

## 1 CALIFORNIA STATE BOARD OF EQUALIZATION

## 2 APPEALS DIVISION BOARD HEARING SUMMARY

3 In the Matter of the Petition for Redetermination )  
 4 Under the Sales and Use Tax Law of: )  
 5 MICHAEL JOSEPH POMPURA ) Account Number: SR EH 53-004276  
 6 Petitioner ) Case ID 473931  
 ) Fontana, San Bernardino County

7 Type of Liability: Responsible person liability

8 Liability period: 07/01/07 – 12/31/07

9 Item Disputed Amount

10 Responsible person liability \$100,614

	<u>Tax</u>	<u>Penalty</u>
11		
12 As determined:	\$87,445.00	<u>\$14,417.90</u>
13 Payments made by corporation	<u>- 1,547.16</u>	
14 Balance, protested	<u>\$ 85,897.84</u>	<u>\$14,417.90</u>
15 Proposed tax redetermination	\$87,445.00	
16 Interest through 10/31/11	26,226.55	
17 Penalty for late payment of returns	14,117.90	
18 Penalty for late payment of a pre-payment	<u>300.00</u>	
19 Total tax, interest, and penalty	\$ 128,089.45	
20 Payments	<u>- 1,547.16</u>	
21 Balance Due	<u>\$ 126,542.29</u>	
22 Monthly interest beginning 11/01/11	<u>\$ 429.49</u>	

## 20 UNRESOLVED ISSUES

21 **Issue 1:** Whether petitioner is personally liable as a responsible person for the unpaid liabilities  
 22 of M&M Ultimate Auto Center, Inc. (M&M) pursuant to Revenue and Taxation Code section 6829.  
 23 We conclude petitioner is personally liable.

24 M&M was a retailer of used vehicles in Fontana and operated under seller's permit SR EA 100-  
 25 747042 from July 1, 2006, through December 31, 2007. M&M had unpaid liabilities related to one  
 26 non-remittance return, and late payment of returns and one pre-payment. The Department determined  
 27 that M&M's business was terminated on or about December 31, 2007, and that the business had  
 28 collected sales tax reimbursement with respect to its retail sales. These are two of the four conditions

1 for imposing personal liability on petitioner for the tax debts incurred by M&M, and they are  
2 undisputed. The other two conditions, which petitioner does dispute, are that petitioner must have  
3 been responsible for sales tax compliance by M&M, and petitioner must have willfully failed to pay or  
4 cause to be paid taxes due from M&M.

5 The Department concluded that petitioner was a responsible person under section 6829 because  
6 petitioner is listed as a corporate officer on various documents filed with the Board and with the  
7 Secretary of State (many of which petitioner signed), M&M's accountant indicated petitioner was a  
8 person who had control and responsibility for M&M, petitioner signed a finance application listing  
9 himself as co-owner and finance manager, and petitioner signed a commercial lease agreement as  
10 tenant. The Department also determined that petitioner willfully failed to pay, or cause to be paid,  
11 M&M's tax liabilities because M&M had funds available at the time the taxes became due and chose  
12 to pay other creditors. In reaching this conclusion, the Department noted payments were made to two  
13 suppliers during the period third quarter 2007 (3Q07), through 1Q08, and wages were paid to  
14 employees in 3Q07 and 4Q07.

15 Petitioner contends that he is not personally liable for M&M's unpaid tax liabilities because he  
16 did not willfully fail to pay the taxes due. Petitioner further contends that M&M did not have any  
17 funds available to pay the full obligations of the business when it discontinued.

18 There is no dispute that petitioner acted as Vice-President, Secretary, Chief Financial Officer,  
19 and Director during the period in which the liability arose. Petitioner also signed the 3Q06 sales and  
20 use tax return which is an indication that he had responsibility for M&M's sales and use tax matters.  
21 Based on this evidence, we find that petitioner was a responsible person as defined by section 6829.

22 With respect to willfulness, personal liability can be imposed on a responsible person under  
23 section 6829 only if that person willfully failed to pay or to cause to be paid taxes due from the  
24 corporation, which means that the failure was the result of an intentional, conscious, and voluntary  
25 course of action (even if without a bad purpose or evil motive). A person is regarded as having  
26 willfully failed to pay taxes, or to cause them to be paid, where he or she had knowledge that the taxes  
27 were not being paid and had the authority to pay taxes or cause them to be paid, but failed to do so.  
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1 At the appeals conference petitioner indicated that he knew about the tax liability, but did not  
2 pay it because M&M did not have the money. However, M&M paid its creditor, Automotive Finance  
3 Corporation, over \$400,000 during the period October 1, 2007, through December 31, 2007, and over  
4 \$60,000 for the period January 1, 2008, through March 31, 2008. M&M also paid its other supplier,  
5 The Radiator Man, over \$4,000 during the same periods. In addition, M&M paid compensation to its  
6 employees of \$198,441 and \$206,295 for 3Q07 and 4Q07 respectively. Thus, we find that funds were  
7 available to pay the sales tax liability, but M&M's management chose to pay other creditors instead.  
8 In summary, we conclude that all conditions have been satisfied for imposing personal liability on  
9 petitioner under section 6829 for the outstanding tax liabilities of M&M.

10 **Issue 2:** Whether the penalties originally assessed against M&M should be relieved. We  
11 conclude that relief is not warranted.

12 Petitioner was advised in the D&R that we could consider recommending relief of these  
13 penalties if he submitted a request for relief, signed under penalty of perjury, on M&M's behalf setting  
14 forth the facts supporting relief. Petitioner has not done so. Therefore, we have no basis on which to  
15 consider recommending relief of any penalties.

16 **OTHER DEVELOPMENTS**

17 None.

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19 Summary prepared by Thea C. Etheridge, Business Taxes Specialist II  
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