

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION SUMMARY FOR BOARD HEARING

3 In the Matter of the Administrative Protest)
 4 Under the Sales and Use Tax Law of:)
 5 JOHN RAY JAMES FORD) Account Number: SR JH 53-002866
) Case ID 436515
 6 Taxpayer) Eureka, Humboldt County

7 Type of Liability: Responsible person liability

8 Liability period: 06/12/01 – 08/31/01

9 Item Disputed Amount

10 Responsible person liability \$54,325

	<u>Tax</u>	<u>Penalty</u>
11 As determined:	\$71,112.00	\$26,006.03
12 Adjustment – Sales and Use Tax Department	<u>-31,787.00</u>	<u>-11,006.19</u>
13 Adjusted liability, protested	<u>\$39,325.00</u>	<u>\$14,999.84</u>
14 Tax	\$39,325.00	
15 Interest through 11/30/10	29,398.06	
Late payment penalty (6/12/01 - 6/30/01)	1,383.50	
16 Failure-to-file penalty (7/1/01 - 8/31/01)	3,932.50	
Finality penalty (7/1/01 – 8/31/01)	3,932.50	
Amnesty interest penalty	<u>5,751.34</u>	
17 Total tax, interest, and penalty	\$83,722.90	
Payments	<u>-9,733.26¹</u>	
18 Balance Due	<u>\$73,989.64</u>	

19 Monthly interest beginning 12/1/10 \$172.62

20 Taxpayer did not appear at the appeals conference held as scheduled on January 15, 2009, even
 21 though the Notice of Conference was sent to his address of record and it was not returned by the U.S.
 22 Postal service as undeliverable. On January 21, 2009, we informed taxpayer by letter that the
 23 conference was held in his absence and offered him the opportunity to provide any additional

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 25 ¹ All payments were amounts collected by the Department by levy. Taxpayer has filed a claim for refund which is timely
 26 for payments totaling \$6,104.00. However, the claim is not ripe for consideration because the tax due for one or more
 27 entire reporting periods has not been fully paid. Taxpayer has not filed a claim for refund for the \$3,629.26 of remaining
 28 payments collected by levy. The dates of those payments were June 9, 2008, November 20, 2008, and January 9, 2009. In
 order to be timely, a claim for refund of those payments must be filed within three years from the date of levy. (Rev. &
 Tax. Code, § 6902.3.)

1 information or argument he wanted us to consider. We also provided forms taxpayer could use to
2 request relief of various penalties assessed against him as a responsible person. On January 22, 2009,
3 we were informed by the Board Proceedings Division that taxpayer had rescheduled his conference to
4 be held on February 4, 2009. This conference was held and taxpayer participated by telephone.

5 This matter was previously scheduled for Board hearing on November 18, 2009, and on
6 March 24, 2010, but was postponed both times at the request of the Sales and Use Tax Department
7 (Department) for additional investigation and review. This matter was then rescheduled for Board
8 hearing on May 26, 2010, and taxpayer appeared at the Board hearing but requested postponement
9 because he could not properly prepare for the oral hearing due to illness. The Board approved the
10 postponement. The matter was then scheduled for Board hearing on August 25, 2010, but taxpayer did
11 not respond to the Notice of Hearing. Accordingly, the Board Proceedings Division informed taxpayer
12 that this matter will be presented to the Board for decision without oral hearing. Subsequently,
13 taxpayer responded and requested an oral hearing before the Board.

14 UNRESOLVED ISSUES

15 **Issue 1:** Whether taxpayer is personally liable as a responsible person for the unpaid liabilities
16 of Niles Nissan, dba Performance Nissan (SR JH 97-899224), pursuant to Revenue and Taxation Code
17 section 6829. We conclude taxpayer is personally liable.

18 Niles Nissan, a corporation, was a retailer of automobiles from June 12, 2001, through
19 August 31, 2001. According to Board records, prior to June 12, 2001, the business had operated under
20 the same dba and at the same location as a sole proprietorship owned by Julie Pauline Fischer (SR JH
21 97-718176), though the Secretary of State's records show that Niles Nissan was incorporated on
22 May 26, 1995.

23 According to court documents provided by taxpayer, Jack Frank originally owned 100 percent
24 of Niles Nissan's stock but sold all of it to Ms. Fischer on April 17, 2000, who transferred it back to
25 Mr. Frank in May 2001. Then, in June 2001, Mr. Frank sold 100 percent of the corporate stock to
26 taxpayer. During the period she owned stock, Ms. Fischer was also an officer and director of Niles
27 Nissan. She resigned as an officer and director on June 11, 2001, the effective date of close-out for the
28 seller's permit issued to her as a sole proprietor. After Ms. Fischer resigned, taxpayer and his wife,

1 Sonia Ford, became the corporate officers for Niles Nissan, and Ms. Fischer was employed by the
2 business as a bookkeeper.

3 Niles Nissan filed a return for the period June 12, 2001, through June 30, 2001, but it did not
4 timely pay the tax, and the Department applied a late-payment penalty of \$1,383.50. Niles Nissan did
5 not file a return for the period July 1, 2001, through August 31, 2001, and the Department issued a
6 Notice of Determination for tax of \$71,112.00 and a failure-to-file penalty of \$7,111.20. Since that
7 determination was not paid timely, the Department applied a finality penalty of \$7,111.20. Also, an
8 amnesty interest penalty of \$10,400.13 was added to the determination because Niles Nissan did not
9 participate in the amnesty program. Upon further review of this matter in March 2010, the Department
10 concluded that its calculation of the amount due for the period July 1, 2001, through August 31, 2001,
11 included sales made in June 2001 that Niles Nissan had already reported with its second quarter 2001
12 return. Accordingly, by memorandum dated April 1, 2010, the Department recommends a reduction of
13 tax and penalty from \$71,112.00 and \$26,006.03 to \$39,325.00 and \$14,999.84, respectively.

14 The Department determined that Niles Nissan's business was terminated on or about
15 August 31, 2001, and that the business had included sales tax reimbursement in its retail sales. These
16 are two of the four conditions for imposing personal liability on taxpayer for the tax debts incurred by
17 Niles Nissan, and they are undisputed. The other two conditions, which taxpayer does dispute, are that
18 taxpayer must have been responsible for sales tax compliance by Niles Nissan, and taxpayer must have
19 willfully failed to pay or to cause to be paid the taxes due from Niles Nissan.

20 The Department concluded that taxpayer was responsible for managing the financial affairs of
21 Niles Nissan, including the filing of sales and use tax returns. The Department noted that taxpayer
22 signed Niles Nissan's seller's permit application as its owner and was listed therein as an officer. In
23 addition, taxpayer signed Niles Nissan's Statement by Domestic Stock Corporation dated June 11,
24 2001, as its president and was identified therein as its chief executive officer (CEO), chief financial
25 officer (CFO), director, and agent for service of process. Also, taxpayer was the only person
26 authorized to sign checks for Niles Nissan's corporate bank account. The Department found that
27 taxpayer had been willful in his failure to pay Niles Nissan's outstanding sales and use tax liabilities
28 because, during the period at issue, Niles Nissan's paid other creditors rather than the Board.

1 Taxpayer contends that he was not a responsible person for Niles Nissan and that he did not
2 willfully fail to pay the liabilities at issue. Although taxpayer purchased 100 percent of the common
3 stock of Niles Nissan, he contends that he had never owned a business and was predominantly a
4 salesperson. It was for that reason, according to taxpayer, that Ms. Fischer remained employed by
5 Niles Nissan as its bookkeeper. Although taxpayer concedes that he was the only authorized signatory
6 on Niles Nissan's bank account, he asserts that Ms. Fischer decided which bills to pay, and he had no
7 control over the company's books. Taxpayer asserts that Ms. Fischer and Mr. Frank were the
8 responsible persons for Niles Nissan, not taxpayer.

9 Taxpayer asserts that he blew the whistle to Bank One, Arizona, N.A. (Bank One), who held a
10 promissory note issued by Niles Nissan, when he discovered that the previous owners had kept two
11 sets of financial statements. Taxpayer contends that, at the end of September 2001, Bank One took
12 possession of Niles Nissan's property, leaving taxpayer unable to pay Niles Nissan's tax liabilities. To
13 support his contentions that Ms. Fischer and Mr. Frank were the responsible persons and that Bank
14 One seized all of Niles Nissan's assets, taxpayer has provided various documents related to legal action
15 taken by Bank One against Mr. and Mrs. Frank regarding the defaulted promissory note.

16 At the time the taxes at issue became due, taxpayer was Niles Nissan's president, CFO, vice-
17 president, and treasurer. He was the only authorized signatory on the bank account for Niles Nissan,
18 he signed Niles Nissan's seller's permit application and a check issued on August 1, 2001, to the
19 Board. We find this evidence establishes that taxpayer was a person with the requisite control,
20 supervision, responsibility, or duty to act for the corporation in sales and use tax matters when the
21 liabilities at issue became due.

22 We find that the evidence does not support taxpayer's contention that Ms. Fischer and
23 Mr. Frank were the persons responsible for Niles Nissan's payment of sales and use taxes for the
24 liability period at issue here. Although Ms. Fischer may have decided which bills to pay, it was
25 ultimately taxpayer's responsibility to ensure that Niles Nissan was in compliance with the Sales and
26 Use Tax Law. As for taxpayer's argument that Mr. Frank was a responsible person, it appears that
27 taxpayer relies primarily on the fact that Bank One initiated a civil action against Mr. Frank rather than
28 taxpayer. We find that Bank One initiated that civil action because Mr. and Mrs. Frank were the

1 personal guarantors on the promissory note in default. Bank One's action is not evidence that
2 Mr. Frank was a responsible person for sales tax compliance during the period at issue. Moreover,
3 even if the evidence proved that Ms. Fischer or Mr. Frank was a responsible person for Niles Nissan,
4 that conclusion would not preclude a finding that taxpayer was also a responsible person. We find that
5 taxpayer was a responsible person during the time the taxes became due.

6 With respect to the willfulness requirement, willfulness means that the failure was the result of
7 an intentional, conscious, and voluntary course of action, even if without a bad purpose or evil motive.
8 A person is regarded as having willfully failed to pay taxes, or to cause them to be paid, where he or
9 she had knowledge that the taxes were not being paid (or lacked knowledge in reckless disregard of his
10 or her duty to know) and had the authority to pay taxes or to cause them to be paid, but failed to do so.

11 Taxpayer was aware that Niles Nissan included sales tax reimbursement in its retail sales. He
12 had a duty to know whether the tax liabilities were being timely paid and, if he lacked such knowledge,
13 it was the result of a reckless disregard of his duty to know. The evidence supports a finding that Niles
14 Nissan had funds from which to pay the taxes since it did pay for other business expenses during the
15 relevant period of \$3,082,405, which was in excess of the amount at issue. We find the available
16 evidence does not support taxpayer's contention that Bank One took possession of Niles Nissan's
17 business assets in September 2001, leaving Niles Nissan unable to pay its bills, including the liabilities
18 at issue. Rather, we find that taxpayer could have caused the tax liabilities at issue here to be paid, but
19 did not do so even though funds were available and taxpayer was the only person with check-signing
20 authority. Thus, we find that taxpayer willfully failed to pay or to cause to be paid the subject taxes
21 due, and that he is liable under section 6829 for the liabilities at issue.

22 **Issue 2:** Whether the late-payment, failure-to-file, finality, and amnesty interest penalties
23 assessed against Niles Nissan should be relieved. We conclude that there is no basis for relief.

24 There is no basis for relief of penalties under section 6829, but if penalties owed by a
25 corporation and imposed on a responsible person under section 6829 are relieved as to the corporation,
26 then that relief would also inure to the benefit of the person liable under section 6829. Thus, a person
27 being held liable under section 6829 for penalties imposed on a corporation may submit a statement
28 under penalty of perjury requesting relief on the corporation's behalf pursuant to Revenue and

1 Taxation Code section 6592. Although we explained these provisions and provided a form that
2 taxpayer could use to request relief of the penalties on behalf of Niles Nissan, no such request has been
3 submitted. Accordingly, we have no basis upon which to consider recommending relief of the
4 penalties.

5 **OTHER DEVELOPMENTS**

6 None.

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8 Summary prepared by Rey Obligacion, Retired Annuitant
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