

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION BOARD HEARING SUMMARY

3 In the Matters of the Administrative Protest)
 4 And Claim for Refund)
 4 Under the Sales and Use Tax Law of:) Account Number SR AC 53-004070
 5) Case ID's 475764, 515722¹
 5 GORDON W. KELLEY)
 6)
 6 Taxpayer)
 7) Stuart, Florida

8 Type of Liability: Responsible person liability

9 Liability period: 07/01/00 – 06/30/03²

10 Item Disputed Amount

10 Responsible person liability \$332,439

11 Tax

Penalty

12 As determined \$354,192.86 \$85,988.60

12 Post-D&R adjustment - 24,209.59 - 37,840.27

13 Adjusted liability \$329,983.27 \$48,148.33

14 Less payments by others - 45,693.00

14 Balance, protested \$284,290.27 \$48,148.33

15 Tax, as adjusted \$329,983.27

16 Interest through 10/31/13 346,398.32

16 Negligence penalty 48,148.33

17 Total tax, interest, and penalty \$724,529.92

18 Payments - 55,942.01

18 Balance Due \$668,587.91

19 Monthly interest beginning 11/01/13 \$ 1,370.21

20 This matter was scheduled for Board hearing in October 2012, but was deferred at the request
 21 of the Sales and Use Tax Department (Department) for further review. As a result of that review, the
 22 Department recommended a reduction, as explained under "Other Matters."
 23
 24
 25

26 ¹ The D&R does not refer to the claim for refund because, at the time the D&R was issued, the claim was not ripe for
 27 consideration. However, the claim is now ripe for consideration because the tax due for the third quarter 2000 has been
 27 fully paid.

28 ² Although a portion of this period was covered by the Board's Tax Amnesty Program, no amnesty interest penalty was
 imposed against Southland Fireplaces, Inc. because it filed a timely amnesty application and entered into a qualifying
 installment payment agreement.

UNRESOLVED ISSUES

1
2 **Issue 1:** Whether taxpayer is personally liable as a responsible person for the unpaid liabilities
3 of Southland Fireplaces, Inc. pursuant to Revenue and Taxation Code section 6829. With the
4 exception of sales tax liability incurred by Southland Fireplaces, Inc., for which it did not collect tax
5 reimbursement (as explained under “Other Matters”), we conclude taxpayer is personally liable.

6 Southland Fireplaces, Inc. (Southland) (SR AC 97-525550) operated as a construction
7 contractor furnishing and installing garage doors and fireplace units from July 1999 through September
8 2005. At the time its business terminated, Southland had unpaid liabilities related to an audit. During
9 the audit period, Southland billed its contracts on a lump sum basis, purchased materials and fixtures
10 without payment of tax by providing resale certificates to vendors, and reported no tax liability. The
11 Department concluded that taxpayer was personally liable for Southland’s sales and use tax debts
12 pursuant to section 6829.³

13 Taxpayer concedes that Southland ceased business operations on September 30, 2005, and that
14 he was a person responsible for Southland’s sales and use tax compliance. Taxpayer asserts, however,
15 that the two remaining conditions for imposing personal liability on him have not been satisfied, that
16 Southland collected sales tax reimbursement with respect to retail sales and that the failure to pay the
17 taxes was willful. As explained under “Other Matters,” an adjustment has been recommended for sales
18 tax liabilities incurred by Southland for which it did not collect tax reimbursement from its customers.
19 However, the majority of Southland’s liability represents use tax due on the consumption of materials
20 in construction contracts. Southland was the consumer of materials it used in the completion of lump
21 sum construction contracts, but failed to report and pay that use tax. Since that use tax is the tax
22 remaining at issue, and this element of section 6829 is satisfied where the applicable tax is use tax
23 owed on the primary taxpayer’s consumption of tangible personal property, we conclude that the first
24 disputed element of section 6829 liability has been satisfied with respect to the amounts of tax
25 remaining in the determination after the adjustment recommended herein.

26
27
28 ³ The Department also found that Terry Eaves and Greg Keeton were personally liable as responsible persons pursuant to section 6829. Terry Eaves has filed an administrative protest (case ID 475767), which is scheduled for Board hearing on the same calendar as this matter. Mr. Keeton has not protested the determination issued to him.

1 With respect to willfulness, taxpayer contends that his failure to pay Southland's tax was not
2 willful because he relied on the advice of Norman Keef, whom taxpayer believed to be a Certified
3 Public Accountant (CPA) and who stated that no sales or use taxes were required to be paid in light of
4 the nature of Southland's business. In support, taxpayer has provided a declaration describing such
5 reliance, as well as a business card and other evidence that indicate Mr. Keef led taxpayer to believe he
6 was a CPA. Also, taxpayer cites various court cases which hold that reliance on the advice of tax
7 professionals negates the willfulness element under Internal Revenue Code section 6672.

8 The willfulness requirement for imposing liability under section 6829 is satisfied where the
9 failure to pay or to cause to be paid the taxes due was the result of an intentional, conscious, and
10 voluntary course of action (even if without a bad purpose or evil motive). A person is regarded as
11 having willfully failed to pay taxes or to cause them to be paid where he or she had knowledge that the
12 taxes were not being paid and had the authority and ability to pay the taxes or to cause them to be paid,
13 but failed to do so.

14 When Southland applied for its seller's permit signed by taxpayer as manager, the Department
15 provided Southland copies of several regulations and Board publications, including California Code of
16 Regulations, title 18, section 1521 and Board Publication 9, "Tax Tips for Construction and Building
17 Contractors." These publications clearly explain that construction contractors billing on a lump sum
18 basis, such as Southland, are consumers of materials and owe use tax on cost if not paying tax or tax
19 reimbursement to their vendors, as here. Taxpayer signed the seller's permit application, and we
20 assume that taxpayer read the publications provided. We note in this regard that taxpayer did not
21 attend the appeals conference, so we were unable to judge his credibility. We note also that taxpayer
22 had been vice-president of Advanced Fireplaces, a construction contractor furnishing and installing
23 prefabricated fireplaces from August 1983 through March 1992 (during an audit, the Department found
24 that Advanced Fireplaces included the cost of materials in its reported taxable measure). We find that,
25 based on the evidence presented, taxpayer was aware that Southland incurred use tax liability when it
26 consumed materials it purchased for resale to perform construction contracts. Taxpayer's citations to
27 cases interpreting federal law are not relevant here.

28

1 assets, and thus lacked the ability to pay the liability. Accordingly, we recommend relief of the finality
2 penalty if the remaining tax liability is paid in full within 30 days of the mailing of the notice of final
3 decision in this appeal.

4 **OTHER MATTERS**

5 When this matter was scheduled for hearing in October 2012, the Department requested that it
6 be deferred for further review. Specifically, the Department was concerned that the amounts of tax
7 included in the determination against taxpayer might include sales tax for which Southland had not
8 collected tax reimbursement from its customers.

9 The Department found that Southland had billed general contractors on a lump-sum basis. The
10 Department determined that Southland was a consumer of materials used in construction contracts and
11 assessed use tax based on the purchase price of those materials. However, the lump sum contracts also
12 included sales of garage door opener and transmitter units (fixtures), for which Southland was liable
13 for sales tax. Since Southland did not collect tax reimbursement from the general contractors on its
14 sales of garage door opener and transmitter units, the Department concluded that the related sales tax
15 liability incurred by Southland should not be included in the determination against taxpayer, since, for
16 those transactions, all four requisite elements for holding taxpayer personally liable have not been met.
17 Accordingly, the Department established an audited amount of sales of fixtures of \$294,340 included
18 in the measure of tax in the audit of Southland, and recommended a reduction of \$24,209.59 in the
19 amount of tax determined against taxpayer.

20
21 Summary prepared by Deborah A. Cumins, Business Taxes Specialist III
22
23
24
25
26
27
28