

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION FINAL ACTION SUMMARY

3 In the Matter of the Petition for Redetermination)
 4 Under the Sales and Use Tax Law of:)
 5 DAVID BERGSTEIN) Account Number: SR AS 53-003340
 6 Petitioner) Case ID 425117
)
) North Hills, 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>
11 As determined, protested	<u>\$11,898.00</u>	<u>\$8,405.10</u>
12 Proposed tax redetermination	\$11,898.00	
13 Interest through 10/31/10	18,421.23	
14 Penalties for late payment of returns	4,974.50	
15 Penalty for failure to file a return	1,715.30	
16 Finality penalty	<u>1,715.30</u>	
17 Total tax, interest, and penalties	\$38,724.33	
18 Payments	<u>-500.00</u>	
19 Balance due	<u>\$38,224.33</u>	
20 Monthly interest beginning 11/1/10	<u>\$66.49</u>	

21 This matter was previously scheduled to be presented to the Board for decision without oral
 22 hearing on June 18, 2010, because petitioner failed to respond to the Notice of Hearing. Subsequently,
 23 this matter was pulled from the consent calendar by acting Board Member Barbara Alby so that it
 24 could be decided along with a related case, whose oral hearing was postponed.

25 **UNRESOLVED ISSUES**

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

1 Santo operated a restaurant in West Hollywood, California under seller's permit SR AS 100-
2 099621 from October 1, 2002, through September 30, 2004. Santo was owned 50 percent by Shah
3 Mirza, an entity managed by petitioner and Susan Hilary Tregub, and 50 percent by Dreamers
4 Enterprises, Inc., an entity owned by Robert Kass. The two parties had an agreement that Shah Mirza
5 would invest money into the restaurant, and Dreamers Enterprises would contribute assets to the
6 restaurant such as the lease of the location and Mr. Kass' expertise in setting up and running a
7 restaurant.

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

18 Petitioner concedes that Santo was terminated and that sales tax reimbursement was collected
19 on its retail sales of tangible personal property. However, petitioner contends he should not be held
20 personally liable for Santo's outstanding tax liability because he was not a responsible person for Santo
21 and did not willfully fail to pay the liabilities at issue. Petitioner asserts that he was only an investor in
22 Santo and had no responsibility for its operations. Petitioner further states that he was not involved in
23 or responsible for the preparation of or filing of any tax or documentation for Santo, including sales
24 and use tax returns. As support, petitioner has submitted several documents he asserts show that
25 Mr. Kass was responsible for the day-to-day 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 Santo's
28 compliance during the time when the taxes became due. Santo's operating agreement, signed by

1 Mr. Bergstein on behalf of Shah Mirza and by Mr. Kass on behalf of Dreamers Enterprises, provided
2 for both entities to manage Santo. The operating agreement also indicated that all decisions as to
3 accounting matters were to be made by the managers and that the managers were to “cause to be
4 prepared and timely filed, with appropriate ... state regulatory and administrative bodies ... all reports
5 required to be filed by the Company with those entities....” Since accounting matters normally
6 encompass tax matters, we understand this to provide, among other things, that the responsibilities
7 imposed on the managers included whether or not to pay Santo’s tax liability, and thus that each
8 manager of Santo was responsible for ensuring that Santo’s returns were prepared and timely filed.
9 Since petitioner was manager of Shah Mirza, we conclude that he was personally involved in Santo’s
10 accounting matters, including sales and use tax matters. Consistent with petitioner’s responsibility for
11 Santo’s compliance with sales and use tax matters, Board records indicate that on January 14, 2005,
12 petitioner’s assistant, Faymi Biedak, spoke with the Department’s staff and stated that petitioner
13 wanted to make payments on Santo’s outstanding tax liability. With respect to petitioner’s assertion
14 that Mr. Kass should be found to be *the* responsible person for Santo’s sales and use tax matters, more
15 than one person may be a responsible person for purposes of section 6829 liability, and the issue here
16 is whether *petitioner* was a responsible person during the time when the taxes became due for the
17 period at issue. We find that he was.

18 With respect to willfulness, personal liability can be imposed on a responsible person only if
19 that person willfully failed to pay or to cause to be paid taxes due from the corporation. Willfulness
20 for these purposes means that the failure was the result of an intentional, conscious, and voluntary
21 course of action, even if not done with a bad purpose or evil motive. A person is regarded as having
22 willfully failed to pay taxes, or cause them to be paid, where he or she had knowledge that the taxes
23 were not being paid (or lacked knowledge in reckless disregard of his or her duty to know) and had the
24 authority to pay taxes or cause them to be paid, but failed to do so.

25 Here, under the operating agreement, it was petitioner’s duty to make sure Santo’s returns were
26 filed. Santo’s fourth quarter 2003 (4Q03), 1Q04, 2Q04, and 3Q04 returns were not filed timely and
27 petitioner should have been aware of this. Since these returns were not timely filed, petitioner knew or
28 should have known that Santo’s tax liability was not being paid. Since petitioner was a manager of

1 Shah Mirza, we conclude that he would have been notified of Santo's tax liability and would have been
2 involved in deciding whether or not to pay the liability when it was due. Documents submitted by
3 petitioner that involved Santo's finances, such as the emails dated July 2, 2002, July 17, 2002, and
4 December 19, 2002, are all addressed to petitioner as well as to Ms. Tregub. Thus, we believe from
5 these documents that, since petitioner was kept aware of Santo's financial matters, petitioner was also
6 informed of Santo's tax liability for the period in issue.

7 We also have evidence that petitioner had the ability to make payments on behalf of Santo. By
8 fax dated July 2, 2002, Mr. Kass requested that both petitioner and Ms. Tregub contact the owner of
9 Tepper Bar Supply and Restaurant Equipment to make payment arrangements related to Santo's
10 purchase of restaurant equipment. In addition, in an email dated July 17, 2002, Mr. Kass stated his
11 frustration with respect to petitioner's delay in making deposits for purchases of restaurant equipment,
12 and in a letter dated October 4, 2002, Mr. Kass requested that petitioner wire money to a vendor for
13 supplies. Based on these facts, we find that petitioner had the ability to make payments on behalf of
14 Santo. Further, the evidence shows that available funds were used to pay other corporate liabilities.
15 During the period at issue, Santo paid rent ranging from \$10,500 to \$11,025 per month, and paid
16 wages in the amount of about \$27,000, as shown on paycheck stubs and a completed business
17 operations questionnaire completed by two employees. Since Santo was paying rent and wages, it was
18 presumably engaged in its restaurant business, making sales and receiving receipts, and acquiring
19 goods for sale and paying its vendors. We conclude that Santo had funds available to pay the liability
20 at issue and that petitioner had the ability to draw from those funds to pay the taxes due, but did not do
21 so. Thus, we conclude that petitioner willfully failed to pay or to cause to be paid the taxes owed by
22 Santo for the period October 1, 2003, through September 30, 2004. Accordingly, we conclude that
23 petitioner is personally liable for those tax debts under section 6829.

24 **Issue 2:** Whether petitioner has established reasonable cause sufficient to relieve the penalties
25 originally assessed against Santo for the period October 1, 2003, through September 30, 2004. We
26 conclude there is no basis for relief.

27 There is no statutory or regulatory authority for relieving these penalties in section 6829
28 determinations, but if petitioner could show that the penalties should be relieved as to Santo under

1 Revenue and Taxation Code section 6592, the relief would also inure to petitioner’s benefit. At the
2 appeals conference, we advised petitioner that he could submit a request for relief of the penalties on
3 Santo’s behalf. On October 21, 2009, we provided petitioner with a “Request for Relief from Penalty”
4 form which he could use to request such relief and instructions on how to complete it. Petitioner did
5 not submit such a request. We thus have no basis to consider recommending relief of the penalties.

6 **OTHER DEVELOPMENTS**

7 None.

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9 Summary prepared by Rey Obligacion, Retired Annuitant
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