

**CALIFORNIA STATE BOARD OF EQUALIZATION**  
**APPEALS DIVISION SUMMARY FOR BOARD HEARING**

In the Matter of the Petition for Redetermination )  
Under the Sales and Use Tax Law of: )  
ROBERT CHARLES HERZOG ) Account Number: SR EH 53-002763  
Case ID 381897  
Petitioner ) Highland, San Bernardino County

Type of Liability: Responsible person liability

Liability Period: 4/1/01 – 3/31/05

| <u>Items</u>                        | <u>Disputed Amount</u> |                   |
|-------------------------------------|------------------------|-------------------|
| Responsible person liability        | \$39,564               |                   |
|                                     | <u>Tax</u>             | <u>Penalties</u>  |
| As determined                       | \$35,950.86            | \$7,208.23        |
| Adjustments: Appeals Division       |                        | <u>-3,595.09</u>  |
| Proposed redetermination, protested | <u>\$35,950.86</u>     | <u>\$3,613.14</u> |
| Proposed tax redetermination        | \$35,950.86            |                   |
| Interest through 7/31/10            | 21,277.11              |                   |
| Negligence penalty                  | 3,595.09               |                   |
| Late payment penalty                | <u>18.05</u>           |                   |
| Total tax, interest, and penalties  | <u>\$60,841.11</u>     |                   |
| Monthly interest beginning 8/1/10   | <u>\$209.71</u>        |                   |

This matter was previously scheduled for Board hearing on September 1, 2009, but was postponed because petitioner was going to be out of town on that date. It was rescheduled for Board hearing on November 18, 2009, and then on January 26, 2010, but was postponed upon the request of the Sales and Use Tax Department (Department) to allow additional time to review the facts. Subsequently, this matter was scheduled for Board hearing on March 24, 2010, but we issued an SD&R on March 10, 2010, and as a result the hearing was postponed as requested by petitioner.

**UNRESOLVED ISSUES**

**Issue 1:** Whether petitioner is personally liable as a responsible person under Revenue and Taxation Code section 6829 for the unpaid liabilities of Herzog Enterprises, Inc., dba Aloha Auto Center (HEI), seller's permit SR EH 97-825097. We conclude that petitioner is personally liable.

1 HEI, a corporation, sold used cars and obtained a seller's permit on March 15, 2001. On  
2 April 29, 2004, petitioner requested that HEI's seller's permit be closed as of the last return filed.  
3 However, upon audit, the Department determined that HEI had continued to receive lease payments  
4 after April 2004. Thus, the Department changed the close-out date of the permit to March 31, 2005,  
5 and extended the audit to that date.

6 The audit report, dated May 19, 2006, indicates that for the period April 1, 2001, through  
7 March 31, 2005, HEI had an audited tax liability of \$49,812.00 comprised of seven audit items. The  
8 Department concluded that petitioner is personally responsible pursuant to section 6829 for tax of  
9 \$35,950.86 incurred by HEI with respect to the transactions in five of the seven audit items for which  
10 HEI collected sales tax reimbursement. Additionally, the Department concluded that petitioner is  
11 responsible for HEI's negligence penalty and finality penalties associated with this tax liability as well  
12 as the \$18.05 late payment penalty resulting from a self-reported non-remittance return HEI filed for  
13 August 2003.

14 There is no dispute that two of the four requirements for imposing liability under section 6829  
15 have been met. HEI's selling business has been terminated and, as to the sales for which tax has been  
16 assessed to petitioner, HEI added sales tax reimbursement to, or included tax reimbursement in, the  
17 selling price of such sales. The two requirements for imposing section 6829 liability that are in dispute  
18 are whether petitioner was a responsible person and whether petitioner willfully failed to pay taxes due  
19 from HEI or cause them to be paid.

20 The Department concluded that petitioner was a responsible person under section 6829 because  
21 petitioner signed HEI's seller's permit application as president, and the application indicates that  
22 petitioner was the only corporate officer. The Secretary of State records indicate petitioner was HEI's  
23 chief executive officer and agent for service of process. Petitioner signed many of HEI's sales and use  
24 tax returns as president, and all the auditor's contacts were with petitioner. Further, notes in the  
25 Board's computerized records indicate that the Department's collection staff had numerous contacts  
26 with petitioner, both written and by telephone, regarding HEI's delinquent taxes. As to willfulness,  
27 during the audit the Department obtained copies of bank statements from HEI's business checking  
28 account for the period April 19, 2003, through January 26, 2005, that show HEI had funds available to

1 pay its tax liabilities. The Department notes that petitioner had check-signing authority throughout the  
2 liability period. Copies of bank statements show that HEI deposited (and withdrew) hundreds of  
3 thousands of dollars into its bank account during the period of April 2003 through January 2005  
4 without paying its liabilities due to the Board. Thus, the Department asserts that petitioner willfully  
5 failed to pay or to cause to be paid HEI's tax liabilities, and that all requirements for imposing the  
6 asserted section 6829 liability on petitioner have been satisfied.

7         Petitioner contends that he was not a responsible person from June 19, 2003, through the end of  
8 the liability period. Petitioner asserts that in January 2003, he met James Mariani and Sheila Snider of  
9 Jus Auto Wholesale, and from February 2003 through May 2003, Mr. Mariani and Ms. Snider  
10 discussed taking over HEI's business from petitioner. Petitioner states that around April 2003,  
11 Mr. Mariani and Ms. Snider took over the day-to-day operations of HEI's business. Petitioner  
12 provided corporate meeting minutes from HEI dated June 19, 2003, indicating that, effective that day,  
13 petitioner continued as a corporate director and Mr. Mariani and Ms. Snider were added as corporate  
14 directors.<sup>1</sup> Further, the minutes reflect that Ms. Snider was added as an additional signer to HEI's  
15 bank accounts. Petitioner provided copies of many checks drawn from HEI's bank account that Ms.  
16 Snider had signed. Some of the checks were issued to Jus Auto Wholesale. Petitioner also provided  
17 copies of some of HEI's sales and use tax returns that were signed by Ms. Snider beginning September  
18 2003. Petitioner's representative stated at the appeals conference that petitioner had no involvement  
19 with or control over the corporate business after June 2003, but when asked what petitioner did after  
20 June 2003 if he was no longer involved with the corporate business, the representative stated he did not  
21 know.

22         Petitioner was the sole corporate officer prior to the addition of Mr. Mariani and Ms. Snider as  
23 corporate directors. He represented HEI during the audit process and had check-signing authority  
24 throughout the liability period. With respect to petitioner's contention that Ms. Snider was involved in  
25 the management of HEI between June 19, 2003, and February 7, 2004, we note that Ms. Snider's  
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27 <sup>1</sup> The Department indicated it determined that Mr. Herzog was the only person against whom a dual determination should  
28 be issued.

1 responsibilities did extend at least to signing checks and sales and use tax returns, but petitioner's  
2 delegation of some responsibilities for HEI's sales and use tax matters to Ms. Snider did not  
3 automatically free petitioner from those responsibilities. He may have chosen to allow Ms. Snider, and  
4 possibly Mr. Mariani, to participate in the management of the business for a period of time, but it  
5 remained *his* business. Nothing in the evidence suggests otherwise. Thus, we conclude that petitioner  
6 was a responsible person for purposes of section 6829.<sup>2</sup>

7         With respect to whether petitioner willfully failed to pay taxes due from HEI or to cause them  
8 to be paid, willfulness means that the failure was the result of an intentional, conscious, and voluntary  
9 course of action. A person is regarded as having willfully failed to pay taxes or to cause them to be  
10 paid where he or she had knowledge that the taxes were not being paid (or lacked knowledge in  
11 reckless disregard of his or her duty to know) and had the authority to pay taxes or cause them to be  
12 paid, but failed to do so. Petitioner was aware that HEI owed sales or use tax on its sales and leases of  
13 vehicles as demonstrated by HEI's collection of tax or tax reimbursement on all its sales and leases.  
14 Bank statements show that the corporation had ample funds available to pay its tax liability. However,  
15 although petitioner had check-signing authority, HEI's tax liabilities remain unpaid.

16         Based on the foregoing, we conclude that petitioner is liable under section 6829 for the unpaid  
17 liabilities of HEI related to the five audit items asserted by the Department.

18         **Issue 2:** Whether the liability assessed against petitioner is excessive. We find that it is not.

19         Petitioner contends that HEI's audited measure of tax due is about \$61,615 too high because  
20 the same measure is duplicated in two different audit items, and that his personal liability should thus  
21 be reduced by \$61,615 in measure. The two audit items consist of transactions which HEI regarded as  
22 leases subject to tax measured by the rental receipts but which were treated by the Department as sales  
23 at inception subject to tax at the time of sale. Thus, the Department considered all receipts under the  
24 contract characterized as leases to be subject to tax at the time of the sale, which occurred at the  
25 inception of the transactions. The Department did not include this item in the assessment against  
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27 <sup>2</sup> It does not appear petitioner disputes his responsibility for sales and use tax matters before or after the period he asserts  
28 Ms. Snider and Mr. Mariani were involved in the business. In any event, we find the record clearly shows that petitioner  
was a responsible person under section 6829 for the entire liability period.

1 petitioner as a responsible person because HEI did not collect sales tax reimbursement on the gross  
2 receipts from its sales at inception. The Department did include in the assessment to petitioner lease  
3 receipts which HEI continued to receive after it stopped making sales and filing returns because HEI  
4 had collected use tax on those rental receipts. Petitioner asserts that for these transactions, the  
5 Department has taxed all the receipts at the time of the sale at inception and then also taxed the rental  
6 receipts as a lease.

7         The Department concedes that there is a possibility the liability assessed *against HEI* could be  
8 overstated if transactions picked up as sales at inception were also included as taxable rentals, but  
9 asserts that petitioner has provided no documentation in support of his contention of double counting.  
10 In any event, even if such had been the case, there has been no double assessment *to petitioner* because  
11 the Department did not include any of HEI's deficiency for sales at inception in the determination  
12 issued to petitioner. Thus, regardless of any possibility of double counting as to HEI, since tax  
13 asserted to petitioner is the use tax HEI actually collected as tax on transactions structured as leases  
14 without remitting such amounts as tax to the Board and since such tax has not been duplicated in the  
15 determination issued to petitioner, this argument does not support any adjustment as to petitioner's  
16 personal liability under section 6829.

17         **Issue 3:** Whether the negligence penalty was properly imposed on HEI. We conclude that HEI  
18 was negligent and the penalty was properly imposed.

19         We initially concluded, in our D&R, that HEI was not negligent since the audit at issue was its  
20 first audit and since the error HEI made in treating certain transactions as leases rather than sales at  
21 inception is an easy one for a new car dealer to make. The Department filed a Request for  
22 Reconsideration (RFR) disputing our conclusion. The Department notes that HEI understated its  
23 reported taxable sales by 112 percent, and that HEI's error in reporting transactions structured as leases  
24 which were actually sales at inception actually resulted in only 28 percent of unreported taxable sales  
25 while the other 72 percent was caused by HEI's inadequate or missing records. The Department notes  
26 further that 340 Report of Sale (ROS) forms were issued to HEI for the liability period. HEI had 204  
27 deal jackets which included completed ROS forms, and the Department located 128 other ROS forms  
28 that were not included in deal jackets, 58 of which were voided. Thus, there were 70 ROS forms used

1 for sales that were available, but without the deal jackets (128-58), and 8 missing forms which we  
2 assume were used for sales, for a total of 78 transactions for which proper records were not produced  
3 for audit. The Department concluded that HEI was negligent because it did not exercise due care in  
4 maintaining records or reporting its taxable sales, and the error rate is significant.

5 In his declaration accompanying his response to the Department's RFR, petitioner asserts that  
6 the missing records were stolen by Mr. Mariani and Ms. Snider and that they were uncooperative and  
7 would not provide them. Petitioner's response notes petitioner's assertion and based thereon asserts  
8 that neither HEI nor petitioner can be held liable for the negligence penalty for the missing deal  
9 jackets.

10 Records necessary for the proper completion of HEI's sales and use tax returns were not  
11 produced for audit. We believe it more likely that the records were not maintained properly than that  
12 they were properly maintained and then stolen. If the missing records resulted from the failure to  
13 properly maintain them in the first place, that might explain the substantial error of 112.55 percent in  
14 the taxable measure. Excluding the error resulting from misreported transactions structured as leases  
15 that were actually sales at inception, HEI's remaining error of understatement was 81 percent (72  
16 percent of 112.55). Standing alone, without some non-negligent explanation, this rate of error is  
17 evidence of HEI's negligence.

18 Assuming for purposes of discussion that the missing records (78 deal jackets and other  
19 records) were actually created and then later removed by Mr. Mariani and Ms Snider, that does not  
20 absolve *HEI* from responsibility. Indeed, when a corporation is negligent, such negligence is always  
21 the result of action or inaction by one or more persons acting on the corporation's behalf. Petitioner,  
22 the sole shareholder and sole officer of HEI, concedes that Mr. Mariani and Ms. Snider were duly  
23 authorized to act on behalf of HEI. We find that HEI is liable for its negligence regardless of which of  
24 the individuals authorized to act on its behalf can be blamed for that negligence.

25 We note we asked petitioner to provide a non-negligent explanation for HEI's missing records and size  
26 of deficiency, and he has not done so. We find that the size of the error and the state of the records  
27 establish that HEI was negligent, and the penalty was properly imposed.

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