

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION SUMMARY FOR BOARD HEARING

3 In the Matter of the Petitions for Redetermination)
 4 Under the Sales and Use Tax Law of:)
 5 GRANT MASON THIEM, JR.) Account Number: SR FHB 53-002188
 6) Case ID's 343755, 343756
 7 Petitioner) San Diego, San Diego County

8 Type of Liability: Section 6829 and suspended corporation
 9 responsible person liability

10 Liability Periods: 01/01/94 – 06/30/99 (Case ID 343755)
 07/01/00 – 12/31/00 (Case ID 343756)

11 <u>Items</u>	<u>Amounts in Dispute</u>	
	<u>343755</u>	<u>343756</u>
12		
13 Tax	\$ 779	\$6,688.00
14 Late payment penalty	\$2,572	\$2,081.00
15 Finality penalty	\$ 78	\$1,817.80
16 Amnesty-interest penalty	\$ 341	\$7,751.20

17 <u>Section 6829 Liability (343755)</u>	<u>Tax</u>	<u>Penalties</u>
18 As determined	\$29,994.00	\$5,571.20
Adjustment: Sales and Use Tax Department	<u>-29,214.74</u>	<u>-2,580.47</u>
19 Proposed redetermination, protested	<u>\$ 779.26</u>	<u>\$2,990.73</u>
20 Proposed tax redetermination	\$ 779.26	
Interest through 4/30/09	1,832.78	
21 Penalty for late payment of returns	2,571.80	
Finality penalty (failure to timely pay determination)	77.93	
22 Amnesty interest penalty	<u>341.00</u>	
Total tax, interest, and penalties	<u>\$5,602.77</u>	
23 Monthly interest beginning 5/1/09	<u>\$5.20</u>	

24 <u>Suspended Corporation Liability (343756)</u>	<u>Tax</u>	<u>Penalties</u>
25 As determined	\$38,988.00	\$11,650.00
Adjustment: Sales and Use Tax Department	<u>-32,300.00</u>	
26 Proposed redetermination, protested	<u>\$ 6,688.00</u>	<u>\$11,650.00</u>

1	Proposed tax redetermination	\$ 6,688.00
	Interest through 4/30/09	22,526.00
2	Penalty for late payment of returns	2,081.00
	Finality penalty	1,817.80
3	Amnesty interest penalty	<u>7,751.20</u>
4	Total tax, interest, and penalties	<u>\$40,864.00</u>
5	Monthly interest beginning 5/1/09	<u>\$44.59</u>

UNRESOLVED ISSUES

7 **Issue 1:** Whether petitioner is personally liable for the unpaid liabilities of Thiem Graphics,
8 Inc. (TGI) (SR FHB 25-755047) as a responsible person during portions of the period January 1, 1994,
9 through June 30, 1999, pursuant to Revenue and Taxation Code section 6829 and for the period July 1,
10 2000, through December 31, 2000, pursuant to California Code of Regulations, title 18, section
11 (Regulation) 1702.6. We find that petitioner is personally liable for TGI's unpaid liabilities.

12 On January 30, 2006, petitioner was issued a Notice of Determination (NOD) pursuant to
13 section 6829, subdivision (a), for unpaid liabilities of TGI of \$29,994 in tax, plus applicable interest, a
14 late payment penalty of \$2,571.80, and a finality penalty of \$2,999.40, for liability per: (1) an audit of
15 TGI for the period January 1, 1994, through December 31, 1996, and (2) a penalty imposed on TGI for
16 its failure to pay the tax due with its second quarter 1999 (2Q99) Sales and Use Tax Return (SUTR).
17 The Department thereafter determined that it had made a calculation error essentially doubling the tax
18 asserted against petitioner, and that TGI did not owe a portion of the tax. Accordingly, the Department
19 notified petitioner that his liability for tax owed by TGI was reduced to \$779.26, the finality penalty
20 correspondingly reduced to \$77.93, the late payment penalty remained the same, and an amnesty-
21 interest penalty of \$341, which had been inadvertently omitted from the NOD issued to petitioner, was
22 added.

23 Also on January 30, 2006, petitioner was issued a NOD for \$38,988 in tax, plus accrued
24 interest, a late payment penalty of \$2,081, a finality penalty of \$1,817.80, and an amnesty-interest
25 penalty of \$7,751.20, pursuant to Regulation 1702.6 as a responsible person resulting from TGI's
26 corporate suspension. The liabilities consisted of (1) a penalty imposed on TGI for its failure to pay
27 the tax due with its 3Q00 SUTR, and (2) disallowed tax-paid purchases resold deduction claimed on
28 TGI's 4Q00 SUTR. On October 26, 2006, this liability was reduced by \$32,300 to \$6,688 to reflect

1 payments made pursuant to an offer in compromise agreement by petitioner's brother, Mr. Paul Thiem
2 (SR FHB 53-002189), whom the Department determined was also personally responsible for TGI's
3 unpaid liabilities. As a result, Mr. Paul Thiem is no longer personally responsible for any of TGI's
4 remaining unpaid liabilities. However, petitioner remains responsible for the balance of TGI's unpaid
5 liabilities asserted against him.

6 TGI's corporate status was suspended by the Secretary of State on April 3, 2000, and TGI
7 thereafter terminated its business on January 25, 2001. During the relevant periods, TGI included or
8 added sales tax reimbursement on its sales of tangible personal property in California, or consumed
9 tangible personal property in California and did not pay the use tax. Petitioner was TGI's chief
10 executive officer/president and chief financial officer charged with the responsibility for the filing of
11 returns or the payment of tax, and he had a duty to act for TGI in complying with the Sales and Use
12 Tax Law when taxes became due. Petitioner knew or should have known that TGI had been collecting
13 sales tax reimbursement from its customers, and that it was not properly remitting the tax
14 reimbursement collected or pay the use tax on its consumption of tangible personal property, to the
15 Board. Since TGI made retail sales during the entire liability period, it is reasonable to conclude that
16 TGI was operating and also paid operating expenses such as rent, utilities, office supplies, and other
17 ordinary and necessary business expenses during the entire liability period. Thus, TGI had the money
18 available to pay the Board when the sales tax reimbursement was collected and became due, yet TGI
19 used the money to pay other creditors and expenses. Accordingly, we find that petitioner willfully
20 failed to pay, or to cause to be paid, the taxes due by intentionally, consciously, and voluntarily making
21 or causing TGI to make payments to other creditors and for operating expenses when he had
22 knowledge of (or with reckless disregard for) the liability owed to the Board.

23 With respect to the requirement for the imposition of responsibility under Regulation 1702.6
24 that the suspended corporation be closely held, the EDD registration form dated August 24, 1982, lists
25 Mr. Grant Thiem, Sr. and Mrs. Agnes Thiem as the former owners of TGI's predecessor (Empire
26 Printing), Mr. Grant Thiem, Sr., as TGI's president, Mrs. Agnes Thiem as vice president,
27 Mr. Paul Thiem as secretary, and petitioner as treasurer. No evidence has been presented that there
28 were any owners of TGI outside the Thiem family members, and we thus conclude that TGI was

1 owned by the Thiem family and closely held. We find that petitioner is liable as a responsible person
2 pursuant to section 6829 and Regulation 1702.6, as applicable

3 Petitioner argues that his Regulation 1702.6 liability should be reduced to zero because the
4 \$32,300 in payments made by Mr. Paul Thiem paid the liabilities owed by TGI in full, or that TGI
5 should be entitled to a higher tax-paid purchases resold deduction for 4Q00.

6 Regarding the payments by Mr. Paul Thiem, since they were less than the total amount owed
7 by TGI and billed to petitioner, they clearly did not pay all the liabilities in full. Nor did the offer-in-
8 compromise entered into between Mr. Paul Thiem and the Board inure to the benefit of petitioner,
9 except for the actual payments made. Rather, the acceptance of the offer-in-compromise by Mr. Paul
10 Thiem does not relieve petitioner of his own liability for the debt owed by TGI except to the extent of
11 the payments actually made. (Rev. & Tax. Code, § 7093.6, subd. (g).)

12 With respect to petitioner's contention regarding tax paid purchases resold deduction for 4Q00,
13 petitioner claims that, based on the prior audit for the audit period July 1, 1990, through
14 December 31, 1993, petitioner estimated that 40 percent of TGI's sales were taxable and that TGI paid
15 its vendor tax on the purchases of the special printing aids (SPA's) that were resold in taxable
16 transactions. Accordingly, petitioner claims that TGI should be entitled to the tax-paid purchases
17 resold deduction of \$570,987 which TGI claimed on its 4Q00 SUTR.

18 We conclude that petitioner is not entitled to the claimed tax paid purchases resold deduction.
19 Petitioner has failed to provide supporting documentation such as purchase invoices for the purchases
20 of SPA's in order to prove that TGI paid tax on its purchases from its vendor. Nor has petitioner
21 provided copies of TGI's sales invoices (or similar documentation) establishing that 40 percent of
22 TGI's sales were taxable sales for 4Q00.

23 **Issue 2:** Whether the NOD's was timely issued with respect to the liability asserted under
24 section 6829 and Regulation 1702.6. We find that he NOD's were timely issued for these periods.

25 Petitioner asserts the NOD's were not issued timely because the limitations period to make the
26 assessments had expired after the passage of three years since the date TGI terminated its business
27 operations.

1 With respect to the section 6829 liability, petitioner's liability did not attach until the corporate
2 business had been terminated. (Rev. & Tax. Code, § 6829, subd. (a).) Thus, the date by which
3 payment of the liability under section 6829 is due is the last day of the month following the quarterly
4 period in which the corporate business was terminated. (Rev. & Tax. Code, § 6451.) This means that
5 the statute of limitations for issuing a determination under section 6829 commenced on that date and
6 ran for three years or eight years, depending on whether the *petitioner*, as the responsible person which
7 his own liability under section 6829, filed his own return. (Memorandum Opinion in *Hosmer*
8 *Chandler McKoon* (5/31/07).) Here, there is no evidence that petitioner filed SUTR's as an individual
9 or in connection with a sole proprietorship, and therefore the eight-year statute applies. (Rev. & Tax.
10 Code, § 6487, subd. (a).) Since TGI's business operations ceased on January 25, 2001, the limitations
11 period started to run on April 30, 2001 (the end of the month following the quarterly period in which
12 the corporation ceased operating), and the NOD dated January 30, 2006, was issued well within that
13 eight-year period. Accordingly, the NOD was timely.

14 With respect to the Regulation 1702.6 liability, a nonremittance return was filed for 3Q00. The
15 liability reported for 3Q00 was final upon the filing of the return, and anyone regarded as having filed
16 the return has no right to an administrative appeal of the reported liability unless and until that liability
17 is paid. If the return were *now* regarded as having been filed by petitioner because the Department
18 asserts that petitioner was a responsible person liable under Regulation 1702.6, that means that the
19 liability reported in that return is final, *as to petitioner*, and there is no right to an administrative appeal
20 prior to payment. Furthermore, if this were truly the case, then the Department should not have even
21 issued a Notice of Determination to petitioner for that liability. Rather, if the return must be regarded
22 as having been filed by petitioner if the Department concludes that there is sufficient information to
23 hold petitioner liable under Regulation 1702.6, upon reaching such a conclusion, the Department could
24 have (and should have) simply issued a demand notice to petitioner, with petitioner having no recourse
25 to administrative appeal prior to payment. Such a result would be so grossly unfair as to render the
26 regulation subject to invalidation based on due process concerns.

27 However, the Board has always intended that an individual against whom the Department
28 asserts liability under Regulation 1702.6 has the full right to appeal that assertion *prior* to paying the

1 asserted liability, even where there were returns filed for the corporation which form the basis of the
2 liability asserted against the individual. This means that a return filed on behalf of a suspended
3 corporation cannot be regarded as having been filed by an individual whom the Department believes is
4 liable under Regulation 1702.6. Thus, unless such an individual filed a return in his or her own name
5 (such as would generally be the case if the individual held a seller's permit in his or her name for a
6 *different* business), the statute of limitations for issuing a determination to an individual under
7 Regulation 1702.6 is eight years after the due date of the return for the liability period at issue.
8 Accordingly, we find that the NOD was issued timely.

9 **Issue 3:** Whether petitioner's personal liabilities under section 6829 and Regulation 1702.6
10 were discharged in his Chapter 7 bankruptcy. We conclude that they were not.

11 Petitioner filed for Chapter 7 bankruptcy on July 27, 2001, and received a discharge on
12 November 21, 2002. Petitioner listed the Board as a creditor of petitioner as a guarantor on sales taxes
13 owed by TGI in Schedule E – *Creditors Holding Unsecured Priority Claims*. Section 523, subdivision
14 (a), of the U.S. Bankruptcy Code provides that taxes “of the kind and for the periods” specified in
15 section 507, subdivision (a)(8), of the U.S. Bankruptcy Code are nondischargeable in bankruptcy. The
16 sales tax, which is the tax at issue here, is a tax measured by gross receipts. (Rev. & Tax. Code, §
17 6051.) Under subdivision (a)(8)(A)(iii) of section 507, a tax on or measured by gross receipts is not
18 dischargeable in bankruptcy if it is not assessed before the bankruptcy petition is filed but remains
19 assessable thereafter. (11 U.S.C. §507, subd. (a)(8)(A)(iii).) Responsible person liabilities under
20 section 6829 and Regulation 1702.6 are considered a tax as defined by section 523. Finally, section
21 507, subdivision (a)(8)(G), specifically provides that penalties related to non-dischargeable tax
22 liabilities that are imposed in compensation for actual pecuniary loss, are also not dischargeable in
23 bankruptcy.

24 Here, the liability was not assessed before petitioner's bankruptcy petition and remained
25 assessable thereafter, and the other conditions for the tax and penalty being nondischargeable are
26 applicable. We therefore conclude that petitioner's personal responsibility for TGI's unpaid liability to
27 the Board for tax and penalties was not discharged in his bankruptcy proceeding (petitioner's argument
28

1 actually relates only to the penalties asserted against him, we conclude that the same result applies for
2 the taxes and for the penalties).

3 **Issue 4:** Whether petitioner has established that TGI should be granted relief from the late-
4 payment and finality penalties that have been passed through to petitioner as a responsible person. We
5 conclude that relief is not warranted.

6 While there is no statutory or regulatory authority for relieving late-payment or finality
7 penalties in section 6829 or Regulation 1702.6 determinations, the penalties would nevertheless be
8 removed if the TGI were relieved of the penalties. Petitioner provided declarations signed under
9 penalty of perjury on July 29, 2008, requesting relief from the late-payment penalties for 2Q99 and
10 3Q00 and from the finality penalties for January 1, 1994, through June 30, 1999, and 4Q00.

11 With respect to late payment penalty for the 2Q99, petitioner indicated that TGI's controller told
12 him that payment was not included when the 2Q99 SUTR was filed. As soon as TGI found out, it paid
13 the tax. With respect to the 3Q00, petitioner indicated that TGI was going through an internal audit of
14 payments to the Board related to SPA's which was not completed at the time the return for 3Q00 was
15 due. However, petitioner maintains that, when completed, the internal audit showed an overpayment
16 to the state for periods prior to 4Q00, including 3Q00.

17 TGI filed returns for 2Q99 and 3Q00 but did not pay the tax by the end of the succeeding
18 month. We believe that a reasonable, prudent business person, in the same circumstances as TGI
19 would have had sufficient internal controls in place such that a return could not be filed by a controller
20 without payment of the tax due with the return. Also, even if TGI had a good faith belief that the
21 return filed for 3Q00 should have actually reported an overpayment, a reasonable prudent person in
22 similar circumstances would have paid the amount of tax the return showed was due with that return,
23 and then filed a claim for refund when the internal audit was completed. A reasonable prudent person
24 would not have filed the return without payment of tax, knowing that a penalty would be assessed for
25 failure-to-pay the tax timely. Thus, we conclude that TGI's failure to pay the tax timely was not
26 beyond TGI's control and was a conscious choice. The same reasoning here applies to the finality
27 penalties.

