

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 FRANCIS RAMO NEWCOMER) Account Number: SR AS 53-003138
 6) Case ID 416900
 7 Petitioner) Los Angeles, Los Angeles County

8 Type of Liability: Responsible person liability

9 Liability Period: 7/1/05 – 6/30/06

10 Item Amount in Dispute

11 Responsible person liability \$9,656

	<u>Tax</u>	<u>Penalties</u>
12 As determined	\$23,556.45	\$3,451.26
13 Adjustment: Appeals Division	<u>-7,523.00</u>	<u>-752.30</u>
14 Proposed redetermination	\$16,033.45	\$2,698.96
15 Less concurred	<u>-9,075.99</u>	<u></u>
16 Balance, protested	<u>\$6,957.46</u>	<u>\$2,698.96</u>
17 Proposed tax redetermination	\$16,033.45	
18 Interest to 3/31/11	8,378.83	
19 Penalty for late payment of a return	2,624.86	
20 Finality penalty	<u>74.10</u>	
21 Total tax, interest, and penalties	<u>\$27,111.24</u>	

22 Monthly interest beginning 4/1/11 \$93.53

23 UNRESOLVED ISSUES

24 **Issue 1:** Whether petitioner has established that the measure of tax for 2Q06 is overstated. We
 25 conclude that he has not.

26 In July 2003, petitioner entered into an agreement under which he became a 50 percent
 27 shareholder of Residence FDG, Inc. (Residence), a California corporation, with Robert Margolin
 28 owning the remaining 50 percent of the shares. Residence obtained a seller's permit, SR AS 100-
 334128, effective July 14, 2003. Petitioner asserts that Mr. Margolin had no involvement in the
 business. In October 2004, Mr. Margolin asked petitioner to buy Mr. Margolin's stock in Residence
 for \$1,000,000, but petitioner refused. In May 2005, Mr. Margolin filed a lawsuit against petitioner for

1 fraud, deceit, and embezzlement. On October 2, 2006, petitioner informed the Board that he
2 discontinued Residence's business at the end of June 2006, and the Board closed out Residence's
3 seller's permit effective June 30, 2006. Subsequently, Mr. Margolin dropped the lawsuit but asked
4 petitioner to turn over his shares in Residence to Mr. Margolin. In July 2007, petitioner forfeited his
5 stock to Mr. Margolin.

6 At close out date, Residence had unpaid liabilities originating from self-assessed sales and use
7 tax returns (SUTR's) filed with partial or no remittance for the period July 1, 2005, through June 30,
8 2006, and a Notice of Determination (NOD) issued to Residence on October 18, 2006, based on a tax
9 shortage resulting from a computational error in the bi-annual SUTR filed for the period July 1, 2005,
10 through December 31, 2005 (the NOD became final on November 17, 2006). The Sales and Use Tax
11 Department (Department) determined that petitioner was a responsible person personally liable for the
12 tax debts of Residence pursuant to Revenue and Taxation Code section 6829, and on August 3, 2007, it
13 issued an NOD to petitioner, which petitioner timely petitioned. Petitioner concedes his liability under
14 section 6829 for Residence's unpaid liabilities, but argues that Residence overstated its tax liability
15 when it filed its SUTR for the period April 1, 2006, through June 30, 2006 (2Q06).

16 Petitioner explains that on October 2, 2006, he appeared at the Board's Culver City District
17 office (District) and provided the District with copies of all of Residence's SUTR's including an
18 unsigned SUTR for the 2Q06, which reported a tax liability of \$17,232.55, measured by taxable sales
19 of \$209,459. Upon review, the District found that the amount reported on the 2Q06 SUTR was a
20 duplicate of the biannual SUTR filed for the period July 1, 2005, through December 31, 2005.
21 Subsequently, petitioner submitted an unsigned amended 2Q06 SUTR, and reported a tax liability of
22 \$9,758.00, measured by taxable sales of \$118,273, but since it was unsigned and petitioner failed to
23 respond to the District's telephone calls and letter, the District rejected the amended 2Q06 SUTR.
24 However, after the first appeals conference on August 28, 2008, and further investigation by the
25 Department, the Department accepted the amended 2Q06 SUTR, even though it was unsigned, because
26 the amounts reported appeared reasonable when compared to the biannual SUTR filed for the period
27 July 1, 2005, through December 31, 2005. With the liability for 2Q06 being reduced to \$9,758.00 and
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1 a payment of \$47.45 having been made against that liability, the Department calculated the remaining
2 unpaid tax liability for 2Q06 as \$9,709.55.¹

3 Petitioner disputes the tax liability reported on the unsigned 2Q06 SUTR and argues that
4 Residence's tax liability for 2Q06 should be based on schedules filed with Residence's 2006 federal
5 income tax return (FITR) which showed that, during the 2Q06 period, Residence had taxable sales of
6 \$14,364.52, and thus, its tax liability should have been \$1,185.07 ($\$14,364.52 \times .0825$). In the
7 alternative, petitioner believes that Residence's tax liability for 2Q06 should be based on bank deposits
8 for this period. Petitioner submitted bank statements for 2Q06 which showed that Residence's total
9 deposits were \$133,434.90. Petitioner claims that, based on previous performance showing that
10 taxable sales represented 25 percent of total sales, Residence's tax liability for 2Q06 at the rate of 8.25
11 percent should be \$2,752.09.

12 The 2006 FITR petitioner seeks to rely on is dated January 31, 2010, and there is no evidence
13 such as postal receipt that this FITR was actually filed with the Internal Revenue Service. Petitioner
14 has also not submitted any supporting documentation to show that the amounts shown on the FITR and
15 schedule are accurate. Since we have also found discrepancies between amounts reported on the FITR
16 and the amounts reported on SUTR for 1Q06, we conclude that the amounts contained in the 2006
17 FITR schedule cannot be relied upon.

18 With respect to petitioner's argument that the bank deposits for 2Q06 should be relied upon, we
19 note that bank deposits are not gross receipts, but merely evidence of gross receipts when sales cannot
20 be verified by direct audit approach due to lack of adequate records. Additionally, the Department
21 found that Residence maintained two bank accounts, but petitioner submitted the deposits on only one
22 bank account. Petitioner claims that the amounts listed on the submitted bank statements represented
23 only sales revenue, whereas the second bank account was used strictly for payroll and payroll taxes,
24 but we believe that Residence must have deposited some or all of its sales revenue into the second
25 bank account to cover Residence's payroll disbursements. We note that the FITR schedule provided
26 by petitioner indicates total sales for 2Q06 of \$232,120.63, while the submitted bank statements for
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28 ¹ It appears that the Department made a calculation error since $\$9,758.00 - \47.45 equals $\$9,710.55$.

1 this period show total deposits of \$133,434.90. Thus, petitioner's own documents show that at least
2 \$100,000 in sales revenue for 2Q06 was deposited into another bank account. Petitioner has not
3 provided any explanation for this difference and has not provided the bank statements from the second
4 bank account. Thus, we find that the submitted bank statements are unreliable for establishing
5 Residence's taxable sales for 2Q06.

6 We conclude that the Department's use of the amended 2Q06 SUTR is a more accurate method
7 than either now proposed by petitioner since petitioner had prepared that amended return shortly after
8 the first one was rejected, and he filed the amended return as Residence's president. We therefore
9 recommend no adjustment to Residence's 2Q06 tax liability.

10 **Issue 2:** Whether Residence should be granted relief from the late payment and finality
11 penalties that have been passed through to petitioner as a responsible person. We conclude relief is not
12 warranted.

13 There is no statutory or regulatory authority for relieving late-payment and finality penalties in
14 section 6829 determinations, but if the penalties were relieved as to Residence, that relief would also
15 inure to the benefit of petitioner. Petitioner has submitted a declaration signed under penalty of perjury
16 requesting relief of the foregoing penalties on Residence's behalf arguing that the litigation with
17 Mr. Margolin ruined Residence's business and strained Residence's finances. Petitioner claims that
18 because of the lawsuit, he left Residence's financial decisions to his bookkeeper, who petitioner claims
19 did not give petitioner an accurate monthly report apparently to shield petitioner from Residence's
20 financial problems.

21 Petitioner's alleged lack of focus on Residence's financial matters does not establish that
22 Residence's failure to timely pay its taxes was due to circumstances beyond its control. We conclude
23 that petitioner has not established reasonable cause to relieve the penalties at issue. Accordingly, we
24 recommend that relief from the penalties at issue be denied.

25 **OTHER DEVELOPMENTS**

26 None.

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28 Summary prepared by Rey Obligacion, Retired Annuitant