

## 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 DANIEL W. SHULTE ) Account Number SR KH 53-004049  
 ) Case ID 475423  
 6 Petitioner ) Dayton, Nevada

7 Type of Liability: Responsible person liability

8 Liability period: 04/01/02 – 06/30/05

9 Item Disputed Amount

10 Responsible person liability \$268,383

	<u>Tax</u>	<u>Penalty</u>
12 As determined	\$325,532.81	\$70,434.93
13 Payment made by the corporation	-127,584.64	<u>0.00</u>
13 Protested	<u>\$197,948.17</u>	<u>\$70,434.93</u>
14 Proposed tax redetermination	\$325,532.81	
15 Interest through 3/31/12	197,411.23	
Negligence penalty	31,306.28	
16 Late-payment penalty	1,246.60	
Finality penalty	31,306.30	
17 Amnesty double-negligence penalty	6,222.81	
Amnesty double-finality penalty	190.78	
18 Amnesty interest penalty	<u>162.16</u>	
19 Total tax, interest, and penalties	\$593,378.97	
Payments <sup>1</sup>	-210,909.46	
20 Balance Due	<u>\$382,469.51</u>	

21 Monthly interest beginning 4/1/12 \$668.64

22 This matter was previously scheduled for Board hearing on September 20, 2011, but was  
 23 postponed so that we could issue a Supplemental Decision and Recommendation. It was rescheduled  
 24 for Board hearing on December 14, 2011, but was postponed at petitioner's request due to a scheduling  
 25 conflict.

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 27 <sup>1</sup> In addition to the payment by the corporation noted above, Mr. Robert Wayne Kral, another individual against whom a  
 28 determination pursuant to Revenue and Taxation Code section 6829 was issued for the same liability, made a payment of  
 \$83,324.82.

## UNRESOLVED ISSUES

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2       **Issue 1:** Whether petitioner is personally liable pursuant to Revenue and Taxation Code section  
3 6829 for the unpaid liabilities of Modern Stainless & Design, Inc. for the period April 1, 2002, through  
4 June 30, 2005. We conclude petitioner is personally liable.

5       Modern Stainless & Design, Inc. (Modern) held seller's permit SR S KH 99-905743 as a  
6 manufacturer of fermentation tanks for the wine and brewing industries. Modern moved its business  
7 from California to Nevada in 2004, but continued to make sales in California, then filed for Chapter 7  
8 bankruptcy on November 28, 2005. The Sales and Use Tax Department (Department) determined that  
9 Modern's business operations terminated on that date, and closed out Modern's seller's permit. For  
10 periods prior to the bankruptcy filing, Modern had unpaid tax liabilities related to an audit for the  
11 period April 1, 2002, through December 31, 2004, and non-payment of self-declared taxes reported on  
12 the first quarter 2005 (1Q05) and 2Q05 tax returns. Petitioner was Modern's president and chief  
13 executive officer for the entire liability period; he had complete and total access to Modern's accounts,  
14 records, and financial information; and he was involved in making all of Modern's financial decisions.  
15 Based on these factors, the Department issued a Notice of Determination to petitioner for Modern's  
16 unpaid liabilities pursuant to Revenue and Taxation Code section 6829.<sup>2</sup> Our understanding is that  
17 petitioner does not dispute that the four requirements for imposing such liability were satisfied, but  
18 contends that the three other corporate officers were equally responsible for the financial decisions of  
19 Modern, and that passing through the determined tax to him, after Modern had filed for Chapter 7  
20 bankruptcy, violates "fundamental aspects of due process."

21       With respect to the argument that all four corporate officers were equally responsible, as  
22 previously noted, the Department has also asserted section 6829 liability against each of the three other  
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24 \_\_\_\_\_  
25 <sup>2</sup> The Department also issued determinations for Modern's liabilities pursuant to section 6829 to three other former officers  
26 of Modern: Robert Wayne Kral (vice president), Vincent Frere (treasurer and chief financial officer), and Russell W.  
27 Kargel (secretary), each of whom filed a timely petition for redetermination. The appeals conferences for Mr. Kral (case ID  
28 475458) and Mr. Kargel (case ID 478189) were held concurrently with petitioner's conference, while a separate appeals  
conference was held for Mr. Frere (case ID 475376). We upheld the asserted liability as to each of them. The Board  
hearings on the appeals of Mr. Kral and Mr. Frere have been scheduled for the same Board meeting as the hearing for  
petitioner. Mr. Kargel did not request a Board hearing following the issuance of our D&R in his appeal, which will be  
finalized after the Board decides the related appeals.

1 former corporate officers of Modern.<sup>3</sup> However, whether or not the determinations issued to them are  
2 upheld is not relevant to whether petitioner is liable for Modern's unpaid tax debts (any amount paid  
3 against Modern's liability by others will, of course, reduce the amount for which petitioner will be held  
4 liable). With respect to petitioner's argument that the liability cannot be passed through to him after  
5 Modern filed bankruptcy, petitioner is mistaken. The liability imposed on petitioner does not result  
6 from his acts or failure to act after Modern filed bankruptcy, but rather for his failure to pay or to cause  
7 to be paid the taxes due before Modern filed bankruptcy. We find that petitioner is personally liable  
8 pursuant to section 6829 for the unpaid tax liability of Modern.

9 **Issue 2:** Whether petitioner's liability as a responsible person for Modern's unpaid tax liability  
10 was discharged in his personal bankruptcy. We conclude that the liability has not been discharged.

11 Petitioner filed for Chapter 7 bankruptcy on September 30, 2005, and was granted a discharge  
12 on April 30, 2008. Petitioner contends that he should not be responsible because the tax debt the  
13 Board seeks to impose on him was discharged in his personal bankruptcy.

14 A bankruptcy discharge does not discharge taxes measured by gross receipts, including sales  
15 taxes, which are not assessed before the bankruptcy petition is filed but remain assessable thereafter.  
16 A tax is assessed, for the purposes of bankruptcy, when a determination becomes final. The  
17 determination here had not been issued at the time petitioner filed for bankruptcy (or when he received  
18 his discharge), and since petitioner timely petitioned the determination, it is not yet final. That is, for  
19 bankruptcy purposes, the liability at issue here was "assessable" at the time petitioner filed for  
20 bankruptcy, and we thus find that petitioner's liability for the sales tax at issue here has not been  
21 discharged.

22 We note that excise taxes, which, as relevant here, include use taxes, are non-dischargeable  
23 when the tax was required to be reported on a return due within the three-year period immediately  
24 prior to the filing of the bankruptcy petition. Modern's liabilities at issue here include use taxes for the  
25 2Q02 through 3Q04. The due dates of the returns for 3Q02 through 3Q04 were within three years of  
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27 <sup>3</sup> The determinations against Mr. Kral and Mr. Kargel are for the same liability period, April 1, 2002, through June 30,  
28 2005, and the same amount, as asserted against petitioner. Since Mr. Frere ceased his duties for Modern prior to the  
termination of its business, the determination to him covers the liability period April 1, 2002, through March 31, 2005.

1 September 30, 2005, the date on which petitioner filed his petition for bankruptcy, and the use tax due  
2 for those quarters is thus non-dischargeable. Since the 2Q02 return was due more than three years  
3 prior to the bankruptcy filing, the use tax due for that quarter was eligible for discharge. However, the  
4 \$749 in use tax due for that quarter was offset by over-reported taxable sales of \$886 and a credit for  
5 tax paid purchases resold of \$1,098. Since the use tax measure for 2Q02 was completely offset, there  
6 was no use tax liability eligible for discharge.

7 **Issue 3:** Whether the penalties imposed against Modern and included in the assessment to  
8 petitioner should be relieved. We conclude that they should not be relieved.

9 Petitioner submitted a request for relief of these penalties on Modern's behalf in which he  
10 contends that the penalties should be relieved because Modern's financial problems led it to use all  
11 funds to pay only those creditors that would help Modern remain solvent. While we accept that  
12 Modern was struggling financially, the evidence shows, and petitioner does not dispute, that Modern  
13 collected tax reimbursement. We find that it was not reasonable for Modern to have used that tax  
14 reimbursement to pay creditors other than the Board. We recommend that the request for relief of  
15 these penalties be denied.

16 **Issue 4:** Whether the amnesty penalties imposed against Modern and included in the  
17 assessment to petitioner should be relieved. We conclude that they should not be relieved.

18 Amnesty penalties were imposed on Modern because it failed to participate in the amnesty  
19 program. Petitioner requests relief of these penalties based on Modern's financial inability to pay its  
20 tax obligations to the Board because its production had decreased. Petitioner has not established any  
21 reason for Modern's failure to participate in the amnesty program that would justify relief of the  
22 amnesty penalties. Accordingly, we recommend that relief be denied.

### 23 OTHER MATTERS

24 None.

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26 Summary prepared by Pete Lee, Business Taxes Specialist II  
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