

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 SUSAN HILARY TREGUB) Account Number: SR AS 53-003339
) Case ID 425147
 6 Petitioner) Los Angeles, Los Angeles County

7 Type of Liability: Responsible person liability

8 Liability Period: 10/1/03 – 9/30/04

9 Item Amount

10 Responsible person liability \$20,303

	<u>Tax</u>	<u>Penalties</u>
12 As determined, protested	<u>\$11,898.00</u>	<u>\$8,405.10</u>

13 Proposed tax redetermination \$11,898.00

14 Interest through 10/31/10 18,421.23

15 Penalties for late payment of returns 4,974.50

16 Penalty for failure to file a return 1,715.30

17 Finality penalty 1,715.30

18 Total tax, interest, and penalties \$38,724.33

19 Payments -500.0020 Balance due \$38,224.3321 Monthly interest beginning 11/1/10 \$66.49

22 This matter was previously scheduled for Board hearing on June 18, 2010, but was postponed
 23 at petitioner's request due to a medical issue.

24 **UNRESOLVED ISSUES**

25 **Issue 1:** Whether petitioner is personally liable as a responsible person under Revenue and
 26 Taxation Code section 6829 for the unpaid liabilities of Santo Coyote, LLC (Santo), a California
 27 limited liability company (SR AS 100-099621), for the period October 1, 2003, through September 30,
 28 2004. We conclude that she is.

Santo operated a restaurant in West Hollywood, California under seller's permit SR AS 100-
 099621 from October 1, 2002, through September 30, 2004. Santo was owned 50 percent by Shah
 Mirza, an entity managed by petitioner and David Bergstein, and 50 percent by Dreamers Enterprises,

1 Inc., an entity owned by Robert Kass. The two parties had an agreement that Shah Mirza would invest
2 money into the restaurant, and Dreamers Enterprises would contribute assets such as the lease of the
3 location as well as Mr. Kass' expertise in setting up and running a restaurant.

4 After the closure of Santo's seller's permit and its failure to pay its liabilities for the period
5 October 1, 2003, through September 30, 2004, the Sales and Use Tax Department (Department)
6 conducted an investigation and determined that Santo's business had been terminated on or about
7 September 30, 2004, and Santo had added and collected sales tax reimbursement on retail sales of
8 tangible personal property. The Department concluded that petitioner was a person responsible for
9 managing the financial affairs of Santo, including the filing of returns, and that petitioner acted
10 willfully in her failure to pay Santo's outstanding sales and use tax liabilities by paying rent, wages,
11 and, presumably, other business expenses, rather than paying the tax due to the Board. Since the
12 Department concluded that each of the four conditions for imposing section 6829 liability on petitioner
13 were satisfied, it issued a Notice of Determination to petitioner for the liability originally incurred by
14 Santo.

15 Petitioner concedes that Santo was terminated and that sales tax reimbursement was collected
16 on its retail sales of tangible personal property. However, petitioner contends she should not be held
17 personally liable for Santo's outstanding tax liability because she was not a responsible person for
18 Santo and did not willfully fail to pay the liabilities at issue. Petitioner asserts that she was the
19 company's attorney and had no ownership interest or involvement in the operation of the business or
20 the filing of tax returns. Petitioner states she had been working as Mr. Bergstein's business and
21 personal attorney since 2000, and she routinely took care of setting up corporate entities for him and
22 acting as agent for service of process. Petitioner further states that she has never been an owner of
23 Shah Mirza or Santo and has no personal interest in either company. As support, petitioner has
24 submitted several documents which, she claims, show that Mr. Kass was responsible for the day-to-day
25 operations of Santo.

26 Section 6829 liability can be imposed only on a responsible person. To be held personally
27 liable for Santo's unpaid liabilities, petitioner must have been a person responsible for the
28 corporation's sales and use tax compliance during the time when the taxes became due. Petitioner

1 spoke with Board staff on August 31, 2004, and stated that she was handling delinquent returns and
2 payments for Santo. Petitioner also spoke with Board staff on September 28, 2004, November 30,
3 2004, and March 16, 2006, regarding Santo's liability and payment on that liability. In addition, a
4 questionnaire completed by an office employee, James Scott Woodward, indicated that petitioner was
5 the person who had control, supervision, and responsibility or duty to act for the business in sales and
6 use tax matters. Although petitioner argues that she acted only as legal counsel to the restaurant and
7 assisted Mr. Kass and Mr. Bergstein in filling out paperwork related to the restaurant, the documents
8 she provided on December 1, 2008, reveal otherwise.

9 Santo's operating agreement, signed by Mr. Bergstein on behalf of Shah Mirza and by Mr.
10 Kass on behalf of Dreamers Enterprises, provided for both entities to manage Santo. The operating
11 agreement also indicated that all decisions as to accounting matters were to be made by the managers
12 and that the managers were to "cause to be prepared and timely filed, with appropriate ... state
13 regulatory and administrative bodies...all reports required to be filed by the Company with those
14 entities...." Since accounting matters normally encompass tax matters, we understand this to provide,
15 among other things, that the responsibilities imposed on the managers included whether or not to pay
16 Santo's tax liability, and thus that each manager of Santo was responsible for ensuring that Santo's
17 sales and use tax returns were prepared and timely filed. Since petitioner was manager of Shah Mirza,
18 we conclude that she was personally involved in Santo's accounting matters (rather merely as a legal
19 counsel), including sales and use tax matters. With respect to petitioner's assertion that Mr. Kass
20 should be found to be *the* responsible person¹ for Santo's sales and use tax matters, more than one
21 person may be a responsible person for purposes of section 6829 liability, and the issue here is whether
22 *petitioner* was a responsible person during the time when the taxes became due for the period at issue.
23 We find that she was.

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¹ The Department investigated Mr. Kass, but found insufficient evidence to establish that Mr. Kass was a responsible person (we note that the limitations period for issuing a Notice of Determination to Mr. Kass has now passed). The Department did issue a Notice of Determination to Mr. Bergstein, and he filed a petition for redetermination. We issued a D&R recommending that Mr. Bergstein's petition be denied. Although he had requested a Board hearing, he did not respond to the hearing notice, and thus his appeal has been placed on the nonappearance calendar for the Board's decision.

1 With respect to willfulness, personal liability can be imposed on a responsible person only if
2 that person willfully failed to pay or to cause to be paid taxes due from the corporation. For these
3 purposes, “willfully fails to pay or to cause to be paid” means that the failure was the result of an
4 intentional, conscious, and voluntary course of action. This failure may be willful even if it was not
5 done with a bad purpose or evil motive. A person is regarded as having willfully failed to pay taxes, or
6 cause them to be paid, where he or she had knowledge that the taxes were not being paid (or lacked
7 knowledge in reckless disregard of his or her duty to know) and had the authority to pay taxes or cause
8 them to be paid, but failed to do so.

9 At least as early as August 31, 2004, which was petitioner’s first documented discussion with
10 the Department regarding amounts owed by Santo, petitioner had actual knowledge of Santo’s tax
11 liability for the fourth quarter 2003 (4Q03), 1Q04, and 2Q04. Petitioner thereafter filed Santo’s 3Q04
12 return on October 21, 2004. While we have no specific evidence that petitioner had knowledge of
13 Santo’s tax liability prior to August 31, 2004, we note all decisions as to Santo’s accounting matters
14 were handled by Santo’s managers, and we infer that these decisions would include whether or not to
15 pay Santo’s tax liability. Since petitioner was a manager of Shah Mirza, we conclude that she would
16 have been notified of Santo’s tax liability and would have been involved in deciding whether or not to
17 pay the liability when it was due. Documents submitted by petitioner that involved Santo’s finances,
18 such as the emails dated July 2, 2002, July 17, 2002, and December 19, 2002, are all addressed to
19 petitioner as well as to Mr. Bergstein. These documents indicate that petitioner was kept aware of
20 Santo’s financial matters, and we find that petitioner was informed of Santo’s tax liability for the
21 period October 1, 2003, through September 30, 2004.

22 Evidence also indicates that petitioner had the ability to make payments on behalf of Santo. By
23 fax on July 2, 2002, Mr. Kass requested that both petitioner and Mr. Bergstein contact the owner of
24 Tepper Bar Supply and Restaurant Equipment to make payment arrangements related to Santo’s
25 purchase of restaurant equipment. This indicates that petitioner was involved in payment
26 arrangements. Board records also indicate that petitioner spoke with Department staff to discuss a
27 payment plan. Additionally, by fax on August 13, 2002, a vendor of Santo indicated that Mr. Kass
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1 asked the vendor to fax the order to petitioner so that she “could cut [the vendor] a check for \$10,000
2” This, again, indicates that petitioner could make payments on Santo’s behalf.

3 The evidence shows that funds were available during the liability period and were used to pay
4 other corporate liabilities, such as rent ranging from \$10,500 to \$11,025 per month and wages in the
5 amount of about \$27,000 (based on paycheck stubs and a completed business operations questionnaire
6 completed by two employees). Since Santo was paying rent and wages, it was presumably engaged in
7 its restaurant business, making sales and receiving receipts, and acquiring goods for sale and paying its
8 vendors. We conclude that Santo had funds available to pay the liability at issue here and that
9 petitioner had the ability to draw from those funds to pay the taxes due, but did not do so. Thus, we
10 conclude that petitioner willfully failed to pay, or cause to be paid, taxes owed by Santo for the period
11 October 1, 2003, through September 30, 2004. Accordingly, we conclude that petitioner is personally
12 liable for those tax debts under section 6829

13 **Issue 2:** Whether petitioner has established reasonable cause to relieve the late-payment
14 penalties, failure to file penalty, and finality penalty originally assessed against Santo for the period
15 October 1, 2003, through September 30, 2004. We conclude that there is no basis for relief.

16 There is no statutory or regulatory authority for relieving these penalties in section 6829
17 determinations, but if petitioner could show that the penalties should be relieved as to the corporation
18 under Revenue and Taxation Code section 6592, the relief would also inure to petitioner’s benefit.
19 Petitioner submitted a declaration signed under penalty of perjury in which she essentially raises the
20 same contentions she raises in relation to her personal liability for Santo’s unpaid taxes. These
21 contentions only address petitioner’s personal liability and do not address why *Santo* failed to pay the
22 taxes and determinations at issue when they became due. As such, they do not provide reasonable
23 cause for relieving Santo of the late payment, failure to file, and finality penalties at issue.

24 **OTHER DEVELOPMENTS**

25 None.

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27 Summary prepared by Rey Obligacion, Retired Annuitant
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