

## 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 DEBORAH S. WEBER ) Account Number: SR FH 53-003092  
 ) Case ID 406773  
 6 Petitioner ) Santee, San Diego County

7 Type of Liability: Responsible person liability

8 Liability Period: 1/1/00-12/31/00

9 Item Disputed Amount

10 Responsible person liability \$23,496

	<u>Tax</u>	<u>Penalties</u>
11 As determined	\$21,213.00	\$6,664.37
12 Adjustment: Appeals Division		-4,381.40
13 Proposed redetermination, protested	<u>\$21,213.00</u>	<u>\$2,282.97</u>
14 Proposed tax redetermination	\$21,213.00	
15 Interest to 3/31/11	20,160.61	
15 Penalty for late payment of returns	2,231.30	
15 Penalty for failure to file prepayment forms	<u>51.67</u>	
16 Total tax, interest, and penalties	<u>\$43,656.58</u>	
17 Monthly interest beginning 4/1/11	<u>\$123.74</u>	

## 18 UNRESOLVED ISSUES

19 **Issue 1:** Whether petitioner is personally liable as a responsible person for the unpaid  
 20 liabilities of NCompass Systems, Inc. (NCompass) (SR FH 97-223375) for the period January 1, 2000,  
 21 through December 31, 2000. We find that petitioner is personally liable.

22 NCompass was a corporation which developed and licensed computer software and also sold  
 23 computer hardware from April 15, 1998, through March 31, 2001, when its seller's permit was closed  
 24 out based on a May 23, 2001, notification from NCompass' counsel, Kendrick Jan, that NCompass  
 25 closed its business on March 31, 2001. At close out, NCompass had unpaid liabilities based on: (1) tax  
 26 of \$21,213.00 self assessed in sales and use tax returns (SUTR's) filed without payment of the tax for  
 27 the first quarter of 2000 (1Q00), 3Q00, and 4Q00; and (2) penalties totaling \$2,282.97 for failure to  
 28 file prepayment forms for April 1, 2000 through April 30, 2000, and May 1, 2000, through June 15,

1 2000, and late payment of returns for 1Q00, 3Q00, and 4Q00. The Sales and Use Tax Department  
2 (Department) determined that petitioner is personally liable for NCompass' unpaid liabilities for the  
3 liability period pursuant to Revenue and Taxation Code section 6829 based on the following facts: (1)  
4 petitioner signed, as vice president, NCompass' quarterly SUTR's for 1Q00, 2Q00, and 3Q00; (2) on  
5 several occasions, she communicated with the Board regarding NCompass' sales and use tax matters;  
6 (3) several documents and NCompass' corporate website identified petitioner as vice president of  
7 finance; and (4) she was identified by an employee of NCompass as the person in charge of  
8 accounting. The Department also found that NCompass collected sales tax reimbursement on its  
9 taxable sales based on petitioner's and NCompass' representative's statements that NCompass added  
10 sales tax reimbursement to taxable sales. Finally, the Department concluded that petitioner had been  
11 willful in her failure to pay the outstanding liabilities of NCompass because, although NCompass had  
12 funds available, they were used instead to pay wages, rent, and other creditors.

13         Petitioner argues that she was not a statutory officer or director of NCompass, that her title was  
14 simply a label without authority, and that her duties with respect to NCompass finances were  
15 performed under the direction of Jill Jan, who was the chief executive officer of NCompass. Petitioner  
16 claims that Ms. Jan had all control, supervision, responsibility, and duty to act in connection with the  
17 corporation's financial affairs. In support of these contentions, petitioner provided the declaration of  
18 Ms. Jan, dated October 30, 2009 (exhibit 3 to the D&R). Petitioner also argues that she was not willful  
19 in NCompass' failure to pay the taxes due for the liability period because NCompass had no funds  
20 available in that all sale proceeds had to be paid to creditors to reduce NCompass' credit obligations,  
21 and other funds available to NCompass during the liability period were from loans made under the  
22 condition that they be used for the payment of payroll, rent, and other overhead expenses. Petitioner  
23 also claims that NCompass lacked the ability to continue operations after a creditor seized its tangible  
24 assets and a capital fund withdrew its promised investment in NCompass in January 2001.

25         Two of the four conditions for imposing liability against petitioner pursuant to section 6829 are  
26 clearly satisfied: NCompass' business operations were terminated March 31, 2001, and evidence  
27 establishes that sales tax reimbursement was collected on taxable sales during the liability period. The  
28 third and fourth conditions are that petitioner must have been a responsible person for NCompass'

1 sales and use tax compliance, and she must have willfully failed to pay or to cause to be paid the taxes  
2 due from NCompass during the liability period.

3 A responsible person for purposes of section 6829 is a person who had a duty to act for the  
4 corporation in complying with any provision of the Sales and Use Tax Law when the subject taxes  
5 became due, including responsibility for the filing of returns or the payment of tax. Petitioner argues  
6 that she was not a statutory officer of NCompass and had no authority to act on behalf of NCompass.  
7 We find this argument unpersuasive. Petitioner signed SUTR's for 1Q00, 2Q00, and 3Q00 on behalf  
8 of NCompass. Petitioner also communicated with the Board regarding sales and use tax matters on  
9 several occasions. Petitioner has not provided any evidence to establish that she required approval of  
10 Ms. Jan before signing the SUTR's or communicating with the Board, other than the declaration of  
11 Ms. Jan, nor is there any indication in the Board's records that petitioner required approval of Ms. Jan  
12 before making promises to the Board on behalf of NCompass to pay its SUT liabilities. Since neither  
13 petitioner nor Ms. Jan appeared at their appeals conferences, we were unable to assess their credibility  
14 with regard to this assertion, and therefore place little weight on the declaration of Ms. Jan. Based on  
15 the foregoing, we conclude that petitioner was a responsible person under section 6829 for the liability  
16 period.

17 With respect to willfulness, personal liability can be imposed on a responsible person under  
18 section 6829 only if that person willfully failed to pay or to cause to be paid taxes due from the  
19 corporation, which means that the failure was the result of an intentional, conscious, and voluntary  
20 course of action (even if without a bad purpose or evil motive). A person is regarded as having  
21 willfully failed to pay taxes, or to cause them to be paid, where he or she had knowledge that the taxes  
22 were not being paid (or lacked knowledge in reckless disregard of his or her duty to know) and had the  
23 authority to pay taxes or cause them to be paid, but failed to do so.

24 Petitioner signed the SUTR's for 1Q00, 2Q00, and 3Q00, as vice president, and we thus  
25 conclude she was aware of the liabilities reported on those SUTR's. Although she did not sign the  
26 4Q00 SUTR, we conclude that she was aware of the tax liability for this period because she  
27 communicated with the Department regarding NCompass' tax liabilities in February 2001.

1           Petitioner has not submitted evidence such as loan agreements or documents related to the asset  
2 seizure, to support her contention with respect to restrictions placed on borrowed funds by creditors of  
3 NCompass, providing only declarations from Jill Jan and NCompass' former general counsel (her  
4 representative in this appeal). Nor has petitioner explained how any of the alleged restrictions on  
5 NCompass' credit or the alleged transfer of all gross receipts to NCompass' creditors allowed for the  
6 selective payment of certain expenses, such as rent and utilities, but not the sales tax liabilities. Based  
7 on the available evidence, we find that NCompass had funds available and elected to pay other  
8 creditors, rather than the Board, despite actual knowledge of its tax liability.

9           Based on the foregoing, we conclude that all conditions for imposing liability on petitioner  
10 pursuant to section 6829 for the liability period has been satisfied.

11           **Issue 2:** Whether the Notice of Determination (NOD) issued to petitioner was timely. We find  
12 that the NOD was timely issued.

13           The Board closed out NCompass' seller's permit effective March 31, 2001. Petitioner did not  
14 file a return in her own name for any of the periods at issue. The Department issued the determination  
15 to petitioner on June 13, 2007, more than three years after the due date of a return for the period in  
16 which NCompass terminated. Petitioner contends that a three-year statute of limitations is applicable,  
17 and thus the NOD barred, because NCompass timely filed its SUTR's. Petitioner argues that the eight-  
18 year statute of limitations does not apply and that the Board's Memorandum Opinion in *Hosmer*  
19 *Chandler McKoon* is flawed because it requires petitioner to file a return in her own name even though  
20 the Board does not have a form of return for this situation and has made no other provision for the  
21 filing of an individual return on a corporate sales tax obligation. Petitioner maintains that without such  
22 a return form, the requirement that one be filed in order to trigger the three-year limitations period,  
23 rather than the eight-year year limitations period, is meaningless.

24           Petitioner argues that the Board should be estopped from pursuing her as responsible person, or  
25 should be barred by the doctrine of laches, because of its conduct regarding the application of the  
26 statute of limitations to petitioner's case. Petitioner also argues that she relied upon the Department's  
27 nonresponse to Mr. Kendrick Jan's letter of October 29, 2004, to the Department requesting  
28 confirmation that a three-year statute of limitations applied to any determination issued pursuant to

1 section 6829 imposing personal liability for NCompass' unpaid liabilities and that this statute of  
2 limitations had expired. Petitioner asserts that because the Department did not respond to Mr. Jan's  
3 letter, she reasonably assumed that the Department had concluded that her stated position regarding the  
4 three-year limitations period was accurate. Petitioner also contends that her assumption regarding the  
5 statute of limitations was confirmed when the Board removed annotation 170.1850<sup>1</sup> from the Business  
6 Taxes Law Guide in 2006. Petitioner further maintains that in a telephone conversation with  
7 Steve Morgan of the Department's Corporate Group, Mr. Morgan confirmed that annotation 170.1850  
8 had been deleted and was not to be prospectively used by the Department and that  
9 Mr. Dave Rosenthal, Annotations Coordinator of the Business Taxes Committee and Training Section,  
10 informed Mr. Jan in an email dated June 28, 2007, that this annotation had been deleted because the  
11 application of the statute of limitations as it was applied to corporate officers was incorrect. Petitioner  
12 asserts that prior to the issuance of the Board's memorandum opinion in *McKoon* on May 31, 2007,  
13 Mr. Jan spoke with the Board's Taxpayers' Rights Advocate's office and was told that there had been  
14 much confusion over the years regarding the interpretation of section 6487, but that due to the deletion  
15 of annotation 170.1850, petitioner's position as set forth in Mr. Jan's October 29, 2004 letter was well  
16 founded. Petitioner alleges that because of her belief that a three-year statute of limitations applies, she  
17 destroyed the documents relating to the transactions upon which the subject tax liability is based. Thus  
18 she claims she is unable to reconstruct NCompass' SUTR's to determine the proper tax liability, if any.

19 As a responsible person, petitioner had an independent (albeit derivative) liability pursuant to  
20 section 6829, and she should have filed a tax return to report that liability by April 30, 2001. However,  
21 petitioner did not file a return in her own name for the liability period, so the eight-year statute of  
22 limitations applies, as opposed to the three-year statute. The NOD was issued on June 13, 2007, which  
23 is within the eight-year limitations period that began to run on April 30, 2001, and therefore timely.  
24 We reject petitioner's contention that *McKoon* is flawed. No special form is required and petitioner  
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26 <sup>1</sup> BTLG annotation 170.1850 stated that a corporate officer who is liable for corporate taxes under the section 6829 is  
27 subject to the three year limitation period specified in section 6487 if he held a seller's permit in his name and filed returns  
28 in question under a seller's permit in his name, a determination may be issued for the corporate officer's liability within the  
eight-year limitation period specified in section 6487.

1 could have filed a standard SUTR in her own name for the second quarter of 2001, thereby triggering  
2 the three-year limitations period.

3 With respect to estoppel and laches, estoppel is an equitable doctrine which may be applied  
4 against a government agency under appropriate facts, and laches is an equitable principle that provides  
5 a defense or bar to those who have neglected to assert their rights in a timely manner, and the delay has  
6 caused prejudice to the other party. Estoppel and laches are equitable defenses and can only be  
7 asserted in a suit in equity, and this Board lacks equity powers and instead is bound by statute.  
8 Therefore, the Board is not empowered to grant such relief in this case.

9 With respect to petitioner's argument that deletion of annotation 170.1850 was a change in the  
10 Board's position regarding the application of an eight-year limitations period against petitioner,  
11 annotations do not have the force of law, and thus the deletion or a creation of an annotation does not  
12 change the governing statutes.

13 We also find unpersuasive petitioner's argument that the Board employees informed her that  
14 the eight-year statute of limitations no longer applied to determinations issued against responsible  
15 persons such as petitioner. We have reviewed the documents and information upon which petitioner  
16 relied, and we find that they do not provide any misinformation that would relieve petitioner of the tax  
17 liability imposed upon her as a responsible person.

18 Finally, we find unpersuasive petitioner's argument that she could not reconstruct the SUTR's  
19 for the liability period because she destroyed the records in reliance on her belief that the three-year  
20 statute of limitations applied. We note that NCompass self assessed its liabilities for the liability  
21 period and failed to remit any payments. Since NCompass prepared the SUTR's itself, it must have  
22 relied upon the best information available to it regarding its sales for those four quarters. Thus, it is  
23 unclear what documentation petitioner destroyed between October 29, 2004, and June 13, 2007, that  
24 NCompass did not utilize in preparing its SUTR's or how this documentation would now result in a  
25 reduction in NCompass' self-reported tax liability. Under these facts, we conclude it is unlikely that  
26 petitioner suffered any prejudice due to any destruction of the documents.

27 Based on the foregoing, we conclude that the NOD was properly and timely issued to petitioner  
28 and that the Board should not be estopped or barred by laches from issuing the NOD against petitioner.

