

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION SUMMARY FOR BOARD HEARING

3 In the Matter of the Petition for Redetermination)
 4 Under the Sales and Use Tax Law of:)
 5 JAMES M. HEIM) Account Number: SR CH 53-002638
 6) Case ID 379939
 7 Petitioner) Tucson, Arizona

8 Type of Liability: Responsible person liability

9 Liability Period: 10/1/00 – 6/30/01

10 <u>Item</u>	<u>Amount</u>				
11 Responsible person liability	\$65,957				
		<u>Tax</u>	<u>Interest</u>	<u>Penalties</u>	<u>Total</u>
13 As determined	\$219,676.11	\$130,299.03	\$99,665.73	\$449,640.87	
14 Adjustment – Appeals Division	<u>-219,676.11</u>	<u>-103,291.88</u>	<u>-60,715.85</u>	<u>-383,683.84</u>	
14 Proposed redetermination, protested	<u>\$0.00</u>	<u>\$27,007.15</u>	<u>\$38,949.88</u>	<u>\$65,957.03</u>	

15 UNRESOLVED ISSUES

16 **Issue:** Whether petitioner is personally liable as a responsible person for the unpaid liabilities
 17 of Basis, Inc. (SR CH 21-741252) (Basis) for the period October 1, 2000, through June 30, 2001
 18 (4Q00, 1Q01, and 2Q01). We find that petitioner is personally liable, but only for the 4Q00 and 1Q01.
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20 Petitioner was a corporate officer of Basis, having acted as a director, chairman of the board,
 21 secretary, and treasurer. Petitioner was also a majority shareholder, CEO, and president of the parent
 22 corporation of Basis. On April 22, 2003, petitioner was forced to resign from his positions at Basis.

23 Basis closed out its business on April 23, 2004, and forfeited its corporate status on
 24 September 15, 2005. Basis' remaining liability at the close out date consisted of a late-payment
 25 penalty of \$11,447.18 for 4Q00, a late-payment penalty of \$27,502.70 for 1Q01, unpaid interest of
 26 \$27,007.15, a self-assessed liability for \$219,676.11 tax for 2Q01, a late-payment penalty of
 27 \$25,211.80 for 2Q01, and an amnesty interest penalty of \$35,504.05 assessed on April 1, 2005. The
 28 Sales and Use Tax Department (Department) determined that petitioner is personally responsible

1 pursuant to Revenue and Taxation Code section 6829 because he held various corporate officer
2 positions at Basis, he was responsible for managing Basis' financial affairs, including the payment of
3 tax to the Board, and he willfully failed to pay taxes due with respect to sales for which Basis collected
4 sales tax reimbursement.

5 Petitioner asserts that two of the four conditions required for imposing liability under section
6 6829 are absent. Petitioner asserts that he was not the person responsible for sales and use tax matters
7 during the liability period, and that instead those matters were handled locally, in California, by
8 Ms. Viviana Magee, a former director of business services, and others to whom she reported.¹
9 Petitioner claims that he was only responsible for corporate finances at a much higher level, where his
10 efforts were focused on securing capital and financing through private offerings and otherwise. He
11 states that he did not become involved with sales and use tax matters for Basis until the board of
12 directors requested that he deal with the company's tax issues in July 2001, at which time he came to
13 California and met with the Board's compliance staff to negotiate an installment payment plan.
14 Petitioner also contends that he never willfully failed to pay the liability. He claims that Basis' vendor
15 and largest secured creditor, MRA Systems, Inc., dba GE Access (GE) to whom it owed \$5,688,355.71
16 (\$5 million principal and the remainder interest), as of December 29, 2000, controlled payments by
17 Basis and he did all that he could do to continue to make the agreed-upon payments until he was forced
18 out in April 2003. He also alleges that on February 24, 2004, when GE foreclosed on its security
19 interest and took possession of all assets of Basis, its assets included more than \$500,000 in cash.

20 With respect to the issue of being personally responsible, petitioner held several corporate
21 officer positions with Basis, the most relevant of which was as treasurer during the 2000-2001 and
22 2001- 2002 fiscal years. Some of the basic responsibilities of a corporate treasurer are financial
23 oversight and cash management. The fact that petitioner was the treasurer of Basis during the time that
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25 ¹ In addition to petitioner, the Department considered issuing dual determination against Ms. Joyce Menke, Ms. Viviana
26 Magee, Ms. Patricia Shanks, Mr. Donald Legnitto, and Mr. William Wallin. Due to insufficient evidence against Ms.
27 Shanks, Mr. Legnitto and Mr. Wallin, their cases were not pursued. Consequently, dual determinations were issued against
28 petitioner, Ms. Menke, and Ms. McGee. Ms. Menke did not file a petition for redetermination. Apparently, she resides in
Iowa and the Board is trying to collect from her. Ms. Magee filed a petition for redetermination. The Department
concluded that Ms. Magee could not act independently for the corporation in sales and use tax matters. Therefore, her
petition was granted and her liability reduced to zero.

1 all of the liabilities at issue became due is sufficient prima facie evidence that he was responsible for
2 the company's finances, including sales and use tax matters. Petitioner may have chosen to delegate
3 those responsibilities to others, including Ms. Magee, but such a delegation did not relieve him of the
4 ultimate responsibility for the finances of Basis, as is evident from the fact that petitioner was the
5 executive who, in July 2001, came to California to personally handle the negotiations with the Board's
6 compliance staff. By mid-July 2001, petitioner was personally and directly involved in handling sales
7 and use tax matters for Basis. Board's records indicate a first contact with petitioner on July 18, 2001,
8 when he met in person with two of the compliance staff to negotiate a payment plan. The liability for
9 all of the quarters at issue here was discussed at the meetings between petitioner and Board staff on
10 July 18 and 19, 2001, and petitioner negotiated an Installment Payment Agreement (IPA) covering the
11 entire tax liability of Basis, including the liability for 2Q01, which was not due until July 31, 2001.
12 Petitioner also remained involved in the process thereafter and renegotiated, or attempted to
13 renegotiate, the IPA until shortly before his resignation on April 22, 2003. We find that this
14 establishes that petitioner was a responsible person for Basis within the meaning of section 6829.

15 With respect to whether petitioner willfully failed to pay, or caused to be paid, taxes due from
16 the corporation, this means that the failure was the result of an intentional, conscious, and voluntary
17 course of action. This failure may have been willful even if it was not done with a bad purpose or evil
18 motive. A person is regarded as having willfully failed to pay taxes, or cause them to be paid, where
19 he or she had knowledge that the taxes were not being paid (or lacked knowledge in reckless disregard
20 of his or her duty to know) and had the authority to pay taxes or cause them to be paid, but failed to do
21 so. The determination of willfulness is a finding of fact.

22 Here, petitioner has not shown that GE had total control of the payments made by Basis.
23 Petitioner's handling of sales and use tax matters for Basis after mid-July 2001 clearly shows that he
24 had the authority to direct payment of sales and use tax to the Board and there is no evidence that he
25 did not have that same authority during all relevant times. Information from the Employment
26 Development Department shows that it paid wages of \$242,923 to ten employees during 4Q00, wages
27 of \$341,934 to twelve employees during 1Q01, and wages of \$234,959 to twelve employees during
28 2Q01. Bank records show ending balances for August 31, September 30, and October 31, 2002, of

1 \$200,827.27, \$26,453.90, and \$128,228.24, respectively. This evidence is sufficient to show that Basis
2 had funds available to pay the liability. It chose not to pay them. Based on these facts, we find that the
3 evidence is sufficient to show that petitioner willfully failed to pay the taxes for 4Q00 and 1Q01 when
4 they became due. Accordingly, we conclude that petitioner is personally responsible for the liabilities
5 of Basis for the 4Q00 and 1Q01. With respect to the liabilities imposed on petitioner that were
6 incurred by Basis during 2Q01, we find that they should be deleted as explained below under Resolved
7 Issues.

8 **Issue 2:** Whether petitioner has established reasonable cause to relieve the late-payment
9 penalties assessed against Basis that were passed through to him as a responsible person. We conclude
10 that petitioner has failed to establish reasonable cause to relieve the penalties for the periods of 4Q00
11 and 1Q01.

12 There is no statutory or regulatory authority for relieving late-payment penalties in section
13 6829 determinations, but the penalties can be relieved as to Basis if a request for relief of such
14 penalties filed on behalf of Basis establishes that relief should be granted. To the extent that relief of
15 penalties were granted to Basis, such relief would inure to petitioner's benefit as well. Petitioner did
16 not request relief of the penalties prior to or at the two appeals conferences, or even after we sent a
17 letter on February 4, 2008, but he requested relief after we reminded him via an email on March 19,
18 2009. In his request, petitioner reiterated that GE controlled the funds required to pay the liabilities,
19 and stated that he lacks personal knowledge of specific events during the periods in issue. We
20 conclude that petitioner's declaration does not establish good cause to relieve the late-payment
21 penalties for 4Q00 and 1Q01 and we are not aware of any circumstances that would warrant granting
22 such relief to Basis. Consequently, we have no basis to recommend that relief be granted as to the late-
23 payment penalties assessed for 4Q00 and 1Q01.

24 **RESOLVED ISSUES**

25 We recommend that the tax, interest, late payment penalty, and the amnesty interest penalty for
26 the period April 1, 2001, through June 30, 2001 (2Q01), be deleted from petitioner's responsible
27 person liability. We find that petitioner did not willfully fail to pay or cause to be paid Basis' 2Q01
28 liabilities because the Department acquiesced in Basis' failure to pay the full amount when due by

1 entering into a payment plan with Basis, and the evidence shows that petitioner acted in good faith to
2 comply with that agreement until it was no longer within his power to do so. It was not until after
3 petitioner resigned and no longer had any control over the finances of Basis that the default became
4 incurable. We find that under these exceptional circumstances, petitioner did not willfully fail to pay
5 the liability of Basis for 2Q01. There were no amnesty interest penalties in the earlier periods.

6 **OTHER DEVELOPMENTS**

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Summary prepared by Rey Obligacion, Business Taxes Specialist III.