



1 Equipment, Inc. (PWTE) (SY AA 97-648231) for the period July 1, 2001, through August 31, 2004.

2 We find that petitioner is personally liable for PWTE's unpaid liabilities.

3 PWTE closed out its seller's permit effective March 31, 2006, indicating that the business had  
4 been discontinued. At the time, PWTE had an unpaid tax liability of \$974,952.43, measured by  
5 \$4,647,914 for understated taxable sales, and \$7,231,628 for disallowed claimed nontaxable sales for  
6 resale or exempt sales in interstate commerce, resulting from an audit for the period July 1, 2001,  
7 through June 30, 2004, and two late prepayment penalties totaling \$103.82 combined for July and  
8 August 2004, as well as other penalties incurred during the liability period. The Sales and Use Tax  
9 Department (Department) concluded that petitioner was responsible for PWTE's compliance with the  
10 Sales and Use Tax Law and is personally liable for its unpaid liabilities for the liability period pursuant  
11 to Revenue and Taxation Code section 6829. The Department concluded that PWTE collected sales  
12 tax reimbursement on the understated taxable sales of \$4,647,914, but we conclude that, based on  
13 available evidence, PWTE only collected sales tax reimbursement on \$453,020 of understated taxable  
14 sales. Thus, we recommended that the measure of tax assessed against petitioner be reduced from  
15 \$4,647,914 to \$453,020.

16 Four conditions must be satisfied to uphold this liability: PWTE must have ceased its selling  
17 business; it must have added or included sales tax reimbursement to its sales of tangible personal  
18 property in California; petitioner must have been under a duty to act for PWTE to comply with the  
19 Sales and Use Tax Law; and petitioner must have willfully failed to pay, or to cause to be paid, the  
20 taxes due from PWTE. Petitioner does not dispute that PWTE has ceased its selling business, and  
21 petitioner has been silent as to the addition or inclusion of sales tax reimbursement in the selling price  
22 of tangible personal property, after we issued our D&R reducing the understated taxable sales to  
23 \$453,020. We assume that petitioner no longer protests this particular issue.

24 The third requirement is that petitioner must have had a duty to act for PWTE in complying  
25 with the provisions of the Sales and Use Tax Law. It is undisputed that petitioner was PWTE's  
26 president at all relevant times, as evidenced by several documents that petitioner signed as PWTE's  
27 president. Corporations Code section 312, subdivision (a), provides that the president of a corporation,  
28 as petitioner was when the taxes in question became due, "is the general manager and chief executive

1 officer of the corporation, unless otherwise provided in the articles or bylaws.” Since petitioner was  
2 president of PWTE, petitioner had broad implied and actual authority to do all acts customarily  
3 connected with carrying out the business of PWTE.

4 Petitioner argues that Mr. William Galvin, who was another shareholder, officer, and director  
5 of PWTE, was a responsible person because he ran PWTE’s office and was an “administrator” who  
6 paid PWTE’s bills, while in contrast petitioner was not a responsible person because he was one of  
7 PWTE’s employees, a mere salesman not charged with the responsibility of filing sales and use tax  
8 returns or paying tax. Petitioner explained that PWTE hired an administrative staff (not including  
9 himself) to run the company. However, petitioner admitted that, as PWTE’s president, he signed its  
10 sales and use tax returns. In addition, petitioner asserted that he is not a responsible person under  
11 section 6829 because the sales and use tax returns that PWTE filed for the quarters in question were  
12 prepared by its accountants, based on spreadsheets that they prepared, and petitioner depended on  
13 those “tax experts” to correctly report PWTE’s liabilities.

14 We conclude that petitioner came within the definition of “responsible person” since he clearly  
15 had a responsibility to act for PWTE in complying with the Sales and Use Tax Law for all relevant  
16 periods. Whether or not Mr. Galvin may also be held liable for PWTE’s unpaid tax debts as a  
17 responsible person does not bear on the issue here, which is whether *petitioner* is a responsible person  
18 liable for the disputed tax under section 6829.<sup>1</sup> More than one person may be held liable under section  
19 6829 for the same primary liability, as long as the requirements for imposing such liability on each  
20 person are satisfied. Of course, the liability will only be collected once, without regard to how many  
21 persons are held liable.

22 The final requirement is that petitioner must have willfully failed to pay or cause to be paid  
23 taxes due from PWTE. For purposes of section 6829, willfulness does not imply bad purpose or evil  
24 motive. A person is willful for these purposes if he or she knew that tax was not being properly paid  
25 and had authority to pay them or cause them to be paid, but did not do so. PWTE issued checks  
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27 <sup>1</sup> The Department did not find that any other person was liable under section 6829 for the debts of PWTE. With respect to  
28 Mr. Galvin, the Department concluded that the evidence did not support that he was involved in or aware of sales tax  
matters.

1 payable to Jerr-Dan Corporation, a vendor, dated from July 13, 2001, through October 21, 2005,  
2 totaling \$1,420,874.52, all of which petitioner signed. This indicates that petitioner had check-writing  
3 authority and thus the authority to pay the liabilities in question when they became due. In addition,  
4 information from EDD indicates that PWTE paid wages to its employees for all quarters from 3Q01  
5 through 3Q05 (except 3Q02), which total \$825,261. The payment of wages, combined with the  
6 substantial payments to Jerr-Dan Corporation, establishes that PWTE had the funds available to pay its  
7 tax liabilities when they became due. Accordingly, we conclude that petitioner had the authority to  
8 pay the tax liabilities in question when they became due but instead preferred other PWTE creditors  
9 over the Board. Thus, petitioner willfully failed to pay or willfully failed to cause PWTE to pay the  
10 liabilities in question. We therefore find that petitioner is liable pursuant to section 6829 for PWTE's  
11 unpaid liabilities as reflected in the table above.

12 **Issue 2:** Whether petitioner has shown that the Department's determination of taxable sales of  
13 MTE and parts against PWTE is excessive. We conclude that he has not done so and that the  
14 determination against PWTE is not excessive.

15 The Department determined PWTE had additional tax liability of \$976,952.43 based on  
16 additional taxable measure of \$11,879,542, consisting of: (1) \$4,647,914 in understated taxable sales  
17 and (2) \$7,231,628 of disallowed claimed nontaxable sales for resale and unsupported claimed exempt  
18 sales in interstate commerce. PWTE's staff indicated that it would provide additional records to  
19 document adjustments, but has not done so. Without additional records, we find there is no basis for  
20 adjustment of PWTE's liability. Furthermore, the Department asserted liability to petitioner only with  
21 respect to the \$383,353.28 tax due for understated taxable sales, and we have recommended reducing  
22 that liability by over 90 percent to tax of \$37,308.26. Thus, even if a reduction to the tax liability of  
23 PWTE were established, that would inure to petitioner's benefit only if it reduced the \$37,308.26 of  
24 tax for which petitioner remains liable. In any event, no further adjustments have been supported, and  
25 we thus recommend no further adjustments.

26 **Issue 3:** Whether PWTE was negligent. We conclude that PWTE was negligent.

27 The Department added a ten percent penalty for negligence because, although PWTE provided  
28 bank statements and a sales tax worksheet, it did not provide complete purchase information or

1 complete records accounting for its use of the report of sale forms issued to it by the DMV, or records  
2 relating to sales it made in the third quarter of 2003, and it provided only a portion of its sales invoices  
3 and almost no supporting documentation for its claimed nontaxable sales such as resale certificates or  
4 bills of lading or other documentation to show delivery out of state. In addition, it did not provide a  
5 general ledger, sales journals, purchase journals, or other summary records. As a result, the  
6 Department concluded that PWTE did not provide records which were adequate for sales and use tax  
7 purposes. Additionally, PWTE underreported its taxable sales by \$11,879,542, reporting taxable sales  
8 of only \$784,634, meaning it understated its tax liability by 1,514 percent ( $\$11,879,542 \div \$784,634$ ).

9 Based on the foregoing, we conclude that PWTE was negligent both in reporting its tax liability  
10 and in keeping records, which resulted in the substantial deficiency determined by audit. Therefore,  
11 we recommend that the negligence penalty determined against PWTE be sustained, and that secondary  
12 liability for that penalty under section 6829 be sustained against petitioner.

13 **Issue 4:** Whether the finality and late prepayment penalties imposed on PWTE should be  
14 relieved. We find that the penalties should not be relieved.

15 There is no statutory or regulatory authority for relieving penalties in section 6829  
16 determinations. However, if the penalties were relieved as to PWTE, then that would also inure to  
17 petitioner's benefit. A person seeking relief from a penalty must submit a statement under penalty of  
18 perjury setting forth the facts on which it bases its claim for relief. (Rev. & Tax. Code, § 6592,  
19 subd. (b).)

20 On November 5, 2008, we faxed a Request for Relief from Penalty (BOE-735) form to  
21 petitioner's representative along with instructions as to how to prepare and submit that form to request  
22 relief from the penalties. A completed request has not been returned. We are therefore unable to  
23 consider recommending relief of these penalties.

#### 24 AMNESTY

25 PWTE did not apply for amnesty or pay all of its amnesty-eligible tax liabilities by March 31,  
26 2005. As such, since the Notice of Determination was issued after the amnesty period, the Department  
27 imposed an amnesty double negligence penalty, an amnesty double finality penalty, and an amnesty  
28 interest penalty against PWTE. (Rev. & Tax. Code, §§ 7071, 7073, subd. (c), 7074, subd. (a).) With

1 our recommended adjustments, amnesty double negligence penalty of \$1,962.14, amnesty double  
2 finality penalty of \$1,962.14, and amnesty interest penalty of \$1,838.11 remain applicable to  
3 petitioner's liability under section 6829.

4 There is no statutory or regulatory authority for relieving amnesty penalties in section 6829  
5 determinations (*cf.* Cal. Code Regs., tit. 18, § 1702, subd. (d)(2)), but Revenue and Taxation Code  
6 section 6592, subdivision (a), provides that such penalties may be relieved if the Board finds that a  
7 person's failure to make a timely payment or participate in amnesty was due to reasonable cause and  
8 circumstances beyond the person's control, and occurred notwithstanding the exercise of ordinary care  
9 and in the absence of willful neglect.

10 On November 5, 2008, we faxed a Request for Relief from Penalty (BOE-735) form to  
11 petitioner's representative along with instructions as to how to prepare and submit that form to request  
12 relief from the penalties. A completed request has not been returned, therefore we are unable to  
13 consider recommending relief of these penalties.

14 **OTHER DEVELOPMENTS**

15 None.

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18 Summary prepared by Rey Obligacion, Business Taxes Specialist III  
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