STATE BOARD OF EQUALIZATION
SALES AND USE TAX APPEAL

CALIFORNIA STATE BOARD OF EQUALIZATION

APPEALS DIVISION BOARD HEARING SUMMARY

In the Matter of the Petition for Redetermination Under the Sales and Use Tax Law of:	
LAWRENCE LYLE PALMER	Account Number SR EA 53-005936 Case ID 534236
Petitioner	San Clemente, Orange County

Type of Liability: Responsible person liability

Liability period: 10/01/07 – 07/28/08

Item	Disputed Amount
Responsible person liability	$269,040

Tax as determined and protested	$229,789.46
Interest through 02/28/14	95,378.17
Late return penalty	7,227.30
Failure-to-file penalties	16,261.60
Finality penalties	15,761.60
Total tax, interest, and penalty	$364,418.13
Monthly interest beginning 03/01/14	$ 1,148.95

This matter was scheduled for Board hearing in October 2012, but was deferred at the request of the Appeals Division in order to issue a supplemental D&R. It was rescheduled for Board hearing in April 2013, but was deferred for settlement consideration.

UNRESOLVED ISSUES

Issue 1: Whether petitioner is personally liable as a responsible person for the unpaid liabilities of Pro-Motors Corporation pursuant to Revenue and Taxation Code section 6829. We conclude petitioner is personally liable.

Pro-Motors Corporation (SR EA 100-959134) operated a used car dealership from October 1, 2007, through July 28, 2008. At the time its business terminated, Pro-Motors had unpaid liabilities related to a return filed with no remittance and three Notices of Determination (NOD's) for periods for which it did not file returns. The Sales and Use Tax Department (Department) concluded petitioner

was personally responsible for Pro-Motor's sales and use tax compliance pursuant to section 6829.[1]

Petitioner concedes that Pro-Motors collected sales tax reimbursement with respect to its taxable sales, but he disputes the specific date that Pro-Motors' business terminated. Petitioner also disputes the two remaining conditions for imposing personal liability pursuant to section 6829, that he is a responsible person and that he willfully failed to pay or to cause to be paid taxes due from Pro-Motors. Petitioner's primary contention is that Ken Owen, the majority owner and investor, is the only individual who should be held personally responsible for Pro-Motors' unpaid liability. Petitioner asserts that Mr. Owen and his accountant, Murray Goldenberg, took control of Pro-Motors' daily business operations sometime in December 2007, that Mr. Owen took control of money received from investors immediately upon receipt, and that he decided which creditors should be paid. Further, petitioner stated at the conference that Mr. Goldenberg dictated the payee of each check and then required two corporate officers with check-signing authority (including petitioner) to sign the checks.

With respect to the date Pro-Motors' business was terminated, petitioner asserts that the business closed on June 13, 2008. However, all available evidence supports the date of business termination established by the Department, July 28, 2008, and we find there is no basis to change that date in our analysis.

Regarding the issue of whether petitioner was a person responsible for Pro-Motors' sales and use tax compliance, we note that he was Pro-Motors' president/chief financial officer. Petitioner was listed as Pro-Motors' president, chief financial officer, or chief executive officer on numerous documents filed with the Department, the City of Stanton, the California Secretary of State, one of Pro-Motors' major suppliers, and the California Auto Dealer Exchange, and he signed several of those documents. In the capacity of either chief financial officer or chief executive officer, petitioner had broad implied and actual authority to perform all acts customarily connected with the corporation's business, including ensuring its sales and use tax compliance. Further, the Department's records indicate that petitioner communicated with the Department regarding Pro-Motors' sales and use tax

---

[1] The Department also issued NOD's for personal liability to Frank Colson and Richard Scoles. Their timely petitions for redetermination (Case ID's 535974 and 535973, respectively) are scheduled for hearing on the same calendar as this matter.

STATE BOARD OF EQUALIZATION
SALES AND USE TAX APPEAL

liabilities, which is direct evidence of petitioner's participation in Pro-Motors' tax compliance obligations. Thus, we find that petitioner was a responsible person as defined by section 6829.

With respect to willfulness, personal liability can be imposed on a responsible person under section 6829 only if that person willfully failed to pay or to cause to be paid taxes due from the corporation, which means that the failure was the result of an intentional, conscious, and voluntary course of action (even if without a bad purpose or evil motive). A person is regarded as having willfully failed to pay taxes, or to cause them to be paid, where he or she had knowledge that the taxes were not being paid and had the authority to pay taxes or cause them to be paid, but failed to do so.

The first requirement for willfulness is knowledge. Petitioner has provided a copy of Pro-Motors' corporate minutes dated March 27, 2008, which describe petitioner's statement that state taxes were due. Further, as stated previously, petitioner discussed Pro-Motors' tax liability with the Department. Thus, we find that petitioner knew that taxes were due but not paid.

Willfulness also requires that the responsible person must have been able to pay, or cause to be paid, the taxes when due. We find for the same reasons noted above that petitioner had authority to cause the taxes due to be paid. Regarding whether Pro-Motors had sufficient funds to pay the taxes due, petitioner has provided a copy of corporate minutes dated December 4, 2007, which show that the individuals at that meeting voted to approve a motion to allow Mr. Owen and Mr. Goldenberg to use the sales tax money until Mr. Owen was able to recapitalize the company. The approval of this motion is clear evidence that the individuals attending the meeting (including petitioner) voted to use money Pro-Motors had collected from customers as reimbursement for its sales tax liability for expenses, rather than to pay the sales tax. Further, there is evidence that Pro-Motors paid wages, paid suppliers, and paid other creditors during the periods at issue. Consequently, we find that funds were available to pay the sales tax liability, but Pro-Motors' management chose to pay other creditors instead, and the failure to pay the sales tax liability was willful.

Petitioner's primary argument is that he had no authority to pay the taxes, and thus he was neither responsible nor willful in his failure to pay the taxes or cause them to be paid. Petitioner asserts that only Mr. Owen exercised that authority, and that Mr. Owen retained that authority with threats of physical harm. Petitioner states that he and the other corporate officers were placed under

STATE BOARD OF EQUALIZATION
SALES AND USE TAX APPEAL

extreme duress by Mr. Owen, who was a shareholder and investor, to release the sales tax reimbursement to Mr. Owen for his personal enrichment. Petitioner states that he feared for his own life and for the safety of his family. On that basis, petitioner asserts that Mr. Owen should be the only individual who is held personally liable for Pro-Motors' tax liability, and that the NOD's issued to petitioner and the other corporate officers should be canceled. While the statute of limitations has passed for issuing a NOD to Mr. Owen, petitioner argues that, because of the "special circumstances" of this case, the statute of limitations should be extended to allow additional time for the Department to issue a NOD to Mr. Owen.

We first note that petitioner has not provided any documentary evidence of the alleged duress at the hands of Mr. Owen. Moreover, even if true, the alleged duress relates to the transfer of funds to Mr. Owen, rather than any alleged duress to refrain from paying the tax liability. Accordingly, we are not persuaded that the alleged duress was a factor in petitioner's decision not to pay Pro-Motors' sales tax. Further, there is no evidence that Mr. Owen was a person who was responsible for Pro-Motors' sales and use tax compliance. In fact, the available information only supports a conclusion that Mr. Owen's role in Pro-Motors was limited to investor and silent partner. Since Mr. Owen was not a person responsible for Pro-Motors' sales tax matters, one essential element for holding him personally liable for Pro-Motors' unpaid liabilities pursuant to section 6829 has not been satisfied. Consequently, there is no basis to find him personally liable for those liabilities, "solely," or otherwise. Moreover, even if there was a basis to find him personally liable, there is no statutory or regulatory basis for extending the statute of limitations based on allegations of duress. In addition, because section 6829 imposes liability on any responsible person, a conclusion that Mr. Owen was a responsible person would not negate our conclusion herein that petitioner is also a responsible person.

In summary, we find that all four requirements for imposing personal liability on petitioner pursuant to section 6829 have been satisfied. We further find that there is no basis to cancel the NOD issued to petitioner, as he has requested, because he would remain liable even if we found that Mr. Owen was also personally liable (which we have not).

Issue 2: Whether petitioner has established reasonable cause sufficient for relieving the penalties originally assessed against Pro-Motors. We conclude he has not.

STATE BOARD OF EQUALIZATION
SALES AND USE TAX APPEAL

There is no statutory or regulatory authority for relieving these penalties in section 6829 determinations, but if petitioner could show that the penalties should be relieved as to the corporation under Revenue and Taxation Code section 6592, the relief would also inure to petitioner's benefit. Petitioner submitted the required declaration signed under penalty of perjury in which he claims that Mr. Owen and Mr. Goldenberg took control of the company and made all financial decisions starting in 2008, and that all penalties should be directed to those individuals. In other words, the grounds stated in the request for relief do not address why *Pro-Motors* failed to timely pay the taxes and determination at issue, but instead reiterate petitioner's contention that he should not be held personally liable. Accordingly, petitioner has not established reasonable cause for Pro-Motors' late payments of amounts reported on returns, its failure to file returns, and its failure to timely pay the determinations at issue. Consequently, we find no basis for relief from the penalties at issue.

OTHER MATTERS

None.

Summary prepared by Lisa Burke, Business Taxes Specialist III

STATE BOARD OF EQUALIZATION
SALES AND USE TAX APPEAL