.32	
15 Interest through 4/30/10	21,538.13	
16 Late filing penalty	1,013.70	
16 Late prepayment penalty	2,357.47	
16 Late payment penalty	<u>3,684.90</u>	
17 Total tax, interest, and penalties	<u>\$57,543.52</u>	

18 Monthly interest beginning 5/1/10 \$168.87

19 UNRESOLVED ISSUES

20 **Issue 1:** Whether petitioner is liable as a responsible person under Revenue and Taxation Code
 21 section 6829 for the unpaid liabilities of G.J.P.F., Inc. dba Strombolis Ristorante & Pizza (GJPF),
 22 seller's permit number SR CH 21-872966, for the period May 1, 2001, through March 31, 2003. We
 23 conclude that petitioner is personally liable.

24 Petitioner was a corporate officer of GJPF, identifying himself on various documents as
 25 corporate president, vice-president, secretary and treasurer, CEO, CFO, Director and Agent, and
 26 president/owner. The Sales and Use Tax Department (Department) closed out GJPF's permit effective
 27 November 20, 2003. At the time the business was terminated, GJPF, had an unpaid liability of
 28 \$28,949.32 in tax, penalties of \$8,522.38, and applicable interest. The penalties included a late filing

1 penalty of \$1,013.70, late prepayment penalties of \$ 2357.47, late payment penalties of \$3,684.90, and
2 an amnesty interest penalty of \$1,466.31. The Department issued a Notice of Determination to
3 petitioner for GJPF's liability based on the Department's finding that petitioner is personally
4 responsible for that liability pursuant to section 6829.

5 It is undisputed that the business has terminated and that petitioner was responsible for tax
6 compliance of GJPF. Although petitioner had indicated on a questionnaire that sales tax reimbursement
7 was not added to the selling price of property sold, a former employee and a former representative
8 stated that tax reimbursement was added, and petitioner did not dispute this element at the appeals
9 conference. We conclude that tax reimbursement was added to the selling price. The element of
10 section 6829 liability that petitioner does dispute is willfulness. He asserts that the Department has not
11 established that he willfully failed to pay, or to cause to be paid, the tax debts owed by GJPF because
12 the Department only has evidence of payments made to suppliers in one quarter of 2001 and must
13 show that payments were made to suppliers or other creditors during every period in order to establish
14 willfulness.

15 Petitioner also contends that he cannot be held liable for interest and penalties due on tax
16 amounts that were subsequently paid. For example, all but \$814.04 of the liability for the second
17 quarter of 2002 has been paid; therefore petitioner argues that he should not be required to pay interest
18 and penalties on the \$5,290.96 that was paid prior to the issuance of the NOD against petitioner.
19 Petitioner bases this contention on the language of section 6829, subdivision (a), which states that an
20 individual can be held "personally liable for any unpaid taxes and interest and penalties on those
21 taxes."¹ Petitioner argues that when the statute refers to "those taxes," the taxes referred to are unpaid
22 taxes. Therefore, according to petitioner, an individual can be held personally liable only for interest
23 and penalties on *unpaid* taxes, not interest and penalties on *paid* taxes.

24 _____
25 ¹ Petitioner also bases the contention on two letters from the legislative history file for section 6829. The first letter is from
26 the author of the bill which enacted section 6829, Thomas M. Hannigan, to Governor Edmund G. Brown (attached as
27 exhibit 1 to the D&R), describing that the provision was necessary to ensure that corporations pay taxes, even when
28 defunct, and are not able to avoid them because they are no longer operating. The second is a letter from former Executive
Secretary of the Board of Equalization to then Governor Edmund G. Brown (attached as exhibit 2 to the D&R) asking for
him to sign the bill and describing the bill's intent to hold individuals "personally liable for sales and use taxes unpaid ...
plus interest and penalties thereon." Petitioner argues that this language is further evidence that the statute was intended to
only require payment of interest and penalties on unpaid taxes.

1 Imposition of liability under section 6829 requires that the responsible person willfully failed to
2 pay or to cause to be paid taxes due from the corporation, meaning that the failure was the result of an
3 intentional, conscious, and voluntary course of action. (Rev. & Tax. Code, § 6829; Cal. Code Regs.,
4 tit. 18, § 1702.5, subd. (b)(2) (the failure may be willful even if not done with a bad purpose or evil
5 motive).) A person is regarded as having willfully failed to pay taxes, or cause them to be paid, where
6 he or she had knowledge that the taxes were not being paid (or lacked knowledge in reckless disregard
7 of his or her duty to know) and had the authority to pay taxes or cause them to be paid, but failed to do
8 so.

9 Here, petitioner signed GJPF's non-remittance sales and use tax return for 1Q03, which shows
10 he had actual knowledge that \$12,663 in sales tax was due. By signing the tax return without paying
11 the taxes reported as due, petitioner obviously knew that GJPF was not paying its taxes for that quarter.
12 Further, petitioner communicated directly with the Department regarding payment of sales tax liability
13 on numerous occasions. We conclude that petitioner knew of GJPF's sales and use tax liabilities for
14 the period at issue.

15 Regarding the Department's burden, it is true that the Department has the burden of proof, but
16 that burden is by a preponderance of the evidence, which means that evidence of payment to other
17 creditors need not be unequivocal, especially where, as here, the corporation itself admits receipt of
18 funds. That is, in addition to the evidence of payments to Sysco Food SVC San Francisco throughout
19 2Q01, all the liability is based on partial remittance and non-remittance returns filed by GJPF. These
20 returns reported that GJPF was receiving funds during the periods at issue.² We find that petitioner
21 was a responsible person for the sales and use tax compliance of GJPF, that funds were available for
22 payment of the taxes due, and petitioner did not use, or cause those funds to be used, to pay the taxes
23 due. Accordingly, we find that the requirements for imposing personal liability on petitioner for the
24 tax debts of GJPF under section 6829 have been satisfied. Regarding petitioner's arguments about his
25 liability for interest that had accrued on taxes eventually paid, the correspondence he submitted does

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27 ² The business was a pizza restaurant, and it is reasonable to assume, as we do, that the business collected payments upon at
28 the time of the sales and did not, for example, accept payments on an installment basis. Thus, we find it is reasonable to
conclude that the gross receipts reported on returns represent gross receipts GJPF received during each reporting period.

1 not support his arguments, which we reject as nonsensical. A person is liable under section 6829 for
2 interest that accrued on unpaid taxes for which that person was responsible even if the taxes that were
3 “unpaid” (i.e., not paid when due, thereby accruing interest) were thereafter paid.

4 **Issue 2:** Whether petitioner has established reasonable cause sufficient to relieve the penalties
5 for late filing of a return, late payment, and late-prepayment assessed against GJPF for 3Q01 through
6 March 31, 2003. We conclude relief is not warranted.

7 Although there is no basis for relief of penalties as to a responsible person under section 6829,
8 if the Board were to grant relief of the penalties to GJPF pursuant to Revenue and Taxation Code
9 section 6592, that relief would inure to petitioner’s benefit as well. A person seeking relief of penalties
10 must submit a statement under penalty of perjury setting for the facts upon which the request for relief
11 is based. (Rev. & Tax. Code, § 6592.) Petitioner has not submitted such a request on behalf of GJPF,
12 and we thus have no basis on which to consider whether to recommend relief from these penalties.

13 **RESOLVED ISSUE**

14 Petitioner has submitted proper request on GJPF’s behalf for relief of the amnesty interest
15 penalty, stating that the liabilities went final before the amnesty program was implemented. The
16 corporation did not file under the amnesty program because it did not have any assets. GJPF was no
17 longer operating at the time of the amnesty program, and we agree that it also likely had no assets at
18 that time. Thus, we conclude that GJPF’s failure to participate in the amnesty program was due to
19 reasonable cause and circumstances beyond its control. Accordingly, we recommend relief from the
20 amnesty interest penalty, conditioned on petitioner’s payment in full of the amnesty-eligible tax and
21 interest remaining due within 30 days from issuance of the Notice of Redetermination in this appeal, or
22 the successful completion of a qualifying installment agreement (not to exceed 13 months) that
23 petitioner enters into with the Department within 30 days of the issuance of the Notice of
24 Redetermination.

25 **OTHER DEVELOPMENTS**

26 None.

27 Summary prepared by Rey Obligacion, Business Taxes Specialist III, Retired
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