

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION BOARD HEARING SUMMARY

In the Matter of the Claim for Refund)
Under the Sales and Use Tax Law of:)
ALAN LEVITZ) Account Number SR GH 53-006100
Claimant) Case ID 718640¹
Tierra Verde, Florida

Type of Liability: Responsible person liability
Liability period: 04/01/08 – 04/10/09

Item Claimed Refund

Claimed overpayment related to Notice of Determination for the liability period, including a collection cost recovery fee \$42,406.72

Claimant filed a claim for refund for payments of \$41,856.72 made against a Notice of Determination (NOD) issued for the period April 1, 2008, through April 10, 2009, and for the payment of a collection cost recovery fee of \$550.00, related to his failure to timely pay the NOD.

This matter was scheduled for Board hearing in July 2015, but was postponed at claimant’s request due to a scheduling conflict.

BACKGROUND

Claimant has been held personally liable pursuant to Revenue and Taxation Code section 6829 for the unpaid tax liabilities of Room Source LLC (Room Source) (SR KH 97-103733). Claimant did not file a timely petition for refund, but did file an untimely appeal that the Sales and Use Tax Department (Department) accepted as an administrative protest. After the NOD was issued to claimant, the Department received some payments from Room Source, and the Department made corresponding adjustments to claimant’s liability. Claimant has since paid all the remaining amount of the NOD, which totaled \$41,856.72 (tax of \$24,653.85, penalties of \$8,994.10, and interest of \$8,208.77), and he has filed timely claims for refund for all payments. Claimant has also paid a

¹ The D&R and SD&R each address taxpayer’s administrative protest and claim for refund. However, the SD&R recommends that the administrative protest be canceled, as explained in the “Background” section. Accordingly, we have deleted the case ID for the administrative protest (574034) from the summary.

1 collection cost recovery fee and has filed a timely claim for refund of that \$550.00. Thus, the entire
2 amount for which claimant has filed a claim for refund is \$42,406.72.

3 Since the NOD is fully paid, the late appeal accepted as an administrative protest serves no
4 useful purpose and is effectively moot. We have therefore recommended that the administrative
5 protest be canceled. Claimant has preserved his appeal rights as to all amounts at issue by his timely
6 claims for refund, and it is the claims for refund that are presented to the Board.

7 There are three elements of claimant's arguments in his claims for refund. First, claimant
8 contends that he should not be held personally liable for the unpaid tax liability of Room Source. Also,
9 he has requested relief of the late prepayment penalties totaling \$5,273.10 and the late return payments
10 of \$3,721.00. Finally, claimant has requested relief of the collection cost recovery fee. Each of those
11 issues is addressed separately below.

12 UNRESOLVED ISSUES

13 **Issue 1:** Whether claimant is personally liable as a responsible person for the unpaid liabilities
14 of Room Source pursuant to Revenue and Taxation Code section 6829. We conclude claimant is
15 personally liable.

16 Room Source was a retailer of home furnishings from April 1997 through April 10, 2009. At
17 the time its business terminated, Room Source had unpaid liabilities for tax and penalties of
18 \$54,520.86 tax and \$10,725.19, respectively, related to returns and prepayments filed with no or partial
19 remittance. The Department concluded that claimant was personally responsible for Room Source's
20 sales and use tax compliance pursuant to section 6829.² After the Department issued an NOD to
21 claimant, the Department noted that Room Source had made a payment that should have been applied
22 to the liability for a portion of June 2008, and it reduced the NOD issued to claimant by \$17,310.86
23 and \$1,731.09 of tax and penalty, respectively. Also, the Department received a payment of
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26 ² The Department also issued an NOD to Harris Allen Blickstein, chief operating officer of Room Source (SR KH 53-
27 006099). Mr. Blickstein filed a timely petition for redetermination, and, after the appeals conference was held, the
28 Department determined that an electronic funds transfer had eliminated the liability for which Mr. Blickstein was being
held liable. Thus, his liability was reduced to zero. The Department also investigated other individuals as potentially
personally liable, Philip Allen Levitz, chief executive officer of Room Source, Daniel P. Selznick, a member of Room
Source, and Carol Sheridan, Room Source's controller. However, the Department's investigation did not disclose evidence
that these individuals were responsible for Room Source's sales and use tax compliance.

1 \$12,556.15 from Room Source's bankruptcy proceeding, and it made a corresponding reduction to
2 claimant's NOD. Accordingly, the amount that remained due from claimant was tax of \$24,653.85
3 (\$54,520.86 - \$17,310.86 - \$12,556.15) and penalty of \$8,994.10 (\$10,725.19 - \$1,731.09), as well as
4 accrued interest. As stated previously, claimant has paid the entire amount in full, including those
5 amounts of tax and penalty, and interest of 8,208.77, and has filed timely claims for refund of all
6 payments, which total \$41,856.72.

7 Claimant disputes two of the four conditions for imposing personal liability pursuant to section
8 6829, that he is a responsible person and that he willfully failed to pay or to cause to be paid taxes due
9 from Room Source. Specifically, claimant asserts that he was not a responsible person because: 1) he
10 was not a member of Room Source and 2) he had no involvement with the business prior to August
11 2008. According to claimant, his father, Philip Levitz, the managing member of Room Source, asked
12 claimant to assist in Room Source's bankruptcy process. Claimant describes his duties in this regard
13 as interfacing with Room source's bankruptcy attorneys and accounting professionals and carrying out
14 related requests of his father and Mr. Selznick. Claimant states he was not assigned responsibility for
15 any day-to-day operational duties at Room Source or any responsibility for Room Source's sales and
16 use tax matters. Further, claimant asserts that at all times he acted under the direction and control of
17 his father and Mr. Selznick and received no compensation for his assistance. Regarding willfulness,
18 claimant argues that any failure to pay Room Source's sales and use tax liability was not willful
19 because Room Source lacked the funds to pay the liability as of April 30, 2009, the date the payment
20 for the first quarter 2009 became due. Therefore, claimant contends that he is not personally liable for
21 Room Source's unpaid tax liabilities because all four conditions for holding him personally liable have
22 not been met.

23 On August 28, 2008, Room Source's board of directors held a special meeting in which they
24 adopted a resolution appointing claimant as an officer and director of Room Source and also as the
25 individual with primary and sole responsibility for handling matters in the bankruptcy case and acting
26 in the capacity of the designated responsible individual as required by the bankruptcy court. Claimant
27 notified the court of his appointment in a declaration filed with the court on September 12, 2008, in
28 which claimant stated that he was an officer and director of Room Source and was the designated

1 responsible individual, having replaced Mr. Blickstein on or about August 28, 2008. That is, no later
2 than September 12, 2008, Room Source and claimant represented *to the court* that claimant was the
3 person with the duty and authority to act for Room Source as a debtor in possession under Chapter 11.³
4 Also, claimant concedes that he had the authority to sign checks on behalf of Room Source.

5 As evidence to support his assertion that he was not a responsible person, as defined in section
6 6829, claimant has provided declarations from Mr. Levitz (claimant's father) and Mr. Selznick.
7 However, we find that the information presented in the declarations directly contradicts the clear
8 evidence of claimant's duties and responsibilities. As expressly stated in the resolution mentioned
9 above, Room Source's board of directors authorized and directed claimant to do and perform
10 everything required to fulfill the duties and responsibilities of a Chapter 11 debtor. There is nothing in
11 the resolution that is susceptible to an interpretation that claimant's authority to perform and fulfill
12 those responsibilities was in any way subordinate to someone else's authority or limited in any way.
13 Most significantly, once claimant was designated as the individual responsible for the duties and
14 obligations of the debtor in possession, his responsibilities clearly included ensuring that the post-
15 petition administrative expenses of Room Source were paid, *including* the sales tax due on post-
16 petition sales for which Room Source had collected sales tax reimbursement for that very purpose.⁴
17 Therefore, the record establishes claimant's responsibility and authority to pay the sales tax, or cause it
18 to be paid, subject only to the supervision of the bankruptcy court. In other words, claimant's
19 designation as the individual responsible for the duties and obligations of the debtor in possession in

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21 ³ We note that 11 U.S.C. § 1107 specifies the rights, powers, and duties of a debtor in possession. This section imposes on
22 the debtor in possession the obligations of a trustee serving under Chapter 11 set forth in 11 U.S.C. § 1106(a), which in turn
23 requires the Chapter 11 trustee to perform substantially all the duties specified for a Chapter 7 trustee in 11 U.S.C. § 704.
24 Among these duties are those specified in subdivision (a), subsection 8, which states:

25 "If the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and
26 with any governmental unit charged with the responsibility for collection or determination of any **tax** arising out of
27 such operation, periodic reports and summaries of the operation of such business, including a statement of receipts
28 and disbursements, and such other information as the United States trustee or the court requires;..."

In other words, petitioner's representation to the bankruptcy court that he was the individual responsible for the duties and obligations of the debtor in possession necessarily meant that he was responsible for the debtor's sales and use tax obligations.

⁴ The commencement of a Chapter 11 case does not exempt a trustee or debtor in possession (i.e., claimant herein) from operating the business in accordance with other laws, and the law specifically requires the trustee or debtor in possession to pay sales tax. (28 U.S.C. § 959(b), 28 U.S.C. § 960.)

1 the bankruptcy court conclusively establishes his responsibility for Room Source's post-petition sales
2 and use tax obligations. Thus, claimant clearly and unequivocally was a responsible person for
3 purposes of section 6829.^{5 6}

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

10 The first requirement for willfulness is knowledge. As a debtor in possession, Room Source
11 was required to submit Monthly Operating Reports (MOR's) to the bankruptcy court, and, as the
12 designated responsible individual, claimant was the person required to sign the reports, declaring under
13 penalty of perjury that he had reviewed the information and believed it to be correct (11 U.S.C.
14 704(a)(8)). The MOR's filed for the periods September 2008 through April 2009 showed amounts of
15 sales tax liability due, and the reports for January, February, March, and April showed that the amounts
16 of sales tax due were not paid in full. Thus, we find that claimant knew that Room Source owed sales
17 taxes that had not been paid.

18 Willfulness also requires that the responsible person must have had the authority to pay, or
19 cause to be paid, the taxes when due. We find for the same reasons noted above that claimant had
20 authority to cause the taxes due to be paid. Regarding whether Room Source had funds available to
21 pay the taxes due, we note that during the applicable periods, Room Source was collecting sales tax
22 reimbursement, which is one element of evidence that the business had funds available to pay the sales
23 tax liability. (See the Board's Compliance Policy and Management Guidelines (CPMG), § 764.150).⁷

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25 ⁵ There is no dispute that the controller, rather than the claimant, prepared the sales and use tax returns. Nevertheless,
claimant was ultimately responsible for ensuring that the sales tax was reported and paid.

26 ⁶ Claimant has questioned the reliability of information provided by some Room Source employees in Business Operations
27 Questionnaire responses and has asserted that the D&R relies too heavily on one phone call from claimant to the
Department. We note that we do not rely on either of these factors in reaching the conclusion that taxpayer was responsible
for Room Source's sales and use tax compliance.

28 ⁷ Claimant had argued that the collection of sales tax reimbursement alone is not sufficient to show that funds were
available to pay the sales tax liability, and he referred to section 170.260 of the CPMG, which is not a section of the current

1 In addition, as documented in the MOR's, claimant made or allowed to be made considerable
2 payments to suppliers, payments of wages, and payments to other creditors during the period at issue.
3 Claimant argues that the failure to pay the sales tax was not willful because funds had been depleted,
4 such that no funds were available to pay the tax on the actual due dates of the taxes. However, in order
5 for the failure to pay to be willful, all that is required is that the failure to pay or to cause to be paid the
6 taxes when due was the result of a voluntary, conscious, and intentional course of action. In this case,
7 claimant was aware that Room Source was terminating its business operations, and he was aware that
8 some of Room Source's funds were in fact amounts of sales tax reimbursement that had been collected
9 from customers. Thus, claimant's decision to spend some of that sales tax reimbursement to pay other
10 creditors was a voluntary, conscious, and intentional course of action, and we find that his failure to
11 pay Room Source's sales tax liability, or cause it to be paid, was willful. In addition, we note that
12 Room Source received \$175,000 for the liquidation of its inventory during the period May 2009
13 through September 2009. Although Room Source required approval from the bankruptcy court to
14 disburse any of the \$175,000, there is no evidence that claimant ever asked that the amount be used to
15 pay Room Source's sales tax liability. Moreover, even after \$147,366 of the \$175,000 was used to pay
16 "Bankruptcy court Professional fees" (presumably attorneys' fees), claimant did not request that the
17 balance be applied to Room Source's sales tax liability. We find that claimant's failure to ask the court
18 for permission to use the \$175,000 to pay the sales tax liability is additional evidence that his failure to
19 pay Room Source's sales tax liability was willful. In summary, we conclude that all conditions have
20 been satisfied for imposing personal liability on claimant under section 6829 for the outstanding tax
21 liabilities of Room Source.

22 **Issue 2:** Whether claimant has established reasonable cause sufficient for relieving the late-
23 payment and late prepayment penalties originally assessed against Room Source. We conclude that he
24 has not.

25 There is no statutory or regulatory authority for relieving these penalties in section 6829
26 determinations, but if claimant could show that the penalties should be relieved as to the LLC under
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28 CPMG. In any event, as explained above, Room Source's collection of sales tax reimbursement is not the sole basis for our

1 Revenue and Taxation Code section 6592, the relief would also inure to claimant's benefit. Claimant
2 submitted a request for relief, signed under penalty perjury. The grounds stated in the request for relief
3 do not address why *Room Source* failed to timely pay the taxes and determination at issue but instead
4 reiterate claimant's contention that he should not be held personally liable. Accordingly, claimant has
5 not established reasonable cause for Room Source's late payments of amounts due reported on returns
6 and prepayment forms. Consequently, we find no basis for relief from the penalties at issue.

7 **Issue 3:** Whether claimant has established reasonable cause for relief from the collection cost
8 recovery fee. We find that he has not.

9 The liability in the NOD issued to claimant became final on July 30, 2010. On January 7,
10 2011, the Department issued to claimant a Demand for Immediate Payment, advising him that failure
11 to pay the liability (or to enter into an installment payment plan) could result in collection action and
12 that a collection fee would be added. On April 18, 2011, the Department imposed a \$550 collection
13 cost recovery fee (CCRF) on claimant. Claimant has filed a request for relief of the CCRF, asserting
14 that he was never an employee or member of Room Source, his role was limited to assistance for
15 bankruptcy purposes for a short period of time, and he was never assigned duties in relation to Room
16 Source's sales and use tax matters. In other words, claimant has simply reiterated the arguments he put
17 forth to assert that personal liability should not be imposed. He has not shown that his failure to pay
18 the tax, interest, and penalties assessed against him within 90 days was due to reasonable cause and
19 circumstances beyond his control. Accordingly, we find no basis to recommend relief of the CCRF.

20 OTHER MATTERS

21 None.

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23 Summary prepared by Deborah A. Cumins, Business Taxes Specialist III
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28 conclusion that there were funds available to pay the liability at issue.