

## 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 GUILLERMO MEMO ESTRADA )

6 Petitioner )

Account Number: SR AR 53-003673

Case ID 437729

Sunland, Los Angeles County

8 Type of Liability: Responsible person liability

9 Liability period: 10/01/04 – 06/30/05

10 Item Disputed Amount

11 Responsible person liability \$15,227

12 TaxPenalty

13 As determined \$16,638.00 \$3,157.10

Pre-D&amp;R adjustment - 3,949.00 - 619.30

14 Proposed redetermination, protested \$12,689.00 \$2,537.80

15 Proposed tax redetermination \$12,689.00

Interest through 08/31/12 7,561.56

16 Failure-to-file penalty 1,268.90

Finality penalty 1,268.9017 Total tax, interest, and penalty \$22,788.3618 Monthly interest beginning 09/01/12 \$ 63.4419 The Board held a hearing regarding this matter on April 25, 2012, granting petitioners 30 days  
20 to provide additional records and the Sales and Use Tax Department (Department) 30 days to respond.21 Based on petitioner's submissions and the Department's response, we do not recommend adjustments,  
22 as discussed below under Post Hearing Developments.23 **UNRESOLVED ISSUE**24 **Issue:** Whether petitioner is personally liable as a responsible person for the unpaid liabilities  
25 of Sound Executives Corporation pursuant to Revenue and Taxation Code section 6829. We conclude  
26 petitioner is personally liable.27 Sound Executives Corporation (SR AR 100-249448) operated an Al & Ed's Autosound  
28 franchise, selling mobile electronics, from June 1, 2003, until May 20, 2005. At the time its business

1 terminated, Sound Executives had unpaid liabilities related to two determinations, the first representing  
2 tax due for the fourth quarter 2004 (4Q04), 1Q05, and 2Q05, for which Sound Executives had not filed  
3 sales and use tax returns, and the second determination representing the tax due on the final sale of  
4 fixtures and equipment. The Department concluded that petitioner was personally liable under section  
5 6829 for the tax-related liabilities of Sound Executives, and it issued a determination to petitioner that  
6 included the amounts assessed against the corporation in those two determinations. The Department  
7 has adjusted the determination issued to petitioner by deleting the amount related to the final sale of  
8 fixtures and equipment and reducing the remainder by \$2,244.00 tax and by the related failure-to-file  
9 and finality penalties.

10 Petitioner does not dispute the Department's findings that the corporation's business was  
11 terminated, that the business had collected sales tax reimbursement with respect to retail sales, and that  
12 petitioner was a responsible person, as defined in section 6829 (three of the four conditions for  
13 imposing personal liability on petitioner for the tax debts incurred by Sound Executives). The final  
14 condition, which petitioner does dispute, is that petitioner must have willfully failed to pay or to cause  
15 to be paid taxes due from Sound Executives.

16 Petitioner was the Chief Financial Officer of Sound Executives, and he concedes that he was  
17 responsible for managing the corporation's financial affairs, including sales and use tax compliance.  
18 He also acknowledges that he was aware when the taxes were due. Petitioner contends that he is not  
19 personally liable for Sound Executives' unpaid tax liabilities because the corporation lacked the funds  
20 to pay them, and thus, he argues, his failure to pay the amounts due was not willful. Petitioner also  
21 asserts that, sometime near the end of 2004, the franchisor, Al & Ed's Autosound, promised to pay the  
22 corporation's debts and liabilities, which petitioner believed would include the payment of taxes.

23 Personal liability can be imposed on a responsible person under section 6829 only if that person  
24 willfully failed to pay or cause to be paid taxes due from the corporation, which means that the failure  
25 was the result of an intentional, conscious, and voluntary course of action (even if without a bad  
26 purpose or evil motive). A person is regarded as having willfully failed to pay taxes, or to cause them  
27 to be paid, where he or she had knowledge that the taxes were not being paid and had the authority and  
28 ability to pay the taxes or cause them to be paid, but failed to do so.

1 It is not disputed that petitioner had knowledge of the taxes due and the authority to pay them.  
2 The only element of willfulness that is disputed is whether petitioner had the ability to pay the taxes or  
3 to cause them to be paid, that is, whether funds were available to pay the taxes due. During the  
4 applicable periods, Sound Executives was making sales, as evidenced by the determined amounts of  
5 gross receipts, and collecting sales tax reimbursement on those sales, which petitioner has not disputed.  
6 Sound Executives also made payments to its landlord during the relevant periods, as well as paying  
7 fees for permits to local governments. Further, petitioner stated at the appeals conference that he  
8 liquidated personal assets and engaged the services of a debt negotiator to help him pay the  
9 corporation's debts prior to its termination, but he elected to use those funds to pay other creditors  
10 instead of the Board. We find that funds were available to pay the sales tax liability, but petitioner  
11 chose to pay other creditors instead. With respect to the assertion that Al & Ed's Autosound assumed  
12 liability for taxes owed to the Board, we note petitioner has presented no documentary evidence and, in  
13 any event, any contractual shifting of tax burdens from Sound Executives to Al & Ed's Autosound  
14 would have been a contractual matter between the contracting parties, without effect on petitioner's  
15 liability vis-à-vis the state. We conclude that all conditions have been satisfied for imposing personal  
16 liability on petitioner under section 6829 for the outstanding tax liabilities of Sound Executives.

#### 17 **POST HEARING DEVELOPMENTS**

18 At the hearing, the Board ordered further review of the liability of Sound Executives.  
19 Specifically, the Members recommended that the Department review the income tax returns filed by  
20 the corporation to determine if adjustments are warranted to the sales and use tax liability. The  
21 Members also suggested that the Department assist petitioner in filing a Request for Relief of penalty  
22 on behalf of Sound Executives.

23 For 2004, the Department found that the gross receipts reported on the corporation's federal tax  
24 return, net of returns and allowances, was \$663,788, which exceeded the amount it reported on its sales  
25 and use tax returns for the first three quarters of 2004, \$474,370, by \$189,418. The Department  
26 applied the audited ratio of taxable to total sales of 54.51 percent to compute unreported taxable sales  
27 of \$103,252 for the fourth quarter 2004, which exceeds the established understatement of \$69,405 for  
28 that quarter by \$33,847. For 2005, the corporation reported gross receipts, net of returns and

1 allowances, of \$147,312, and the Department used that figure to compute taxable sales of \$80,300  
2 (\$147,312 x 54.51%), which is \$25,300 less than the established understatement of \$105,600 for the  
3 first two quarters of 2005. Thus, based on the Department's review of the federal tax returns for Sound  
4 Executives, it appears that the established understatement for the period October 1, 2004, through May  
5 20, 2005, is actually \$8,547 less than it should have been (\$33,847 - \$25,300). With respect to the  
6 final sale of equipment, the Department used figures from Sound Executives' state income tax return to  
7 verify the established amount of the final sale of equipment and fixtures of \$23,500. Accordingly, we  
8 find that a reconciliation of amounts reported on the income tax returns and the sales and use tax  
9 returns does not support any further reduction to the assessed liability.

10 At the hearing, petitioner also asserted that he never received the Notice of Determination  
11 issued to the corporation on December 16, 2005, or the Notice of Determination issued to him on  
12 January 28, 2008. We find that the determinations were mailed to petitioner at his address of record.  
13 Further, the fact that petitioner filed a timely petition for redetermination in response to the  
14 determination issued to him on January 28, 2008, is evidence that he received the Notice of  
15 Determination.

16 After the Department contacted him on July 18, 2012, petitioner filed a Request for Relief of  
17 the failure-to-file and finality penalties. Petitioner asserts that Sound Executives informed the  
18 franchisor that it was going to close the business, and the franchisor offered to eliminate all debts owed  
19 to it if Sound Executives kept the doors open while the franchisor found a replacement franchisee.  
20 According to petitioner, he understood that the franchisor would be responsible for payroll, inventory,  
21 taxes, and some other expenses during the time that it was searching for a replacement franchisee.  
22 Also, petitioner states that a professional lawyer/debt negotiator advised Sound Executives to not pay  
23 the taxes. We find that these assertions do not represent reasonable cause for Sound Executives failure  
24 to file returns for the period October 1, 2004, through May 20, 2005, or its failure to timely pay the  
25 determinations. Accordingly, we recommend that the request for relief of the penalties be denied.  
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27 Summary prepared by Deborah A. Cumins, Business Taxes Specialist III  
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