

## 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 CHAD KIMO KUKAHIKO ) Account Number: SR AS 53-002165  
 6 ) Case ID 334779  
 7 Petitioner ) Los Angeles, Los Angeles County )

8 Type of Liability: Responsible person liability

9 Audit Period: 7/1/03 – 9/30/04

10 Item Disputed Amount

11 Responsible person liability \$63,989

	<u>Tax</u>	<u>Penalties</u>
13 As determined and protested	<u>\$52,615.71</u>	<u>\$11,373.50</u>
14 Proposed tax redetermination	\$52,615.71	
15 Interest through 9/30/09	28,055.52	
15 Penalties	<u>11,373.50</u>	
16 Total tax, interest, and penalty	<u>\$92,044.73</u>	
17 Monthly interest beginning 10/1/09	<u>\$350.77</u>	

18 This matter was previously scheduled for Board hearing on July 1, 2009. After petitioner failed  
 19 to respond to the notice of hearing, the Board Proceedings Division informed petitioner that this matter  
 20 would be presented to the Board for decision without oral hearing, and petitioner then asked that the  
 21 matter remain on the hearing calendar. The matter was then postponed because petitioner submitted a  
 22 second settlement proposal (the first had been rejected prior to the appeals conference). The latest  
 23 settlement offer was also rejected, and this matter was rescheduled for Board hearing. After petitioner  
 24 again failed to respond to the notice of hearing, the Board Proceedings Division informed petitioner  
 25 that this matter would be presented to the Board for decision without oral hearing. Petitioner then  
 26 contacted the Board Proceedings Division requesting that the matter remain on the hearing calendar.

27 **UNRESOLVED ISSUES**

28 **Issue 1:** Whether petitioner is liable as a responsible person under Revenue and Taxation Code

1 section 6829 for Mustard & Trollope, Inc.'s liabilities. We conclude petitioner is personally liable.

2           Petitioner was a corporate officer of Mustard & Trollope, Inc. (M&T), seller's permit number  
3 SR AS 100-365502. The liability at issue is based on M&T's self-reported liabilities on its sales and  
4 use tax returns (SUTR's). M&T's business was closed out on June 30, 2005. The Sales and Use Tax  
5 Department (Department) determined that petitioner is personally responsible pursuant to Revenue and  
6 Taxation Code section 6829 because he was the chief financial officer (CFO) of M&T, he was the  
7 person responsible for managing M&T's financial affairs, including the payment of tax to the Board,  
8 and he willfully failed to pay taxes due with respect to sales for which M&T collected sales tax  
9 reimbursement. Although the business operated through June 30, 2005, the Department determined  
10 that petitioner is only liable for the period from July 1, 2003, through September 30, 2004, because  
11 petitioner left his position as CFO on December 24, 2004 (before the taxes were due for the fourth  
12 quarter 2004).

13           Petitioner does not dispute that M&T charged and collected sales tax reimbursement on its  
14 sales of tangible personal property, but contends that he was not responsible for managing M&T's  
15 financial affairs because he did not control M&T's finances or its payments to creditors. Petitioner  
16 maintains that the CEO, Mr. James Mustard, was the responsible person for every aspect of the  
17 business operation. Petitioner states that he reported directly to Mr. Mustard who authorized any  
18 actions taken by petitioner, and that he had no authority or ability to issue checks or disburse funds in a  
19 manner that deviated from Mr. Mustard's instructions. Petitioner also contends that M&T has not been  
20 terminated, dissolved, or abandoned and therefore any liabilities asserted under section 6269 are  
21 premature. Additionally, he asserts he did not willfully fail to pay M&T's taxes because he was  
22 unduly influenced and subject to coercion by Mr. Mustard's power while he held the position of CFO.  
23 Petitioner maintains that his autonomy was impaired through his relationship with Mr. Mustard,  
24 rendering his actions at M&T, including his failure to satisfy M&T's tax obligations, coerced and  
25 involuntary. Thus, petitioner asserts that this failure was not willful within the meaning of section  
26 6829.

27           The evidence shows that petitioner was responsible for tax compliance. Petitioner signed the  
28 SUTR's for 3Q03, January through March 2004, and 3Q04 and signed the prepayment forms for

1 January, February, October, and November 2004. Additionally, petitioner had regular communications  
2 with the Department regarding payment of sales tax liability, and several communications regarding  
3 payment of M&T's monthly installments to the Board. On December 2 and 13, 2004, petitioner  
4 visited the Board's Culver City office and advised that he would return with the SUTR for 3Q04 and  
5 the prepayment for 4Q04 and requested a payment plan of \$8,000 a month. On December 14, 2004,  
6 petitioner contacted the Department to discuss payments and was advised that M&T's tax arrearage  
7 was approximately \$83,309.69 and that collection action was pending. After petitioner left his position  
8 as CFO, in December 2005 when he contacted the Department to discuss his petition for  
9 redetermination of the dual assessment issued to him pursuant to section 6829, he confirmed that, for  
10 the period in dispute here, M&T had funds available but paid other creditors while the tax liability  
11 existed, that he was the CFO and made financial decisions, and that he signed checks and returns.

12 As a CFO, petitioner had a duty to act for the corporation in its financial affairs, including  
13 compliance with the Sales and Use Tax Law. Petitioner signed M&T's seller's permit application and  
14 returns, communicated regularly with the Department on sales and use tax matters, and by his own  
15 admission, signed checks on behalf of M&T. For the foregoing reasons, we find that there is  
16 overwhelming evidence that petitioner was a person responsible for ensuring M&T's sales and use tax  
17 compliance when the taxes became due for the period of July 1, 2003, through September 30, 2004.

18 Petitioner argues that the corporation has not been terminated, dissolved, or abandoned; and  
19 therefore, any liabilities asserted under section 6269 are premature. The evidence, however, shows  
20 that the business was closed out on June 30, 2005, and petitioner has not presented any evidence to the  
21 contrary. We find that the discontinuance of the corporation's business activities satisfies the  
22 termination requirement. (Cal. Code Regs., tit. 18, § 1702.5, subd. (b)(3).) Therefore, we find that,  
23 even if the corporation itself has not terminated, M&T ceased its business activities by June 30, 2005,  
24 the effective date of closure of its seller's permit.

25 The evidence shows that petitioner had actual knowledge of M&T's sales and use tax  
26 liabilities. Petitioner signed the SUTR's and prepayment forms on behalf of M&T and communicated  
27 directly with the Department on various occasions regarding payment of sales tax liability. Instead of  
28 paying the taxes due, petitioner used the funds to pay other liabilities. Petitioner admitted that M&T

1 had the funds to pay sales and use tax obligations but paid other creditors instead. We find petitioner's  
2 contention that his failure to pay the tax liabilities was involuntary and the result of coercion and undue  
3 influence by Mr. Mustard unpersuasive. For all the foregoing reasons, we find that petitioner is  
4 personally liable as a responsible person within the meaning of section 6829.

5 With regard to petitioner's argument that Mr. Mustard is the only person who should be held  
6 personally liable for the taxes due, we note that more than one person may be held for the same  
7 primary liability, as long as the requirements for imposing such liability on each person are satisfied  
8 (the liability will only be collected once irrespective of how many persons are held liable). We find  
9 that petitioner is personally liable as a responsible person for the full amount of the unpaid liability at  
10 issue here. The Department has issued a determination against Mr. Mustard for the unpaid corporate  
11 liabilities of M&T, and a separate D&R has been issued in that case.

12 **Issue 2:** Whether petitioner has established reasonable cause to relieve the late payment  
13 penalties assessed against M&T. We conclude that petitioner has failed to establish reasonable cause.

14 Petitioner submitted a statement, under penalty of perjury, requesting relief from the penalties.  
15 Petitioner asserts that as a result of the coercion, duress, and undue influence caused by his relationship  
16 with Mr. Mustard, he suffers from a serious illness in the form of a dissociate disorder and his failure  
17 to pay M&T's sales and use tax liability was both involuntary and a result of his illness. He asserts  
18 that these reasons qualify as reasonable cause to justify relief from the penalties.

19 The only basis for relief of penalties as to a person being held liable under section 6829 is to  
20 establish that the corporation is entitled to relief of those penalties. If the penalties are relieved as to  
21 the corporation, then that relief inures to the benefit of any persons who are liable under section 6829.  
22 Petitioner's statement conflicts with his argument that Mr. Mustard was solely responsible for payment  
23 of taxes. If Mr. Mustard were truly solely responsible for the payment of taxes, then petitioner's  
24 alleged illness would not be a basis for relief of the penalties. As discussed above, however, we find  
25 that petitioner was responsible for payment of taxes for the periods in dispute here. However, even if  
26 petitioner's alleged illness were a sufficient explanation for petitioner's own failure to pay or cause to  
27 be paid the taxes due, that still would not be sufficient to show that *M&T's* failure to timely pay was  
28 due to reasonable cause and circumstances beyond its control, or that it occurred notwithstanding the

1 exercise of ordinary care and in the absence of willful neglect. It appears that the only way this could  
2 be true, based on petitioner's allegations of personal illness, is if petitioner were the *only* person with  
3 responsibility for paying the tax due, and neither Mr. Mustard nor any employee of M&T had reason to  
4 know of his failure to fulfill his duties to ensure that M&T complied with the Sales and Use Tax Law.  
5 We find that petitioner has not established that M&T failed to timely pay the taxes due as a result of  
6 reasonable cause and circumstances beyond its control, and that such failure occurred notwithstanding  
7 the exercise of ordinary care and in the absence of willful neglect. Consequently, we do not  
8 recommend relief of the late payment penalties.

9 **OTHER DEVELOPMENTS**

10 None.

11  
12  
13 Summary prepared by Rey Obligation, Business Taxes Specialist III  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28