

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:)
JING SHEN) Account Number: SR EA 53-002568
) Case ID 424037
Petitioner) Beijing, China

Type of Liability: Responsible Person

Liability Period: 8/29/96 – 12/31/00

<u>Item</u>	<u>Amount</u>
Responsible Person Liability	\$38,241
Relief of Interest	\$18,357

	<u>Tax</u>	<u>Penalties</u>
As determined, protested	\$42,781.43	\$21,672.10
Adjustments: Sales and Use Tax Department	-13,226.24	-5,336.76
Appeals Division	<u>-13,058.32</u>	<u>-12,948.30</u>
Proposed redetermination	<u>\$16,496.87</u>	<u>\$3,387.04</u>
Proposed tax redetermination	\$16,496.87	
Interest (tax paid in full 9/23/09)	18,356.74	
Penalties	<u>3,387.04</u>	
Total tax, interest, and penalties	\$38,240.65	
Payments	<u>-16,496.87</u>	
Balance due	<u>\$21,743.78</u>	

This matter was previously scheduled for Board hearing on February 24, 2010, but was postponed to allow petitioner additional time to file a supplemental brief.

UNRESOLVED ISSUES

Issue 1: Whether petitioner is personally liable as a responsible person for the unpaid liabilities of Netrue Communications, Inc. (Netrue), seller's permit number SR Y EA 97-275537. We conclude that petitioner is liable as a responsible person for the unpaid liabilities of Netrue for the period January 1, 1997, through December 31, 1999.

The Sales and Use Tax Department (Department) issued a timely Notice of Determination to petitioner under Revenue and Taxation Code section 6829 for \$42,781.43 tax, plus accrued interest,

1 and penalties of \$21,672.10, representing a portion of the unpaid liabilities of Netrue for the period
2 August 29, 1996, through December 31, 2000. After petitioner filed a timely petition for
3 redetermination, the Department deleted the liability for the year 2000 because petitioner established
4 that his employment by Netrue ended on September 12, 2000, prior to the date on which the sales and
5 use tax return (SUTR) for 2000 was due (January 31, 2001). In the D&R, we find that the evidence
6 does not establish petitioner was a person responsible for Netrue's sale and use tax matters with respect
7 to liability accrued prior to January 1, 1997, and thus recommend that liability be deleted as to
8 petitioner. We also recommend, based on the Department's post-conference concession, that tax on
9 unreported sales of \$140,900 assessed to Netrue be deleted from petitioner's liability because the
10 Department is unable to establish that Netrue had included or added sales tax reimbursement to its
11 selling price for such sales, an essential element for liability under section 6829. Thus, the determined
12 liability that remains in dispute consists of the use tax Netrue owes on purchases of fixed assets during
13 the period January 1, 1997, through December 31, 1999, which is the tax determined to Netrue for that
14 period after deducting the tax on unreported sales of \$140,900 noted above.

15 As relevant to the conditions for imposing liability on a person under Revenue and Taxation
16 Code section 6829, petitioner disputes that he was responsible for Netrue's tax matters and that he
17 willfully failed to pay or cause to be paid any taxes owed. Petitioner became president and CEO of
18 Netrue in July 1997, and remained CEO until his departure in September 2000. However, petitioner
19 asserts that the chief financial officer and controller handled all tax filings during his tenure with the
20 company. We note that on July 24, 1998, petitioner alone signed the application for the seller's permit
21 on behalf of Netrue, and the SUTR's filed by Netrue for 1998 and for 1999 both bear petitioner's
22 signature. Petitioner asserts that he did not sign these SUTR's and the signatures are forgeries. We
23 have compared the signatures on the SUTR's with other signatures that are indisputably his (such as on
24 a letter and a declaration from petitioner), and they appear sufficiently similar to us to have all been
25 written by the same person (petitioner's contention is supported only by his assertion, and he has not
26 submitted any further evidence). If petitioner did sign the SUTR's, that would be convincing evidence
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1 of his responsibility.¹ However, without regard to that issue, other evidence shows that petitioner was
2 responsible for Nettrue's sales and use tax matters. For example, a letter dated March 15, 1998, from
3 outside accountant Casey Tung to another outside accountant, James Chang, regarding Nettrue's
4 financial statements shows that it was copied only to petitioner. This indicates that the outside
5 accountants believed petitioner was one of the primary people responsible for Nettrue's financial
6 statements. In addition, petitioner appears to have been the only person to recommend particular
7 investments or payments at the August 1998 meeting of the board of directors, and to report to the
8 board of directors on the company's financial condition in October 1999. We conclude that the
9 available evidence contradicts petitioner's claim that he had no involvement in Nettrue's day-to-day
10 financial matters and shows that his responsibility for Nettrue's sales and use tax matters during the
11 period he was Nettrue's president and CEO.

12 With respect to petitioner's argument that he did not willfully fail to pay or cause to be paid any
13 taxes owed by Nettrue, "willfully fails to pay or to cause to be paid" means that the failure was the
14 result of an intentional, conscious, and voluntary course of action. (Rev. & Tax. Code, § 6829, subd.
15 (d).) This failure may be willful even if it was not done with a bad purpose or evil motive. (Cal. Code
16 Regs., tit. 18, § 1702.5, subd. (b)(2).) In summary, a person is regarded as having willfully failed to
17 pay taxes or cause them to be paid where he or she had knowledge that the taxes were not being paid
18 (or lacked knowledge in reckless disregard of his or her duty to know) and had the authority to pay
19 taxes or cause them to be paid, but failed to do so.

20 As president and CEO and, we believe, a person who was responsible for sales and use tax
21 matters, we conclude that petitioner must have known that Nettrue was spending significant sums to
22 purchase capital assets without payment of tax or tax reimbursement during the years of growth in
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24 ¹ Although we believe that petitioner did sign the 1998 and 1999 returns, one alternative possibility is that the signatures
25 could have been added by someone else with petitioner's specific or implicit authorization. The signatures are represented
26 as petitioner's and thus should have been petitioner's own signature, but in this type of situation, we believe that there are
27 situations where the person whose "signature" appears on the return has actually authorized another person to sign his or
28 her name, for example, where the person whose signature is required is not physically present to sign the document. (By
noting that this may occur, we do *not* intend to indicate that this is an appropriate practice.) The point of this observation is
that we find it difficult to believe that someone else signed petitioner's name on tax returns for two years without his
knowledge and authorization while he had been, and continued to be, president and CEO. We believe that, whether or not
the signature was actually by petitioner's own hand, petitioner knew the contents of the SUTR's and authorized their filing
with the Board.

1 1997, 1998, and 1999. We note that Nettrue's SUTR for 1999 reported use tax measured by \$37,029
2 (about 78 percent of Nettrue's audited use tax liability for that year), which we believe demonstrates
3 petitioner's knowledge that Nettrue was required to report on its SUTR's the use tax Nettrue owed on its
4 use of equipment acquired without the payment of tax or tax reimbursement. Given the amount of
5 purchases subject to use tax in 1997 (\$102,994) and 1998 (\$111,213), we further believe that petitioner
6 would have known of these purchases and would have known that Nettrue owed use tax related to those
7 purchases. However, Nettrue filed no return at all for 1997 and filed a return but reported no use tax in
8 1998. We find that petitioner either knew that Nettrue failed to pay any of the use tax it owed for 1997
9 and 1998 and less use tax than due for 1999, or his lack of knowledge was the result of his reckless
10 disregard of his duty to know.

11 With respect to Nettrue's ability to pay the tax, there appears to have been more than adequate
12 cash flow during the relevant times. According to petitioner's statements in his declaration and
13 November 28, 2007 letter to Board staff, it was not until well after January 31, 2000, that the fortunes
14 of Nettrue turned down, along with the fortunes of many technology companies. Nettrue's Consolidated
15 Financial Statement for the year ended December 31, 1999, while showing net operating losses for
16 1997, 1998, and 1999, also shows ending cash and cash equivalents in 1997, 1998, and 1999 of
17 \$308,000, \$1.68 million, and \$3.067 million, respectively. Petitioner states in his November 28, 2007
18 letter to Board staff that, "Nettrue did not have any cash flow challenge which would have caused the
19 company to divert collected sales tax to other creditors because we were able to raise enough money
20 from investors." This shows that Nettrue had the ability to pay its taxes when due for the periods at
21 issue. According to petitioner's declaration, when in August 1998 Global Light Telecommunications,
22 Inc. (Global) acquired a 51 percent stake in Nettrue and a corresponding four seats on the seven-
23 member board of directors and when Nettrue acquired Vitacom in May 1999, substantial sums of
24 money were being spent by the company.

25 Petitioner claims that Global and its management assumed substantial control over Nettrue's
26 management when it purchased a controlling interest in August 1998. Petitioner claims that shortly
27 after Global took a majority of Nettrue's board of directors, the board delegated responsibility for
28 providing oversight and supervision of Nettrue's accounting and finances to Global staff. Petitioner

1 alleges that another aspect of Global's control was the requirement that all checks over \$1,000 bear
2 two signatures, one from the Global management group and one from the original Nettrue management
3 group (petitioner was one of two authorized signors from the original Nettrue management group).

4 The mere fact that checks had to be countersigned by a member of the Global group does not
5 establish that petitioner did not have the authority and ability to pay taxes due. Petitioner alleges that
6 he did not have the authority to pay the taxes because that authority rested with Global. However,
7 there is no evidence that Global prevented petitioner from filing a return for Nettrue in 1997 or
8 correctly reporting use tax in 1998 or 1999. The board of directors authorized substantial payments to
9 others at petitioner's urging and must have authorized payment of the use tax Nettrue did report and
10 pay for 1999, which exceeded the \$1,000 threshold for countersigned checks. We find that this shows
11 Global's board authorized payments at petitioner's request, including payments to the Board. Had
12 petitioner requested authorization to pay the liabilities at issue, we believe the evidence establishes that
13 Global's board would have granted petitioner's request, and petitioner has not established (or alleged)
14 that he requested authorization for payment of the tax due and that such authorization was refused.

15 We find that all elements for imposing responsible person liability pursuant to section 6829
16 have been satisfied to hold petitioner liable for Nettrue's liability for fixed asset purchases subject to
17 use tax for the period January 1, 1997, through December 31, 1999.

18 **Issue 2:** Whether the penalties assessed against Nettrue that were carried over and imposed
19 against petitioner should be deleted. We recommend no adjustments.

20 Penalties for negligence, failure to file, and failure to timely pay the determination were
21 imposed against Nettrue and were included in the responsible person liability imposed against
22 petitioner. The Department imposed the negligence penalty against Nettrue because of Nettrue's
23 substantial underreporting and its failure to maintain adequate supporting business records. Petitioner
24 made no specific argument against the negligence penalty. Based on the evidence, we find that Nettrue
25 was negligent and that the negligence penalty was properly imposed.

26 With respect to the penalties for failure to file and failure to timely pay the determination,
27 although there is no statutory or regulatory authority for relieving penalties in section 6829
28 determinations, if the Board were to relieve the penalties as to Nettrue under Revenue and Taxation

1 Code section 6592, that relief would also inure to the benefit of petitioner. Petitioner submitted a
2 request for relief of the penalties, signed under penalty of perjury, in which he makes the same
3 arguments as noted above, that he is not personally liable at all because he did not have the requisite
4 control, authority, and ability to pay the tax. However, petitioner has not presented any basis for
5 concluding that Netrue's failure to pay the liability or file a timely petition for redetermination was due
6 to reasonable cause and circumstances beyond the Netrue's control, and occurred notwithstanding the
7 exercise of ordinary care and in the absence of willful neglect. Therefore, we find that relief from the
8 penalties is not warranted.

9 **Issue 3:** Whether interest should be relieved. We find that interest should not be relieved.

10 Petitioner asserts that interest should be relieved because the Department unreasonably delayed
11 its efforts to collect the tax from Netrue and its controlling shareholder, Global. He asserts that there
12 has been a six-year delay, none of which is attributable to petitioner, and had the Department been
13 more punctual in its pursuit of Global and others, and in its notification to petitioner regarding his
14 potential exposure, the interest would have been mitigated. Interest may be relieved if there was an
15 unreasonable error or delay by a Board employee in his or her official capacity, with no significant
16 aspect of the error or delay can be attributed to an act or failure to act by petitioner.. (Rev. & Tax.
17 Code, § 6593.5.) The Board may only grant relief for tax periods commencing on or after July 1, 1999
18 (Rev. & Tax. Code, § 6593.5, subd. (d)), so if petitioner were to establish all elements for relief, such
19 relief would be available only with respect to the interest that has accrued on the tax liability incurred
20 for the third and fourth quarters 1999.

21 The notice of determination was timely issued to petitioner. We do not believe that relief of
22 interest under Revenue and Taxation Code section 6593.5 is available solely because of the timing of a
23 notice of determination that is issued before the statute of limitations has run out, barring, perhaps,
24 some highly unusual circumstances not applicable here. At the time the notice of determination was
25 issued to petitioner, the Board had eight years to issue the determination from the last day of the month
26 following the quarter in which the business of Netrue was terminated, and the determination was
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1 issued well within that time.² We conclude that there was no unreasonable delay in issuing the
2 determination, nor has there been any other unreasonable delay. Thus, we find that there is no basis
3 for relief of interest.

4 **RESOLVED ISSUES**

5 In addition to the adjustments we recommend, noted above, we also conclude that petitioner
6 has established that Nettrue's failure to file for amnesty was due to reasonable cause. (The amnesty
7 interest penalty applicable to the period of January 1, 1997, through December 31, 1999, is \$5,738.33.)
8 We therefore recommend that the amnesty interest penalty be relieved if petitioner either pays in full
9 the interest remaining due (petitioner has paid all the tax imposed on him) within 30 days from the
10 issuance of the Notice of Redetermination, or within that period, enters into a qualifying installment-
11 payment agreement to pay the remaining interest in full within 13 months, and successfully completes
12 that agreement.

13 **OTHER DEVELOPMENTS**

14 None.

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16 Summary prepared by Rey Obligacion, Retired Annuitant
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27 ² Revenue and Taxation Code section 6829 was amended, pursuant to legislation sponsored by the Board, to provide a
28 specific limitations period for issuing a determination under section 6829 on and after January 1, 2009. Since the
determination here was issued long before January 1, 2009, the new limitations period is inapplicable to the present appeal.