

1 calendar, but was removed from that calendar at the request of Board Member Runner. It was
2 rescheduled for decision on the Adjudicatory calendar in September 2012, but was postponed at
3 taxpayer's request that this matter be placed back on the Oral Hearing calendar. It was rescheduled for
4 Board hearing in February 2013, but taxpayer did not respond to the Notice of Hearing. Thus, the
5 matter was again scheduled for decision on the nonappearance calendar. However, it was
6 inadvertently scheduled on the Consent calendar for February 2013, rather than the Adjudicatory
7 calendar.

8 UNRESOLVED ISSUE

9 **Issue 1:** Whether taxpayer is personally liable as a responsible person for the unpaid liabilities
10 of Nadir & Son, Inc. pursuant to Revenue and Taxation Code section 6829. We conclude taxpayer is
11 personally liable.

12 Nadir & Son, Inc. (Nadir) (SR FH 100-527007) operated a Chevron gas station from
13 February 9, 2005, through July 31, 2007. At the time its business terminated, Nadir had unpaid
14 liabilities related to returns and prepayment forms filed with no remittance or partial remittance and
15 three determinations issued by the Sales and Use Tax Department (Department) because Nadir failed
16 to file returns.

17 There is apparently no dispute that Nadir's business operations were terminated or that it
18 collected sales tax reimbursement with respect to its taxable sales, which are two of the four conditions
19 for imposing personal liability pursuant to section 6829, since the Department was notified that Nadir
20 had discontinued its operations, and Nadir claimed deductions for sales tax included on each sales and
21 use tax return it filed. Taxpayer disputes the remaining two conditions, that he is a responsible person
22 and that he willfully failed to pay or to cause to be paid taxes due from Nadir.³

23 Taxpayer signed Nadir's application for a seller's permit as vice-president and signed other
24 documents as the corporation's Chief Financial Officer (CFO). Additionally, taxpayer communicated
25 with the Department regarding sales and use tax matters on various occasions.

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27 ³ The D&R notes that taxpayer also contends the liability established for Nadir is excessive. Although the D&R does not
28 analyze that assertion, we note that taxpayer has not provided evidence to show that the amounts of tax and penalty
assessed against Nadir were excessive, and we do not address this issue further.

1 Taxpayer contends that he was an absentee owner who had no responsibilities related to
2 Nadir's sales and use tax compliance. However, we find this contention unpersuasive. The available
3 evidence, including a personal promissory note taxpayer signed on behalf of the corporation and his
4 signature on a corporate check payment to the landlord, reveals that taxpayer was an active owner. We
5 find there is no evidence to support his assertion that he was an absentee owner. Also, as noted
6 previously, taxpayer communicated with the Department regarding Nadir's sales and use tax liability
7 on various occasions. Accordingly, we find that taxpayer, in his position as vice president and CFO,
8 was directly responsible for Nadir's sales and use tax compliance, and that the third requirement for
9 imposition of personal liability pursuant to section 6829 has been met.

10 With respect to willfulness, personal liability can be imposed on a responsible person under
11 section 6829 only if that person willfully failed to pay or to cause to be paid taxes due from the
12 corporation, which means that the failure was the result of an intentional, conscious, and voluntary
13 course of action (even if without a bad purpose or evil motive). A person is regarded as having
14 willfully failed to pay taxes, or to cause them to be paid, where he or she had knowledge that the taxes
15 were not being paid and had the authority to pay taxes or cause them to be paid, but failed to do so.

16 In this case, there is evidence that the Department communicated with taxpayer requesting
17 payment of the amounts due from Nadir. Thus, we find that taxpayer knew the tax was due and was
18 not being paid.

19 Willfulness also requires that the responsible person must have been able to pay, or to cause to
20 be paid, the taxes due. We find for the same reasons noted above that taxpayer had authority to cause
21 the taxes due to be paid. Regarding whether Nadir had sufficient funds to pay the taxes due, we note
22 that Nadir's practice was to collect sales tax reimbursement, and those amounts collected were
23 available to pay the amount of tax due for the applicable periods. In addition, there is evidence that
24 Nadir paid employee wages, made payments to at least one supplier, and made rent payments to its
25 landlord. Accordingly, we find that Nadir had funds available to pay its tax liability, but taxpayer
26 elected to pay other creditors instead. Thus, we find that taxpayer's failure to pay the tax owed by
27 Nadir was willful. In summary, we conclude that all conditions have been satisfied for imposing
28 personal liability on taxpayer under section 6829 for the outstanding tax liabilities of Nadir.

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OTHER MATTERS

Since taxpayer did not appear at the conference, we did not have an opportunity to discuss relief of penalties with him. However, in our post-conference correspondence, we explained to taxpayer that the penalties at issue could be relieved if the Board concluded that Nadir’s failure to timely report and pay the amounts was due to reasonable cause and circumstances beyond its control. We also provided a form to taxpayer that he could use to request relief. Taxpayer did not return the form or otherwise request relief of the penalties. Thus, we have no basis to consider recommending relief of the late-payment, failure-to-file, or finality penalties.

Summary prepared by Lisa Burke, Business Taxes Specialist III