

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION SUMMARY FOR BOARD HEARING

3 In the Matter of the Administrative Protest)
 4 Under the Sales and Use Tax Law of:)
 5 LONNIE DAVIS NAEFKE) Account Number: SR AS 53-003626
 6) Case ID 458687
 7 Taxpayer) Torrance, Los Angeles County

8 Type of Liability: Responsible person liability - suspended corporation

9 Liability Period: 04/01/05 - 09/30/05

<u>Item</u>	<u>Amount</u>	
Responsible person liability (corporate suspension)	\$6,670	
	<u>Tax</u>	<u>Penalty</u>
As determined, protested	<u>\$6,064.00</u>	<u>\$606.40</u>
Tax	\$6,064.00	
Interest to 10/31/10	2,895.65	
Penalties for late payment of returns	<u>606.40</u>	
Total tax, interest, and penalty	\$9,566.05	
Payments	<u>-20.00</u>	
Balance due	<u>\$9,546.05</u>	
Monthly interest beginning 11/01/10	<u>\$35.26</u>	

18 UNRESOLVED ISSUES

19 **Issue 1:** Whether taxpayer is personally liable as a responsible person for the unpaid liabilities
 20 incurred during the period April 1, 2005, to September 30, 2005, by Pacific Cellsite Systems, Inc., dba
 21 Pacific Concealment Systems (PCS) (SR AS 097-124020), while suspended. We find that taxpayer is
 22 personally liable for PCS's unpaid liabilities.

23 PCS, a California corporation, sold telecommunications equipment, from July 1, 1997, to
 24 September 30, 2005, when it ceased doing business. Its seller's permit was closed out on January 17,
 25 2006, effective September 30, 2005. Prior to close out, the Franchise Tax Board (FTB) suspended
 26 PCS's corporate status on March 1, 2005, but PCS continued to operate its business after its corporate
 27 status was suspended, and filed sales and use tax returns without remittance for the periods April 1,
 28 2005, through June 30, 2005, and July 1, 2005, to September 30, 2005.

1 After close out, the Sales and Use Tax Department (Department) conducted an investigation
2 and concluded that taxpayer was personally liable for unpaid tax liabilities of PCS for the period April
3 1, 2005, through September 30, 2005, under California Code of Regulations, title 18, section
4 (Regulation) 1702.6, subdivision (a), because he was a person responsible for managing the financial
5 affairs of PCS, including the filing of returns. The Department reached this conclusion based on
6 several documents which identified taxpayer as President, CEO, and agent of PCS. Other evidence
7 shows that taxpayer signed checks payable to the Board; he signed Franchise Tax Board Form 100
8 Year 2002 as President on August 9, 2005; and by letter dated October 13, 2005, taxpayer tendered his
9 resignation as President of PCS as of October 16, 2005. The Department also found that PCS added or
10 included sales tax reimbursement on its sales of tangible personal property based on an affidavit signed
11 by one of PCS's customers, a questionnaire completed Ms. Susan Cody (a PCS employee) stating that
12 tax reimbursement was added as a separate line item on sales invoices, and copies of sales invoices
13 supporting Ms. Cody's statement. Accordingly, on March 3, 2008, the Department issued a Notice of
14 Determination to taxpayer for the unpaid liabilities of PCS based on nonremittance returns for the
15 period April 1, 2005, through September 30, 2005.¹

16 Taxpayer filed a timely petition for redetermination arguing that he was not responsible for
17 PCS's financial affairs and thus did not willfully fail to pay the taxes due. Taxpayer claims that he was
18 merely a minority stockholder, and that the majority stockholder, Mr. Thomas Keenum, controlled all
19 financial aspects of the business. Taxpayer also asserts that, although he was the sole signer on PCS's
20 bank account, he did so as required by Mr. Keenum. At the appeals conference, Ms. Cody
21 contradicted her previous statement and stated that Mr. Keenum and PCS's controller, Mr. Ron Tiller,
22 dealt with PCS's finances and merely presented checks to taxpayer for signature. Taxpayer further
23 claims that when PCS was closed out, it was left with an Employment Development Department
24 (EDD) liability, and that taxpayer was not found to be responsible for that liability. Therefore,
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26 ¹ The Department investigated whether Ms. Cody or Mr. Ron Tiller should also be held liable under Regulation 1702.6.
27 The Department found that Mr. Tiller was a responsible person under Regulation 1702.6, and issued a Notice of
28 Determination to him. Since Mr. Tiller did not file a petition for redetermination, that liability is now final. The
Department found that there is not enough evidence to find Ms. Cody was a responsible person under Regulation 1702.6,
and thus did *not* issue a Notice of Determination to her for this liability.

1 taxpayer asserts that he should not be responsible for PCS's outstanding sales and use tax liabilities.

2 Regulation 1702.6 provides for personal liability of a corporate officer or shareholder who has
3 control over the operations or management of a closely held corporation during the time its powers,
4 rights, and privileges are suspended. To impose a liability on an individual under Regulation 1702.6
5 for sales tax incurred by the corporation, the Department must establish that the business collected
6 sales tax reimbursement for the applicable liability. There is no dispute that PCS was a closely held
7 corporation, that its corporate status was suspended during the periods in issue and that sales tax
8 reimbursement was collected with respect to the subject liability. It is important to note that
9 "willfulness" is *not* an element of responsible person liability under Regulation 1702.6. Thus, the only
10 issue in dispute is whether taxpayer was a responsible person, which means an officer or shareholder
11 who was charged with the responsibility for the filing of returns or the payment of tax or who had a
12 duty to act for the closely held corporation in complying with any provision of the Sales and Use Tax
13 Law, and who derived a direct financial benefit from the failure to pay the tax liability.

14 We conclude the evidence supports the finding that taxpayer was a responsible person during
15 the periods in issue. Although he was a minority stockholder of PCS, he was the president, CEO and
16 agent of PCS. He signed the application for a seller's permit as president, he signed checks payable to
17 the Board dated July 29, 2004, and January 21, 2005; he signed as president Franchise Tax Board
18 Form 100 Year 2002 on August 9, 2005; and he was the president during the entire liability period,
19 not tendering his resignation as president of PCS until after the liability period had ended. Thus, as
20 president of a closely held corporation (with no evidence of any written limitation on his authority), we
21 find that taxpayer had control over operations and management of PCS which necessarily includes the
22 duty to ensure that the corporation was in compliance with the Sales and Use Tax Law, whether he
23 exercised that authority or not. Additionally, taxpayer's argument that Mr. Keenum, as the majority
24 stockholder, had control over operations and management of PCS, and not taxpayer, is inconsistent
25 with taxpayer's description of Mr. Keenum in his letter of resignation. In that letter, taxpayer
26 repeatedly refers to Mr. Keenum as an investor and to his investment in PCS, and also refers to the
27 corporation as being taxpayer's company. Based on the foregoing, we find that taxpayer was a
28 responsible person as defined by Regulation 1702.6 during the period in question, and is therefore

1 personally liable for PCS's unpaid tax liabilities for the second and third quarters of 2005.

2 We reject taxpayer's contention that he should be relieved of these liabilities because he was
3 not found to be personally responsible for PCS's outstanding EDD liabilities. Not only is
4 Unemployment Insurance Code section 1735 irrelevant to the liability at issue here incurred under the
5 Revenue and Taxation Code, that provision also includes a willfulness element that is lacking under
6 Regulation 1702.6. We find that petitioner is liable under the provisions applicable here and that there
7 is no basis upon which to which relieve taxpayer of that liability.

8 **Issue 2:** Whether the penalties for late payment of returns originally assessed against PCS
9 should be relieved. We conclude that relief is not warranted.

10 Taxpayer submitted a request for relief of the penalty pursuant to Revenue and Taxation Code
11 section 6592, signed under penalty of perjury, for the same reasons addressed under Issue 1. However,
12 taxpayer has not explained why PCS failed to pay the self-assessed liabilities for the second and third
13 quarters of 2005. Since taxpayer has not established reasonable cause for the failure of PCS to timely
14 pay the amounts reported as due on its returns, we find no basis for relief.

15 **OTHER DEVELOPMENTS**

16 None.

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18 Summary prepared by Rey Obligacion, Retired Annuitant
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