

**CALIFORNIA STATE BOARD OF EQUALIZATION**  
**APPEALS DIVISION SUMMARY FOR BOARD HEARING**

In the Matter of the Petitions for Redetermination )  
Under the Sales and Use Tax Law of: )  
GREG L. MOYLAN ) Account Number: SR JH 53-002680  
Petitioner ) Case ID's 403554, 479953  
Santa Rosa, Sonoma County )

Type of Liability: Responsible person liability  
Liability periods: 04/01/05 – 09/30/05 (403554)  
10/01/05 – 12/05/05 (479953)

| <u>Item</u>                         | <u>Disputed Amount</u> |                    |                    |                   |
|-------------------------------------|------------------------|--------------------|--------------------|-------------------|
| Responsible person liability        | \$131,484 (403554)     |                    |                    |                   |
|                                     | \$12,924 (479953)      |                    |                    |                   |
|                                     | <u>403554</u>          |                    | <u>479953</u>      |                   |
|                                     | <u>Tax</u>             | <u>Penalty</u>     | <u>Tax</u>         | <u>Penalty</u>    |
| As determined:                      | \$115,933.41           | \$15,550.60        | \$20,977.00        | \$2,097.70        |
| Adjustment - Appeals Division       |                        |                    | <u>-9,228.00</u>   | <u>-922.80</u>    |
| Proposed redetermination, protested | <u>\$115,933.41</u>    | <u>\$15,550.60</u> | <u>\$11,749.00</u> | <u>\$1,174.90</u> |
| Proposed tax redetermination        | \$115,933.41           |                    |                    |                   |
| Tax, as redetermined                |                        |                    | \$11,749.00        |                   |
| Interest through 2/28/11            | 57,712.01              |                    | 4,624.88           |                   |
| 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>  |                   |
| Monthly interest beginning 3/1/11   | <u>\$673.85</u>        |                    | <u>\$6.99</u>      |                   |

This matter was previously scheduled for Board hearing on November 18, 2010, but was postponed because petitioner had a family emergency.

**UNRESOLVED ISSUES**

**Issue 1:** Whether petitioner is personally liable as a responsible person for the unpaid liabilities of Skier's Quest, Inc. (SR JH 97-277702) pursuant to Revenue and Taxation Code section 6829. We 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 began working for Skier's Quest in January 2005. On July 1, 2005, Mr. Johnson sold his 50-percent  
5 share of Skier's Quest to petitioner and David Miramontez for \$175,000.<sup>1</sup> After July 1, 2005,  
6 petitioner and Mr. Miramontez were added as signers on Skier's Quest's business bank account at  
7 Wells Fargo, along with Mr. Schriber. In August 2005, petitioner and Mr. Miramontez opened a new  
8 business bank account for Skier's Quest at the Redwood Credit Union and transferred substantially all  
9 of the funds from the Wells Fargo account to the new account. Only petitioner and Mr. Miramontez  
10 were signers on the Redwood Credit Union account. At an appeals conference on April 8, 2010,  
11 Mr. Schriber stated he received a telephone call from Mr. Miramontez on December 10, 2005, stating  
12 that neither Mr. Miramontez nor petitioner would be returning to Skier's Quest and that they would  
13 leave the keys for Mr. Schriber at the store. Subsequently, Mr. Schriber removed all of the remaining  
14 assets of Skier's Quest. Skier's Quest's seller's permit was closed out on February 14, 2006, effective  
15 December 5, 2005. At the time its business terminated, Skier's Quest had unpaid tax-related liabilities  
16 for sales and use tax returns filed with no remittance for the second quarter 2005 (2Q05) and 3Q05 and  
17 for a determination issued for the period October 1, 2005, through December 5, 2005 (4Q05), for  
18 which no return was filed.

19 The Sales and Use Tax Department (Department) concluded that petitioner, Mr. Miramontez,  
20 and Mr. Schriber were each personally liable for the unpaid tax-related liabilities of Skier's Quest  
21 under section 6829. It issued identical notices of determination on April 20, 2007, and October 1,  
22 2008, to each of those individuals for the periods April 1, 2005, through September 30, 2005, and  
23 October 1, 2005, through December 5, 2005, respectively. Petitioner filed timely petitions with respect  
24 to both determinations.<sup>2</sup>

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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 those individuals.

28 <sup>2</sup> Mr. Miramontez filed a timely petition with respect to the determination issued for 2Q05 and 3Q05 and filed an untimely  
appeal, which was accepted as an administrative protest, with respect to the determination issued for 4Q05. Mr. Schriber  
filed untimely appeals that were accepted as administrative protests of both determinations. The petition and administrative  
protest filed by Mr. Miramontez are scheduled for the same Board meeting as the instant appeals. We have recommended

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 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. Miramontez had purchased 50 percent ownership  
9 of 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. Miramontez 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) Mr. Miramontez stated to the Board that he and petitioner took over  
14 control of Skier's Quest as of July 1, 2005; and 6) petitioner is listed as the vice president on the  
15 updated seller's permit application completed by petitioner and Mr. Miramontez on November 30,  
16 2005. The Department also determined that petitioner willfully failed to pay, or cause to be paid,  
17 Skier's Quest's tax liabilities because Skier's Quest had funds available at the time the taxes became  
18 due and chose to pay other creditors.

19 Petitioner contends that he was not responsible for Skier's Quest's sales and use tax  
20 compliance. Petitioner stated in the petition for redetermination that, when he invested in Skier's  
21 Quest, he was a 19-year-old college student with no business experience. He asserted that his duties  
22 were limited to cleaning boats and stocking shelves, and occasionally showing boats, and that his  
23 duties never changed. Further, he stated that the company was controlled by Mr. Schriber and  
24 Mr. Johnson until Mr. Johnson left on June 30, 2005, after which only Mr. Schriber was in control.

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26 that the administrative protests filed by Mr. Schriber be granted, and action on those matters is being held pending the  
27 Board's decision in the matters related to petitioner and Mr. Miramontez. We note that Mr. Schriber has made several  
28 payments on these liabilities, totaling \$416.74 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.

<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 Petitioner claimed that everything he did was at the direction of Mr. Schriber, with his job at risk if he  
2 did not follow Mr. Schriber's instructions. In addition, petitioner stated that he had no knowledge that  
3 sales tax had not been paid, and that he did not even know the Board of Equalization existed until  
4 November 18, 2005. He claimed that Mr. Schriber presented him returns for Skier's Quest for 2Q05  
5 and 3Q05 and instructed him to sign them. In addition to maintaining that he did not know about the  
6 taxes, petitioner stated he could not have paid them without Mr. Schriber's authorization. Also,  
7 petitioner contends that, after Skier's Quest closed its doors, Mr. Schriber took possession of all its  
8 remaining assets, with an estimated value of \$444,000. Petitioner therefore claims that Mr. Schriber  
9 should be the person held responsible for Skier's Quest's tax liabilities. Petitioner argues that no  
10 Skier's Quest stock was ever issued to him and that he was thus never actually an owner, officer, or  
11 director of Skier's Quest and never had the authority, responsibility, or ability to pay Skier's Quest's  
12 taxes. Petitioner also contends that he did not willfully fail to pay or cause to be paid Skier's Quest's  
13 liabilities since, as a result of transfers from the Skier's Quest bank account by Mr. Schriber and  
14 various undocumented sales by Mr. Johnson and Mr. McNerney, the business was unable to pay any of  
15 its creditors, including the Board. Petitioner also argues that the Board should have seized and  
16 attempted to sell the remaining assets of Skier's Quest before proceeding against any individuals.

17 We find that the facts do not support petitioner's assertions that his duties amounted to little  
18 more than cleaning boats and stocking shelves and that all of his actions in relation to Skier's Quest tax  
19 compliance were directed by Mr. Schriber. It is undisputed that, effective July 1, 2005, petitioner and  
20 Mr. Miramontez purchased Mr. Johnson's interest in Skier's Quest. Mr. Miramontez, Mr. Schriber,  
21 Mr. Johnson, and Mr. McNerney have all stated, either at the various appeals conferences, in written  
22 statements, or in communications with Ms. Catherine Sorg, a Board employee working at the Santa  
23 Rosa district office, that, as of July 1, 2005, petitioner and Mr. Miramontez were in charge of Skier's  
24 Quest. In addition, in August 2005, petitioner and Mr. Miramontez effectively closed the Wells Fargo  
25 bank account, to which Mr. Schriber had access, and opened a new account at Redwood Credit Union,  
26 to which only petitioner and Mr. Miramontez had access. At the appeals conference on April 8, 2010,  
27 petitioner stated that this move was motivated, in part, by a desire to prevent Mr. Schriber from having  
28 access to the business account. We find that transfer of the business account is inconsistent with

1 petitioner's claim that he was little more than a stock boy and that his actions were at all times  
2 controlled and directed by Mr. Schriber.

3         Petitioner also had numerous conversations with Ms Sorg in November 2005 regarding the  
4 preparation of sales and use tax returns for 2Q05 and 3Q05. The Board's computerized records do not  
5 indicate that petitioner ever stated Mr. Schriber was the person in charge, or even mention  
6 Mr. Schriber's name. Further, at the appeals conference, Mr. Miramontez said that, after July 1, he  
7 only contacted Mr. Schriber occasionally by telephone. From this evidence, we find that, as of July 1,  
8 2005, petitioner and Mr. Miramontez were the only people in charge of the day-to-day operation of  
9 Skier's Quest. As to the extent of petitioner's personal responsibility, petitioner supervised the  
10 preparation of, and signed, the sales and use tax returns filed for 2Q05 and 3Q05. There is no evidence  
11 that petitioner's duties or responsibilities changed at any point between July 1, 2005, and November  
12 30, 2005. Therefore, we find petitioner was responsible for Skier's Quest's tax compliance when the  
13 taxes became due for 2Q05 and 3Q05. Petitioner states that he resigned on or about December 14,  
14 2005, thus ending any responsibility he may have had, but he has presented no evidence of how he  
15 resigned or to whom he tendered his resignation. In addition, petitioner appeared, along with  
16 Mr. Miramontez, as the representatives of Skier's Quest at a July 7, 2007 appeals conference held in  
17 relation to the determination issued to Skier's Quest for 4Q05. Thus, we find that, although Skier's  
18 Quest terminated its business operations in December 2005, petitioner's responsibility did not end.  
19 Based on these facts, we find petitioner was a responsible person, as defined by section 6829, for all  
20 periods at issue.

21         With regard to petitioner's claim that he never received any Skier's Quest stock and thus never  
22 became an officer or owner of the corporation, we note there is no requirement under section 6829 that  
23 a responsible person be either an officer or owner of the corporation.

24         With respect to the willfulness requirement, willfulness means that the failure was the result of  
25 an intentional, conscious, and voluntary course of action, even if it was not done with a bad purpose or  
26 evil motive. A person is regarded as having willfully failed to pay taxes, or to cause them to be paid,  
27 where he or she had knowledge that the taxes were not being paid (or lacked knowledge in reckless  
28 disregard of his or her duty to know) and had the authority to pay taxes or to cause them to be paid, but

1 failed to do so. Here, petitioner claims he did not know that taxes were due, and had not even heard of  
2 the Board prior to November 2005. However, the evidence indicates that, as of July 1, 2005, petitioner  
3 and Mr. Miramontez were in charge of all aspects of Skier's Quest's operations. As one of the two  
4 people in charge of Skier's Quest, which was making substantial sales and collecting sales tax  
5 reimbursement, petitioner had a duty to inform himself as to what taxes were due and when. Further,  
6 based on his conversations with Board staff in December 2005, we find petitioner must have known  
7 that no return would be filed for 4Q05. Further, Ms. Sorg contacted petitioner regarding Skier's  
8 Quest's tax liability on November 4, 2005, and there is no question petitioner knew of the outstanding  
9 liability as of that date. Consequently, we find that petitioner knew that the taxes at issue were due,  
10 and not paid, or he lacked knowledge in reckless disregard of his duty to know.

11 We find for the same reasons noted above that petitioner had authority to cause the taxes due to  
12 be paid. It is undisputed that petitioner was a signer on the corporate account on the earliest date when  
13 taxes at issue became due, July 31, 2005. In addition, contrary to petitioner's claim, there is no  
14 evidence that petitioner's ability to pay bills was in any way restricted. Regarding whether Skier's  
15 Quest had sufficient funds to pay the taxes due, we note that the July 31, 2005, August 31, 2005, and  
16 November 1, 2005, bank statements show balances of \$171,971.51, \$223,612.35, and \$134,815.01,  
17 respectively. Thus, Skier's Quest continued to have sufficient funds available to pay its taxes when the  
18 taxes for 2Q05 and 3Q05 became due. With respect to 4Q05, we note that the bank account shows a  
19 balance of only \$1,048.40 of December 31, 2005. However, the tax liability is the result of sales on  
20 which sales tax reimbursement was charged and collected by Skier's Quest. Thus, Skier's Quest had  
21 collected sufficient funds from its customers to pay its tax liability, but the money was not paid to the  
22 Board. Instead, the bank statements show a large number of checks and Visa Checkcard withdrawals  
23 during 4Q05, which reflect funds paid to other creditors, as well as some withdrawals that appear to  
24 have been for personal expenses, such as charges to various restaurants. We therefore find that funds  
25 were available to pay the sales tax liability, but Skier's Quest's management chose to pay other  
26 creditors instead. Based on the foregoing, we find petitioner willfully failed to pay the taxes at issue.

27 Regarding petitioner's argument that the Board should have seized and sold the remaining  
28 assets of Skier's Quest prior to proceeding against any individual, we first note that the value of the

1 remaining assets was far less than the \$444,000 claimed by petitioner, since most of the assets  
2 represented new boats that were actually owned by Ski World and GE, rather than Skier's Quest.  
3 Regardless of the value, while the Board has the authority to seize property and sell it at public auction  
4 to pay amounts due, this is not the exclusive remedy available to the Board. One option is for the  
5 Board to proceed against individuals if it finds they were responsible persons as defined in section  
6 6829. These options, along with other remedies of the Board, are cumulative, and the Board is not  
7 required to pursue one remedy to the exclusion of any other remedy permitted by statute. (Rev. & Tax.  
8 Code, § 6827.) Therefore, we find the Board was not required to seize and sell the remaining assets of  
9 Skier's Quest before proceeding under section 6829.

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

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

14 Since Skier's Quest did not file a return for 4Q05, the Department issued a determination for  
15 that period on July 6, 2006, based on estimated sales of \$270,653. To establish that estimate, the  
16 Department combined average daily reported taxable sales for 4Q04 and 3Q05, and reduced the  
17 amount by 20 percent to reflect a decline in sales as the business closed. Petitioner contends the  
18 estimate is excessive, and he submitted a sales and use tax return in April 2009, reporting total sales of  
19 \$124,084.75 and taxable sales of \$108,205.49 for 4Q05.

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

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

27 Skier's Quest's unpaid liabilities assessed against petitioner include late-payment penalties of  
28 \$4,752.70 for 2Q05 and \$10,797.90 for 3Q05, and a failure-to-file penalty for 4Q05, which is

1 \$1,174.90 after the adjustments recommended in the D&R. There is no statutory or regulatory  
2 authority for relieving these penalties in section 6829 determinations, but if petitioner could show that  
3 the penalties should be relieved as to the corporation under Revenue and Taxation Code section 6592,  
4 the relief would also inure to petitioner's benefit.

5 Petitioner has not submitted a request for relief, signed under penalty perjury. Although  
6 Mr. Miramontez did submit a request for relief of the penalties, the grounds stated in that request were  
7 a repetition of some of the reasons why Mr. Miramontez contends he should not be held liable under  
8 section 6829, and do not address why *Skier's Quest* failed to timely pay the taxes for 2Q05 and 3Q05  
9 or to file a return for 4Q05. Since no request for relief has been submitted that addresses the reasons  
10 that the penalties were imposed, we find that relief of the penalties is not warranted.

11 **OTHER DEVELOPMENTS**

12 None.

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14 Summary prepared by Rey Obligacion, Retired Annuitant  
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