

Amend Revenue and Taxation Code Section 6829 of the Sales and Use Tax Law to include imposition of personal liability on responsible persons of a closely held corporation or closely held limited liability company (LLC) for liabilities arising during a period of suspension of that closely held corporation or closely held LLC, but only if the corporation or LLC is not revived within 60 days of the imposition of the suspension.

Further, add statutes comparable to Section 6829, as amended, to those Board of Equalization (BOE)-administered special tax and fee programs where circumstances would warrant the imposition of personal liability on an officer, partner, member, manager, or other person having control or supervision of, or who is charged with the responsibility for the filing of returns or the payment of taxes or fees for a corporation, partnership, limited partnership, limited liability partnership, or LLC that has been terminated, dissolved or abandoned or on a responsible person of a closely held corporation or closely held LLC that has been suspended without being timely revived.

Source: Legal Department, Sales and Use Tax Department, and Property and Special Taxes Department.

Existing Law

Since 1982, the BOE has been statutorily authorized to impose personal liability on the officers, partners, members, managers, and other persons who control or supervise, or who are charged with the responsibility for the filing of returns or the payment of sales or use tax, or who are under a duty to act for various business entities that have been terminated, dissolved, or abandoned, pursuant to Section 6829 of the Sales and Use Tax Law. In order for the BOE to impose personal liability on such persons for payment of unpaid taxes and the interest and penalties on those taxes, the BOE must establish that the person willfully failed to pay or to cause to be paid any taxes due from the business entity pursuant to the Sales and Use Tax Law. In addition, the BOE must also establish that the business entity collected sales tax reimbursement or use tax from its customers on sales of tangible personal property, or used or consumed tangible personal property without paying the use tax to the seller, and failed to report and pay the sales or use tax to the BOE.

In addition, in 2000, the BOE promulgated Sales and Use Tax Regulation 1702.6, which sets forth the personal liability of an officer or shareholder who has control over the operations or management of a closely held corporation during the time the corporation's powers, rights, and privileges are suspended and of any responsible person who fails to pay or to cause to be paid any sales and use taxes due from the closely held corporation while it is suspended, regardless of the basis of the suspension. Regulation 1702.6 also requires the BOE to establish that the corporation collected sales tax reimbursement or use tax and failed to report and pay the tax to the BOE, or consumed tangible personal property and failed to pay the applicable tax either to the seller or the BOE. Under the BOE's interpretation of the Sales and Use Tax Law, as reflected by Regulation 1702.6, a subsequent reviving of the suspended corporation cannot negate or cancel the liability of the responsible persons for the period of suspension under any circumstances.

Further, the Secretary of State (SOS) and the Franchise Tax Board (FTB), pursuant to Sections 2205 and 17654 of the Corporations Code and Sections 23301 and 23305.5 of the Revenue and Taxation Code, respectively, may suspend a corporation or LLC for failure to fulfill its responsibilities under those codes.

This Proposal

This proposal is a duplicate of last year's Proposal 2-1 that was unanimously adopted by the BOE at its December 15, 2009 Legislative Committee, and was one of three BOE-sponsored proposals that were included in AB 2676 (Ma) during the 2010 Legislative Session. Although approved by the Legislature, Governor Schwarzenegger vetoed AB 2676, stating that the most significant provisions of this bill had already been addressed by the Budget Conference Committee, and that the bill was unnecessary (the veto message was referring to the provisions eliminating the sunset date of the use tax line on the FTB returns).

Just like last year's Proposal 2-1, this year's Proposal 2-2 would codify, in Section 6829, the BOE's legal interpretation as promulgated in Regulation 1702.6 in a manner that would permit the responsible persons of closely held, suspended corporations to be relieved of personal liability for sales and use tax deficiencies if they take prompt action to revive the corporations within 60 days of the imposition of the suspensions. Staff believes that a statutory change is necessary to provide such relief and that the availability of such relief would promote greater overall compliance with state law, including state tax law, by encouraging responsible persons to be vigilant in curing violations that result in the suspension of closely held corporations' powers, rights and privileges. To further promote uniformity and fairness, this proposal would also extend the application of the BOE's legal interpretation to closely held LLCs because LLCs are also subject to suspension by the SOS and FTB. Additionally, the proposal adds further clarity by providing an express statute of limitations provision for liabilities arising from suspension.

Further, this proposal would add a provision comparable to Section 6829, as amended, to certain special tax and fee programs administered by the BOE because it has been argued that the BOE currently lacks the authority to hold personally liable those persons responsible for misappropriating tax and fee amounts collected or received by business entities that have ceased business operations in California or whose powers, rights, and privileges have been suspended. Staff believes it is necessary for effective tax and fee program administration to address the BOE's authority to impose such personal liability when the business entities' records reflect that a transaction included the tax or fee (even if the tax or fee was not separately stated on the receipt or invoice for the transaction), but the tax or fee amount in question was not remitted to the BOE. Any curtailment of the BOE's ability to impose personal liability where such misappropriation of tax or fee amounts has occurred would permit the unjust enrichment of those persons responsible for the misappropriation and create an unfair business advantage over other law-abiding California businesses.

Staff believes that the special tax and fee programs for which such responsible person liability is currently appropriate are: (1) the Motor Vehicle Fuel Tax Law; (2) the Use Fuel Tax Law; (3) the Diesel Fuel Tax Law; (4) the Hazardous Substances Tax Law (with respect to the disposal fee only); (5) the Integrated Waste Management Fee Law; (6) the Oil Spill Response, Prevention, and Administration Fees Law; and (7) the Fee Collection Procedures Law (with respect to only the electronic waste recycling fee and the tire recycling fee). Adding a provision comparable to Section 6829, as amended, would also promote uniformity across all the appropriate tax and fee programs with regard to the personal liability of a responsible person during a period of suspension of a closely held corporation or closely held limited liability company, when such responsible person does not act promptly to revive the corporation or limited liability company.

Following is Section 6829 of the Sales and Use Tax Law, as proposed to be amended. Comparable statutes would also be added, with appropriate modifications, to the special tax and fee laws listed previously.

Section 6829 of the Revenue and Taxation Code is amended to read:

6829. (a) Upon the termination, dissolution, or abandonment of the business of a corporation, partnership, limited partnership, limited liability partnership, or limited liability company, any officer, member, manager, partner, or other person having control or supervision of, or who is charged with the responsibility for the filing of returns or the payment of tax, or who is under a duty to act for the corporation, partnership, limited partnership, limited liability partnership, or limited liability company in complying with any requirement of this part, shall, notwithstanding any provision in the Corporations Code to the contrary, be personally liable for any unpaid taxes and interest and penalties on those taxes, if the officer, member, manager, partner, or other person willfully fails to pay or to cause to be paid any taxes due from the corporation, partnership, limited partnership, limited liability partnership, or limited liability company pursuant to this part.

(b) The officer, member, manager, partner, or other person shall be liable only for taxes that became due during the period he or she had the control, supervision, responsibility, or duty to act for the corporation, partnership, limited partnership, limited liability partnership, or limited liability company described in subdivision (a), plus interest and penalties on those taxes.

(c) Personal liability may be imposed pursuant to this section, only if the board can establish that the corporation, partnership, limited partnership, limited liability partnership, or limited liability company had included tax reimbursement in the selling price of, or added tax reimbursement to the selling price of, tangible personal property sold in the conduct of its business, or when it can be established that the corporation, partnership, limited partnership, limited liability partnership, or limited liability company consumed tangible personal property and failed to pay the tax to the seller or has included use tax on the billing and collected the use tax or has issued a receipt for the use tax and failed to report and pay use tax.

(d) (1) Upon suspension of a closely held corporation or closely held limited liability company, a corporate officer, shareholder, or member with control over operations or management of the closely held corporation or closely held limited liability company during a time in which the corporation's or limited liability company's powers, rights, and privileges are suspended or any responsible person who fails to pay or to cause to be paid any taxes due from the closely held corporation or closely held limited liability company during a time in which the corporation's or limited liability company's powers, rights, and privileges are suspended shall, notwithstanding any provision in the Corporations Code to the contrary, be personally liable under the circumstances set forth below for any unpaid sales or use tax liability of that suspended corporation or limited liability company incurred during the period of that suspension. The corporate officer, shareholder, member, or responsible person shall be liable for the unpaid tax, and interest and penalties on those taxes not so paid, regardless of the basis for the suspension of the corporation's or limited liability company's powers, rights, and privileges.

(2) Notwithstanding paragraph (1), if the closely held corporation or closely held limited liability company can establish that it has taken all actions necessary to qualify for revival

within 60 days from the date the suspension was imposed, no corporate officer, shareholder, member, or responsible person shall be held to be personally liable for any unpaid tax, interest, or penalty incurred by the corporation or limited liability company during that period of suspension.

(e) Personal liability under subdivision (d) applies only when the board establishes that, during the period of suspension, the corporation or limited liability company:

(1) Sold tangible personal property in the conduct of its business and collected sales tax reimbursement on the selling price (whether separately itemized or included in the selling price) and failed to remit such tax when due; or

(2) Collected use tax and failed to report and pay the tax; or

(3) Consumed tangible personal property and failed to pay the applicable tax to the seller or the board.

(f) For purposes of subdivisions (d) and (e):

(1) "Responsible person" means any officer, shareholder, or member who is charged with the responsibility for the filing of returns or the payment of tax or who has a duty to act for the closely held corporation or closely held limited liability company in complying with any provision of this part, and who derives a direct financial benefit from the failure to pay the tax liability.

(2) "Closely held corporation" means a corporation in which ownership is concentrated in one individual, one family, or a small number of individuals and the majority stockholders manage the business or have delegated or assigned such management to the corporate officers.

(3) "Closely held limited liability company" means a limited liability company in which ownership is concentrated in one individual, one family, or a small number of individuals and the majority members manage the business or have delegated or assigned such management to the company officers.

(4) "Control over operations or management" means the power to manage or affect day-to-day operations of the business. For the purposes of subdivisions (d) and (e), it is rebuttably presumed that a corporate or company officer has control over operations and management of the closely held corporation or closely held limited liability company, respectively.

(5) (i) "Period of suspension" means that period of time, beginning on the date the suspension is imposed, during which a closely held corporation or closely held limited liability company was suspended for any reason.

(ii) Notwithstanding subparagraph (i), "period of suspension" does not mean a period of time of 60 consecutive days or less, beginning on the day the suspension was imposed, during which a closely held corporation or closely held limited liability company was suspended, but only if the corporation or limited liability company has taken all actions necessary to qualify for revival on or before the sixtieth day.

(g) A suspended corporation or limited liability company shall remain liable for the unpaid tax, interest, and penalties incurred during the period in which its corporate or limited liability company powers, rights, and privileges were suspended without regard to any personal liability determined under subdivisions (d), (e), and (f). Payments made pursuant to subdivisions (d), (e), and (f) shall be applied to the liability of the corporation or limited liability company.

(h) For purposes of this section, subdivisions (a), (b), and (c), "willfully fails to pay or to cause to be paid" means that the failure was the result of an intentional, conscious, and

voluntary course of action.

(e) Except as provided in subdivision (j), the sum due for the liability under this section may be collected by determination and collection in the manner provided in Chapter 5 (commencing with Section 6451) and Chapter 6 (commencing with Section 6701).

(f) A notice of deficiency determination under this section shall be mailed within three years after the last day of the calendar month following the quarterly period in which the board obtains actual knowledge, through its audit or compliance activities, or by written communication by the business or its representative, of the termination, dissolution, or abandonment of the business of the corporation, partnership, limited partnership, limited liability partnership, or limited liability company or of the suspension of the closely held corporation or closely held limited liability company, or, within eight years after the last day of the calendar month following the quarterly period in which the corporation, partnership, limited partnership, limited liability partnership, or limited liability company business was terminated, dissolved, or abandoned or in which the closely held corporation or closely held limited liability company was suspended, whichever period expires earlier. If a business or its representative files a notice of termination, dissolution, or abandonment of its business with a state or local agency other than the board, or if the California Secretary of State or the California Franchise Tax Board notifies a closely held corporation or closely held limited liability company that it is suspended, the filing or notice shall not constitute actual knowledge by the board under this section.

(k) Notwithstanding subdivision (j), when the board mails acknowledgement to a closely held corporation or closely held limited liability company that the closely held corporation or closely held limited liability company has been suspended and the acknowledgement is mailed within three years of the date on which the board obtained actual knowledge as defined in subdivision (j) of the suspension of the closely held corporation or closely held limited liability company, a notice of deficiency determination under this section shall be mailed, at the latest, within three years after the last day of the calendar month following the quarterly period following the revival of that closely held corporation or closely held limited liability company.