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November 9, 2015

Ms. Susanne Buehler, Chief  
Board of Equalization  
Tax Policy Division  
Sales and Use Tax Department  
450 N Street  
Sacramento, CA 94279-0092

VIA: Email: [Susanne.Beuhler@boe.ca.gov](mailto:Susanne.Beuhler@boe.ca.gov)

Re: Proposed amendments to California Code of Regulations, title 18, section 1702.5,  
*Responsible Person Liability*.<sup>1</sup>

Dear Ms. Buehler,

This submission is being made in response to the Initial Discussion Paper (IDP) issued on October 22, 2015 and the interested parties meeting (meeting/IPM) held on October 22, 2015 regarding proposed amendments to Regulation 1702.5. We also address the Alternative Proposed Language (APL) presented at the meeting.

With a few exceptions as described below, we believe the APL most accurately describes the language and intent of Revenue and Taxation Code section 6829, *Personal Liability of Corporate Officer*.<sup>2</sup> Each proposed subdivision that differs between the IDP and APL is addressed below.

**Subdivision (b)(2)(A) (sub-element of “willfully fails”)**

Proposed language:

<sup>1</sup> All references to Regulations hereafter are to California Code of Regulations, title 18, unless otherwise noted.

<sup>2</sup> All references to Code sections hereafter are to Revenue and Taxation Code sections unless otherwise noted.

IDP: “*At the time the taxes came due, the responsible person knew or must have known that the taxes were not being paid. Evidence of actual knowledge is not required. It is sufficient if the Board can establish that it is more likely than not that the responsible person knew of the liability.*”

APL: “*At the time the taxes came due, the responsible person knew that the taxes were not being paid. Knowledge can be established using the available evidence, including circumstantial evidence, showing that it is more likely than not that the person actually knew that the taxes due were not being paid.*”

***Discussion:***

Code section 6829, subdivision (d) states:

“Willfully fails to pay or cause to be paid [italics omitted] means the failure was the result of an intentional, conscious, *and* voluntary course of action.” (Emphasis added.)

Pursuant to the definition provided under Code section 6829, three factors must be established in order to find that a person willfully failed. It must be shown the failure was 1) intentional, 2) conscious, *and* 3) voluntary. The use of the word “intentional” in the definition makes it clear the legislature only intended to hold individuals responsible when their action or inaction was carried out with a desired result.

Intentional may be defined as the willingness to bring about something planned or foreseen. (Blacks Law Dict. (8<sup>th</sup> ed. 2004) p. 826, col. 2; also see *Marich v. MGM/UA Telecommunications, Inc.* (2003) 113 Cal.App.4th 415, 421-422 [where the court thoroughly analyzes and defines the meaning of intentional as “those consequences which (a) represent the very purpose for which an act is done (regardless of the likelihood of occurrence), or (b) are known to be substantially certain to result (regardless of desire).”].)

In order to plan or foresee that taxes will not be paid, i.e., intentionally fail to pay, a person must have *knowledge* that their action or inaction will result in the failure to pay. Failure to pay without knowledge or intent would be akin to negligence, which is below the “intentional” threshold established under the law.

The IDP includes language that appears to undermine or conflict with the law. For example, the proposed language accurately states that a person can be held liable if that person “knew...that the taxes were not being paid.” The same sentence, however, includes “or must have known.” The manner in which the sentence is written suggests that “must have known” is something different than “knew.” In other words, it appears to state that something less than knowledge is sufficient to establish that a person willfully failed to pay, e.g., negligence.

The second sentence in the subdivision further conflicts with the legal definition of willful failure by stating that “[e]vidence of actual knowledge is not required.” This is an inaccurate explanation of the law because 1) in order to willfully fail to pay, an individual must do so intentionally, 2) in order to intentionally fail, an individual must have knowledge that their action or inaction will result in a failure to pay, and 3) the burden is on the Board to prove that a personal willfully failed. Thus, evidence of actual knowledge *is* required.

Because the alternative language accurately describes the law and it will help to avoid confusion created by the language presented in the IDP, we believe the alternative language should be presented to the Board Members for adoption.

**Subdivision (b)(2)(C) (sub-element of “willfully fails”)**

Proposed language:

IDP: *“The responsible person had the ability to pay the taxes but chose not to. The Board need not establish that the actual amount of taxes owed was available at any given time. The Board must only establish that funds were, in general, available and not paid to the Board.”*

APL: *“The responsible person had the ability to pay the taxes but chose not to.”*

***Discussion:***

We believe the language proposed in the IDP for subdivision (b)(2)(C) is overly broad and inconsistent with the law. Code section 6829, subdivision (b) states:

“The officer, member, manager, partner, or other person shall be liable only for taxes that ***became due during the period he or she had control....***” (Emphasis added.)

Code section 6829, subdivision (b) establishes a limitation to the period in which an individual may be held personally responsible. Specifically, an individual can only be held responsible for tax that “became due during the period he or she had control.” Therefore, it is the Board’s obligation in administering Code section 6829, to show that the taxes at issue became due *during the period* the person pursued had control. Showing that funds were available “at any given time” or “in general,” may be interpreted to include periods well before or well after the period in which the responsible person had control. Therefore, the language is inconsistent with the law.

The alternative language accurately describes the law. If a person with knowledge has the ability to pay taxes that are due, but chooses not to, that person may be held liable under Code section 6829. The availability of funds “at any given time” or “in general,” however, does not necessarily prove that a responsible person had the ability to pay the taxes that became due during the period in which he or she had control.

Because the alternative language accurately describes circumstances under which personal liability may attach, and the IDP language does not, we believe the alternative language should be presented to the Board Members for approval.

**Subdivision (d), Burden Of Proof**

Proposed language:

IDP: *“In order for a person to be personally liable, the Board has the burden to prove that the requirements of personal liability in subdivision (a), and further defined in subdivision (b), have been satisfied under the preponderance of the evidence standard of proof.”*

APL: The APL did not include any proposed language.

***Discussion:***

We agree with Staff’s proposal to clarify the burden and standard of proof under subdivision (d).

**Subdivision (e), Presumption of No Personal Liability:**

Proposed language:

IDP and APL (identical language): “*For a Notice of Determination issued against a responsible person after July 1, 2016, if the person is not an officer, member, partner, or manager with an ownership interest in the entity, the person is presumed to not be personally liable under subdivision (a), unless the Board rebuts this presumption with clear and convincing evidence.*”

### ***Discussion***

At the IPM we discussed scenarios in which personal liability is pursued for the failure to pay use tax on materials consumed under construction contracts, and similar circumstances. We believe a circumstance in which an individual fails to pay use tax due on the consumption of goods, is different from a circumstance in which an individual fails to remit tax that was collected. Therefore, we propose an alteration to IDP subdivision (e) to include a favorable presumption and a higher standard of proof when there is a failure to pay use tax on the consumption of goods:

Proposed Alternative:

**(e) PRESUMPTION OF NO PERSONAL LIABILITY** For a Notice of Determination issued against a responsible person after July 1, 2016, if the underlying liability stems from a failure to pay use tax due on the consumption of tangible personal property, or the person is not an officer, member, partner, or manager with an ownership interest in the entity, the person is presumed to not be personally liable under subdivision (a), unless the Board rebuts this presumption with clear and convincing evidence.

We thank you for providing us with the opportunity to submit these suggestions. Please feel free to contact me with any questions or comments.

Sincerely,

  
Jesse W. McClellan, Esq.  
Principal