

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 RUSSELL C. ROBBINS, SR.) Account Number: SR EH 53-004543
) Case ID 479532
 6 Petitioner) Murrieta, Riverside County

7 Type of Liability Responsible person liability

8 Liability Period: 11/1/05 - 2/28/06

9 Item Disputed Amount

10 Responsible Person Liability \$13,671

	<u>Tax</u>	<u>Penalty</u>
11 As determined, protested	<u>\$11,429.00</u>	<u>\$2,241.90</u>
12 Proposed tax redetermination	\$11,429.00	
13 Interest to 3/31/11	5,232.50	
14 Penalty for late payment of a return	404.30	
15 Penalty for filing a late return	360.40	
15 Penalties for failure to file returns	738.60	
15 Finality penalties	<u>738.60</u>	
16 Total tax, interest, and penalty	<u>\$18,903.40</u>	
17 Monthly interest beginning 4/1/11	<u>\$66.67</u>	

18 This matter was scheduled for Board hearing on October 19, 2010, but the hearing was moved
 19 to October 21, 2010. The hearing was postponed because petitioner indicated that he was not available
 20 on that date and preferred to have the Board hearing held in March 2011.

21 UNRESOLVED ISSUES

22 **Issue 1:** Whether petitioner is personally liable as a responsible person for the unpaid
 23 liabilities of WWYL Enterprises, LLC (WWYL), (SR EH 100-655816), for the period November 1,
 24 2005, through February 28, 2006. We find that petitioner is personally liable.

25 WWYL operated a restaurant under the dba Rocky Cola Café, from November 1, 2005, to
 26 March 31, 2006, when it discontinued its business operations (in August 2006, its seller's permit was
 27 closed out effective March 31, 2006). There is no evidence of further sales after March 31, 2006, and
 28 on April 13, 2007, WWYL filed a Chapter 7 petition for bankruptcy, the case closing on September 17,

Russell C. Robbins, Sr.

1 2009. At close out of its seller's permit, WWYL had unpaid liabilities incurred for the period
2 November 1, 2005, through February 28, 2006, with respect to a return filed late, a payment made with
3 a check returned for insufficient funds, and for returns that were not filed. The Sales and Use Tax
4 Department (Department) determined that petitioner is personally liable for WWYL's unpaid liabilities
5 because he was a responsible person within the meaning of Revenue and Taxation Code section 6829.
6 The Department made this determination based on: 1) several documents that identified petitioner as a
7 member and a 33 1/3 percent owner of WWYL; 2) corporate checks which petitioner signed; and 3) a
8 letter to the Board, which he co-authored, addressing sales and use tax matters. The Department also
9 found that WWYL added sales tax reimbursement to the selling price of taxable sales based on
10 affidavits obtained from two customers of WWYL, and that petitioner had been willful in his failure to
11 pay the outstanding liabilities of WWYL because, although WWYL had funds available, they were
12 used instead to pay wages and to pay vendors and other creditors. The Department issued a Notice of
13 Determination to petitioner as a responsible person for the unpaid liabilities of WWYL, and petitioner
14 filed a timely petition for redetermination.¹

15 At the conference, petitioner did not dispute that WWYL's business had been terminated, that
16 sales tax reimbursement was added or included in taxable sales, or that petitioner was a responsible
17 person pursuant to section 6829. However, petitioner argues he was not willful in the nonpayment of
18 the taxes due from WWYL. Petitioner asserts he did not know the business was a bad business
19 because the seller lied about the financial standing of the business and notes he was an owner of the
20 business for only five months prior to WWYL's filing for bankruptcy. Although there were funds
21 available, petitioner asserts those funds had to be used to pay creditors, vendors, and suppliers, as well
22 as pay wages, to keep the business operating. Petitioner asserts he paid bills out of his own pocket and
23 did not realize he could be held liable for the unpaid liabilities of WWYL. Petitioner contends that the
24 Board's only recourse should have been to file a claim with the United States Bankruptcy Court.

27 ¹ The Department also issued a Notice of Determination under section 6829 to Mr. Russell C. Robbins, Jr. for the same
28 unpaid liabilities, and he filed a timely petition for redetermination (Case ID 485670), which is scheduled for hearing on the
same date as the instant appeal.

1 Personal liability can be imposed on a responsible person under section 6829 only if that person
2 willfully failed to pay or to cause to be paid taxes due from the corporation, which means that the
3 failure was the result of an intentional, conscious, and voluntary course of action (even if without a bad
4 purpose or evil motive). A person is regarded as having willfully failed to pay taxes, or cause them to
5 be paid, where he or she had knowledge that the taxes were not being paid (or lacked knowledge in
6 reckless disregard of his or her duty to know) and had the authority to pay taxes or cause them to be
7 paid, but failed to do so.

8 WWYL filed a late return for the period November 1, 2005, through November 30, 2005, paid
9 the tax, but not the interest and penalty. It also filed a late return for the period December 1, 2005,
10 through December 31, 2005, and while it submitted a check for tax, interest, and penalty, the check
11 was dishonored. We find that petitioner, as a responsible person, knew or should have known that
12 taxes were due but not paid. In fact, petitioner acknowledged WWYL's failure to pay taxes in several
13 letters to the Board, which is further evidence of his knowledge that taxes were due. We find that
14 petitioner acted consciously and voluntarily when he elected to use WWYL's available funds to pay
15 other liabilities instead of paying the taxes and penalties owed. He conceded that WWYL paid wages,
16 paid its suppliers and other creditors, paid lease payments to its property manager, and paid its attorney
17 and bankruptcy filing fees. That is, WWYL had funds available but petitioner chose to use those funds
18 to pay creditors other than the Board. We therefore find that all the requirements for imposing
19 liability on petitioner under section 6829 have been satisfied.

20 Petitioner's argument regarding WWYL's bankruptcy filing is unpersuasive. Even if the taxes
21 owed by WWYL had been discharged in its bankruptcy proceeding, that discharge would have applied
22 only to WWYL, not petitioner. We know of no authority, and petitioner has presented none, that
23 would prevent the Board from recovering the unpaid tax, interest, and penalties incurred by WWYL
24 from petitioner as a responsible person liable under section 6829. Petitioner's liability here is a
25 personal liability which is statutorily imposed by section 6829, and would not have been discharged in
26 WWYL's bankruptcy proceedings, which dealt only with WWYL's continued liability for its debts. In
27 any event, taxes are not generally dischargeable in bankruptcy and petitioner has not provided any
28 evidence that WWYL's sales and use tax liabilities were discharged in its bankruptcy proceedings.

Russell C. Robbins, Sr.

