

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION SUMMARY FOR BOARD HEARING

In the Matter of the Petition for Redetermination)
Under the Sales and Use Tax Law of:)
BETTY JO ROBART) Account Number: SR AC 53-002760
Case ID 383878
Petitioner) Sylmar, Los Angeles County

Type of Liability: Responsible Person Liability

Liability Period: 1/1/94 – 12/31/00

Item Amount in Dispute

Responsible Person Liability \$102,953¹

| | <u>Tax</u> | <u>Penalties</u> |
|------------------------------------|---------------------|------------------|
| As determined, protested | \$ 29,181.81 | \$16,342.38 |
| Proposed tax redetermination | \$ 29,181.81 | |
| Interest to 2/28/10 | 66,621.36 | |
| Penalties | 16,342.38 | |
| Total tax, penalties, and interest | <u>\$112,145.55</u> | |
| Monthly interest beginning 3/1/10 | <u>\$170.23</u> | |

This matter was scheduled for Board hearing on October 30, 2008, but was postponed because petitioner filed a settlement proposal. Since the settlement negotiations were not successful, this matter has been rescheduled for Board hearing.

UNRESOLVED ISSUES

Issue 1: Whether the Notice of Determination to petitioner as a responsible person for the liabilities of Philwan, Inc. (Philwan) (SR AC 13-747918) was timely. We find that it was timely.

On November 20, 2006, the Sales and Use Tax Department (Department) issued a Notice of Determination (NOD) to petitioner as a responsible person pursuant to Revenue and Taxation Code section 6829 for the unpaid liabilities of Philwan, doing business as Super Sound Electronic, for two

¹ Comprised of tax of \$29,182, finality penalties of \$8,020, negligence penalties of \$8,322, and interest accrued through the November 20, 2006 Notice of Determination of \$57,429 (interest has continued to accrue).

1 separate audit periods, January 1, 1994, through December 31, 1996, and January 1, 1997, through
2 December 31, 2000. Petitioner concedes she was liable as a responsible person under section 6829 for
3 the unpaid liabilities of Philwan, but contends that the NOD was not issued timely because it was not
4 issued within the three-year limitation period set forth in Revenue and Taxation Code section 6487,
5 subdivision (a). Petitioner states that, at the time of the Philwan audits, the Department knew that
6 petitioner was the sole owner and responsible person who managed the financial obligations of the
7 corporation and, petitioner asserts, could have issued a timely dual determination against both Philwan
8 and petitioner. Instead, the Department issued to Philwan an NOD on February 26, 1998, for the
9 period January 1, 1994, to December 31, 1996, and another NOD on April 10, 2001, for the period
10 January 1, 1997, to December 31, 2000. Petitioner claims that the statute of limitations for issuing a
11 dual determination for the February 26, 1998 assessment expired at the end of January 1999 and for the
12 April 10, 2001 assessment, expired at the end of January 2004. Since the Department did not issue the
13 NOD to petitioner until November 20, 2006, petitioner contends that the statute of limitations expired
14 before the NOD was issued to her for personal liability.

15 Petitioner disagrees with the Memorandum Opinion in *Hosmer Chandler McKoon* (5/31/07)
16 which explains the application of the statute of limitations to an NOD issued for liability under section
17 6829. As explained in *McKoon*, the statute of limitations for issuing an NOD under section 6829
18 begins running on the last day of the month following the quarter during which the business
19 terminates, and extends for three years if the responsible person filed a sales and use tax return in his or
20 her own name for that quarter or for eight years if the responsible person did not do so. Petitioner
21 claims that *McKoon* creates a legal fiction and new law, and argues that the decision places the burden
22 on the owners of closely held corporations to file individual sales and use tax returns on their own
23 initiative for assessments to the corporation. Petitioner asserts that no statute imposes this burden on
24 the individual under the circumstances in this case and that the decision usurps the legislative function
25 of elected representatives in the Legislature. Petitioner also argues *McKoon* is unconstitutional and
26 violates basic due process by punishing individual taxpayers, without prior notice, for past conduct that
27 they cannot change and petitioner contends that, as such, *McKoon* is an *ex post facto* decision and
28 violates both the United States and the California Constitutions.

1 Petitioner also notes that after the corporation discontinued business, the business was sold to
2 KRC, a corporation owned by her children, and that all proceeds were paid over to the Board.
3 Petitioner states that KRC obtained a Tax Clearance Certificate from the Board in 2001, and asserts
4 that on December 27, 2001, the Board issued a Certificate of Payment stating in part that no taxes were
5 owed and there is no requirement that any buyer withhold any amount for payment of taxes, interest, or
6 penalties. Petitioner claims that she relied on the Certificate and, therefore, the Board should be
7 estopped from issuing an NOD to petitioner.

8 Contrary to petitioner's belief, *McKoon* did not state a new rule but rather simply explained the
9 existing rule, applying section 6487 to determinations issued for liability under section 6829. Since
10 section 6829 imposes a personal liability as of the termination date of the corporation, the technical
11 provisions of the Sales and Use Tax Law require that the responsible person file a sales and use tax
12 return to report his or her personal liability by the end of the month following the quarter of
13 termination, and for the period at issue here, provided for an eight-year limitations period if the
14 responsible person failed to do so.²

15 Here, the corporation ceased doing business on September 6, 2001. Because petitioner had an
16 independent (albeit derivative) liability as a responsible person once Philwan ceased doing business
17 (all of the other elements of section 6829 had already been satisfied), she was required to file a
18 personal return for the quarterly period July 1, 2001, through September 30, 2001, by October 31, 2001
19 to report that liability. Since she did not do so, the eight-year statute of limitations applies, and the
20 NOD issued on November 20, 2006, was well within that limitations period.

21 Regarding petitioner's arguments about the issuance of certificates, when the Department was
22 contacted in connection with KRC's agreement to purchase Philwan's business, the Department issued
23 a Notice of Amounts Due and Conditional Release on October 11, 2001, which stated Philwan's total
24 liability at that time including tax, interest, and penalty was \$90,258.11. Since KRC remitted the entire
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26 _____
27 ² The statute of limitations applicable to an NOD issued pursuant to Revenue and Taxation Code section 6829 was changed
28 operative January 1, 2009, to provide a limitations period applicable specifically to such an NOD. (Rev. & Tax. Code, §
6829, subd. (f).) This statutory amendment is inapplicable to the present matter since the NOD here was issued on
November 20, 2006, well before the operative date of the statutory change.

1 purchase price of \$51,000 to the Board towards the amount Philwan owed, a Certificate of Payment
2 was issued to document that the *purchaser* had satisfied its responsibility under Revenue and Taxation
3 Code section 6811 and thus did not have liability under Revenue and Taxation Code section 6812.
4 This is the very reason that the Certificate of Payment specifically provides that it was given “solely
5 for the protection of the purchaser or purchasers of the business or stock of goods and does *not* release
6 the seller from any taxes, interest, or penalties.” Thus, not only was Philwan advised of the specific
7 amount due at the time of the purchase (which was more than the purchase price remitted to the
8 Board), but also the Certificate of Payment was specifically limited to documenting the *purchaser’s*
9 satisfaction of its obligations and does not provide a basis to relieve petitioner of the liability she has
10 under section 6829 for the amounts still owed by Philwan.

11 **Issue 2:** Whether petitioner is entitled to relief from interest. We conclude that relief is not
12 warranted.

13 Petitioner asserts that the lengthy delay in issuing the NOD to petitioner until more than five
14 and one-half years after the Department issued the second NOD to Philwan resulted in needless
15 compounding of delinquency penalties and interest against her. Petitioner asserts that she
16 detrimentally relied on the certificates issued to KRC by the Board and she is thus entitled to relief
17 from the interest in full.

18 The law provides for relief of interest under specific circumstances. Since petitioner’s failure
19 to pay the amount due was not due to a disaster or due to reasonable reliance on written advice from
20 the Board (Rev. & Tax. Code, §§ 6593, 6596, subd. (a)), the only possibility for relief here would be if
21 there had been an unreasonable error or delay by an employee of the Board acting in his or her official
22 capacity, with no significant aspect of the error or delay having been attributable to an act of, or a
23 failure to act by, petitioner (Rev. & Tax. Code, § 6593.5, subds. (a)(1), (b)).

24 The Department spent several years unsuccessfully pursuing collection of the outstanding
25 corporate liability from the corporation itself prior to considering issuing the subject NOD. We believe
26 that the delay caused by the Department’s efforts to collect from the corporation first were reasonable
27 and prudent under the circumstances. The Department further delayed pursuing petitioner when, on
28 behalf of Philwan, she applied for amnesty in May 2005 and entered into an installment payment

1 agreement that would have extinguished the liability. The installment payment agreement was
2 terminated in May 2006 after one year and no payments, and in June 2006 the Department re-
3 examined the account and determined that the issuance of a determination under section 6829 was
4 warranted at that time. Upon completing its examination in September 2006, the Department issued
5 the NOD to petitioner on November 20, 2006. Hence, after the plan was terminated, there was no
6 unreasonable delay by the Department in examining whether an NOD should be issued to petitioner.
7 We note also that relief of interest is warranted only if no significant aspect of the delay can be
8 attributable to an act or a failure to act by petitioner, and here, petitioner did contribute to the delay by
9 submitting an amnesty application for Philwan and then never making any payments towards the
10 liability. Based on these factors, we conclude that petitioner has failed to establish an unreasonable
11 delay by the Department or that petitioner did not significantly contribute to the delay. Consequently,
12 we find no basis for relief from interest.

13 **Issue 3:** Whether the penalties originally assessed against Philwan for which petitioner is
14 being held liable as a responsible person should be deleted. We conclude that the penalties should not
15 be deleted.

16 The determination issued to petitioner as a responsible person includes penalties assessed to
17 Philwan for negligence and for failure to timely pay the determinations. The negligence penalty was
18 assessed because the tax deficiencies were caused by the same types of errors that resulted in the
19 deficiency in prior audits. There is no basis for relief of such penalties as to a responsible person liable
20 under Revenue and Taxation Code section 6829. However, if the penalties were deleted as to Philwan,
21 the deletion of the penalties from the liabilities owed by Philwan would also inure to petitioner's
22 benefit.

23 Petitioner requests relief of the penalties on behalf of the corporation based on the same
24 arguments noted above related to why she should not be liable for the disputed amounts. However,
25 petitioner has not addressed *Philwan's* lack of negligence or *Philwan's* failure to pay taxes or timely
26 petition a determination. Thus, petitioner's declaration does not show why the recurring errors from
27 prior audit was not negligence, or provide a valid basis for Philwan's failure to petition or pay the
28 liability within 30 days of the issuance of the NOD. We find no basis for removal of the penalties.

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AMNESTY

The Board's policy is to not impose the amnesty interest penalty on a dualee where the primary taxpayer is not subject to the penalty because it applied for amnesty and entered into an installment payment plan. Here, Philwan did file an application to participate in the amnesty program and entered into an installment payment plan. Accordingly, the amnesty interest penalty will not be imposed in this matter.

Summary prepared by Rey Obligacion, Business Taxes Specialist III, Retired