STATE BOARD OF EQUALIZATION
SALES AND USE TAX APPEAL

CALIFORNIA STATE BOARD OF EQUALIZATION

APPEALS DIVISION BOARD HEARING SUMMARY

In the Matters of the Administrative Protests Under the Sales and Use Tax Law of:	
CHERYL ANN ZEVOTEK	Account Number SR EA 53-004168 Case ID 507207
MARK ANDREW ZEVOTEK	Account Number SR EA 53-004167 Case ID 507203
Taxpayers	Whittier, Los Angeles County

Type of Liability: Responsible person liability

Liability period: 01/01/03 – 04/24/06

Item	Disputed Amount
Responsible person liability	$64,328[1]

	Tax	Penalty
As determined	$67,684.15	$8,577.12
Post-D&R adjustments	- 23,145.28	- 2,842.55
Protested	$44,538.87	$5,734.57

Protested tax	$44,538.87
Interest through 02/28/14	29,521.85
Finality penalty	453.60[2]
Late payment penalty-returns with no or partial remittance	5,709.59
Late prepayment penalty	24.98
Total tax, interest, and penalties	$80,248.89
Payments	- 2,632.15[3]
Balance Due	$ 77,616.74
Monthly interest beginning 03/01/14	$ 209.53

These matters were scheduled for Board hearing in July 2012, but were deferred at the request of the Sales and Use Tax Department (Department) for further review. The Department found that two

[1] The liabilities for the taxpayers are identical.

[2] Although we have recommended conditional relief of the finality penalty, and have excluded that penalty from the protested liability above, we include the finality penalty in this portion of the chart because the conditions for relief have not yet been met.

[3] Although payments totaling $232.15 were made in 2009 and regular payments of $50.00 have been made each month beginning February 5, 2010, neither taxpayer has filed any claims for refund. Since more than three years has passed since the due-date of the last quarterly period (July 31, 2009) and more than six months has passed since the liability became final (April 30, 2008), a claim for refund is timely only to the extent it is filed within six months of the date of the claimed overpayment. (Rev. & Tax. Code, § 6902.) The Sales and Use Tax Department informed each taxpayer in letters dated September 4, 2009, of the need to file claims for refund within six months from the date of each payment.

prepayment penalties had been computed at 10 percent, rather than 6 percent, and adjusted the penalties accordingly. These matters were rescheduled for Board hearing in April 2013, but were postponed for settlement consideration. However, taxpayers withdrew from the settlement process. The matters were then placed back on the hearing calendar, but were deferred at the Department's request for additional time to conduct further review. Following this additional review, the Department completed a reaudit of Stonetek Consultants Corportation, which reduced the tax portion of taxpayers' liability related to the audit by $10,368.28, as explained under issue 2.

UNRESOLVED ISSUES

Issue 1: Whether taxpayers are personally liable as responsible persons for the unpaid liabilities of Stonetek Consultants Corporation. We conclude taxpayers are personally liable.

Stonetek Consultants Corporation (SCC) (SR EA 97-880182) made retail sales of tools and supplies for the flooring industry. At the time its business terminated, SCC had unpaid liabilities related to a Notice of Determination, sales and use tax returns filed with no remittance or partial remittance, and penalties for late prepayments. Taxpayers concede two of the four conditions for imposing personal liability pursuant to section 6829, that SCC has terminated its business and that it collected sales tax reimbursement with respect to its taxable sales. However, while neither taxpayer has raised any specific disagreement with the conclusion that he or she was a person responsible for SCC's sales and use tax compliance, they have not conceded this issue. Taxpayers do specifically dispute that they willfully failed to pay or to cause to be paid taxes due from SCC.

Taxpayers are husband and wife. On SCC's application for a seller's permit, Ms. Zevotek was listed as president and Mr. Zevotek was listed as vice-president of SCC. Both taxpayers signed various documents related to the administration of sales and use tax and the operation of the business, using various titles, including president, vice-president, secretary, treasurer, CEO, CFO, and director of SCC. In any of these roles, taxpayers had broad implied authority over all elements of SCC's business, including ensuring SCC's sales and use tax compliance. We find that the evidence shows both taxpayers were responsible persons as defined in section 6829.

Taxpayers contend that their failure to pay the tax liability or to cause it to be paid was not willful. Taxpayers assert that SCC filed bankruptcy on May 4, 2006, and, as of that date, its assets

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were under the control of the bankruptcy trustee. In addition, taxpayers allege that SCC had an insurance policy to cover losses sustained from a robbery in December 2005, but the insurance company failed to tender the insurance proceeds and, as a result, SCC did not have funds to pay the tax-related liabilities. Further, taxpayers allege that the liability remained unpaid because the Department failed to seize inventory that SCC had left at its business location during the bankruptcy, which ended on December 3, 2010.[4]

The failure to pay or to cause to be paid the taxes due is willful under section 6829 where the failure was the result of an intentional, conscious, and voluntary course of action (even if without a bad purpose or evil motive). A person is regarded as having willfully failed to pay or to cause to be paid the taxes due where he or she knew that the taxes were not being paid and had the authority to pay the taxes or to cause them to be paid, but failed to do so.

Both taxpayers acknowledge that they participated in the day-to-day operations of the business and that they were aware of the sales tax due on the returns filed with no remittance or partial remittance but state they were not aware of the audit liability. However, the understatement established by audit represents a difference between accrued sales tax reimbursement and reported tax. Considering taxpayers' participation in the day-to-day operations of the business, we believe the evidence establishes that taxpayers knew of the understatement of tax on the returns. Consequently, we find that taxpayers knew of SCC's tax-related liabilities.

It is also clear that taxpayers had authority to pay or to cause to be paid the taxes due. The final issue, then, is whether SCC had sufficient funds to pay the taxes due. During the periods through April 24, 2006, SCC was making substantial sales, as evidenced by its reported gross receipts. Also, SCC paid wages and made payments to other creditors during the periods when the tax became due with returns. We find that the insurance company's failure to cover SCC's losses related to the robbery is irrelevant since SCC still had funds to pay other creditors. Based on our finding that funds

[4] There is nothing in the law that excuses a person of liability under Revenue and Taxation Code section 6829 for this reason. We do not address this contention further.

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were available to pay the sales tax liability, but taxpayers chose to pay other creditors instead, we conclude that taxpayers were willful for periods through March 31, 2006.

For the period April 1, 2006 through April 24, 2006, taxpayers asserted that their failure to pay the liabilities was not willful because SCC's assets were under the control of the bankruptcy trustee as of May 4, 2006. The return for the period April 1 through April 24, 2006, was filed on May 1, 2006, prior to taxpayers' filing a petition for bankruptcy. In our Supplemental Decisions and Recommendations issued in these matters, we rejected taxpayers' assertion, because we reasoned that since taxpayers filed the return prior to the bankruptcy, the trustee had no control or authority over SCC's payment of taxes, and did not prevent taxpayers from paying the taxes. Upon further review, we conclude that we were wrong. Filing a return early does not change the actual due date of the return. Therefore, the due date for the return for this period (i.e., second quarter 2006) was not until July 31, 2006, during which time SCC was in bankruptcy and would have been unable to pay the tax liability. Accordingly, we conclude that taxpayers did not willfully fail to pay SCC's tax liability for the period April 1, 2006 through April 24, 2006, and therefore the liability for this period should be deleted.

In summary, we conclude that all conditions have been satisfied for imposing personal liability on taxpayers under section 6829 for the outstanding tax liabilities of SCC for the period January 1, 2003, through March 31, 2006.

Issue 2: Whether additional adjustments are warranted to the unreported taxable sales established in the audit of SCC. We find no further adjustment is warranted.

The Department found SCC had accrued sales tax reimbursement of $16,199 in excess of the sales tax reported during the audit period. Taxpayers disputed the determination but did not provide sufficient documentation to support their assertion that the amount of sales tax accrued was excessive because certain adjusting entries had not been made. However, upon further review of the audit, the Department concluded that, even though the requested records were not provided, an adjustment to allow for bad debts was warranted. Accordingly, in a reaudit dated June 24, 2013, the Department reduced the amount of unreported taxable sales by $133,784, from $209,020 to $75,236. We find no basis for any additional adjustments.

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Issue 3: Whether taxpayers have established reasonable cause sufficient for relieving the late-payment and late prepayment penalties originally assessed against SCC. We find that they have not.

The late payment penalties have been imposed for the first and second quarters of 2006. In light of our conclusion that taxpayers did not willfully fail to pay tax for the second quarter of 2006, taxpayers are not liable for the late payment penalty for that quarter. Regarding the remaining penalties, taxpayers request relief of the penalties on the basis that SCC's failure to properly report its sales tax liability was due to a loss of its computers, along with all financial information, in a robbery that occurred December 31, 2005. Since the remaining late payment penalty relates to the liability for the first quarter of 2006, and the prepayment penalties were assessed because SCC failed to file prepayment returns for January and February 2006, SCC's failure to timely pay the amount reported on returns or file prepayments was not related to loss of financial data on December 31, 2005. Accordingly, we find SCC's failure to make timely payments of returns and prepayments in 2006 was not due to reasonable cause, and we find no basis to recommend relief of the remaining late payment penalty or late prepayment penalties.

RESOLVED ISSUE

Taxpayers have requested relief of the finality penalty applied to the determination issued to SCC on September 22, 2006, for the period January 1, 2003, through April 24, 2006. It is undisputed that SCC's business operations ceased on or before May 4, 2006, when SCC filed for Chapter 7 bankruptcy. Since the corporation was in bankruptcy when the determination was issued, we find SCC's failure to pay the determination issued September 22, 2006, occurred notwithstanding the exercise of ordinary care and in the absence of willful neglect. Accordingly, we find there is reasonable cause to relieve the finality penalty, and we recommend that the finality penalty be relieved provided that taxpayers pay the tax due in full, within 30 days of the mailing of the notice of final decision in these appeals.

OTHER MATTERS

None.

Summary prepared by Lisa Burke, Business Taxes Specialist III