

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION FINAL ACTION SUMMARY

3 In the Matter of the Petition for Redetermination )  
 4 Under the Sales and Use Tax Law of: ) Account Number SR GHC 53-006395  
 5 JOSIE ROWE ) Case ID 538662  
 6 Petitioner ) Seaside, Monterey County

7 Type of Liability: Responsible person liability  
 8 Liability period: 01/01/07 – 03/10/08

9 Item Disputed Amount

10 Responsible person liability \$5,553

	<u>Tax</u>	<u>Penalty</u>
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12 As determined	\$5,860.00	\$895.80
13 Post-D&R adjustment	<u>- 1,002.00</u>	<u>- 200.40</u>
13 Proposed redetermination, protested	<u>\$4,858.00</u>	<u>\$695.40</u>
14 Proposed tax redetermination	\$4,858.00	
15 Interest through 06/30/13	2,181.34	
15 Penalties for late returns	276.20	
16 Failure to file penalties	209.60	
16 Finality penalty	<u>209.60</u>	
17 Total tax, interest, and penalty	<u>\$7,734.74</u>	
18 Monthly interest beginning 07/01/13	<u>\$ 24.29</u>	

19 A Notice of Appeals Conference was mailed to petitioner’s address of record, and it was not  
 20 returned by the Post Office. Petitioner did not respond or appear at the appeals conference, which was  
 21 held as scheduled. We sent petitioner a letter offering the opportunity to provide any additional  
 22 arguments and evidence in writing she wished us to consider, but she did not respond. The matter was  
 23 scheduled for Board hearing in December 2012, but was deferred at the request of Member Runner’s  
 24 office for further review and adjustments by the Sales and Use Tax Department (Department). The  
 25 Department did make adjustments, as explained under “Other Matters.” The matter was again  
 26 rescheduled for hearing in May 2013 but petitioner did not respond to the Notice of Hearing. Thus, the  
 27 matter was scheduled for decision on the nonappearance calendar. However, it was inadvertently  
 28 scheduled on the Consent calendar, and has been moved to the Adjudicatory Calendar.

STATE BOARD OF EQUALIZATION  
SALES AND USE TAX APPEAL

**UNRESOLVED ISSUE**

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2       **Issue 1:** Whether petitioner is personally liable as a responsible person for the unpaid liabilities  
3 of Diva Dulche LLC pursuant to Revenue and Taxation Code section 6829. We conclude petitioner is  
4 personally liable.

5       Diva Dulche, LLC (SR GH 100-838585) operated a café from November 29, 2006, through  
6 March 10, 2008. At the time its business terminated, Diva Dulche had unpaid liabilities related to two  
7 returns filed late and a Notice of Determination issued because it failed to file returns. The Department  
8 concluded that petitioner was personally responsible for Diva Dulche’s sales and use tax compliance  
9 and that the remaining conditions for holding petitioner personally liable for Diva Dulche’s unpaid  
10 liabilities pursuant to section 6829 had been met.

11       There is ample evidence that Diva Dulche’s business has been terminated and that it collected  
12 sales tax reimbursement with respect to its retail sales, and petitioner has offered no argument  
13 otherwise. Petitioner does dispute the remaining two conditions for imposing personal liability  
14 pursuant to section 6829, that she was a responsible person and that she willfully failed to pay or to  
15 cause to be paid taxes due from Diva Dulche. However, in her petition for redetermination, petitioner  
16 described herself as having been a “50-percent partner in the business with most of the operational  
17 responsibilities of the business.” In fact, petitioner does not dispute that she was responsible for sales  
18 and use tax matters but contends that she is not responsible for Diva Dulche’s unpaid tax liabilities  
19 because Richard Muscio, the other member of the LLC who provided all business advice and guidance  
20 and working capital, agreed to pay those debts.

21       With respect to willfulness, personal liability can be imposed on a responsible person under  
22 section 6829 only if that person willfully failed to pay or to cause to be paid taxes due from the  
23 corporation. A person is regarded as having willfully failed to pay taxes, or to cause them to be paid,  
24 where he or she had knowledge that the taxes were not being paid and had the authority to pay taxes or  
25 cause them to be paid, but failed to do so. Since petitioner signed the two sales and use tax returns  
26 Diva Dulche filed, and she apparently was the only manager who communicated with the Board  
27 regarding sales and use tax matters, we find that taxpayer knew of the liabilities that were due and  
28 remained unpaid. The evidence also shows that petitioner had authority to pay or to cause to be paid

1 the taxes due, and in her petition, petitioner acknowledged that there were funds available to pay  
2 employees, lease payments, food and supplies, and many other expenses that were required to keep the  
3 business open. The available evidence also shows that Diva Dulche was making payments for rent,  
4 wages, and other expenses throughout the liability period. Thus, we find that Diva Dulche had  
5 available funds to pay its sales tax liability (and it had collected reimbursement for such purpose), but  
6 that instead petitioner chose to pay or to cause to be paid other creditors. In summary, we conclude  
7 that all conditions have been satisfied for imposing personal liability on petitioner under section 6829  
8 for the outstanding tax liabilities of Diva Dulche.

9 As for petitioner's argument that Mr. Muscio, not petitioner, should be held liable for Diva  
10 Dulche's unpaid tax liabilities because he agreed to pay the business's debts, we note that, even if Mr.  
11 Muscio could be held liable under section 6829 for the liabilities at issue here, that would not affect  
12 our conclusion that petitioner is liable under section 6829 since more than one person may be held  
13 personally liable pursuant to section 6829 for an LLC's unpaid liabilities. However, the Department  
14 concluded that there was insufficient evidence of Mr. Muscio's responsibility for Diva Dulche's tax  
15 compliance to support asserting the liability against him. If petitioner and Mr. Muscio had an  
16 agreement under which he agreed to pay Diva Dulche's debts, that agreement would be a matter  
17 between petitioner and Mr. Muscio, and has no effect on a taxpayer's liability vis-à-vis the state.

#### 18 **OTHER MATTERS**

19 The determination issued to petitioner includes penalties for late returns of \$276.20, penalties  
20 for failure to file returns of \$309.80 and a finality penalty of \$309.80, which were originally incurred  
21 by Diva Dulche. Although we explained to petitioner that she could request relief of these penalties on  
22 behalf of Diva Dulche and provided a form she could use, she has not done so. Accordingly, we have  
23 no basis to consider recommending relief of these penalties.

24 After this matter was deferred from the December 2012 Board meeting, the Department  
25 reviewed its computation of the taxable sales for the periods when Diva Dulche did not file returns  
26 (July 1, 2007, through March 31, 2008). To estimate the amounts of taxable sales for those periods,  
27 the Department had computed an average of the sales reported for prior periods, which it had then  
28 increased by 10 percent to establish sales for the periods for which no returns were filed. In its review

1 after the December 2012 Board meeting, the Department concluded that the 10 percent increase was  
2 not warranted. Also, the Department found that the closing date for the restaurant was January 5,  
3 2008, and that the closing date previously used in the calculations, March 10, 2008, was the closing  
4 date for the wholesale bakery only. Accordingly, the Department reduced the estimated amount of  
5 sales for the periods for which no returns were filed by 10 percent and revised the amount of taxable  
6 sales for the first quarter 2008 to reflect the closing date of January 5, 2008.

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