

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION SUMMARY FOR BOARD HEARING

In the Matter of the Petitions for Redetermination)
Under the Sales and Use Tax Law of:)
GREG L. MOYLAN) Account Number: SR JH 53-002680
Petitioner) Case ID's 403554, 479953
Santa Rosa, Sonoma County

Type of Liability: Responsible person liability
Liability periods: 04/01/05 – 09/30/05 (403554)
10/01/05 – 12/05/05 (479953)

<u>Item</u>	<u>Disputed Amount</u>			
Responsible person liability	\$131,484 (403554)			
	\$ 12,924 (479953)			
	<u>403554</u>		<u>479953</u>	
	<u>Tax</u>	<u>Penalty</u>	<u>Tax</u>	<u>Penalty</u>
As determined:	\$115,933.41	\$15,550.60	\$20,977.00	\$2,097.70
Adjustment - Appeals Division	<u>00.00</u>	<u>00.00</u>	<u>- 9,228.00</u>	<u>- 922.80</u>
Proposed redetermination, protested	<u>\$115,933.41</u>	<u>\$15,550.60</u>	<u>\$11,749.00</u>	<u>\$1,174.90</u>
Proposed tax redetermination	\$115,933.41		\$11,749.00	
Interest through 11/30/10	55,690.46		4,603.91	
Penalties	<u>15,550.60</u>		<u>1,174.90</u>	
Total tax, interest, and penalties	\$187,174.47		\$17,527.81	
Payments	<u>- 416.74</u>		<u>-10,550.90</u>	
Balance Due	<u>\$186,757.73</u>		<u>\$ 6,976.91</u>	
Monthly interest beginning 12/1/10	<u>\$ 673.85</u>		<u>\$ 6.99</u>	

UNRESOLVED ISSUES

Issue 1: Whether petitioner is personally liable as a responsible person for the unpaid liabilities of Skier's Quest, Inc. (SR JH 97-277702) pursuant to Revenue and Taxation Code section 6829. We conclude petitioner is personally liable.

Skier's Quest sold new and used boats, water ski equipment, and accessories from April 1, 1998, through December 5, 2005. When the corporation was formed, Gary Johnson held 50 percent ownership, and Dennis Schriber and Scott McNerney each held 25 percent ownership. Petitioner began working for Skier's Quest in January 2005. On July 1, 2005, Mr. Johnson sold his 50-percent

1 share of Skier's Quest to petitioner and David Miramontez for \$175,000.¹ After July 1, 2005,
2 petitioner and Mr. Miramontez were added as signers on Skier's Quest's business bank account at
3 Wells Fargo, along with Mr. Schriber. In August 2005, petitioner and Mr. Miramontez opened a new
4 business bank account for Skier's Quest at the Redwood Credit Union and transferred substantially all
5 of the funds from the Wells Fargo account to the new account. Only petitioner and Mr. Miramontez
6 were signers on the Redwood Credit Union account. At an appeals conference on April 8, 2010,
7 Mr. Schriber stated he received a telephone call from Mr. Miramontez on December 10, 2005, stating
8 that neither Mr. Miramontez nor petitioner would be returning to Skier's Quest and that they would
9 leave the keys for Mr. Schriber at the store. Subsequently, Mr. Schriber removed all of the remaining
10 assets of Skier's Quest. Skier's Quest's seller's permit was closed out on February 14, 2006, effective
11 December 5, 2005. At the time its business terminated, Skier's Quest had unpaid tax-related liabilities
12 for sales and use tax returns filed with no remittance for the second quarter 2005 (2Q05) and 3Q05 and
13 for a determination issued for the period October 1, 2005, through December 5, 2005 (4Q05), for
14 which no return was filed.

15 The Sales and Use Tax Department (Department) concluded that petitioner, Mr. Miramontez,
16 and Mr. Schriber were each personally liable for the unpaid tax-related liabilities of Skier's Quest
17 under section 6829. It issued identical notices of determination on April 20, 2007, and October 1,
18 2008, to each of those individuals for the periods April 1, 2005, through September 30, 2005, and
19 October 1, 2005, through December 5, 2005, respectively. Petitioner filed timely petitions with respect
20 to both determinations.²

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24 ¹ All the parties agree that, after July 1, 2005, neither Mr. Johnson nor Mr. McNerney had any part in the operation of
Skier's Quest, and no determinations for personal liability have been issued to either of those individuals.

25 ² Mr. Miramontez filed a timely petition with respect to the determination issued for 2Q05 and 3Q05 and filed an untimely
appeal, which was accepted as an administrative protest, with respect to the determination issued for 4Q05. Mr. Schriber
26 filed untimely appeals that were accepted as administrative protests of both determinations. The petition and administrative
protest filed by Mr. Miramontez are scheduled for the same Board meeting as the instant appeals. We have recommended
27 that the administrative protests filed by Mr. Schriber be granted, and action on those matters is being held pending the
Board's decision in the matters related to petitioner and Mr. Miramontez. We note that Mr. Schriber has made several
28 payments on these liabilities, totaling \$416.74 applied to 2Q05 and 3Q05 and totaling \$475.00 applied to 4Q05.
Mr. Schriber has not filed a claim for refund of those payments, and the time for timely doing so has expired.

1 It is undisputed that Skier's Quest's business has terminated and that the business had added or
2 included sales tax reimbursement in its retail sales,³ which are two of the four conditions for imposing
3 personal liability on petitioner for the tax debts incurred by Skier's Quest. The other two conditions,
4 which petitioner does dispute, are that petitioner must have been responsible for sales tax compliance
5 by Skier's Quest, and petitioner must have willfully failed to pay or cause to be paid taxes due from
6 Skier's Quest.

7 The Department concluded that petitioner was a responsible person under section 6829 based
8 on the following information: 1) petitioner and Mr. Miramontez had purchased 50 percent ownership
9 of Skier's Quest from Mr. Johnson on July 1, 2005; 2) former officers Mr. Johnson and Mr. McNerney
10 both identified petitioner as one of Skier's Quest's responsible parties for the period beginning July 1,
11 2005; 3) Mr. Schriber stated that petitioner and Mr. Miramontez were in charge of Skier's Quest after
12 July 1, 2005; 4) on September 7, 2005, petitioner signed corporate documents as a shareholder and
13 director of Skier's Quest; 5) Mr. Miramontez stated to the Board that he and petitioner took over
14 control of Skier's Quest as of July 1, 2005; and 6) petitioner is listed as the vice president on the
15 updated seller's permit application completed by petitioner and Mr. Miramontez on November 30,
16 2005. The Department also determined that petitioner willfully failed to pay, or cause to be paid,
17 Skier's Quest's tax liabilities because Skier's Quest had funds available at the time the taxes became
18 due and chose to pay other creditors.

19 Petitioner contends that he is not personally liable for Skier's Quest's unpaid tax liabilities
20 because he was not responsible for Skier's Quest's sales and use tax compliance. Petitioner stated in
21 the petition for redetermination that, when he invested in Skier's Quest, he was a 19-year-old college
22 student with no business experience. He asserted that his duties were limited to cleaning boats and
23 stocking shelves, and occasionally showing boats, and that his duties never changed. Further, he stated
24 that the company was controlled by Mr. Schriber and Mr. Johnson until Mr. Johnson left on June 30,
25 2005, after which only Mr. Schriber was in control. Petitioner claimed that everything he did was at
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28 ³ The Department concluded that the business terminated on or about December 5, 2005. Based on bank records, we
conclude in the D&R that the business terminated on December 16, 2005.

1 the direction of Mr. Schriber, with his job at risk if he did not follow Mr. Schriber's instructions. In
2 addition, petitioner stated that he had no knowledge that sales tax had not been paid, and that he did
3 not even know the Board of Equalization existed until November 18, 2005. He claimed that
4 Mr. Schriber presented him returns for Skier's Quest for 2Q05 and 3Q05 and instructed him to sign
5 them. In addition to maintaining that he did not know about the taxes, petitioner stated he could not
6 have paid them without Mr. Schriber's authorization. Also, petitioner contends that, after Skier's
7 Quest closed its doors, Mr. Schriber took possession of all its remaining assets, with an estimated value
8 of \$444,000. Petitioner therefore claims that Mr. Schriber should be the person held responsible for
9 Skier's Quest's tax liabilities. Petitioner also argues that no Skier's Quest stock was ever issued to him
10 or Mr. Miramontez and that he was thus never actually an owner, officer, or director of Skier's Quest
11 and never had the authority, responsibility, or ability to pay Skier's Quest's taxes. Petitioner also
12 contends there was no willful failure to pay Skier's Quest's liabilities since, as a result of transfers
13 from the Skier's Quest bank account by Mr. Schriber and various undocumented sales by Mr. Johnson
14 and Mr. Mc Nerney, the business was unable to pay any of its creditors, including the Board. Petitioner
15 also argues that the Board should have seized and attempted to sell the remaining assets of Skier's
16 Quest before proceeding against any individuals.

17 We find that the facts do not support petitioner's assertions that his duties amounted to little
18 more than cleaning boats and stocking shelves and that all of his actions in relation to Skier's Quest tax
19 compliance were directed by Mr. Schriber. It is undisputed that, effective July 1, 2005, petitioner and
20 Mr. Miramontez purchased Mr. Johnson's interest in Skier's Quest. Mr. Miramontez, Mr. Schriber,
21 Mr. Johnson, and Mr. Mc Nerney have all stated, either at the various appeals conferences, in written
22 statements, or in communications with Ms. Catherine Sorg, a Board employee working at the Santa
23 Rosa district office, that, as of July 1, 2005, petitioner and Mr. Miramontez were in charge of Skier's
24 Quest. In addition, in August 2005, petitioner and Mr. Miramontez effectively closed the Wells Fargo
25 bank account, to which Mr. Schriber had access, and opened a new account at Redwood Credit Union,
26 to which only petitioner and Mr. Miramontez had access. At the appeals conference on April 8, 2010,
27 petitioner stated that this move was motivated, in part, by a desire to prevent Mr. Schriber from having
28 access to the business account. We find that transfer of the business account is inconsistent with

1 petitioner's claim that he was little more than a stock boy and that his actions were at all times
2 controlled and directed by Mr. Schriber.

3 Petitioner also had numerous conversations with Ms Sorg in November 2005 regarding the
4 preparation of sales and use tax returns for 2Q05 and 3Q05. The Board's computerized records do not
5 indicate that petitioner ever stated Mr. Schriber was the person in charge, or even mention
6 Mr. Schriber's name. Further, at the appeals conference, petitioner and Mr. Miramontez stated that
7 neither Mr. Johnson nor Mr. McNerney had any part in the operation of Skier's Quest during the
8 periods in question, and Mr. Miramontez stated Mr. Schriber was consulted only occasionally by
9 telephone. From this evidence, we find that, as of July 1, 2005, petitioner and Mr. Miramontez were
10 the only people in charge of the day-to-day operation of Skier's Quest. As to the extent of petitioner's
11 personal responsibility, petitioner supervised the preparation of, and signed, the sales and use tax
12 returns filed for 2Q05 and 3Q05. There is no evidence that petitioner's duties or responsibilities
13 changed at any point between July 1, 2005, and November 30, 2005. Therefore, we find petitioner was
14 responsible for Skier's Quest's tax compliance when the taxes became due for 2Q05 and 3Q05.
15 Petitioner states that he resigned on or about December 14, 2005, thus ending any responsibility he
16 may have had, but he has presented no evidence of how he resigned or to whom he tendered his
17 resignation. In addition, petitioner appeared, along with Mr. Miramontez, as the representatives of
18 Skier's Quest at a July 7, 2007 appeals conference held in relation to the determination issued to
19 Skier's Quest for 4Q05. Thus, we find that, although Skier's Quest terminated its business operations
20 in December 2005, petitioner's responsibility did not end. Based on these facts, we find petitioner was
21 a responsible person, as defined by section 6829, for all periods at issue.

22 With regard to petitioner's claim that he never received any Skier's Quest stock and thus never
23 became an officer or owner of the corporation, we note there is no requirement under section 6829 that
24 a responsible person be either an officer or owner of the corporation.

25 With respect to the willfulness requirement, willfulness means that the failure was the result of
26 an intentional, conscious, and voluntary course of action, even if it was not done with a bad purpose or
27 evil motive. A person is regarded as having willfully failed to pay taxes, or to cause them to be paid,
28 where he or she had knowledge that the taxes were not being paid (or lacked knowledge in reckless

1 disregard of his or her duty to know) and had the authority to pay taxes or to cause them to be paid, but
2 failed to do so. Here, petitioner claims he did not know that taxes were due, and had not even heard of
3 the Board prior to November 2005. However, the evidence indicates that, as of July 1, 2005, petitioner
4 and Mr. Miramontez were in charge of all aspects of Skier's Quest's operations. As one of the two
5 people in charge of Skier's Quest, which was making substantial sales and collecting sales tax
6 reimbursement, petitioner had a duty to inform himself as to what taxes were due and when. Further,
7 based on his conversations with Board staff in December 2005, we find petitioner must have known
8 that no return would be filed for 4Q05. Further, Ms. Sorg contacted petitioner regarding Skier's
9 Quest's tax liability on November 4, 2005, and there is no question petitioner knew of the outstanding
10 liability as of that date. Consequently, we find that petitioner knew that the taxes at issue were due,
11 and not paid, or he lacked knowledge in reckless disregard of his duty to know.

12 We find for the same reasons noted above that petitioner had authority to cause the taxes due to
13 be paid. It is undisputed that petitioner was a signer on the corporate account on the earliest date when
14 taxes at issue became due, July 31, 2005. In addition, contrary to petitioner's claim, there is no
15 evidence that petitioner's ability to pay bills was in any way restricted. Regarding whether Skier's
16 Quest had sufficient funds to pay the taxes due, we note that the July 31, 2005, August 31, 2005, and
17 November 1, 2005, bank statements show balances of \$171,971.51, \$223,612.35, and \$134,815.01,
18 respectively. Thus, Skier's Quest continued to have sufficient funds available to pay its taxes when the
19 taxes for 2Q05 and 3Q05 became due. With respect to 4Q05, we note that the bank account shows a
20 balance of only \$1,048.40 of December 31, 2005. However, the tax liability is the result of sales on
21 which sales tax reimbursement was charged and collected by Skier's Quest. Thus, Skier's Quest had
22 collected sufficient funds from its customers to pay its tax liability, but the money was not paid to the
23 Board. Instead, the bank statements show a large number of checks and Visa Checkcard withdrawals
24 during 4Q05, which reflect funds paid to other creditors, as well as some withdrawals that appear to
25 have been for personal expenses, such as charges to various restaurants. We therefore find that funds
26 were available to pay the sales tax liability, but Skier's Quest's management chose to pay other
27 creditors instead. Based on the foregoing, we find petitioner willfully failed to pay the taxes at issue.

1 Regarding petitioner's argument that the Board should have seized and sold the remaining
2 assets of Skier's Quest prior to proceeding against any individual, we first note that the value of the
3 remaining assets was far less than the \$444,000 claimed by petitioner, since most of the assets
4 represented new boats that were actually owned by Ski World and GE, rather than Skier's Quest.
5 Regardless of the value, while the Board has the authority to seize property and sell it at public auction
6 to pay amounts due, this is not the exclusive remedy available to the Board. One option is for the
7 Board to proceed against individuals if it finds they were responsible persons as defined in section
8 6829. These options, along with other remedies of the Board, are cumulative, and the Board is not
9 required to pursue one remedy to the exclusion of any other remedy permitted by statute. (Rev. & Tax.
10 Code, § 6827.) Therefore, we find the Board was not required to seize and sell the remaining assets of
11 Skier's Quest before proceeding under section 6829.

12 In summary, we conclude that all four conditions have been satisfied for imposing personal
13 liability on petitioner under section 6829 for the outstanding tax liabilities of Skier's Quest.

14 **Issue 2:** Whether an adjustment is warranted to the amount of unreported sales for 4Q05. We
15 recommend no further adjustment.

16 Since Skier's Quest did not file a return for 4Q05, the Department issued a determination for
17 that period on July 6, 2006, based on estimated sales of \$270,653. To establish that estimate, the
18 Department combined average daily reported taxable sales for 4Q04 and 3Q05, and reduced the
19 amount by 20 percent to reflect a decline in sales as the business closed. Petitioner contends the
20 estimate is excessive, and he submitted a sales and use tax return in April 2009, reporting total sales of
21 \$124,084.75 and taxable sales of \$108,205.49 for 4Q05.

22 The bank statements for 4Q05 show total deposits of \$165,443.89, which exceed the amount of
23 total sales reported on the late return by \$41,359.14 (\$165,443.89 – \$124,084.75). In the D&R, we
24 recommended that the amount of bank deposits be used as the amount of total sales and that the
25 amount be reduced by \$1,104.00⁴ to establish tax-included taxable sales of \$164,339.89 (\$164,553.89 -
26 \$1,104.00). After adjustment for the amount of tax included, we recommended that the amount of
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28 ⁴ \$1,104.00 is the total of two work orders that appear to represent charges for nontaxable labor.

1 unreported sales be reduced to \$151,604. In the absence of complete records, we recommend no
2 further adjustment.

3 **Issue 3:** Whether petitioner has established reasonable cause sufficient for relieving the late-
4 payment and failure-to-file penalties originally assessed against Skier's Quest. We find he has not.

5 Skier's Quest's unpaid liabilities assessed against petitioner include late-payment penalties of
6 \$4,752.70 for 2Q05 and \$10,797.90 for 3Q05, and a failure-to-file penalty for 4Q05, which is
7 \$1,174.90 after the adjustments recommended in the D&R. There is no statutory or regulatory
8 authority for relieving these penalties in section 6829 determinations, but if petitioner could show that
9 the penalties should be relieved as to the corporation under Revenue and Taxation Code section 6592,
10 the relief would also inure to petitioner's benefit.

11 Petitioner has not submitted a request for relief, signed under penalty perjury. Although
12 Mr. Miramontez did submit a request for relief of the penalties, the grounds stated in that request were
13 a repetition of some of the reasons why Mr. Miramontez contends he should not be held liable under
14 section 6829, and do not address why *Skier's Quest* failed to timely pay the taxes for 2Q05 and 3Q05
15 or to file a return for 4Q05. Since no request for relief has been submitted that addresses the reasons
16 that the penalties were imposed, we find that relief of the penalties is not warranted.

17 **OTHER DEVELOPMENTS**

18 None.

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20 Summary prepared by Deborah A. Cumins, Business Taxes Specialist III
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