

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 KERRY MICHAEL LAWRENCE) Account Number: SR KH 53-003601
 6) Case ID 439774
 7 Petitioner) Rancho Cordova, Sacramento County

8 Type of liability: Responsible person liability

9 Liability period: 10/1/01 – 10/31/02

10 Item Amount in Dispute

11 Responsible person liability \$24,156

	<u>Tax</u>	<u>Penalties</u>
12 As determined and protested:	\$21,853.82	\$4,903.44
13 Adjustment: Appeals Division		<u>-2,600.84</u>
14 Proposed redetermination	<u>\$21,853.82</u>	<u>\$2,302.60</u>

15 Proposed tax redetermination \$21,853.82

16 Interest through 7/31/10 15,876.62

17 Penalties for late payment of returns 2,210.30

Finality penalty 92.30

Total tax, interest, and penalties due \$40,033.04

18 Monthly interest beginning 8/1/10 \$127.48

19 This matter was scheduled for Board hearing on November 18, 2009, but was postponed so that
 20 the Sales and Use Tax Department (Department) could further investigate and review the case. This
 21 matter was then rescheduled for Board hearing on March 24, 2010, but the Department again requested
 22 postponement so that it could subpoena information from petitioner's bank and payroll preparation
 23 company.

24 **UNRESOLVED ISSUES**

25 **Issue 1:** Whether petitioner is personally liable as a responsible person for the unpaid
 26 liabilities of Electrical Specialty Parts Network, Inc. (ESPN), seller's permit number SR KH 97-
 27 492192, for the period October 1, 2001, through October 31, 2002, pursuant to Revenue and Taxation
 28 Code section 6829. We conclude that petitioner is personally liable.

1 ESPN, a California corporation, was a retailer of automobile parts and operated its business
2 from February 1, 1999, through October 31, 2002. ESPN's California seller's permit was closed,
3 effective that date, due to its discontinued business operations. There is no evidence of further sales
4 after this date. On October 1, 2003, the Franchise Tax Board suspended the corporation.

5 ESPN's unpaid liabilities at issue originate from non-remittance returns filed for the period
6 October 1, 2001, through September 30, 2002, and a Notice of Determination for the period of
7 October 1, 2002, to October 31, 2002,¹ which was issued on April 4, 2003, and became final on
8 May 3, 2003. Based on its investigation, the Department concluded that petitioner was a person
9 responsible for managing the financial affairs of ESPN, including the payment of tax to the Board.
10 The Department also found that petitioner had been willful in his failure to pay the outstanding
11 liabilities. Accordingly, the Department issued a Notice of Determination to petitioner pursuant to
12 Revenue and Taxation Code section 6829 for the tax liabilities of ESPN.

13 Petitioner acknowledges that the business was terminated on October 31, 2002, and that sales
14 tax reimbursement was collected, which are two of the four conditions for imposing liability pursuant
15 to section 6829. However, he disputes the findings that he was a person responsible for ESPN's sales
16 and use tax compliance and that he willfully failed to pay ESPN's tax liability, or to cause it to be paid.
17 Petitioner argues that the actual owners and corporate officers of ESPN were Gretchen Schaefer Ibarra,
18 Terry Lyon, and Daniel Vitt.² Petitioner states that he did not sign ESPN's application for seller's
19 permit (which was signed by Ms. Ibarra on January 28, 1999, as CFO and treasurer), and he asserts
20 that he was only an employee, with no authority to borrow for or obligate the company in any way.
21 Petitioner contends that he was hired around December 1999 to make sales and assist in marketing, but
22 that he and co-employee Mr. Robert Schimpf were left to run the company after Ms. Ibarra left ESPN
23 in December 1999 to take a job with another company, Mr. Lyon left ESPN in late 2000 or early 2001
24 due to his father's death, and Mr. Vitt left ESPN around April 2001. Petitioner states that at that time,
25 ESPN was in "massive debt" due to its owner's management. At the appeals conference, petitioner
26

27 ¹ ESPN operated through October 31, 2002, but did not file a return for the fourth quarter 2002.

28 ² At the appeals conference, petitioner indicated that ESPN was formed in 1999 as a result of a merger of Lyon Enterprises, a company owned and run by Terry Lyon, and Wright Wiring, a company owned and run by Ms. Ibarra.

1 stated that he and Mr. Schimpf ran the company, with input from Ms. Ibarra. However, petitioner
2 asserted all tax documents for the company were prepared by Ms. Nancy Houston, ESPN's office
3 manager and bookkeeper, and he was not involved.

4 The taxes at issue here became due starting on January 31, 2002 (for the period of October 1,
5 2001, through December 31, 2001), and on or before the last day of the month following each quarterly
6 period thereafter, with the last due date being January 31, 2003 (for the period of October 1, 2002,
7 through October 31, 2002). Thus, the question is whether petitioner had the control, supervision,
8 responsibility, or duty to act for ESPN in relation to the sales and use tax laws from January 31, 2002,
9 through January 31, 2003.

10 Petitioner signed corporate checks payable to the Board dated October 25, 2001,
11 November 20, 2001, and December 21, 2001, in the amounts of \$4,240.00, \$4,528.00 and \$3,628.00
12 for the third and fourth quarters of 2001. Petitioner admitted that he ran the day-to-day operations of
13 ESPN and was responsible for making decisions about the company's finances during the period of
14 October 1, 2001, through October 31, 2002, which included making decisions about which of ESPN's
15 creditors should be paid. Therefore, in addition to issuing corporate checks payable to the Board,
16 petitioner had the ability and authority to pay ESPN's remaining taxes due for the liability period. We
17 find that petitioner was a person responsible for sales and use taxes on the date the business closed, and
18 there is no evidence that petitioner was prevented from acting on behalf of ESPN to pay the sales and
19 use taxes due after the date of termination. We therefore conclude that petitioner was a responsible
20 person for purposes of section 6829 for all periods at issue.

21 With respect to willfulness, personal liability can be imposed on a responsible person only if
22 that person willfully failed to pay or to cause to be paid taxes due from the corporation. (Rev. & Tax.
23 Code, § 6829, subs. (a), (b).) For these purposes, "willfully fails to pay or to cause to be paid" means
24 that the failure was the result of an intentional, conscious, and voluntary course of action. (Rev. &
25 Tax. Code, § 6829, subd. (d).) This failure may be willful even if it was not done with a bad purpose
26 or evil motive. (Cal. Code Regs., tit. 18, § 1702.5, subd. (b)(2).) A person is regarded as having
27 willfully failed to pay taxes, or cause them to be paid, where he or she had knowledge that the taxes
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1 were not being paid (or lacked knowledge in reckless disregard of his or her duty to know) and had the
2 authority to pay taxes or cause them to be paid, but failed to do so.

3 Here, petitioner signed a corporate check payable to the Board dated December 21, 2001, in the
4 amount of \$3,628.00 for a prepayment, along with penalty, for the fourth quarter 2001, which indicates
5 that he had actual knowledge, at that time, of tax that was owed by ESPN for the fourth quarter 2001.
6 Although there is no specific evidence that petitioner knew that ESPN owed taxes to the Board during
7 the subsequent periods when ESPN's quarterly returns became due (i.e., on January 31, 2002, April 30,
8 2002, July 31, 2002, October 31, 2002, and January 31, 2003), petitioner admitted that he was involved
9 in running ESPN's day-to-day business operations, made decisions about which of ESPN's creditors
10 should be paid, and made payments to ESPN's landlord. In addition, petitioner was a person
11 responsible for ensuring that ESPN complied with the Sales and Use Tax Law during the liability
12 period. As a result, petitioner had a duty to know and should have known that ESPN owed the tax
13 liabilities at issue for these quarters when the sales and use tax returns became due, and, if he did not
14 know, only lacked knowledge in reckless disregard of his duty to know.

15 The evidence shows that other corporate liabilities were paid instead of ESPN's tax liabilities.
16 ESPN's checks show that ESPN paid rent and common area maintenance charges from November 20,
17 2001, through May 23, 2002, in the amount of \$21,520. Since ESPN was paying rent, we believe that
18 it was also making sales and paying vendors for inventory as well as utilities and other business
19 expenses, and petitioner admits responsibility for paying them. Despite the fact that petitioner knew or
20 should have known that ESPN's tax liabilities were not being paid, he paid those other creditors.
21 Therefore, we conclude that petitioner's failure to pay ESPN's taxes was conscious and voluntary.

22 Based on all of the foregoing, we conclude that petitioner willfully failed to pay ESPN's taxes
23 due, or failed to cause them to be paid for the period October 1, 2001, through October 31, 2002, and
24 that petitioner is liable for the unpaid liability of ESPN pursuant to section 6829.

25 **Issue 2:** Whether petitioner has established reasonable cause sufficient to relieve the late
26 payment penalties and finality penalty originally assessed against ESPN for the period October 1,
27 2001, through October 31, 2002. We conclude that petitioner has failed to do so.

28 There is no statutory or regulatory authority for relieving late-payment or finality penalties in

1 section 6829 determinations, but if the penalties were relieved as to ESPN, that relief would also inure
2 to the benefit of petitioner. Petitioner has submitted a declaration signed under penalty of perjury
3 requesting relief of the foregoing penalties on ESPN's behalf. In his request, petitioner makes the
4 same arguments as addressed above in Issue 1.

5 We find nothing in the present record that indicates ESPN's failure to timely file or pay was
6 due to reasonable cause and circumstances beyond its control. In fact, petitioner's request for relief
7 provides no explanation for ESPN's failure to timely file or pay, since the request for relief addresses
8 only the reasons why petitioner (not ESPN) failed to do so. Therefore, we conclude that relief of the
9 penalties is not warranted.

10 **Issue 3:** Whether interest accruing on the tax liability should be relieved. We recommend that
11 relief be denied.

12 Petitioner's declaration remotely implicates a request for relief of interest. In his declaration,
13 petitioner contends that because he did not receive any correspondence from the Board until 2008 to
14 inform him that he could be held personally responsible for ESPN's tax debts, he was unable to
15 "address the issue immediately" in order to decrease the accumulated interest. The Board may grant
16 relief of interest under Revenue and Taxation Code section 6593.5 where it finds that the failure to pay
17 tax is due in whole or in part to an unreasonable error or delay by an employee of the Board acting in
18 his or her official capacity, with no significant aspect of the delay caused by the taxpayer. The
19 Department issued the determination to petitioner after it had exhausted its numerous efforts to collect
20 the tax at issue directly from ESPN. We find that there was no unreasonable delay, and that relief of
21 interest is not warranted.

22 **RESOLVED ISSUE**

23 A 50-percent amnesty interest penalty of \$2,600.84 was imposed against ESPN because the tax
24 liability was incurred during amnesty-eligible periods, and ESPN failed to apply for amnesty, or pay
25 the tax and interest due, by March 31, 2005. (Rev. & Tax. Code, § 7074, subd. (a).) The amnesty
26 interest penalty was included in the determination issued to petitioner as part of the unpaid liabilities of
27 ESPN. (Rev. & Tax. Code, § 6829, subds. (a), (e).)

