

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 JILL JAN) Account Number: SR FH 53-003093
 6 Petitioner) Case ID 406775
)
) El Cajon, San Diego County

7 Type of Liability Responsible person liability

8 Liability Period: 1/1/00 - 12/31/00

9 Item Disputed Amount

10 Responsible person liability \$23,496

	<u>Tax</u>	<u>Penalties</u>
11 As determined	\$21,213.00	\$6,664.37
12 Adjustment: Appeals Division		<u>-4,381.40</u>
13 Proposed redetermination, protested	<u>\$21,213.00</u>	<u>\$2,282.97</u>
14 Proposed tax redetermination	\$21,213.00	
15 Interest to 3/31/11	20,160.61	
15 Penalty for late payment of returns	2,231.30	
15 Penalty for failure to file prepayment forms	<u>51.67</u>	
16 Total tax, interest, and penalties	<u>\$43,656.58</u>	

17 Monthly interest beginning 4/1/11 \$123.74

18 UNRESOLVED ISSUES

19 **Issue 1:** Whether petitioner is personally liable as a responsible person for the unpaid
 20 liabilities of NCompass Systems, Inc. (NCompass) (SR FH 97-223375) for the period January 1, 2000,
 21 through December 31, 2000. We find that petitioner is personally liable.

22 NCompass was a corporation which developed and licensed computer software and also sold
 23 computer hardware from April 15, 1998, through March 31, 2001, when its seller's permit was closed
 24 out based on a May 23, 2001, notification from NCompass' counsel, Kendrick Jan, that NCompass
 25 closed its business on March 31, 2001. At close out, NCompass had unpaid liabilities based on: (1) tax
 26 of \$21,213.00 self assessed in sales and use tax returns (SUTR's) filed without payment of the tax for
 27 the first quarter of 2000 (1Q00), 3Q00, and 4Q00; and (2) penalties totaling \$2,282.97 for failure to
 28 file prepayment forms for April 1, 2000 through April 30, 2000, and May 1, 2000, through June 15,

1 2000, and late payment of returns for 1Q00, 3Q00, and 4Q00. The Sales and Use Tax Department
2 (Department) determined that petitioner is personally liable for NCompass' unpaid liabilities for the
3 liability period pursuant to Revenue and Taxation Code section 6829 based on the following facts: (1)
4 petitioner signed, as vice president, NCompass' quarterly SUTR's for 4Q98, 3Q99, 4Q00, and 1Q01,
5 and signed, as president, NCompass' 1999 federal income tax return; (2) on several occasions,
6 petitioner communicated with the Board via telephone regarding NCompass' sales and use tax matters;
7 3) several documents identified petitioner as president, chief executive officer (CEO), secretary, and
8 chief financial officer of NCompass; and (4) petitioner was identified as the person operating
9 NCompass' business by its employee. The Department also found that NCompass collected sales tax
10 reimbursement on its taxable sales based on Ms. Deborah Weber's and NCompass' representative's
11 statements that NCompass added sales tax reimbursement to taxable sales. Finally, the Department
12 concluded that petitioner had been willful in her failure to pay the outstanding liabilities of NCompass
13 because, although NCompass had funds available, they were used instead to pay wages, rent, and
14 creditors.

15 On appeal, petitioner conceded that she was a responsible person, but contends she did not
16 willfully fail to pay sales tax during any portion of the assessment period because NCompass had no
17 funds available in that all sale proceeds had to be paid to creditors to reduce NCompass' credit
18 obligations, and other funds available to NCompass during the liability period were from loans made
19 under the condition that they be used for the payment of payroll, rent, and other overhead expenses.
20 Petitioner also claims that NCompass lacked the ability to continue operations after a creditor seized its
21 tangible assets and a capital fund withdrew its promised investment in NCompass in January 2001.

22 Three of the four conditions for imposing liability against petitioner pursuant to section 6829
23 are clearly satisfied: NCompass' business operations were terminated March 31, 2001; evidence
24 establishes that sales tax reimbursement was collected on taxable sales during the liability period; and
25 petitioner concedes that she was a responsible person for purposes of section 6829. The fourth
26 condition, which petitioner disputes, is that petitioner must have willfully failed to pay or to cause to
27 be paid the taxes due from NCompass during the liability period.

1 Personal liability can be imposed on a responsible person under section 6829 only if that person
2 willfully failed to pay or to cause to be paid taxes due from the corporation, which means that the
3 failure was the result of an intentional, conscious, and voluntary course of action (even if without a bad
4 purpose or evil motive). A person is regarded as having willfully failed to pay taxes, or to cause them
5 to be paid, where he or she had knowledge that the taxes were not being paid (or lacked knowledge in
6 reckless disregard of his or her duty to know) and had the authority to pay taxes or cause them to be
7 paid, but failed to do so.

8 Petitioner signed the SUTR for 4Q00 as president and Deborah Weber, vice president, signed
9 the SUTR's for 1Q00, 2Q00, and 3Q00. According to petitioner's declaration under penalty of perjury
10 dated October 30, 2009 (exhibit 3 to the D&R), petitioner approved all documents signed by
11 Ms. Weber. This declaration indicates that petitioner approved, and was thus aware of, the SUTR's
12 signed by Ms. Weber for 1Q00 through 3Q00, which in turn we take to mean that petitioner had actual
13 knowledge of NCompass' sales and use tax liability reflected in those SUTR's. We find that petitioner
14 was also aware of the liability reflected in the SUTR for 4Q00 which petitioner signed herself.

15 Petitioner has not submitted evidence such as loan agreements or documents related to the asset
16 seizure to support her contention with respect to restrictions placed on borrowed funds by creditors of
17 NCompass, providing only declarations from herself and NCompass' former general counsel (her
18 representative in this appeal). Nor has petitioner explained how any of the alleged restrictions on
19 NCompass' credit or the alleged transfer of all gross receipts to NCompass' creditors allowed for the
20 selective payment of certain expenses, such as rent and utilities, but not the sales tax liabilities. Based
21 on the available evidence, we find that NCompass had funds available and elected to pay other
22 creditors, rather than the Board, despite actual knowledge of its tax liability.

23 Based on the foregoing, we conclude that all conditions for imposing liability on petitioner
24 pursuant to section 6829 for the liability period have been satisfied.

25 **Issue 2:** Whether petitioner's liability as a responsible person has been discharged as a result
26 of her personal bankruptcy. We conclude that the liability has not been discharged.

27 Petitioner filed for Chapter 7 bankruptcy on August 24, 2001, which was discharged on
28 November 27, 2001. On appeal, petitioner contends that the Board failed to file a determination or

1 priority claim in the bankruptcy action and that the tax debt which the Board seeks to impose on her
2 has been discharged. Taxes are generally not dischargeable in bankruptcy. A bankruptcy court
3 discharge does not discharge taxes measured by gross receipts, such as the sales tax at issue here, that
4 are not assessed before the bankruptcy petition is filed but remain assessable thereafter. Since the
5 Notice of Determination (NOD) was issued to petitioner on June 13, 2007, after the date of discharge,
6 the liability was not discharged.

7 **Issue 3:** Whether the NOD issued to petitioner was timely. We find that the NOD was timely.

8 The Board closed out NCompass' seller's permit effective March 31, 2001. Petitioner did not
9 file a return in her own name for any of the periods at issue. The Department issued the determination
10 to petitioner on June 13, 2007, more than three years after the due date of a return for the period in
11 which NCompass terminated. Petitioner contends that a three-year statute of limitations is applicable,
12 and thus the NOD barred, because NCompass timely filed its SUTR's. Petitioner argues that the eight-
13 year statute of limitations does not apply and that the Board's Memorandum Opinion in *Hosmer*
14 *Chandler McKoon* is flawed because it requires petitioner to file a return in her own name even though
15 the Board does not have a form of return for this situation and has made no other provision for the
16 filing of an individual return on a corporate sales tax obligation. Petitioner maintains that without such
17 a return form, the requirement that one be filed in order to trigger the three-year limitations period,
18 rather than the eight-year year limitations period, is meaningless.

19 Petitioner argues that the Board should be estopped from pursuing her as a responsible person,
20 or should be barred by the doctrine of laches, because of its conduct regarding the application of the
21 statute of limitations to petitioner's case. Petitioner also argues that she relied upon the Department's
22 nonresponse to Mr. Kendrick Jan's letter of October 29, 2004, to the Department requesting
23 confirmation that a three-year statute of limitations applied to any determination issued pursuant to
24 section 6829 imposing personal liability for NCompass' unpaid liabilities and that this statute of
25 limitations had expired. Petitioner asserts that because the Department's did not respond to Mr. Jan's
26 letter, she reasonably assumed that the Department had concluded that her stated position regarding the
27 three-year limitations period was accurate. Petitioner also contends that her assumption regarding the
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1 statute of limitations was confirmed when the Board removed annotation 170.1850¹ from the Business
2 Taxes Law Guide in 2006. Petitioner further maintains that in a telephone conversation with
3 Steve Morgan of the Department's Corporate Group, Mr. Morgan confirmed that annotation 170.1850
4 had been deleted and was not to be prospectively used by the Department and that Dave Rosenthal,
5 Annotations Coordinator of the Business Taxes Committee and Training Section informed Mr. Jan in
6 an email dated June 28, 2007, that this annotation had been deleted because the application of the
7 statute of limitations as it was applied to corporate officers was incorrect. Petitioner asserts that prior
8 to the issuance of the Board's memorandum opinion in *McKoon* on May 31, 2007, Mr. Jan spoke with
9 the Board's Taxpayers' Rights Advocate's office and was told that there had been much confusion
10 over the years regarding the interpretation of section 6487, but that due to the deletion of annotation
11 170.1850, petitioner's position as set forth in Mr. Jan's October 29, 2004 letter was well founded.
12 Petitioner alleges that because of her belief that a three-year statute of limitations applies, she
13 destroyed the documents relating to the transactions upon which the subject tax liability is based. Thus
14 she claims she is unable to reconstruct NCompass' SUTR's to determine the proper tax liability, if any.

15 As a responsible person, petitioner had an independent (albeit derivative) liability as a
16 responsible person, and she should have filed a tax return to report that liability by April 30, 2001.
17 However, petitioner did not file a return in her own name for the liability period, so the eight-year
18 statute of limitations applies, as opposed to the three-year statute. The NOD was issued on June 13,
19 2007, which is within the eight-year limitations period that began to run on April 30, 2001, and
20 therefore timely. We reject petitioner's contention that *McKoon* is flawed. No special form is required
21 and petitioner could have filed a standard SUTR in her own name for the second quarter of 2001,
22 thereby triggering the three-year limitations period.

23 With respect to estoppel and laches, estoppel is an equitable doctrine which may be applied
24 against a government agency under appropriate facts, and laches is an equitable principle that provides
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26 ¹ BTLG annotation 170.1850 stated that a corporate officer who is liable for corporate taxes under the section 6829 is
27 subject to the three-year limitation period specified in section 6487 if he held a seller's permit in his name and filed returns
28 in question under a seller's permit in his name, a determination may be issued for the corporate officer's liability within the
eight-year limitation period specified in section 6487.

1 a defense or bar to those who have neglected to assert their rights in a timely manner, and the delay has
2 caused prejudice to the other party. Estoppel and laches are equitable defenses and can only be
3 asserted in a suit in equity, and this Board lacks equity powers and instead is bound by statute.
4 Therefore, the Board is not empowered to grant such relief in this case.

5 With respect to petitioner's argument that deletion of annotation 170.1850 was a change in the
6 Board's position regarding the application of an eight-year limitations period against petitioner,
7 annotations do not have the force of law, and thus the deletion or a creation of an annotation does not
8 change the governing statutes.

9 We also find unpersuasive petitioner's argument that Board employees informed her that the
10 eight-year statute of limitations no longer applied to determinations issued against responsible persons
11 such as petitioner. We have reviewed the documents and information upon which petitioner relied,
12 and we find that they do not provide any misinformation that would relieve petitioner of the tax
13 liability imposed upon her as a responsible person.

14 Finally, we find unpersuasive petitioner's argument that she could not reconstruct the SUTR's
15 for the liability period because she destroyed the records in reliance on her belief that the three-year
16 statute of limitations applied. We note that NCompass self assessed its liabilities for the liability
17 period and failed to remit any payments. Since NCompass prepared the SUTR's itself, it must have
18 relied upon the best information available to it regarding its sales for those four quarters. Thus, it is
19 unclear what documentation petitioner destroyed between October 29, 2004, and June 13, 2007, that
20 NCompass did not utilize in preparing its SUTR's or how this documentation would now result in a
21 reduction in NCompass' self-reported tax liability. Under these facts, we conclude it is unlikely that
22 petitioner suffered any prejudice due to any destruction of the documents.

23 Based on the foregoing, we conclude that the NOD was properly and timely issued to petitioner
24 and that the Board should not be estopped or barred by laches from issuing the NOD against petitioner.

25 **Issue 4:** Whether petitioner has established reasonable cause to relieve the penalties imposed
26 on NCompass. We conclude that petitioner has not done so.

27 There is no statutory or regulatory authority for relieving penalties in section 6829
28 determinations, but if NCompass were relieved of the penalties under section 6592, that relief would

1 also inure to the benefit of petitioner. Petitioner submitted a declaration signed under penalty of
2 perjury in which she requests relief from the penalties for the same reasons addressed under Issues 1,
3 2, and 3. The request does not bear on the failures of NCompass that resulted in the penalties, and we
4 therefore conclude that petitioner has not established reasonable cause for relieving the penalties.

5 **Amnesty**

6 An amnesty interest penalty of \$4,381.40 was applied to NCompass' liability because
7 NCompass did not participate in the amnesty program. NCompass ceased business operations on or
8 before March 31, 2001, and thus could not have participated in the amnesty program, which took place
9 four years later in 2005. Therefore, we find that NCompass' failure to participate in the amnesty
10 program occurred notwithstanding the exercise of ordinary care and in the absence of willful neglect.
11 We recommend that relief of the amnesty interest penalty be granted provided petitioner either pays in
12 full the tax and interest due within 30 days from the notice of determination, or, within the same 30-
13 day period, enters into a qualifying installment-payment agreement to pay the tax and interest due
14 within 13 months, and successfully completes the payment agreement.

15 **OTHER DEVELOPMENTS**

16 None.

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18 Summary prepared by Rey Obligacion, Retired Annuitant
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