

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 PAUL ANTHONY WASSEM) Account Number SR GH 53-006075
 6 Petitioner) Case ID 535330
) Los Gatos, Santa Clara County

7 Type of Liability: Responsible person liability

8 Liability period: 10/01/06 – 06/30/07¹

9 Item Disputed Amount

10 Responsible person liability \$32,099

| | <u>Tax</u> | <u>Penalty</u> |
|--|--------------------|-------------------|
| 12 As determined and proposed to be redetermined | \$32,089.59 | \$3,208.96 |
| 13 Less payments by other parties | <u>- 3,199.89</u> | <u>00.00</u> |
| 14 Balance, protested | <u>\$28,889.70</u> | <u>\$3,208.96</u> |
| 15 Proposed tax redetermination | \$32,089.59 | |
| 16 Interest through 06/30/13 | 14,885.20 | |
| 17 Penalties for late filing of returns | 3,196.19 | |
| 18 Finality penalty | <u>12.77</u> | |
| 19 Total tax, interest, and penalty | \$50,183.75 | |
| Payments | <u>- 3,199.89</u> | |
| Balance Due | <u>\$46,983.86</u> | |
| Monthly interest beginning 07/01/13 | <u>\$ 144.45</u> | |

20 UNRESOLVED ISSUES

21 **Issue 1:** Whether petitioner is personally liable as a responsible person for the unpaid liabilities
 22 of Bike Spring, LLC pursuant to Revenue and Taxation Code section 6829. We conclude petitioner is
 23 personally liable.

24 Bike Spring, LLC (SR GH 100-680281) operated as a premier-level dealer for Specialized
 25 Bicycle Components, Inc. (Specialized) from January 2006 through September 2007. At the time its
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27 ¹ The liability assessed against petitioner does not include amounts due from the LLC for the period April 1, 2007, through
 28 June 27, 2007, since the LLC filed for bankruptcy protection on June 27, 2007, and the tax due for the quarter was not
 assessed before the bankruptcy filing date.

1 business terminated, Bike Spring had unpaid liabilities related to returns filed with no remittance and
2 one Notice of Determination (NOD) for a tax shortage on a return. The Sales and Use Tax
3 Department (Department) concluded that petitioner was personally responsible, pursuant to section
4 6829, for the sales tax liabilities incurred by Bike Spring.²

5 Petitioner disputes only one of the four conditions for imposing personal liability pursuant to
6 section 6829, that he willfully failed to pay or to cause to be paid taxes due from Bike Spring. On that
7 issue, petitioner concedes that he was responsible for managing Bike Spring's financial affairs,
8 including all sales and use tax matters, and acknowledges that Bike Spring continued to pay wages, as
9 well as vendors and other creditors, during the liability period. However, petitioner asserts that his
10 failure to pay the taxes due from Bike Spring, or cause them to be paid was not willful, and argues he
11 should not be held personally liable for Bike Spring's unpaid tax liabilities.³ Petitioner states that
12 Specialized caused Bike Spring's business to fail. While petitioner indicates that at no time did
13 Specialized assert control over Bike Spring's bank accounts, Bike Spring was required, by court order,
14 to make daily wire transfers to Specialized. If it did not, Specialized would refuse to provide inventory
15 to Bike Spring. Petitioner states that Bike Spring, in an attempt to save the business and to bring other
16 capital into the business, filed a Chapter 11 bankruptcy petition on June 27, 2007. However, when
17 negotiations with Specialized failed, Bike Spring converted its Chapter 11 bankruptcy to a Chapter 7
18 bankruptcy in October 2007. Petitioner claims that Bike Spring's failure to pay its sales tax liabilities
19 was the result of various unfair business practices of Specialized, as explained in the D&R.

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22 ² The Department did not issue any other dual determinations in this case because petitioner was the only member of the
23 LLC and the only person responsible for Bike Spring's sales and use tax compliance (a fact not in dispute).

24 ³ Petitioner also argues that he should not be held liable because: 1) a California Court of Appeal case, *Parmar v. State Bd.*
25 *of Equalization* (2011) 196 Cal.App.4th 705, prohibits the Board from issuing a dual determination against any individual
26 member of a closed LLC when that LLC is suspended, and 2) petitioner is unable to pay the amounts at issue because he
27 filed for personal bankruptcy, has no assets, is unemployed, and is raising a small child alone as a widower. We find the
28 cited court case is not applicable here because Bike Spring was not suspended; instead, the LLC is terminated. We further
find that petitioner's financial circumstances have no bearing on the application of section 6829, and the Board has no
authority to grant equitable relief. We have explained to petitioner that he may apply to the Department for a payment plan
or, when the liability is final, may contact the Board's Offers in Compromise section to discuss his eligibility for that
program. At the time of the appeals conference, petitioner also asserted that the Department should not issue a
determination to petitioner until it received the final payment from Bike Spring's bankruptcy estate, but that issue is moot
because the payment was received before the D&R was issued.

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

7 It is undisputed that petitioner knew that the taxes were due from Bike Spring and were not
8 being paid. Also, petitioner concedes that he was the sole and managing member of Bike Spring, and
9 operated as its Chief Executive Officer and Chief Financial Officer. Therefore, he clearly had
10 authority to pay Bike Spring's sales taxes or to cause them to be paid, and petitioner has made no
11 argument to the contrary.

12 Regarding whether Bike Spring had sufficient funds to pay the taxes due, petitioner has
13 conceded that, during the applicable periods, Bike Spring continued to pay wages, and made payments
14 to vendors and other creditors to keep the business operating. Moreover, Bike Spring's bankruptcy
15 documents indicate that the LLC generated sufficient income to pay the sales tax liability. Thus, we
16 find that Bike Spring had funds available to pay the taxes when they became due but petitioner chose
17 to pay other creditors instead. Specifically, we find petitioner's argument that Specialized is
18 responsible for Bike Spring's failure to pay its taxes does not succeed. Petitioner made the decision to
19 make payments to Specialized and other creditors, and to pay wages, rather than first paying Bike
20 Spring's taxes. In summary, we conclude that all conditions have been satisfied for imposing personal
21 liability on petitioner under section 6829 for the outstanding tax liabilities of Bike Spring.

22 **Issue 2:** Whether taxpayer has established reasonable cause sufficient for relieving the
23 penalties for late filing of returns and the finality penalty originally assessed against Bike Spring. We
24 conclude that he has not.

25 There is no statutory or regulatory authority for relieving these penalties in section 6829
26 determinations, but if petitioner could show that the penalty should be relieved as to the LLC under
27 section 6592, the relief would also inure to petitioner's benefit. Petitioner submitted the required
28 declaration signed under penalty of perjury in which he claims that Bike Spring failed to timely pay its

1 tax liability because it was under extreme duress to make preferential payments to Specialized under
2 the threat of Writ of Possession and Bankruptcy and thus was forced to make extraordinary payments
3 to Specialized, against its will.

4 Bike Spring's financial difficulties do not constitute reasonable cause or circumstances for its
5 failure to pay its tax liability or to timely file its returns. Accordingly, we find no basis to recommend
6 relief of the penalties at issue.

7 **OTHER MATTERS**

8 None.

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10 Summary prepared by Deborah A. Cumins, Business Taxes Specialist III

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