

## 1 CALIFORNIA STATE BOARD OF EQUALIZATION

## 2 APPEALS DIVISION SUMMARY FOR BOARD HEARING

3 In the Matter of the Petition for )  
 4 Redetermination and Administrative Protest )  
 5 Under the Sales and Use Tax Law of: )  
 6 DAVID ANTHONY MIRAMONTEZ ) Account Number: SR JH 53-002679  
 7 ) Case ID's 402645, 492370  
 8 Petitioner/Taxpayer ) Santa Rosa, Sonoma County  
 )

9 Type of Liability: Responsible person liability

10 Liability period: 04/01/05 – 09/30/05 (402645)  
 11 10/01/05 – 12/05/05 (492370)

| <u>Item</u>                            | <u>Disputed Amount</u> |                    |                    |                   |
|--|------------------------|--------------------|--------------------|-------------------|
|  | <u>402645</u>          |                    | <u>492370</u>      |                   |
|  | <u>Tax</u>             | <u>Penalty</u>     | <u>Tax</u>         | <u>Penalty</u>    |
| 12 Responsible person liability        | \$131,484              | (402645)           |                    |                   |
|  |                        | \$12,924           |                    | (492370)          |
| 15 As determined:                      | \$115,933.41           | \$15,550.60        | \$20,977.00        | \$2,097.70        |
| 16 Adjustment - Appeals Division       |                        |                    | -9,228.00          | -922.80           |
| 17 Proposed redetermination, protested | <u>\$115,933.41</u>    | <u>\$15,550.60</u> | <u>\$11,749.00</u> | <u>\$1,174.90</u> |
| 18 Proposed tax redetermination        | \$115,933.41           |                    |                    |                   |
| 19 Tax, as redetermined                |                        |                    | \$11,749.00        |                   |
| 20 Interest through 2/28/11            | 57,712.01              |                    | 4,624.88           |                   |
| 21 Penalties                           | <u>15,550.60</u>       |                    | <u>1,174.90</u>    |                   |
| Total tax, interest, and penalties     | \$189,196.02           |                    | \$17,548.78        |                   |
| Payments                               | <u>-416.74</u>         |                    | <u>-10,550.90</u>  |                   |
| Balance Due                            | <u>\$188,779.28</u>    |                    | <u>\$6,997.88</u>  |                   |
| 22 Monthly interest beginning 3/1/11   | <u>\$673.85</u>        |                    | <u>\$6.99</u>      |                   |

23 This matter was previously scheduled for Board hearing on November 18, 2010, but was  
 24 postponed to allow petitioner additional time to hire a representative.

## 25 UNRESOLVED ISSUES

26 **Issue 1:** Whether petitioner is personally liable as a responsible person for the unpaid liabilities  
 27 of Skier's Quest, Inc. (SR JH 97-277702) pursuant to Revenue and Taxation Code section 6829. We  
 28 conclude petitioner is personally liable.

1 Skier's Quest sold new and used boats, water ski equipment, and accessories from April 1,  
2 1998, through December 5, 2005. When the corporation was formed, Gary Johnson held 50 percent  
3 ownership, and Dennis Schriber and Scott McNerney each held 25 percent ownership. Petitioner  
4 worked for Skier's Quest from April 2000 to March 2005. On July 1, 2005, Mr. Johnson sold his  
5 50-percent share of Skier's Quest to petitioner and Greg Moylan for \$175,000.<sup>1</sup> After July 1, 2005,  
6 petitioner and Mr. Moylan were added as signers on Skier's Quest's business bank account at Wells  
7 Fargo, along with Mr. Schriber. In August 2005, petitioner and Mr. Moylan opened a new business  
8 bank account for Skier's Quest at the Redwood Credit Union and transferred substantially all of the  
9 funds from the Wells Fargo account to the new account. Only petitioner and Mr. Moylan were signers  
10 on the Redwood Credit Union account. At an appeals conference on April 8, 2010, Mr. Schriber stated  
11 he received a telephone call from petitioner on December 10, 2005, stating that neither he nor  
12 Mr. Moylan would be returning to Skier's Quest and that they would leave the keys for Mr. Schriber at  
13 the store. Subsequently, Mr. Schriber removed all of the remaining assets of Skier's Quest. Skier's  
14 Quest's seller's permit was closed out on February 14, 2006, effective December 5, 2005. At the time  
15 its business terminated, Skier's Quest had unpaid tax-related liabilities for sales and use tax returns  
16 filed with no remittance for the second quarter 2005 (2Q05) and 3Q05 and for a determination issued  
17 for the period October 1, 2005, through December 5, 2005 (4Q05), for which no return was filed.

18 The Sales and Use Tax Department (Department) concluded that petitioner, Mr. Moylan, and  
19 Mr. Schriber were each personally liable for the unpaid tax-related liabilities of Skier's Quest under  
20 section 6829. It issued identical notices of determination on April 20, 2007, and October 1, 2008, to  
21 each of those individuals for the periods April 1, 2005, through September 30, 2005, and October 1,  
22 2005, through December 5, 2005, respectively. Petitioner filed a timely petition with respect to the  
23 determination issued for 2Q05 and 3Q05 and filed an untimely appeal, which was accepted as an  
24 administrative protest, for the determination for 4Q05.<sup>2</sup>

25 \_\_\_\_\_  
26 <sup>1</sup> All the parties agree that, after July 1, 2005, neither Mr. Johnson nor Mr. McNerney had any part in the operation of  
27 Skier's Quest, and no determinations for personal liability have been issued to either of them.

28 <sup>2</sup> Mr. Moylan filed timely petitions for redetermination for both determinations, and Mr. Schriber filed untimely appeals  
that were accepted as administrative protests of both determinations. The petitions filed by Mr. Moylan are scheduled for  
the same Board meeting as the instant appeals. We have recommended that the administrative protests filed by  
Mr. Schriber be granted, and action on those matters is being held pending the Board's decision in the matters related to

1 It is undisputed that Skier's Quest's business has terminated and that the business had added or  
2 included sales tax reimbursement in its retail sales,<sup>3</sup> which are two of the four conditions for imposing  
3 personal liability on petitioner for the tax debts incurred by Skier's Quest. The other two conditions,  
4 which petitioner does dispute, are that petitioner must have been responsible for sales tax compliance  
5 by Skier's Quest and petitioner must have willfully failed to pay or to cause to be paid taxes due from  
6 Skier's Quest.

7 The Department concluded that petitioner was a responsible person under section 6829 based  
8 on the following information: 1) petitioner and Mr. Moylan had purchased 50 percent ownership of  
9 Skier's Quest from Mr. Johnson on July 1, 2005; 2) former officers Mr. Johnson and Mr. McNerney  
10 both identified petitioner as one of Skier's Quest's responsible parties for the period beginning July 1,  
11 2005; 3) Mr. Schriber stated that petitioner and Mr. Moylan were in charge of Skier's Quest after  
12 July 1, 2005; 4) on September 7, 2005, petitioner signed corporate documents as a shareholder and  
13 director of Skier's Quest; 5) petitioner stated to the Board that he and Mr. Moylan took over control of  
14 Skier's Quest as of July 1, 2005; and 6) petitioner is listed as the general manager on the updated  
15 seller's permit application completed by petitioner and Mr. Moylan on November 30, 2005. The  
16 Department also determined that petitioner willfully failed to pay, or to cause to be paid, Skier's  
17 Quest's tax liabilities because Skier's Quest had funds available at the time the taxes became due and  
18 chose to pay other creditors.

19 Petitioner contends that he is not personally liable for Skier's Quest's unpaid tax liabilities  
20 because he was not responsible for Skier's Quest's sales and use tax compliance. Petitioner asserts he  
21 was not even an employee of Skier's Quest during 2Q05 and was unaware that a tax payment was due  
22 for that quarter when he and Mr. Moylan purchased Mr. Johnson's interest on July 1, 2005. Petitioner  
23 argues that no Skier's Quest stock was ever issued to him and that he was thus never actually an  
24 owner, officer, or director of Skier's Quest and never had the authority, responsibility, or ability to pay  
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26 petitioner and Mr. Moylan. We note that Mr. Schriber has made several payments on these liabilities, totaling \$416.74  
27 applied to 2Q05 and 3Q05 and totaling \$475.00 applied to 4Q05. Mr. Schriber has not filed a claim for refund of those  
payments, and the time for timely doing so has expired.

28 <sup>3</sup> The Department concluded that the business terminated on or about December 5, 2005. Based on bank records, we  
conclude in the D&R that the business terminated on December 16, 2005.

1 Skier's Quest's taxes. Petitioner also contends he did not willfully fail to pay or cause to be paid  
2 Skier's Quest's liabilities, stating that, as a result of transfers from the Skier's Quest bank account by  
3 Mr. Schriber and various undocumented sales by Mr. Johnson and Mr. McNerney, the business was in  
4 "survival mode" during the relevant period and was unable to pay any of its creditors, including the  
5 Board. Further, petitioner states that, in November 2005, when he and Mr. Moylan first learned of  
6 Skier's Quest's unpaid taxes, a representative of the Board, Catherine Sorg, a Board employee working  
7 at the Santa Rosa district office, told him that making payments on the liability would establish that he  
8 was a responsible person for Skier's Quest and result in his being held personally liable. Petitioner  
9 states that he interpreted Ms. Sorg's comments as advice that he should not pay Skier's Quest's  
10 liability. Petitioner also argues that the Board should have seized and attempted to sell the remaining  
11 assets of Skier's Quest before proceeding against any individuals.

12         With respect to petitioner's claim that he could not be responsible for the taxes for 2Q05  
13 because he was not employed by Skier's Quest during that quarter, we find that the pertinent issue is  
14 whether petitioner was a responsible person when the taxes became due, on July 31, 2005. Thus, it is  
15 irrelevant whether petitioner was an employee of Skier's Quest prior to July 1, 2005. With regard to  
16 petitioner's claim that he never received any Skier's Quest stock and thus never became an officer or  
17 owner of the corporation, we note there is no requirement under section 6829 that a responsible person  
18 be either an officer or owner of the corporation.

19         It is undisputed that, effective July 1, 2005, petitioner and Mr. Moylan purchased  
20 Mr. Johnson's interest in Skier's Quest. Petitioner, Mr. Schriber, Mr. Johnson, and Mr. McNerney  
21 have all stated, either at the various appeals conferences or in written statements, that, as of July 1,  
22 2005, petitioner and Mr. Moylan were in charge of Skier's Quest. Petitioner confirmed those  
23 statements in a conversation with Ms. Sorg on November 4, 2005, and again at the appeals conference  
24 on April 8, 2010, which is strong evidence that petitioner was one of the people responsible for Skier's  
25 Quest's tax compliance. Further, at the appeals conference, petitioner stated that Mr. Schriber was  
26 consulted only occasionally by telephone. In addition, in conversations with Ms Sorg in November  
27 2005, petitioner discussed possible payment plans. Petitioner states that he resigned on or about  
28 December 10, 2005, thus ending any responsibility he may have had. However, petitioner appeared,

1 along with Mr. Moylan, as the representatives of Skier's Quest at a July 7, 2007 appeals conference  
2 held in relation to the determination issued to Skier's Quest for 4Q05. Moreover, in April 2009,  
3 petitioner prepared, signed, and submitted a return for 4Q05 for Skier's Quest. These actions show  
4 that, although Skier's Quest terminated its business operations in December 2005, petitioner's  
5 responsibility did not end. Based on these facts, we find petitioner was a responsible person as defined  
6 by section 6829 for all periods at issue.

7         With respect to the willfulness requirement, willfulness means that the failure was the result of  
8 an intentional, conscious, and voluntary course of action, even if it was not done with a bad purpose or  
9 evil motive. A person is regarded as having willfully failed to pay taxes, or to cause them to be paid,  
10 where he or she had knowledge that the taxes were not being paid (or lacked knowledge in reckless  
11 disregard of his or her duty to know) and had the authority to pay taxes or to cause them to be paid, but  
12 failed to do so. Petitioner does not deny he knew that taxes were due, although he has stated that he  
13 did not know he was responsible for taxes due for 2Q05, before he became a responsible person for  
14 Skier's Quest. However, the evidence indicates that, when the tax became due for 2Q05, on July 31,  
15 2005, petitioner and Mr. Moylan were in charge of all aspects of Skier's Quest's operations. As one of  
16 the two people in charge of Skier's Quest, which was making substantial sales and collecting sales tax  
17 reimbursement, petitioner had a duty to inform himself as to what taxes were due and when. Further,  
18 based on his conversations with Board staff in December 2005, we find petitioner must have known  
19 that no return would be filed for 4Q05. Consequently, we find that petitioner knew that no-remittance  
20 returns were filed for 2Q05 and 3Q05, and that no return was filed for 4Q05, or he lacked knowledge in  
21 reckless disregard of his duty to know. Further, Ms. Sorg contacted petitioner regarding Skier's  
22 Quest's tax liability on November 4, 2005, and there is no question petitioner knew of the outstanding  
23 liability as of that date.

24         We find for the same reasons noted above that petitioner had authority to cause the taxes due to  
25 be paid. It is undisputed that petitioner was a signer on the corporate account on the earliest date when  
26 taxes at issue became due, July 31, 2005. In addition, there is no evidence that petitioner's ability to  
27 pay bills was in any way restricted. Regarding whether Skier's Quest had sufficient funds to pay the  
28 taxes due, we note that the July 31, 2005, August 31, 2005, and November 1, 2005, bank statements

1 show balances of \$171,971.51, \$223,612.35, and \$134,815.01, respectively. Thus, Skier's Quest  
2 continued to have sufficient funds available to pay its taxes when the taxes for 2Q05 and 3Q05 became  
3 due. With respect to 4Q05, we note that the bank account balance as of December 31, 2005, shows a  
4 balance of only \$1,048.40. However, the tax liability is the result of sales on which sales tax  
5 reimbursement was charged and collected by Skier's Quest. Thus, Skier's Quest had collected  
6 sufficient funds from its customers to pay its tax liability, but the money was not paid to the Board. In  
7 that regard, the bank statements show a large number of checks and Visa Checkcard withdrawals  
8 during 4Q05, which reflect funds paid to other creditors, as well as some withdrawals that appear to  
9 have been for personal expenses, such as charges to various restaurants. We therefore find that funds  
10 were available to pay the sales tax liability, but Skier's Quest's management chose to pay other  
11 creditors instead. Based on the foregoing, we find petitioner willfully failed to pay the taxes at issue.

12 With respect to petitioner's argument that he was advised by Ms. Sorg to not pay the taxes at  
13 issue, we find the Board's computerized records do not support this assertion. Further, Ms. Sorg  
14 denies giving such advice, and we find it highly unlikely that she did so. The Board's records clearly  
15 indicate that Ms. Sorg was attempting to collect the taxes due from Skier's Quest during November  
16 and December 2005, and she discussed possible payment plans with petitioner, Mr. Moylan, and  
17 Mr. Schriber. We find it entirely implausible that Ms. Sorg would have discouraged petitioner from  
18 making payments against the liability. Regarding petitioner's argument that the Board should have  
19 seized and sold the remaining assets of Skier's Quest prior to proceeding against any individual, we  
20 first note that the value of the remaining assets has not been established, and most of the assets  
21 represented new boats that were actually owned by Ski World and GE, rather than Skier's Quest.  
22 Regardless of the value, while the Board has the authority to seize property and sell it at public auction  
23 to pay amounts due, this is not the exclusive remedy available to the Board. One option is for the  
24 Board to proceed against individuals if it finds they were responsible persons as defined in section  
25 6829. These options, along with other remedies of the Board, are cumulative, and the Board is not  
26 required to pursue one remedy to the exclusion of any other remedy permitted by statute. (Rev. & Tax.  
27 Code, § 6827.) Therefore, we find the Board was not required to seize and sell the remaining assets of  
28 Skier's Quest before proceeding under section 6829.

1 In summary, we conclude that all four conditions have been satisfied for imposing personal  
2 liability on petitioner under section 6829 for the outstanding tax liabilities of Skier's Quest.

3 **Issue 2:** Whether an adjustment is warranted to the amount of unreported sales for 4Q05. We  
4 recommend no further adjustment.

5 Since Skier's Quest did not file a return for 4Q05, the Department issued a determination for  
6 that period on July 6, 2006, based on estimated sales of \$270,653. To establish that estimate, the  
7 Department combined average daily reported taxable sales for 4Q04 and 3Q05, and reduced the  
8 amount by 20 percent to reflect a decline in sales as the business closed. Petitioner contends the  
9 estimate is excessive, and he submitted a sales and use tax return in April 2009, reporting total sales of  
10 \$124,084.75 and taxable sales of \$108,205.49 for 4Q05.

11 The bank statements for 4Q05 show total deposits of \$165,443.89, which exceed the amount of  
12 total sales reported on the late return by \$41,359.14. We recommend that the amount of bank deposits  
13 be used as the amount of tax-included total sales, reducing that amount by \$1,104.00 for orders that  
14 appear to be for nontaxable labor and for tax included, to establish taxable sales of \$151,604 for 4Q05.  
15 In the absence of complete records, we recommend no further adjustment.

16 **Issue 3:** Whether petitioner has established reasonable cause sufficient for relieving the late-  
17 payment and failure-to-file penalties originally assessed against Skier's Quest. We conclude he has  
18 not.

19 Skier's Quest's unpaid liabilities assessed against petitioner include late-payment penalties of  
20 \$4,752.70 for 2Q05 and \$10,797.90 for 3Q05, and a failure-to-file penalty for 4Q05, which is  
21 \$1,174.90 after the adjustments recommended in the D&R. There is no statutory or regulatory  
22 authority for relieving these penalties in section 6829 determinations, but if petitioner could show that  
23 the penalties should be relieved as to the corporation under Revenue and Taxation Code section 6592,  
24 the relief would also inure to petitioner's benefit.

25 Petitioner has submitted a request for relief, signed under penalty perjury, which repeats some  
26 of the reasons why petitioner contends he should not be held liable under section 6829. The request  
27 does not address why *Skier's Quest* failed to timely pay the taxes for 2Q05 and 3Q05 or to file a return  
28 for 4Q05. Thus, we find that relief of the penalties is not warranted.

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**OTHER DEVELOPMENTS**

None.

Summary prepared by Rey Obligacion, Retired Annuitant