STATE BOARD OF EQUALIZATION
SALES AND USE TAX APPEAL

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:	)	
JAMES STEPHEN MUSTARD	)	Account Number: SR AS 53-002164 Case ID 336696
Petitioner	)	Los Angeles, Los Angeles County

Type of Liability: Responsible person liability

Audit Period: 7/1/03 – 6/30/05

Item	Disputed Amount
Responsible person liability	$102,146

	Tax	Penalties
As determined and protested	$85,531.30	$16,615.15
Proposed tax redetermination	$85,531.30	
Interest through 9/30/09	41,562.25	
Penalties	16,615.15	
Total tax, interest, and penalties	$143,708.70	
Monthly interest beginning 10/1/09	$570.21	

This matter was previously scheduled for Board hearing on July 1, 2009, but was postponed because petitioner's representatives removed themselves from this case before the scheduled Board hearing, and thus, petitioner needed to obtain new representation.

UNRESOLVED ISSUES

Issue 1: Whether petitioner is liable as a responsible person under Revenue and Taxation Code section 6829 for Mustard & Trollope, Inc.'s liabilities. We conclude that petitioner is personally liable.

Petitioner was a corporate officer of Mustard & Trollope, Inc. (M&T), seller's permit number SR AS 100-365502. M&T self-reported the subject liabilities on its sales and use tax returns. M&T's business was closed out on June 30, 2005. The Sales and Use Tax Department (Department) determined that petitioner is personally responsible pursuant to Revenue and Taxation Code section

6829 because he was the president and CEO of M&T, he was a person responsible for managing M&T's financial affairs, including the payment of tax to the Board, and he willfully failed to pay taxes due with respect to sales for which M&T collected sales tax reimbursement.

Petitioner contends that he was not a responsible person. He asserts that he had no authority in sales and use tax matters, and that the chief financial officer (CFO), Chad Kukahiko, was the responsible person. Petitioner maintains that a bifurcated power structure was agreed upon at M&T's first board meeting under which petitioner, as CEO, had no authority to make financial decisions, including payments to creditors, except under the most limited emergency circumstances. Petitioner was to be responsible for the creative artistic aspects of the business, in addition to marketing and sales, while Mr. Kukahiko, as the CFO, was to have sole authority over financial decisions. Petitioner also contends that he did not willfully fail to pay taxes because he was unaware of M&T's tax obligations until June 2005 and, in any event, lacked the authority to pay them.

There is no dispute that two of the requirements for imposing responsible person liability on petitioner under section 6829 have been met; the business has been terminated and it charged and collected sales tax reimbursement on its sales of tangible personal property. The issues here are whether petitioner was a responsible person during the time when the taxes became due, and whether he was aware of the tax liability and willfully failed to pay or cause to be paid the taxes due.

The evidence shows that petitioner was the president and CEO of the corporation from inception of M&T to its termination. As president of the corporation, petitioner had broad implied and actual authority to do all acts customary connected with the business, including the duty to ensure that the corporation was in compliance with the Sales and Use Tax Law. Here, there is evidence of petitioner's direct involvement and responsibility for tax compliance. Petitioner signed M&T's seller's permit application as the CEO. On June 28, 2005, petitioner contacted the Department to advise that the check for the last payment made to the Board might be returned for insufficient funds but that he might be able to replace that check. On July 8, 2005, petitioner advised the Department that M&T had closed its business the prior week and expressed interest in making an offer in compromise with regard to M&T's tax liability. These communications with the Department evidence petitioner's involvement with M&T's sales and use tax compliance. Furthermore, petitioner has presented no documentation in

the form of corporate articles or bylaws to support his assertion that there was an absolute division of responsibilities between himself and the CFO. We find that there is overwhelming evidence that petitioner was a responsible person during the periods when the taxes became due.

The evidence shows that petitioner had actual knowledge of M&T's tax liabilities. He communicated directly with the Department on several occasions regarding payment of sales tax liability. Instead of paying the taxes due, petitioner used the funds to pay other liabilities. Thus, we conclude that petitioner willfully failed to pay M&T's taxes, or failed to cause them to be paid, for the period at issue.

With regard to petitioner's argument that Mr. Kukahiko is the person who should be held personally liable for the taxes due, we note that more than one person may be held for the same primary liability, as long as the requirements for imposing such liability on each person are satisfied (the liability will only be collected once irrespective of how many persons are held liable). We find that petitioner is personally liable for the full amount of the unpaid liability. The Department has issued a determination against Mr. Kukahiko for the unpaid corporate liabilities of M&T through September 30, 2004 (because he left his position as CFO before the taxes were due for the next quarter), and a separate D&R has been issued for that case. Of course, in addition to the reasons explained above, if Mr. Kukahiko departed in late 2004 as appears to be the case, petitioner's argument that Mr. Kukahiko was solely responsible for M&T's tax compliance cannot be sustained under any theory for the period after September 30, 2004. In any event, we find that the requirements for imposing liability on petitioner pursuant to section 6829 have been satisfied.

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

Petitioner submitted a statement, under penalty of perjury, requesting relief from the penalties. Petitioner asserts that under the bifurcated power structure of M&T, he had no control over the payment of M&T's creditors or its tax liabilities and that all power over M&T finances was vested with the CFO.

The only basis for relief of penalties as to a person being held liable under section 6829 is to establish that the corporation is entitled to relief of those penalties. If the penalties are relieved as to

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the corporation, then that relief inures to the benefit of any persons who are liable under section 6829. Petitioner's statement does not explain how M&T's failure to timely pay was due to reasonable cause and circumstances beyond its control, or establish that it occurred notwithstanding the exercise of ordinary care and in the absence of willful neglect. Rather, petitioner simply states that he had no control over the finances and that Mr. Kukahiko failed in his responsibility to comply with the sales and use tax laws and regulations. We find nothing in the present record that indicates M&T's failure to timely pay was due to reasonable cause and circumstances beyond its control, and occurred notwithstanding the exercise of ordinary care and in the absence of willful neglect. Consequently, we recommend relief be denied.

OTHER DEVELOPMENTS

None.

Summary prepared by Rey Obligacion, Business Taxes Specialist III