

**CALIFORNIA STATE BOARD OF EQUALIZATION**  
**APPEALS DIVISION SUMMARY FOR BOARD HEARING**

In the Matter of the Petition for Redetermination )  
Under the Sales and Use Tax Law of: )  
IRVING PAUL BERMAN ) Account Number: SR AC 53-003078  
Petitioner ) Case ID 404690  
Westlake Village, Los Angeles County

Type of Liability: Responsible person liability

Liability period: 04/01/98 – 12/31/00

<u>Item</u>	<u>Disputed Amount</u>
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Responsible person liability	\$12,498
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	<u>Tax</u>	<u>Penalty</u>
As determined and protested:	\$8,610.10	\$3,887.49
Proposed tax redetermination	\$8,610.10	
Interest through 1/31/10	8,231.56	
Negligence penalty	867.91	
Finality penalty	861.01	
Amnesty interest penalty	<u>2,158.57</u>	
Total tax, interest, and penalty	<u>\$20,729.15</u>	
Monthly interest beginning 2/1/10	<u>\$ 50.23</u>	

This matter was previously scheduled for Board hearing on December 15, 2009, but was postponed at petitioner’s request because of a scheduling conflict.

**UNRESOLVED ISSUES**

**Issue 1:** Whether petitioner is liable as a responsible person under Revenue and Taxation Code section 6829 for Sentech’s liabilities. We conclude that petitioner is personally liable.

Petitioner was the president, chief executive officer, and chief financial officer of Sentech Electronics, Inc. (Sentech), seller’s permit number SR AC 13-837136, which manufactured circuit boards. The Sales and Use Tax Department (Department) closed out Sentech’s seller’s permit effective March 31, 2002. At the time the business was terminated, Sentech had an unpaid liability pursuant to a Notice of Determination issued to Sentech based on an audit of the period April 1, 1998, through December 31, 2000. The Department issued a Notice of Determination to petitioner for

1 Sentech's liability based on the Department's finding that petitioner is personally responsible for that  
2 liability pursuant to section 6829 because he was a person responsible for managing Sentech's  
3 financial affairs, including the payment of tax to the Board, and he willfully failed to pay taxes due  
4 with respect to sales for which Sentech collected sales tax reimbursement.

5 There is no dispute that two of the requirements for imposing responsible person liability on  
6 petitioner under section 6829 have been met. The business has been terminated, and petitioner was a  
7 person responsible for Sentech's sales and use tax matters. The issues here are whether sales tax  
8 reimbursement was added to the selling price of the sales at issue, and whether petitioner willfully  
9 failed to pay, or to cause to be paid, the taxes due.

10 Petitioner contends that the Department has not proved that Sentech has any liability on sales  
11 for which it collected sales tax reimbursement because Sentech had remitted all such reimbursement to  
12 the Board. Petitioner asserts that Sentech collected sales tax reimbursement for each sale unless it had  
13 a resale certificate on file for the customer and remitted all amounts to the Board as tax. He contends  
14 that for most of the transactions at issue in the audit, Sentech had not collected sales tax reimbursement  
15 because the transactions were valid sales for resale, and the other transactions at issue were discounted,  
16 cancelled, or resulted in a bad debt. Sentech's audited understatement was established based on the  
17 difference between recorded sales tax accrued and reported sales tax, but petitioner argues that the  
18 recorded amounts were in error, the correct amount of sales tax due has been reported, and there was  
19 no understatement.

20 Petitioner has not offered evidence that any particular sale for which sales tax was accrued was  
21 not subject to tax. Rather, he merely alleges that since Sentech paid all sales tax due, the records  
22 indicating otherwise must be wrong for one (or more) of the alleged reasons. Also, petitioner contends  
23 that an accrual account entry does not constitute evidence that sales tax was actually collected and  
24 concludes that the Department has not proved this element of its case. We find that the Department  
25 did provide evidence that Sentech added or included sales tax reimbursement to the price of products  
26 sold at retail. Petitioner concedes that Sentech's accounting system generated an invoice that included  
27 sales tax reimbursement for each taxable sale, and also recorded the amount of sales tax accrued in  
28 Sentech' tax accrual account. We find it reasonable to conclude that amounts recorded in the tax

1 accrual account were actually collected by Sentech, and we find it is petitioner's burden to establish  
2 otherwise. He has not done that. Regarding bad debts, to the extent that petitioner were to establish  
3 that Sentech qualified for bad debt deductions reducing its tax liability, that reduction would also inure  
4 to petitioner's benefit. However, petitioner has not established Sentech's right to any bad debt  
5 deductions.

6 Petitioner asserts that willfulness requires something tantamount to fraud, and the Department  
7 has shown nothing more than a mere mistake or, at worst, negligence. Petitioner states that he  
8 prepared Sentech's sales and use tax returns from sales reports and was not aware that tax was accrued  
9 and not paid. He contends that he could not have willfully failed to pay the liability because Sentech  
10 had no assets by the time the determination was issued to it.

11 Petitioner's contention that fraud must be established is simply not correct. "Willful" for these  
12 purposes means voluntary, conscious, and intentional. (Cal. Code Regs., tit. 18, § 1702.5, subd.  
13 (b)(2).) That is, if a responsible person is aware that the tax is due and does not pay that tax with funds  
14 available for that purpose, then this element of liability is established. For example, the willfulness  
15 element is satisfied where a responsible person is aware of the tax liability and decides to use available  
16 funds to pay other creditors. Here, the evidence establishes that petitioner knew of Sentech's tax  
17 liability, especially given the sizable discrepancy between accrued and reported sales tax, but elected to  
18 make lease payments and pay vendors, which satisfies the willfulness requirement for imposing  
19 liability under section 6829.

20 Petitioner's willfulness would not be negated even if his contention were true that, at the time  
21 the determination was issued to it, Sentech had no assets. Rather, he must also establish that there  
22 were no funds available for payment of taxes on the original due dates of those taxes, with the timely  
23 return for each quarter. Since Sentech paid other creditors throughout the audit period, we find that the  
24 evidence shows funds were available on each date the returns were due. We thus find the requirements  
25 for imposing responsible person liability on petitioner under section 6829 have been met.

26 **Issue 2:** Whether the notice of determination was timely issued. We find that it was.

27 Sentech filed its last sales and use tax return for the first quarter 2002 (1Q02), and the Board  
28 closed out Sentech's seller's permit effective March 31, 2002. Petitioner did not file a return in his

1 own name for any of the periods at issue. The Sales and Use Tax Department (Department) issued the  
2 determination to petitioner on May 29, 2007. Petitioner contends that the determination was not issued  
3 within the period established by the statute of limitations. He also states that it was issued after he had  
4 filed for bankruptcy protection, and, had he received proper notice, he would have listed the Board as a  
5 creditor, and the disputed taxes would have been paid through the bankruptcy.

6 With respect to personal liability assessed against a responsible person for amounts incurred by  
7 a corporation, the responsible person may not be held liable until the business is terminated. In this  
8 case, the Board closed Sentech's seller's permit effective March 31, 2002. Consequently, the liability  
9 attached to petitioner on that date and was due on April 30, 2002. Had petitioner filed a timely sales  
10 and use tax return in his own name for the first quarter 2002, a determination issue to petitioner for any  
11 personal sales and use tax liability would have been timely only if it had been issued by April 30,  
12 2005, that is, within three years from the last day of the month following the first quarter 2002.  
13 However, where a person does not file a return for a given quarter, the period for issuing a  
14 determination to that person for that quarter is eight years. Since petitioner had not filed a return in his  
15 own name for the period in which the business of Sentech was terminated (or for any of the periods  
16 during which the liability was incurred), a determination would have been timely if it had been issued  
17 by April 30, 2010, that is, within eight years from the due date for the first quarter 2002.<sup>1</sup> Thus, we  
18 find that the determination issued May 29, 2007, was timely.

19 With respect to petitioner's assertion regarding his bankruptcy, we note that petitioner and his  
20 wife filed for bankruptcy on June 18, 2001, before Sentech's business was terminated and petitioner  
21 became personally liable for the amounts assessed against Sentech. Thus, the bankruptcy is simply  
22 irrelevant to the question of whether the determination was issued timely.

23 **Issue 3:** Whether adjustments are warranted to the liability assessed against Sentech. We find  
24 that no adjustments are warranted.

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27 <sup>1</sup> Section 6829 was amended operative January 1, 2009, to include a limitations period specifically applicable to  
28 determinations issued under section 6829. This specific limitations period applies to determinations issued pursuant to  
section 6829 on and after January 1, 2009, but does not apply to determinations issue prior to January 1, 2009, such as the  
determination here, which was issued on May 29, 2007.

1           Petitioner contends that the determination was not timely issued to Sentech because it was  
2 issued after the company went out of business and was mailed to an incorrect address. The earliest  
3 quarter in the audit period was the 2Q98, and the tax was due for that quarter on July 31, 1998. The  
4 determination was issued on July 2, 2001, which is within the three-year period following the due-date  
5 of the return. Therefore, we find the determination was timely issued to Sentech. The determination  
6 was mailed to Sentech at a post office box address that was provided to Board staff by the U. S. Postal  
7 Service on October 3, 2000. There was no address provided by Sentech after that date. Further, sales  
8 and use tax returns were mailed to Sentech at the same address for the first, second, and third quarters  
9 of 2001. The fact that Sentech completed and returned those returns is evidence that petitioner was  
10 receiving mail at the post office box when the determination was issued. Petitioner has provided no  
11 evidence that Sentech notified the Department of a change of address and nothing to support his claim  
12 that the post office box to which the determination was sent had been closed without forwarding  
13 information by the time the determination would have been delivered. In addition, the determination  
14 was not returned by the Post Office. We find that the determination was properly mailed to Sentech.

15           Petitioner also contends that the audit incorrectly assumed sales tax reimbursement was  
16 included in or added to the price of drop shipments for customers of clients who had provided valid  
17 resale certificates. In addition, petitioner asserts that the liability is excessive because the recorded  
18 amount of sales tax accrued was overstated. In that regard, petitioner asserts that the tax accrual  
19 account was not adequately scrutinized during the audit because Sentech was already out of business  
20 when the audit report was issued, but he has not identified any specific errors in the recorded amounts.

21           The deficiency is based on a difference between sales tax accrued by Sentech and the amounts  
22 paid. If Sentech drop-shipped tangible personal property to its clients' customers, it would have been  
23 proper for it to accrue tax because Sentech is deemed the retailer with respect to those sales. We  
24 cannot accept petitioner's unsupported statement that Sentech's customers collected sales tax  
25 reimbursement with respect to those sales and remitted sales tax to the Board. Petitioner has the  
26 burden of proving that tax was paid, and he has offered no evidence to support that claim. It should  
27 also be noted that, to the extent that Sentech had actually regarded these transactions as either sales for  
28 resale or as taxable to its customers and not to itself, Sentech presumably would not have accrued sales



1 not done so. Accordingly, we have no basis upon which to recommend relief from the amnesty  
2 interest penalty.

3 **OTHER DEVELOPMENTS**

4 None.

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7 Summary prepared by Deborah A. Cumins, Business Taxes Specialist III  
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