

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION BOARD HEARING SUMMARY

In the Matter of the Petition for Redetermination)
Under the Sales and Use Tax Law of:)
FRANK NICHOLAS COLSON) Account Number SR EA 53-005938
Petitioner) Case ID 535974
Lake Elsinore, Riverside County

Type of Liability: Responsible person liability
Liability period: 10/01/07 – 07/28/08

<u>Item</u>	<u>Disputed Amount</u>
Responsible person liability	\$269,040
Tax as determined and protested	\$229,789.46
Interest through 02/28/14	95,378.17
Late return penalty	7,227.30
Failure-to-file penalties	16,261.60
Finality penalties	<u>15,761.60</u>
Total tax, interest, and penalty	<u>\$364,418.13</u>
Monthly interest beginning 03/01/14	<u>\$ 1,148.95</u>

This matter was scheduled for Board hearing in October 2012, but was deferred at the request of the Appeals Division in order to issue a supplemental D&R. It was rescheduled for Board hearing in April 2013, but was deferred for settlement consideration.

UNRESOLVED ISSUES

Issue 1: Whether petitioner is personally liable as a responsible person for the unpaid liabilities of Pro-Motors Corporation pursuant to Revenue and Taxation Code section 6829. We conclude petitioner is personally liable.

Pro-Motors Corporation (SR EA 100-959134) operated a used car dealership from October 1, 2007, through July 28, 2008. At the time its business terminated, Pro-Motors had unpaid liabilities related to a return filed with no remittance and three Notices of Determination (NOD's) for periods for which it did not file returns. The Sales and Use Tax Department (Department) concluded petitioner

1 was personally responsible for Pro-Motor's sales and use tax compliance pursuant to section 6829.¹

2 Petitioner concedes that Pro-Motors collected sales tax reimbursement with respect to its
3 taxable sales, but he disputes the specific date that Pro-Motors' business terminated. Petitioner also
4 disputes the two remaining conditions for imposing personal liability pursuant to section 6829, that he
5 is a responsible person and that he willfully failed to pay or to cause to be paid taxes due from Pro-
6 Motors. Petitioner's primary contention is that Ken Owen, the majority owner and investor, is the only
7 individual who should be held personally responsible for Pro-Motors' unpaid liability. Petitioner
8 asserts that Mr. Owen and his accountant, Murray Goldenberg, took control of Pro-Motors' daily
9 business operations sometime in December 2007, that they convinced the corporate officers to use the
10 sales tax reimbursement collected from customers as working capital, and that Mr. Owen promised he
11 would pay the taxes when they became due with a personal check.

12 With respect to the date Pro-Motors' business was terminated, petitioner asserts the business
13 closed on June 13, 2008. However, all available evidence supports the date of business termination
14 established by the Department, July 28, 2008, and we find there is no basis to change that date in our
15 analysis.

16 Regarding the issue of whether petitioner was a person responsible for Pro-Motors' sales and
17 use tax compliance, we note that he was Pro-Motors' vice-president/chief financial officer. Petitioner
18 was listed as Pro-Motors' vice-president or chief financial officer on numerous documents filed with
19 the Department, the City of Stanton, the California Secretary of State, and one of Pro-Motors' major
20 suppliers, and he signed several of those documents. In the capacity of chief financial officer,
21 petitioner had broad implied and actual authority to do all acts customarily connected with the
22 corporation's business, including ensuring its sales and use tax compliance. Further, petitioner signed
23 Pro-Motors sales and use tax return for the fourth quarter 2007, and the Department's records indicate
24 that petitioner communicated with the Department regarding Pro-Motors' sales and use tax liabilities,
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27 ¹ The Department also issued NOD's for personal liability to Lawrence Palmer and Richard Scoles. Their timely petitions
28 for redetermination (Case ID's 534236 and 535973, respectively) are scheduled for hearing on the same calendar as this
matter.

1 which is direct evidence of petitioner's participation in Pro-Motors' tax compliance obligations. Thus,
2 we find that petitioner was a responsible person as defined by section 6829.

3 With respect to willfulness, personal liability can be imposed on a responsible person under
4 section 6829 only if that person willfully failed to pay or to cause to be paid taxes due from the
5 corporation, which means that the failure was the result of an intentional, conscious, and voluntary
6 course of action (even if without a bad purpose or evil motive). A person is regarded as having
7 willfully failed to pay taxes, or to cause them to be paid, where he or she had knowledge that the taxes
8 were not being paid and had the authority to pay taxes or cause them to be paid, but failed to do so.

9 The first requirement for willfulness is knowledge. Petitioner has provided a copy of Pro-
10 Motors' corporate minutes dated March 27, 2008, which describe a statement by the corporate
11 president that state taxes were due. Further, as stated previously, petitioner discussed Pro-Motors' tax
12 liability with the Department. Thus, we find that petitioner knew that taxes were due but not paid.

13 Willfulness also requires that the responsible person must have been able to pay, or cause to be
14 paid, the taxes when due. We find for the same reasons noted above that petitioner had authority to
15 cause the taxes due to be paid. Regarding whether Pro-Motors had sufficient funds to pay the taxes
16 due, petitioner has provided a copy of corporate minutes dated December 4, 2007, which show that the
17 individuals at that meeting voted to approve a motion to allow Mr. Owen and Mr. Goldenberg to use
18 the sales tax money until Mr. Owen was able to recapitalize the company. The approval of this motion
19 is clear evidence that the individuals attending the meeting (including petitioner) voted to use money
20 Pro-Motors had collected from customers as reimbursement for its sales tax liability for expenses,
21 rather than to pay the sales tax. Further, there is evidence that Pro-Motors paid wages, paid suppliers,
22 and paid other creditors during the periods at issue. Consequently, we find that funds were available to
23 pay the sales tax liability, but Pro-Motors' management chose to pay other creditors instead, and the
24 failure to pay the sales tax liability was willful.

25 Petitioner's primary argument is that he had no authority to pay the taxes, and thus he was
26 neither responsible nor willful in his failure to pay the taxes or cause them to be paid. Petitioner
27 asserts that only Mr. Owen exercised that authority, and that Mr. Owen retained that authority with
28 threats of physical harm. Petitioner states that he and the other corporate officers were placed under

1 extreme duress by Mr. Owen, who was a shareholder and investor, to release the sales tax
2 reimbursement to Mr. Owen for his personal enrichment. Petitioner states that he feared for his own
3 life and for the safety of his family. On that basis, petitioner asserts that Mr. Owen should be the only
4 individual who is held personally liable for Pro-Motors' tax liability, and that the NOD's issued to
5 petitioner and the other corporate officers should be canceled. While the statute of limitations has
6 passed for issuing a NOD to Mr. Owen, petitioner argues that because of the "special circumstances"
7 of this case, the statute of limitations should be extended to allow additional time for the Department to
8 issue a NOD against Mr. Owen.

9 We first note that petitioner has not provided any documentary evidence of the alleged duress
10 at the hands of Mr. Owen. Moreover, even if true, the alleged duress relates to the transfer of funds to
11 Mr. Owen, rather than any alleged duress to refrain from paying the tax liability. Accordingly, we are
12 not persuaded that the alleged duress was a factor in petitioner's decision not to pay Pro-Motors' sales
13 tax. Further, there is no evidence that Mr. Owen was a person who was responsible for Pro-Motors'
14 sales and use tax compliance. In fact, the available information only supports a conclusion that Mr.
15 Owen's role in Pro-Motors was limited to investor and silent partner. Since Mr. Owen was not a
16 person responsible for Pro-Motors' sales tax matters, one essential element for holding him personally
17 liable for Pro-Motors' unpaid liabilities pursuant to section 6829 has not been satisfied. Consequently,
18 there is no basis to find him personally liable for those liabilities, "solely," or otherwise. Moreover,
19 even if there was a basis to find him personally liable, there is no statutory or regulatory basis for
20 extending the statute of limitations based on allegations of duress. In addition, because section 6829
21 imposes liability on any responsible person, a conclusion that Mr. Owen was a responsible person
22 would not negate our conclusion herein that petitioner is also a responsible person.

23 In summary, we find that all four requirements for imposing personal liability on petitioner
24 pursuant to section 6829 have been satisfied. We further find that there is no basis to cancel the NOD
25 issued to petitioner, as he has requested, because he would remain liable even if we found that Mr.
26 Owen were also personally liable (which we have not).

27 **Issue 2:** Whether petitioner has established reasonable cause sufficient for relieving the
28 penalties originally assessed against Pro-Motors. We conclude he has not.

