

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:)
MARTIN L. HUDLER) Account Number: SR EH 53-003484
) Case ID 434939
)
Petitioner) Lake Oswego, Oregon

Type of Liability Responsible person liability

Liability period 01/01/05 – 03/31/06

<u>Item</u>	<u>Disputed Amount</u>
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Responsible person liability	\$28,745
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	<u>Tax</u>	<u>Penalty</u>
As determined, protested	<u>\$23,174.21</u>	<u>\$5,570.90¹</u>
Proposed tax redetermination	\$23,174.21	
Interest through 10/31/10	12,649.89	
Penalties for late payment of returns	<u>5,570.90</u>	
Total tax, interest, and penalty	<u>\$41,395.00</u>	
Monthly interest beginning 11/1/10	<u>\$135.18</u>	

UNRESOLVED ISSUES

Issue 1: Whether petitioner is personally liable as a responsible person, pursuant to Revenue and Taxation Code section 6829, for the unpaid liabilities of The Young and the Restofus, Inc. (Y&R). We conclude petitioner is personally liable.

Y&R was a retailer of women's clothing from January 1, 2004, through September 30, 2006. Although Y&R began its business operations in California on January 1, 2004, it did not apply for a seller's permit until April 11, 2006. Y&R's seller's permit application was signed by petitioner as Y&R's president, and seller's permit SR EH 100-733048 was issued to Y&R on April 12, 2006, with an effective start date of January 1, 2004. Between April 19, 2006, and April 27, 2006, Y&R filed all

¹ The penalties exceed 10 percent of the tax assessed to petitioner because the corporation had paid some of the tax before the determination was issued to petitioner.

1 its sales and use tax returns (SUTR's) for, as relevant herein, the liability period of January 1, 2005,
2 through March 31, 2006.² The SUTR's for the first quarter 2005 (1Q05) and 1Q06 were filed with no
3 remittance, and the SUTR's for the 2Q05, 3Q05, and 4Q05 were filed with partial remittances. At the
4 time its business terminated, Y&R had unpaid liabilities for each of those five quarters.

5 The Sales and Use Tax Department (Department) determined that Y&R's business was
6 terminated on or about September 30, 2006, which petitioner does not dispute. This is one of the four
7 conditions for imposing personal liability on petitioner pursuant to section 6829 for the tax debts
8 incurred by Y&R. The other three conditions, which petitioner disputes, are that the business had
9 added or included sales tax reimbursement in its retail sales, petitioner must have been responsible for
10 sales tax compliance by Y&R, and he must have willfully failed to pay or cause to be paid taxes due
11 from Y&R.

12 The Department concluded that Y&R included or added sales tax reimbursement in its retail
13 sales based on the questionnaire completed by Mr. Gaston Alvarez, who was the vice president of
14 Y&R and who owned 50 percent of Y&R stock, with petitioner holding the other 50 percent.³ In the
15 questionnaire, Mr. Alvarez indicated that "tax was charged normally as far as [he] could tell," but that
16 he was not present at the store (he indicates later in the questionnaire that he had not been with Y&R
17 since June 2006). The Department also relied on a printout from Y&R's website on May 31, 2007,
18 which indicates that Y&R added sales tax reimbursement to the total amount of its sales.

19 The Department also concluded that petitioner was a responsible person under section 6829
20 based on various facts, including that: 1) petitioner was identified in several documents as president,
21 CEO, and owner of Y&R; 2) petitioner was identified as a responsible party for sales and use tax
22 matters per a questionnaire completed by Mr. Alvarez; and 3) petitioner signed a Board issued Power
23 of Attorney form on April 20, 2007, as president, in which he appointed Charles Markley to represent
24 petitioner before the Board. In addition, the Department determined that petitioner willfully failed to
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27 ² The Board's computer records indicate that SUTR's were also filed for 2004 and fully paid.

28 ³ A dual determination under Revenue and Taxation Code section 6829 was also issued to Mr. Alvarez for the same liability at issue in this appeal.

1 pay, or cause to be paid, Y&R's tax liabilities because Y&R had funds available at the time the taxes
2 became due and chose to pay other creditors.

3 Petitioner contends that he was not aware whether Y&R charged sales tax reimbursement on its
4 retail sales and the Department has not provided sufficient evidence that Y&R did so. Petitioner
5 claims that the evidence relied upon by the Department was seven months after the liability period and
6 does not prove that Y&R charged sales tax reimbursement during the periods in issue. Petitioner also
7 contends that the questionnaire submitted by Mr. Alvarez should not be considered because
8 Mr. Alvarez cannot be trusted.

9 Petitioner also contends that, although he was Y&R's president, he and Mr. Alvarez agreed that
10 Mr. Alvarez, who previously operated a retail clothing business, would run Y&R's day-to-day business
11 operations. Petitioner indicates that he and Mr. Alvarez each owned 50 percent of the shares of stock
12 in Y&R. He alleges that, until approximately June 2006, he lived in Oregon, and other than receiving
13 financial reports from Mr. Alvarez, he was merely an investor in Y&R and had no other involvement
14 in its business operations, including the payment of taxes to the Board. He claims that the financial
15 reports show sufficient funds to cover all required payments. However, he indicated that he became
16 suspicious when he received calls from creditors and banks about delinquent and overdrawn accounts.
17 He went to California to investigate and found that Mr. Alvarez was maintaining two sets of books and
18 engaging in fraudulent activities regarding Y&R's business operations. Accordingly, petitioner claims
19 he ordered Mr. Alvarez to resign, and that when Mr. Alvarez departed, he took Y&R's books and
20 financial records, as well as the computer, which prevented petitioner from discovering Y&R's true
21 financial condition. Petitioner alleges that because of the fraudulent financial reports, he was not
22 aware that not all sales tax liabilities have been paid. Petitioner contends that he tried to run Y&R's
23 business operations from June 2006, but was unsuccessful, and thus, he shut it down in September
24 2006.

25 Personal liability can be imposed only to the extent Y&R included or added tax reimbursement
26 in its sales of tangible personal property in this state or consumed tangible personal property and did
27 not pay the tax. We conclude that Mr. Alvarez' statement is enough to establish a prima facie case on
28 this issue. Although the burden of proof is on the Department, all the evidence should have been in the

1 possession of Y&R, for whom petitioner was president, and thus, if Y&R did not collect sales tax
2 reimbursement, petitioner should have been able to show that sales tax reimbursement was not
3 included in taxable sales. Petitioner has not presented any such evidence. Therefore, we conclude that
4 Y&R included tax reimbursement in its sales of tangible personal property during the liability period.

5 Personal liability can be imposed only on a responsible person, which means any officer,
6 member, manager, employee, director, shareholder, or other person having control or supervision of, or
7 who is charged with the responsibility for, the filing of returns or the payment of tax or who has a duty
8 to act for the corporation in complying with any provision of the Sales and Use Tax Law when taxes
9 became due. We find petitioner had the actual authority to do all customary acts connected with the
10 operation of a business, including responsibility for Y&R's compliance with the Sales and Use Tax
11 Law. Petitioner was the president of Y&R, and as president, he signed the application for a seller's
12 permit, and was identified as CEO in California SOS data base. He was aware of the overall operation
13 and management of Y&R's finances since he periodically received financial statements during the
14 liability period. Additionally, he showed considerable actual authority over Y&R's business
15 operations when he ordered Mr. Alvarez to resign. Accordingly, we find he had a responsibility to act
16 for Y&R in complying with any requirement of the Sales and Use Tax Law.

17 Willfulness for these purposes means that the failure was the result of an intentional, conscious,
18 and voluntary course of action. This failure may be willful even if it was not done with a bad purpose
19 or evil motive. A person is regarded as having willfully failed to pay taxes, or cause them to be paid,
20 where he or she had knowledge that the taxes were not being paid (or lacked knowledge in reckless
21 disregard of his or her duty to know) and had the authority to pay taxes or cause them to be paid, but
22 failed to do so. The Department has the burden of proof on this element (as with any other element of
23 section 6829 liability). However, in cases such as this, where all the evidence is (or should be) in the
24 possession of the taxpayer, that burden is satisfied, at least initially, by the Department establishing a
25 prima facie case.

26 Petitioner contends that he did not know that Y&R had failed to pay its taxes until June 2006.
27 However, he signed Y&R's application for seller's permit as its president on April 11, 2006, and he
28 must have been aware that, since Y&R had been operating since January 1, 2004, and making taxable

1 sales since that time, Y&R was not paying taxes when due. Y&R subsequently filed all its non-
2 remittance and partial remittance SUTR's for the liability period within eight to sixteen days after the
3 application was filed, and thus, petitioner was aware, in April 2006, that Y&R had failed to remit any
4 taxes to the Board for the 1Q05 through 4Q05.

5 Even if the financial statements provided to petitioner did not specifically indicate that Y&R
6 owed sales tax to the Board, petitioner had a duty to know and should have known, as Y&R's
7 president, 50-percent owner, and a person responsible for Y&R's sales and use tax compliance, that
8 since Y&R did not have a seller's permit, it could not have timely filed its SUTR's or paid its taxes to
9 the Board. Based on the foregoing, we find that petitioner either knew that Y&R's did not file its
10 SUTR's or pay its taxes, when due, for 1Q05 through 1Q06, and, if he did not know, lacked such
11 knowledge in reckless disregard of his duty to know.

12 Willfulness also requires that the responsible person must have been able to pay, or cause to be
13 paid, the taxes when due. We find that petitioner was an authorized signer on Y&R's business
14 accounts and that petitioner had the authority to manage these accounts. Although petitioner may not
15 have signed any checks on these accounts, it does not diminish his ability to have done so. In addition,
16 petitioner has not presented any evidence that his authority to do all customary acts connected with the
17 business was limited in any way. The fact that petitioner had the authority to order Mr. Alvarez, a co-
18 owner, to resign indicates that he had considerable actual authority over all aspects of Y&R's affairs,
19 which must have included the payment of obligations. Thus, even if petitioner did not personally sign
20 checks, we find that he had the authority to direct others to do so. Accordingly, we conclude that
21 petitioner had the authority to pay the taxes or cause them to be paid, but failed to do so.

22 Regarding whether Y&R had sufficient funds to pay the taxes due, we note that Y&R paid one
23 supplier over \$49,000 between June 13, 2005, and April 17, 2006. In addition, Y&R's bank statements
24 reflect payments totaling over \$30,000 from January 1, 2006, through May 31, 2006. Since Y&R was
25 paying a supplier and other creditors, and remained in business until September 30, 2006, it is
26 reasonable to conclude that Y&R was also paying the other necessary operating expenses of the
27 business during the entire liability period. Also, Y&R was making substantial sales, as evidenced by
28 its reported gross receipts. Accordingly, we find that Y&R had the funds available to pay its tax

1 liabilities, but chose to pay other creditors instead. Thus, we find that petitioner's failure to pay
2 Y&R's taxes, or cause them to be paid, was willful. In summary, we conclude that all conditions have
3 been satisfied for imposing personal liability on petitioner under section 6829 for the outstanding tax
4 liabilities of Y&R.

5 **Issue 2:** Whether petitioner has established reasonable cause sufficient for relieving the
6 penalties for late payment of returns originally assessed against Y&R. We conclude that he has not.

7 There is no statutory or regulatory authority for relieving these penalties in section 6829
8 determinations, but if petitioner could show that the penalty should be relieved as to the corporation
9 under Revenue and Taxation Code section 6592, the relief would also inure to petitioner's benefit.

10 Petitioner submitted the required declaration signed under penalty of perjury in which he requests
11 relief from the penalties for the same reasons addressed under Issue 1. Petitioner's request for relief
12 does not address why Y&R failed to timely pay the taxes and determination at issue but instead
13 reiterates petitioner's contention that he should not be held personally liable. Accordingly, petitioner
14 has not established reasonable cause for Y&R's late payments of amounts due, as reported on SUTR's,
15 and we find no basis for relief from the penalties at issue.

16 **OTHER DEVELOPMENTS**

17 None.

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19 Summary prepared by Rey Obligacion, Retired Annuitant
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