

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION SUMMARY FOR BOARD HEARING

3 In the Matter of the Claim for Refund)
 4 Under the Sales and Use Tax Law of:)
 5 DAVID HAROLD JOHNSON) Account Number: SR KHO 53-002192
 6 Claimant) Case ID 451147
)
) Alamo, Contra Costa County

7 Type of Liability Responsible person liability

8 Liability Period: 01/01/01 – 06/30/01

9 Item Amount

10 Claim for refund \$9,911.45¹

11 This matter was previously scheduled for Board hearing on August 25, 2010, but was
 12 postponed because petitioner had a scheduling conflict. This matter was rescheduled for Board
 13 hearing on November 17, 2010, but was again postponed because petitioner had a family emergency.

14 UNRESOLVED ISSUES

15 **Issue 1:** Whether claimant is personally liable as a responsible person for the unpaid liabilities
 16 of Chemtron International, Inc. (Chemtron) for the period January 1, 2001, to June 30, 2001. We find
 17 claimant is personally liable, and the claim for refund should be denied.

18 Chemtron, which was engaged in selling chemical resin and epoxy products, obtained seller's
 19 permit SY CH 97-193196 with a start date of November 1, 1997, and the permit was closed out
 20 effective December 31, 2001. At the close out of its seller's permit, Chemtron had unpaid liabilities
 21 which it incurred when it filed sales and use tax returns with no remittance for the first and second
 22 quarters of 2001 (1Q01 and 2Q01).

23 The Sales and Use Tax Department (Department) concluded that claimant was a person
 24 responsible for managing Chemtron's financial affairs, including the filing of returns. The Department

25 _____
 26 ¹ Claimant was issued a Notice of Determination for \$17,461.45 in tax, \$2,204.90 in late payment penalties, and \$2,929.93
 27 amnesty interest penalty which is now final because claimant did not timely file a petition for redetermination. Claimant
 28 paid the tax in full and filed a claim for refund for an unspecified amount, which was received by the Board on July 14,
 2008. The claim for refund was timely only for payments totaling \$9,911.45, consisting of \$7,431.45 of voluntary
 payments made from January 14, 2008, through July 14, 2008, and \$2,480.00 of Franchise Tax Board offsets applied on
 June 12, 2007, and July 8, 2008. (Rev. & Tax. Code, §§ 6902 and 6902.3.)

1 also found that claimant had been willful in his failure to pay the outstanding liabilities because
2 Chemtron had funds available at the time the taxes became due but chose to pay other creditors rather
3 than paying its tax liabilities to the Board. Accordingly, the Department issued a Notice of
4 Determination to claimant pursuant to Revenue and Taxation Code section 6829 for the unpaid
5 liabilities of Chemtron.

6 There is no dispute that two of the four requirements for imposing liability under section 6829
7 have been met. Chemtron's business has been terminated and, based on information provided by
8 claimant and by Chemtron's former controller, Cindy Saito, Chemtron added sales tax reimbursement
9 to, or included tax reimbursement in, the selling price of tangible personal property.² The two disputed
10 requirements for imposing section 6829 liability are whether claimant was a responsible person and
11 whether claimant willfully failed to pay taxes due from Chemtron or cause them to be paid.

12 A responsible person for these purposes is a person who had control or supervision of, or who
13 was charged with the responsibility for, the filing of returns or the payment of tax or who had a duty to
14 act for the corporation in complying with any provision of the Sales and Use Tax Law when the taxes
15 became due. Claimant is listed as Chemtron's CEO and president in several documents, and he was
16 Chemtron's incorporator and initial agent for service of process. As Chemtron's CEO, claimant had
17 broad implied and actual authority to do all acts customarily connected with the corporation's business,
18 including ensuring its sales and use tax compliance. Claimant concedes that he was charged with the
19 responsibility for handling Chemtron's tax matters, but argues that he delegated all of his responsibility
20 and authority regarding those matters to Ms. Saito. However, even if that were true, as claimant
21 concedes he was charged with responsibility for Chemtron's sales and use tax matters, and we thus
22 find that he was a responsible person within the meaning of section 6829 with respect to the liabilities
23 in dispute.

24 The final requirement, willfulness, means that the failure was the result of an intentional,
25 conscious, and voluntary course of action, even if without bad purpose or evil motive. A person is

27 ² A Notice of Determination was also issued to Ms. Saito. On January 30, 2009, the Board concluded that Ms. Saito was a
28 responsible person and denied her petition.

1 regarded as having willfully failed to pay taxes or to cause them to be paid where he or she had
2 knowledge that the taxes were not being paid (or lacked knowledge in reckless disregard of his or her
3 duty to know) and had the authority to pay taxes or cause them to be paid, but failed to do so.

4 Claimant acknowledged that he was informed by Ms. Saito that, at the time of filing the sales
5 and use tax returns, Chemtron did not have the money to pay its taxes. He stated there was nothing he
6 could do at that point to remedy the situation other than try to earn more money to pay those taxes.
7 Thus, claimant knew that Chemtron filed its 1Q01 and 2Q01 returns without remitting the taxes
8 reported on them. Thus, we find that claimant had *actual knowledge* that Chemtron had tax liabilities
9 for both quarters at issue, yet failed to pay the tax due with those returns.

10 At the appeals conference, claimant acknowledged that Chemtron paid its suppliers, paid rent
11 to its landlord, and paid wages to its employees. We understand Ms. Saito's statement that Chemtron
12 stopped paying her salary in August 2001 to mean that she did receive wages from Chemtron until that
13 time, including at the time Chemtron's 1Q01 and 2Q01 taxes were due. Further, the fact that other
14 creditors were paid establishes that funds were available to pay the Board, but the company elected not
15 to do so. In light of the above, we find that claimant's failure to pay the liabilities at issue was willful.

16 Based on the foregoing, we conclude that claimant is personally liable as a responsible person
17 pursuant to section 6829 for Chemtron's unpaid tax, interest, and penalties arising out of the
18 nonremittance returns filed for 1Q01 and 2Q01, and that the claim for refund should be denied.

19 **Issue 2:** Whether Chemtron should be granted relief from the late payment penalties that have
20 been passed through to claimant as a responsible person. We recommend no relief.

21 Although none of the penalty has been paid and the penalty is therefore not formally before the
22 Board in this appeal, for efficient use of resources, we believe it is appropriate to address this issue as
23 part of the current appeal.

24 There is no statutory or regulatory authority for relieving late-payment penalties in section
25 6829 determinations, but if the penalties were relieved as to Chemtron, that relief would also inure to
26 the benefit of claimant. Claimant has submitted a declaration signed under penalty of perjury
27 requesting relief of the foregoing penalties on Chemtron's behalf. In his request, claimant stated that
28 (1) the original tax amount has been paid in full; (2) the interest and penalties were assessed on the

1 corporation after it was defunct; and (3) claimant does not recall receiving bills at his residence until he
2 began negotiating with the Department regarding a payment plan. Claimant further declared that he
3 was granted a no-asset personal bankruptcy and continues to experience significant financial hardship.

4 Claimant's arguments do not provide any reasonable cause regarding why *Chemtron* failed to
5 timely pay the taxes reported on its 1Q01 and 2Q01 returns. Claimant knew at the time that Chemtron
6 was filing its 1Q01 and 2Q01 returns without remitting the taxes reported on them, even though
7 Chemtron had funds available with which to pay the tax liability. We find that relief of the late
8 payment penalties is not warranted.

9 AMNESTY

10 A 50-percent amnesty interest penalty of \$2,929.93 was imposed against Chemtron because the
11 tax liability was incurred during amnesty-eligible periods, and Chemtron failed to apply for amnesty,
12 or pay the tax and interest due, by March 31, 2005. The amnesty interest penalty was included in the
13 determination issued to claimant as part of the unpaid liabilities of Chemtron. As with the late
14 payment penalties, although none of the amnesty-interest penalty has been paid and the penalty is thus
15 not formally before the Board in this appeal, for efficient use of resources, we believe it is appropriate
16 to address this issue as part of current appeal.

17 Claimant has submitted a declaration, signed under penalty of perjury, requesting relief of the
18 amnesty interest penalty. In his request, claimant states, in pertinent part, that the interest and penalties
19 were assessed on the corporation after it was defunct. There is no dispute that Chemtron ceased
20 business operations as of December 31, 2001. The amnesty program existed from February 1, 2005,
21 through March 31, 2005. By the time of the amnesty program, Chemtron was no longer operating and
22 likely had no assets. Thus, we conclude Chemtron's failure to participate in the amnesty program was
23 due to reasonable cause and circumstances beyond its control. Accordingly, we recommend relief
24 from the amnesty interest penalty, provided that, within 30 days from the notice of the Board's final
25 decision in this matter, claimant either pays in full the interest due or enters into a qualifying
26 installment payment agreement to pay the full interest due within 13 months, and successfully
27 completes that agreement.

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OTHER DEVELOPMENTS

None.

Summary prepared by Rey Obligacion, Retired Annuitant