

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 ROBERT A. SCHIMPF) Account Number: SR KH 53-003600
 6) Case ID 437280
 7 Petitioner) Rancho Cordova, Sacramento County

8 Type of liability: Responsible person liability

9 Liability period: 10/1/01 – 10/31/02

10 Item Amount in Dispute

11 Responsible person liability \$24,156

	<u>Tax</u>	<u>Penalties</u>
12 As determined and protested:	\$21,853.82	\$4,903.44
13 Adjustment: Appeals Division		<u>-2,600.84</u>
14 Proposed redetermination	<u>\$21,853.82</u>	<u>\$2,302.60</u>

15 Proposed tax redetermination \$21,853.82

16 Interest through 12/31/10 16,514.14

17 Penalties for late payment of returns 2,210.30

Finality penalty 92.30

18 Total tax, interest, and penalties due \$40,670.56

Monthly interest beginning 1/1/11 \$127.48

19 The Board hearing in this matter was held on July 14, 2010. The Board allowed petitioner 30
 20 days to provide additional evidence to support his contention that he is not a responsible person and the
 21 Sales and Use Tax Department (Department) 30 days to respond. However, petitioner did not submit
 22 any material after the hearing. Thus, our conclusion remains that petitioner is a responsible person for
 23 purposes of section 6829, as discussed below.

24 UNRESOLVED ISSUES

25 **Issue 1:** Whether petitioner is personally liable as a responsible person for the unpaid
 26 liabilities of Electrical Specialty Parts Network, Inc. (ESPN), seller's permit number SR KH 97-
 27 492192, for the period October 1, 2001, through October 31, 2002, pursuant to Revenue and Taxation
 28 Code section 6829. We conclude that petitioner is personally liable.

1 ESPN, a California corporation, was a retailer of automobile parts and operated its business
2 from February 1, 1999, through October 31, 2002. ESPN's California seller's permit was closed,
3 effective that date, due to its discontinued business operations. There is no evidence of further sales
4 after this date. On October 1, 2003, the Franchise Tax Board suspended the corporation.

5 ESPN's unpaid liabilities at issue originate from non-remittance returns filed for the period
6 October 1, 2001, through September 30, 2002, and a Notice of Determination for the period of
7 October 1, 2002, to October 31, 2002,¹ which was issued on April 4, 2003, and became final on
8 May 3, 2003. Based on its investigation, the Sales and Use Tax Department (Department) concluded
9 that petitioner was a person responsible for managing the financial affairs of ESPN, including the
10 payment of tax to the Board. The Department also found that petitioner had been willful in his failure
11 to pay the outstanding liabilities. Accordingly, the Department issued a Notice of Determination to
12 petitioner pursuant to Revenue and Taxation Code section 6829 for the tax liabilities of ESPN.

13 Petitioner acknowledges that the business was terminated on October 31, 2002, and that sales
14 tax reimbursement was collected, which are two of the four conditions for imposing liability pursuant
15 to section 6829. However, he disputes the findings that he was a person responsible for ESPN's sales
16 and use tax compliance and that he willfully failed to pay ESPN's tax liability, or to cause it to be paid.
17 Petitioner argues that the actual owners and corporate officers of ESPN were Gretchen Schaefer Ibarra,
18 Terry Lyon, and Daniel Vitt.² Petitioner states that he did not sign ESPN's application for seller's
19 permit (which was signed by Ms. Ibarra on January 28, 1999, as CFO and treasurer), and he asserts
20 that he was only an employee, with no authority to borrow for or obligate the company in any way.
21 Petitioner contends that he was hired around December 1999 as a technician to make field calls to
22 customers, teach ESPN's employees how to rebuild the electrical products sold by ESPN, and to
23 supervise the production side of the company, but that he and co-employee Mr. Kerry Lawrence were
24 left to run the company after Ms. Ibarra left ESPN in December 1999 to take a job with another
25 company, Mr. Lyon left ESPN in late 2000 or early 2001 due to his father's death, and Mr. Vitt left
26

27 ¹ ESPN operated through October 31, 2002, but did not file a return for the fourth quarter 2002.

28 ² At the appeals conference, petitioner indicated that ESPN was formed in 1999 as a result of a merger of Lyon Enterprises, a company owned and run by Terry Lyon, and Wright Wiring, a company owned and run by Ms. Ibarra.

1 ESPN around April 2001. Petitioner states that at that time, ESPN was in “massive debt” due to its
2 owner’s management. At the appeals conference, petitioner stated that he and Mr. Lawrence ran the
3 company, with input from Ms. Ibarra. However, petitioner asserted all tax documents for the company
4 were prepared by Ms. Nancy Houston, ESPN’s office manager and bookkeeper, and he was not
5 involved.

6 The taxes at issue here became due starting on January 31, 2002 (for the period of October 1,
7 2001, through December 31, 2001), and on or before the last day of the month following each quarterly
8 period thereafter, with the last due date being January 31, 2003 (for the period of October 1, 2002,
9 through October 31, 2002). Thus, the question is whether petitioner had the control, supervision,
10 responsibility, or duty to act for ESPN in relation to the sales and use tax laws from January 31, 2002,
11 through January 31, 2003.

12 Petitioner admitted that he signed, as president, ESPN’s sales and use tax return for the fourth
13 quarter 2001 (4Q01), California income tax return for 1999, and the Stock Buy Back and
14 Reimbursement agreement between ESPN and Mr. Vitt on April 24, 2001. Petitioner admitted that he,
15 along with Mr. Lawrence and Ms. Ibarra, was responsible for making decisions about the company’s
16 finances during the period of October 1, 2001, through October 31, 2002, which included making
17 decisions about which of ESPN’s creditors should be paid. Petitioner also admitted that he was an
18 authorized signer on ESPN’s business accounts, signed some corporate checks, and made some
19 employment decisions regarding the termination of employees. Additionally, petitioner communicated
20 with the Department regarding payment of ESPN’s sales tax liability on July 23, 2002, which is further
21 evidence of petitioner’s responsibility for ESPN’s sales and use tax compliance. We find that
22 petitioner was a person responsible for sales and use taxes on the date the business closed, and there is
23 no evidence that petitioner was prevented from acting on behalf of ESPN to pay the sales and use taxes
24 due after the date of termination. We therefore conclude that petitioner was a responsible person for
25 purposes of section 6829 for all periods at issue.

26 With respect to willfulness, personal liability can be imposed on a responsible person only if
27 that person willfully failed to pay or to cause to be paid taxes due from the corporation. (Rev. & Tax.
28 Code, § 6829, subs. (a), (b).) For these purposes, “willfully fails to pay or to cause to be paid” means

1 that the failure was the result of an intentional, conscious, and voluntary course of action. (Rev. &
2 Tax. Code, § 6829, subd. (d).) This failure may be willful even if it was not done with a bad purpose
3 or evil motive. (Cal. Code Regs., tit. 18, § 1702.5, subd. (b)(2).) A person is regarded as having
4 willfully failed to pay taxes, or cause them to be paid, where he or she had knowledge that the taxes
5 were not being paid (or lacked knowledge in reckless disregard of his or her duty to know) and had the
6 authority to pay taxes or cause them to be paid, but failed to do so.

7 Here, petitioner signed ESPN's nonremittance SUTR for 4Q01, which indicates that he had
8 actual knowledge, at that time, of tax that was owed, but not paid, by ESPN for 4Q01. In addition,
9 petitioner communicated directly with the Department regarding payment of sales tax liability on
10 July 23, 2002, which proves that he had actual knowledge that tax was due by ESPN for 4Q01 through
11 2Q02. Although there is no specific evidence that petitioner knew that ESPN owed taxes to the Board
12 during the subsequent periods when ESPN's quarterly returns became due (i.e., on October 31, 2002,
13 and January 31, 2003), petitioner admitted that he was involved in running ESPN's day-to-day
14 business operations, made decisions about which of ESPN's creditors should be paid, and made
15 payments to ESPN's creditors and signed some corporate checks. In addition, petitioner was a person
16 responsible for ensuring that ESPN complied with the Sales and Use Tax Law during the liability
17 period. As a result, petitioner had a duty to know and should have known that ESPN owed the tax
18 liabilities at issue for these quarters when the sales and use tax returns became due, and, if he did not
19 know, only lacked knowledge in reckless disregard of his duty to know.

20 The evidence shows that ESPN charged sales tax reimbursement on its sales during the liability
21 period, and thus, ESPN had at least this money on hand to pay the taxes when they became due.
22 Instead of paying the tax due, ESPN's checks show that ESPN paid rent and common area
23 maintenance charges from November 20, 2001, through May 23, 2002, in the amount of \$21,520.
24 Since ESPN was paying rent, we believe that it was also making sales and paying vendors for
25 inventory as well as utilities and other business expenses, and petitioner admits responsibility for
26 paying them. Despite the fact that petitioner knew or should have known that ESPN's tax liabilities
27 were not being paid, he paid those other creditors. Therefore, we conclude that petitioner's failure to
28 pay ESPN's taxes was conscious and voluntary.

1 Based on all of the foregoing, we conclude that petitioner willfully failed to pay ESPN's taxes
2 due, or failed to cause them to be paid for the period October 1, 2001, through October 31, 2002, and
3 that petitioner is liable for the unpaid liability of ESPN pursuant to section 6829.

4 **Issue 2:** Whether petitioner has established reasonable cause sufficient to relieve the late
5 payment penalties and finality penalty originally assessed against ESPN for the period October 1,
6 2001, through October 31, 2002. We conclude that petitioner has failed to do so.

7 There is no statutory or regulatory authority for relieving late-payment or finality penalties in
8 section 6829 determinations, but if the penalties were relieved as to ESPN, that relief would also inure
9 to the benefit of petitioner. Petitioner has submitted a declaration signed under penalty of perjury
10 requesting relief of the foregoing penalties on ESPN's behalf. In his request, petitioner makes the
11 same arguments as addressed above in Issue 1.

12 We find nothing in the present record that indicates ESPN's failure to timely file or pay was
13 due to reasonable cause and circumstances beyond its control. In fact, petitioner's request for relief
14 provides no explanation for ESPN's failure to timely file or pay, since the request for relief addresses
15 only the reasons why petitioner (not ESPN) failed to do so. Therefore, we conclude that relief of the
16 penalties is not warranted.

17 **Issue 3:** Whether interest accruing on the tax liability should be relieved. We recommend that
18 relief be denied.

19 Petitioner's declaration remotely implicates a request for relief of interest. In his declaration,
20 petitioner contends that no correspondence from the Board until 2008 informed him that he could be
21 held personally responsible for ESPN's tax debts; thus, he was unable to "address the issue
22 immediately" in order to decrease the accumulated interest. The Board may grant relief of interest
23 under Revenue and Taxation Code section 6593.5 where it finds that the failure to pay tax is due in
24 whole or in part to an unreasonable error or delay by an employee of the Board acting in his or her
25 official capacity, with no significant aspect of the delay caused by the taxpayer. The Department
26 issued the determination to petitioner after it had exhausted its numerous efforts to collect the tax at
27 issue directly from ESPN. We find that there was no unreasonable delay, and that relief of interest is
28 not warranted.

RESOLVED ISSUE

1
2 A 50-percent amnesty interest penalty of \$2,600.84 was imposed against ESPN because the tax
3 liability was incurred during amnesty-eligible periods, and ESPN failed to apply for amnesty, or pay
4 the tax and interest due, by March 31, 2005. (Rev. & Tax. Code, § 7074, subd. (a).) The amnesty
5 interest penalty was included in the determination issued to petitioner as part of the unpaid liabilities of
6 ESPN. (Rev. & Tax. Code, § 6829, subds. (a), (e).)

7 Petitioner submitted a declaration signed under penalty of perjury requesting relief of the
8 amnesty interest penalty. In his request, petitioner makes the same arguments as addressed above in
9 Issue 1. As discussed above, ESPN ceased business operations on or about October 31, 2002, while
10 the amnesty program did not commence until February 1, 2005, over two years later. Thus, by the
11 time of the amnesty program, ESPN was no longer operating and likely had no assets. Under the
12 circumstances, we conclude that ESPN's failure to participate in the amnesty program was due to
13 reasonable cause and circumstances beyond its control. Accordingly, we recommend relief from the
14 amnesty interest penalty, provided that, within 30 days from the Notice of Redetermination, petitioner
15 either pays in full the tax and interest due or enters into a qualifying installment payment agreement to
16 pay the full tax and interest due within 13 months, and successfully completes that agreement.

17
18 Summary prepared by Rey Obligacion, Retired Annuitant
19
20
21
22
23
24
25
26
27
28