

Memorandum

320.0205

To : Mr. Jeffrey L. McGuire
Tax Policy Division (MIC:92)

Date: March 29, 2004

From : Randy Ferris
Senior Tax Counsel

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Subject: Rev. & Tax. Code, § 6592 – Excusable Delay

This is in response to your memorandum dated, February 19, 2004, to Janice Thurston requesting guidance regarding a corporation that was assessed a penalty for filing its return late. Your memorandum has been assigned to me for reply.

In relevant part, you state:

“We have a corporation that was assessed a penalty for filing its return late. The penalty is subject to relief [pursuant to Revenue and Taxation Code, section (Section)] 6592, excusable delay. This same penalty was later assessed to an individual as the responsible party [pursuant to Section] 6829, personal liability of corporate officer. The responsible party then submitted a request for relief of penalty for both the corporation and for himself as the responsible party.

“While there’s no question a request for relief of penalty for the corporation can be considered [pursuant to Section] 6592, discussion has [been] generated over whether or not [Section] 6592 applies to the penalty assessed to the responsible party.

“One argument is that [Section] 6592 does not apply to the penalty assessed to the responsible party because the penalty assessed to the responsible party is assessed [pursuant to Section] 6829. [Section] 6829 is not one of the [Revenue and Taxation] Code sections referenced as being subject to relief in [Section] 6592.

“The other argument is that because the penalty assessed to the corporation is subject to relief [pursuant to Section] 6592, so too is the penalty when it’s billed to the responsible party [pursuant to Section] 6829.

“Would you please advise whether or not a penalty assessed to a corporation that is subject to relief [pursuant to Section] 6592 is also subject to relief [pursuant to Section] 6592 when it is billed to the responsible party [pursuant to Section] 6829?”

DISCUSSION

Section 6592, which sets forth the requirements for relief from certain penalties imposed under the Sales and Use Tax Law, provides:

Excusable delay. (a) If the Board finds that a person’s failure to make a timely return or payment is due to reasonable cause and circumstances beyond the person’s control, and occurred notwithstanding the exercise of ordinary care and the absence of willful neglect, the person shall be relieved of the penalties provided by Sections 6476, 6477, 6479.3, 6480.4, 6480.8, 6511, 6565, 6591, and 7051.2.

(b) Except as provided in subdivision (c) any person seeking to be relieved of the penalty shall file with the board a statement under penalty of perjury setting forth the facts upon which he or she bases his or her claim for relief.

(c) The board shall establish criteria that provides for efficient resolution of requests for relief pursuant to this section.

Section 6829, which imposes, under certain circumstances, a liability on corporate officers and other responsible persons for the unpaid liabilities of various defunct business entities (e.g., terminated, dissolved or abandoned corporations, LLCs, partnerships, etc.), is not a “penalty” provision. Rather, Section 6829 holds such responsible persons dually liable (i.e., together with the entity in which they formerly shared in the control) because of their own conduct in failing to cause the defunct business entities to be in compliance with the reporting and payment requirements of the Sales and Use Tax Law. (See Cal. Code Regs., tit. 18, § 1702.5.) Moreover, even if Section 6829 was a penalty provision, which it is not, as you have correctly pointed out, Section 6829 is not listed among the statutes with respect to which relief may be obtained under Section 6592. Accordingly, the Board cannot grant relief from a Section 6829 liability pursuant to Section 6592.

However, because Section 6829 establishes a dual liability that is contingent on, and derives from, the liability of the subject defunct business entity, if the Board relieves a penalty imposed on that business entity pursuant to Section 6592 and if this penalty amount was included in the responsible person’s liability under Section 6829, the responsible person’s liability should consequently be reduced by the same amount. Provided all the requirements for relief are met, when appropriate, the Board may grant relief for any relevant unpaid penalty pursuant to Section 6592 at any time (i.e., no statute of limitations exists with respect to the

Board's ability to grant relief under Section 6592 as to unpaid penalty amounts¹). Since any penalty amount included in a Section 6829 liability will always be unpaid, the Board has the ability, when appropriate, to ultimately reduce a responsible person's liability by granting relief under Section 6592 to the relevant business entity. For purposes of deciding whether relief under Section 6592 is appropriate, the Department should accept statements under penalty of perjury setting forth the facts upon which the claim for relief is based that are signed by the subject responsible persons, who presumably would be able to allege percipient knowledge of the relevant business entities' tax reporting conduct for the periods at issue, on behalf of these business entities.

I trust that this adequately addresses your concerns. If any questions remain, please do not hesitate to contact me.

RMF:bb

cc: Mr. Alan Giorgi (MIC:95)
Mr. Rich Reger (MIC:40)
Mr. James C. Kuhl, Sr. (MIC:92)
Mr. Curtis Stapp (MIC:92)

¹ If the penalty amount has been paid, the statute of limitations with respect to refund claims would be applicable. (See Rev. & Tax. Code, § 6902.)