1   **CALIFORNIA STATE BOARD OF EQUALIZATION**

2   **APPEALS DIVISION BOARD HEARING SUMMARY**

3   In the Matter of the Petition for Redetermination)
    Under the Sales and Use Tax Law of:)

4   )
) Account Number SR GH 53-004475

5   EREN NIAZI) Case ID 482301
)

6   Petitioner) San Jose, Santa Clara County

7   Type of Liability: Responsible person liability

8   Liability period: 10/01/06 – 06/22/07

9   Item   Disputed Amount

10 Responsible person liability $298,092

11 Tax as determined and protested $259,804.35
    Interest through 01/31/13   119,705.57

12 Late payment penalties   17,721.54
    Failure to file penalty   20,565.80

13 Total tax, interest, and penalty $417,797.26

14 Monthly interest beginning 02/01/13 $ 1,299.02

15 **UNRESOLVED ISSUES**

16 **Issue 1:** Whether petitioner is personally liable as a responsible person for the unpaid liabilities

17 of Open Source Systems, Inc. pursuant to Revenue and Taxation Code section 6829. We conclude

18 petitioner is personally liable.

19 Open Source Systems, Inc. (Open Source) (SR GH 100-196196) was a retailer of server storage

20 media from October 2002 until June 22, 2007. Open Source filed for Chapter 7 bankruptcy on July 3,

21 2007, and a final decree was entered into on March 25, 2009. At the time its business terminated,

22 Open Source had unpaid liabilities related to a Notice of Determination and two returns filed with

23 partial remittance. The Sales and Use Tax Department (Department) concluded that petitioner was

24 personally responsible for Open Source's sales and use tax compliance pursuant to section 6829.[1]

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26 [1] The Department also issued a determination to James Lyle Anderson (SR GH 53-004476), and he filed a timely petition
    for redetermination (Case ID 485900). We recommended that his appeal be granted, and that recommendation was

27 approved by the Board when the matter was presented on the Sales and Use Tax Matters – Consent Calendar on
    February 28, 2012. The Department also considered issuing determinations for personal liability against Jeremy Streig and

28 Ivan Sacoquain, but it found that they were not responsible for Open Source's sales and use tax compliance during the
    relevant periods.

1   Petitioner concedes that Open Source's business operations terminated in June 2007, and he

2 stated on a questionnaire that Open Source collected sales tax reimbursement with respect to its retail

3 sales. Also, Open Source reported purchases subject to use tax on the two returns that it filed with

4 partial remittance, which clearly shows that Open Source consumed tangible personal property and did

5 not pay the use tax. However, petitioner disputes two of the four conditions for imposing personal

6 liability pursuant to section 6829, that he was a responsible person and that he willfully failed to pay or

7 to cause to be paid taxes due from Open Source.

8   Petitioner was Open Source's Chief Executive Officer (CEO). The Department concluded that

9 he was a responsible person under section 6829 because he signed various documents related to sales

10 and use tax matters and corporate matters as president or CEO of Open Source, and he was listed in the

11 Secretary of State records as Open Source's CEO, secretary, director, and agent for service of process.

12 The Department also determined that taxpayer willfully failed to pay, or to cause to be paid, Open

13 Source's tax liabilities because Open Source had funds available at the time the taxes became due and

14 chose to pay other creditors.

15   Petitioner contends that he is not personally liable for Open Source's unpaid tax liabilities

16 because he was not a responsible person within the meaning of section 6829. Specifically, petitioner

17 asserts that he lacked authority to sign Open Source's checks and that Open Source had a Chief

18 Financial Officer, internal accounting department, and outside accountants who were responsible for

19 preparation and submission of all required tax returns and payments. Petitioner states that his duties

20 related to technical innovations rather than sales and use tax matters. In addition, petitioner claims that

21 Open Source's secured lender instituted a lock box security system that required that all payments on

22 accounts receivable be mailed to the lender.

23   The evidence shows that petitioner was Open Source's CEO/president beginning as early as

24 March 20, 2003, and there is no indication that petitioner's role as CEO ceased before the business

25 operations terminated (e.g., petitioner signed Open Source's seller's permit application in 2003 and a

26 waiver of limitation form in August 2006, both as its CEO/president). Generally, a president and CEO

27 is presumed to have broad implied and actual authority to do all acts customarily connected with the

28 business, including ensuring its compliance with the Sales and use Tax Law. Petitioner has provided

Eren Niazi   *-2-*

1   no documentation to support his assertions that he lacked authority to sign Open Source's checks or

2   that the secured lender required all payments on accounts receivable be sent to the lender, or any other

3   evidence to show that his authority as CEO was limited. Further, in documents filed with the

4   bankruptcy court, petitioner was identified as CEO and owner of 100 percent of the corporate stock, as

5   well as the corporation's "responsible individual." Thus, we find that petitioner was a responsible

6   person as defined by section 6829 during the period at issue.

7   Personal liability can be imposed on a responsible person under section 6829 only if that person

8   willfully failed to pay or to cause to be paid taxes due from the corporation, which means that the

9   failure was the result of an intentional, conscious, and voluntary course of action (even if without a bad

10 purpose or evil motive). A person is regarded as having willfully failed to pay taxes, or to cause them

11 to be paid, where he or she had knowledge that the taxes were not being paid and had the authority to

12 pay taxes or cause them to be paid, but failed to do so.

13   Although petitioner did not sign the sales and use tax returns, as Open Source's president and

14 CEO, petitioner should have received the determination issued to Open Source, as well as the

15 Demands for Immediate Payment related to the amounts due on the returns filed with partial

16 remittance. Therefore, based on the evidence that is available, we conclude that petitioner was aware

17 of the unpaid tax liabilities.

18   Willfulness also requires that the responsible person must have been able to pay, or cause to be

19 paid, the taxes when due. Although petitioner asserts that Open Source's Chief Financial Officer and

20 accountants were responsible for preparation and submission of all required tax returns and payments,

21 we find that, as CEO with 100 percent stock ownership, petitioner had authority over those individuals.

22 Petitioner's designation of authority over the sales and use tax matters to other employees does not

23 alleviate his ultimate responsibility for Open Source's sales and use tax compliance. Regarding

24 whether Open Source had sufficient funds to pay the taxes due, we note that a list of payments filed

25 with the bankruptcy court shows Open Source made payments to various creditors totaling about

26 $1.3 million from March 14, 2007, through June 6, 2007. Also, two employees have stated that they

27 received wages during the relevant period. Thus, we find that funds were available to pay the sales tax

28 liability, but Open Source's management chose to pay other creditors instead. In summary, we

Eren Niazi   *-3-*

1 conclude that all conditions have been satisfied for imposing personal liability on petitioner under

2 section 6829 for the outstanding tax liabilities of Open Source.

3 **Issue 2:** Whether petitioner has established reasonable cause sufficient for relieving the late-

4 payment and failure-to-file penalties originally assessed against Open Source. We conclude that he

5 has not.

6 While there is no basis under section 6829 for relieving the responsible person of penalties

7 imposed on the corporation, if the corporation were relieved of the penalties, that relief also inures to

8 the benefit of the responsible person. Here, petitioner submitted a request for relief of the penalties,

9 signed under penalty perjury, but the grounds for relief simply reiterate petitioner's contention that he

10 should not be held personally liable as opposed to stating a basis for relieving Open Source of the

11 penalties. Accordingly, we conclude that there is no basis for relieving Open Source of the penalties.

OTHER MATTERS

13 None.

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15 Summary prepared by Deborah A. Cumins, Business Taxes Specialist III

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