

FILED & ENTERED

JUL 27 2012

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY castro DEPUTY CLERK

**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re

CARL M. LOPEZ,

Debtor(s).

CARL M. LOPEZ

Plaintiff,

vs.

**STATE OF CALIFORNIA STATE
BOARD OF EQUALIZATION,**

Defendant.

Case No. 2:12-bk-16237-RK

Chapter 7

Adv. No. 2:12-ap-01342-RK

**MEMORANDUM DECISION RE
ADVERSARY COMPLAINT TO
DETERMINE DISCHARGEABILITY OF
DEBT**

This case came on for trial before the undersigned United States Bankruptcy Judge on December 16, 2011 and February 1, 2012 on the complaint of Carl M. Lopez (the "Debtor") seeking a determination of dischargeability of a claim filed by the State of California State Board of Equalization ("SBE"). The Debtor contends that he is not liable for a portion of his former company's unpaid sales and use tax liability under California Revenue & Taxation Code ("Rev. & T. Code") § 6829. The Debtor appeared by and through his attorney of record, the Law Office of Michael W. Binning, by Michael W.

1 Binning. SBE appeared by and through its counsel of record, Wendy D. Vierra, Tax
2 Counsel. After the parties filed post-trial briefs on February 15, 2012 and February 22,
3 2012, the court took the matter under submission.

4 Having received and considered the testimony of witnesses offered by both written
5 declaration and oral testimony, having considered the documentary evidence admitted
6 into evidence, having reviewed the parties' briefs, and the arguments of counsel made
7 during trial, the court hereby issues this memorandum decision, which sets forth the
8 following findings of fact and conclusions of law pursuant to Federal Rule of Civil
9 Procedure 52(a), Federal Rules of Bankruptcy Procedure 7052 and 9014 and Local
10 Bankruptcy Rule 7052-1.

11 **FACTS**

12 On January 6, 2006, Michael P. Resk ("Resk"), as the Incorporator, filed Articles of
13 Incorporation of Hilbrick Equipment, Inc., a California Corporation, ("Hilbrick") with the
14 California Secretary of State. *Joint Pretrial Order, filed on September 15, 2011 ("JPTO")*
15 ¶ 2. Resk contributed the capital of Hilbrick. *JPTO* ¶ 3. The Debtor did not contribute
16 any funds to the capital of Hilbrick. *JPTO* ¶ 4.

17 Resk served as the President and CEO of Hilbrick at all times. *JPTO* ¶ 5. The
18 Debtor was never a director of Hilbrick. *JPTO* ¶ 6. The Debtor prepared the foundation
19 of Hilbrick's business plan, which was finalized by both the Debtor and Resk. *JPTO* ¶ 7.

20 Hilbrick was engaged in the business of equipment rental. The day-to-day
21 operations of the company took place at a rental yard, located at 9615 Cherry Avenue,
22 Fontana, California, 92335. The company's business office was located at 3822 Campus
23 Drive, Suite 221, Newport Beach, California 92660. *JPTO* ¶ 8.

24 The Debtor worked primarily at Hilbrick's rental yard in Fontana and did not have
25 an office at Hilbrick's business office in Newport Beach. *JPTO* ¶ 9. Resk worked at
26 Hilbrick's business office in Newport Beach and did not have an office at the rental yard
27 in Fontana. *JPTO* ¶ 10; Testimony of Michael P. Resk, February 1, 2012, at 9:11 a.m.
28 The Debtor was responsible for the day-to-day management of Hilbrick's rental yard in

1 Fontana, including the management, retention and termination of Hilbrick's employees.
2 *JPTO* ¶ 11. The Debtor reviewed and approved incoming vendor invoices for payment
3 by Hilbrick and held the authority to negotiate write-offs on Hilbrick's outgoing invoices.
4 *JPTO* ¶ 12.; Testimony of Michael P. Resk, February 1, 2012, at 9:11 to 9:13 a.m. and
5 9:19 to 9:21 a.m. Resk signed the lease on behalf of Hilbrick for the Fontana rental yard.
6 *JPTO* ¶ 13.

7 Resk and the Debtor opened Hilbrick's banking account at Wells Fargo Bank,
8 4590 MacArthur Blvd., Newport Beach, California. *JPTO* ¶ 14. The Debtor had signature
9 authority on Hilbrick's banking account and accessibility to Hilbrick's online banking
10 account. *JPTO* ¶ 15; Testimony of Carl M. Lopez, December 16, 2011, at 9:26 to 9:27
11 a.m., and February 1, 2012, at 9:37 and 9:48 a.m. The checks for Hilbrick's banking
12 account were kept at Hilbrick's business office in Newport Beach. *JPTO* ¶ 16; Testimony
13 of Michael P. Resk, February 1, 2012, at 9:13 to 9:14 a.m. The Debtor had use of both a
14 company debit card and a company American Express credit card, both of which he used
15 while working at Hilbrick. *JPTO* ¶ 17. The Debtor also made bank deposits for Hilbrick.
16 *JPTO* ¶ 18.

17 Resk performed accounting functions for Hilbrick, including issuing general checks
18 and payroll checks through the Quickbooks software program. *JPTO* ¶ 19; Testimony of
19 Michael P. Resk, February 1, 2012, at 9:11 to 9:12 a.m. The Debtor testified that he had
20 no access to the Quickbooks program. Testimony of Carl M. Lopez, February 1, 2012, at
21 9:28 a.m.

22 The Debtor participated in the financial operations of Hilbrick. Testimony of
23 Michael P. Resk, February 1, 2012, at 9:11 to 9:17 a.m. The Debtor attended weekly
24 business meetings with Resk during which the Debtor and Resk discussed the
25 company's finances and financial concerns. *JPTO* ¶ 20; Testimony of Michael P. Resk,
26 February 1, 2012, at 9:21 to 9:23 a.m.; Testimony of Carl M. Lopez, February 1, 2012, at
27 9:34 to 9:35 a.m. and 9:51 to 9:54 a.m. The Debtor testified that he had knowledge of
28 company sales and payables, and he alerted Resk about suppliers not being paid and

1 about cash flow problems. Testimony of Carl M. Lopez, February 1, 2012, at 9:21 to 9:23
2 a.m., 9:34 to 9:36 a.m. and 9:51 to 9:54 a.m. The Debtor testified that he specifically
3 discussed and reviewed company payables with Resk. Testimony of Carl M. Lopez,
4 February 1, 2012, at 9:29 to 9:33 a.m.

5 The Debtor testified that he did not sign company checks, while Resk testified that
6 Debtor signed five percent of the checks, including payroll checks. Testimony of Michael
7 P. Resk, February 1, 2012, at 9:13 to 9:15 a.m.; Testimony of Carl M. Lopez, February 1,
8 2012, at 9:37 to 9:38 a.m. The Debtor testified that the actual decisions to pay company
9 payables were made by Resk. Testimony of Carl M. Lopez, February 1, 2012, at 9:43
10 a.m.

11 The Debtor and Hilbrick entered into a Stock Incentive Agreement dated
12 December 6, 2006. *JPTO* ¶ 21. Pursuant to the agreement, the Debtor was to receive
13 shares of stock once Hilbrick became more profitable. *JPTO* ¶ 21. The Debtor also had
14 an agreement with Resk that he would eventually share in Hilbrick's profits once the
15 company became more profitable. *JPTO* ¶ 22.

16 Hilbrick collected sales tax reimbursement during the relevant period of July 1,
17 2007 through December 31, 2007 (the "Relevant Period"). *JPTO* ¶ 23. Hilbrick did not
18 pay SBE \$61,194.00 in sales taxes that it collected during the Relevant Period. *JPTO*
19 ¶ 24. The Debtor prepared, filed and signed each of the state sales and use tax returns
20 for Hilbrick during the Relevant Period. *JPTO* ¶ 25.; Testimony of Carl M. Lopez,
21 February 1, 2012, at 9:30 to 9:31 a.m. and 9:42 to 9:46 a.m.; Testimony of Michael P.
22 Resk, February 1, 2012, at 9:17 to 9:18 a.m.; Exhibits A and B (company sales tax
23 returns signed by the Debtor for calendar quarters July to September 2007 and October
24 to December 2007).

25 Hilbrick made payments to its creditors and its employees (including the Debtor)
26 during the Relevant Period. *JPTO* ¶ 26; Testimony of Carl M. Lopez, February 1, 2012,
27 at 9:29 to 9:33 a.m. The Debtor was aware that Hilbrick had an outstanding sales and
28 use tax liability with SBE when Hilbrick made payments to creditors and employees

1 during the Relevant Period. *JPTO* ¶ 27; Testimony of Carl M. Lopez, February 1, 2012,
2 at 9:32 to 9:34 a.m. On December 26, 2007, in his capacity as Hilbrick's Chief Operating
3 Officer, the Debtor entered into an Installment Agreement with SBE on behalf of Hilbrick.
4 *JPTO* ¶ 28; Testimony of Carl M. Lopez, February 1, 2012, at 9:43 to 9:44 a.m. The
5 Debtor communicated with SBE regarding Hilbrick's outstanding sales and use tax
6 liability. *JPTO* ¶ 29.

7 Hilbrick terminated its business operations effective as of February 1, 2008. *JPTO*
8 ¶ 30. On January 2, 2009, SBE issued a notice of determination to the Debtor in the
9 amount of \$57,314.23 for personal liability as a corporate officer of Hilbrick pursuant to
10 Rev. and T. Code § 6829 for the self-assessed liabilities incurred during the period July 1,
11 2007 through December 31, 2007. *JPTO* ¶ 31. The January 2, 2009 tax assessment
12 against the Debtor became final on February 1, 2009. *JPTO* ¶ 32.

13 **ANALYSIS**

14 **I. Burden of Proof**

15 The parties dispute whether the Debtor or SBE bears the burden of proof. The
16 Supreme Court has stated "that in the absence of modification expressed in the
17 Bankruptcy Code the burden of proof on a tax claim in bankruptcy remains where the
18 substantive tax law puts it." *Raleigh v. Illinois Department of Revenue*, 530 U.S. 15, 26
19 (2000). SBE cites *Raleigh* and argues that because the Debtor bears the burden of proof
20 under California law he also bears the burden of proof in this case. See *Modern Paint &*
21 *Body Supply, Inc. v. State Board of Equalization*, 87 Cal. App. 4th 703, 708 (2001) (under
22 substantive tax law of California, a party challenging a tax assessment has the burden of
23 proving that the assessment is wrong). *Raleigh*, however, addressed the burden of proof
24 in claim objection litigation. This case does not involve an objection to SBE's claim, but
25 instead the issue is whether the claim is dischargeable.

26 "The [g]overnment bears the burden of proving by a preponderance of the
27 evidence that a tax debt is nondischargeable." *United States v. Clayton*, 468 B.R. 763,
28 769-770 (M.D.N.C. 2012), citing *Grogan v. Garner*, 498 U.S. 279, 286-287 (1991). "This

1 policy promotes the Bankruptcy Code's goal of providing a 'fresh start' to the 'honest but
2 unfortunate debtor' while recognizing that the Bankruptcy Code does not afford 'a
3 completely unencumbered new beginning.'" *Id.* at 770; *see also Hartford Casualty*
4 *Insurance Co. v. Fields (Matter of Fields)*, 926 F.2d 501, 503 (5th Cir. 1991) ("As with all
5 such claims, the party seeking an exception to discharge bears the burden of proof as to
6 nondischargeability."); *United States v. Hindenlang (In re Hindenlang)*, 164 F.3d 1029,
7 1034 (6th Cir. 1999) (recognizing that the government has the burden under § 523(a)(1));
8 *United States v. Fegeley (In re Fegeley)*, 118 F.3d 979, 983 (3d Cir. 1997) (same); *United*
9 *States v. Jacobs (In re Jacobs)*, 490 F.3d 913, 921 (11th Cir. 2007) (same).

10 Thus, because SBE opposes the discharge, it bears the burden of proof.

11 **II. The Debtor's Tax Liability is Nondischargeable**

12 Section 523(a)(1)(A) of the Bankruptcy Code creates an exception to an
13 individual's discharge for certain tax debts:

14 (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of
15 this title does not discharge an individual debtor from any debt—

16 (1) for a tax or a customs duty—

17 (A) of the kind and for the periods specified in section . . .
18 507(a)(8) of this title, whether or not a claim for such tax was filed
or allowed[.]

19 11 U.S.C. § 523(a)(1)(A).

20 The Ninth Circuit has held that a sales and use tax imposed under Rev. & T. Code
21 § 6869 is a "tax" within the meaning of § 523(a)(1) and is "of a kind" specified in
22 § 507(a)(8). *See Ilko v. California State Board of Equalization (In re Ilko)*, 651 F.3d 1049,
23 1054-1057 (9th Cir. 2011). The parties have stipulated that if the court finds that the
24 Debtor is a responsible person under Rev. & T. Code § 6829 and is therefore personally
25 liable for the unpaid sales taxes owed by Hilbrick, the tax liability is not dischargeable
26 since it was assessed against the Debtor within 240 days of the date of the filing of the
27 bankruptcy petition. *JPTO* ¶ 34; 11 U.S.C. §§ 507(a)(8)(A) and 523(a)(1). Thus, if the
28

1 taxes were properly assessed against the Debtor as a responsible person under
2 Revenue & Tax Code § 6869, they are are nondischargeable under § 523(a)(1)(A).

3 Revenue & Tax Code § 6869 provides, in pertinent part, as follows:

4 Upon the termination, dissolution, or abandonment of the business . . .
5 **any officer, member, manager, partner, or other person having control or**
6 **supervision of, or who is charged with the responsibility for the filing**
7 **of returns or the payment of tax, or who is under a duty to act for the**
8 **corporation, partnership, limited partnership, limited liability partnership,**
9 **or limited liability company in complying with any requirement of this part,**
10 **shall . . . be personally liable for any unpaid taxes and interest and**
11 **penalties on those taxes, if the officer, member, manager, partner, or**
12 **other person willfully fails to pay or to cause to be paid any taxes**
13 **due from the corporation, partnership, limited partnership, limited liability**
14 **partnership, or limited liability company pursuant to this part.**

15 Rev. & T. Code § 6869(a) (emphasis added).

16 California Code of Regulations Title 18, § 1702.5 (“CCR § 1702.5”) interprets Rev.
17 & T. Code § 6869. Specifically, CCR § 1702.5 states that any “responsible person who
18 willfully fails to pay or to cause to be paid” taxes due under Rev. & T. Code § 6869 shall
19 be personally liable. CCR § 1702.5(a).

20 The parties agree that Hilbrick terminated its business operations as of February
21 1, 2008. Thus, the only issues that the court must decide is whether the Debtor is a
22 “responsible person” and whether he “willfully” failed to pay taxes due under Rev. & T.
23 Code § 6869. As discussed below, SBE has shown that the Debtor was a responsible
24 person and willfully failed to pay taxes within the meaning of Rev. & T. Code § 6829.

25 **1. The Debtor is a “Responsible Person”**

26 The clear language of the statute imposes liability on any “person having control or
27 supervision of, or who is **charged with the responsibility for the filing of returns or**
28 **the payment of tax.”** Rev. & T. Code § 6829 (emphasis added). Additionally, the
California Code of Regulations defines a “responsible person” as follows:

Responsible Person. As used herein, the term “responsible person”
means any officer, member, manager, employee, director, shareholder,
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 has a duty to act for the corporation, partnership, limited
partnership, limited liability partnership, or limited liability company in
complying with any provision of the Sales and Use Tax Law. The term

1 “responsible person” does not include any person who would otherwise
2 qualify but is serving in that capacity as an unpaid volunteer for a non-
3 profit organization.

4 CCR § 1702.5(b)(1).

5 In this case, the Debtor may be determined to be as a “responsible person” within
6 the meaning of Rev. & T. Code § 6829 for two reasons. First, it is undisputed that the
7 Debtor prepared, signed and filed Hilbrick’s sales and use tax returns for the Relevant
8 Period. Thus, on that basis alone, the court finds that Debtor is a “responsible person”
9 within the meaning of Rev. & T. Code § 6829.

10 Additionally, and alternatively, the court finds that the Debtor had the requisite
11 control and responsibility to ensure Hilbrick complied with Rev. & T. Code § 6829. The
12 evidence shows that the Debtor served as a manager and Hilbrick’s Chief Operating
13 Officer. Additionally, the evidence further shows that the Debtor had signature authority
14 on Hilbrick’s banking account and accessibility to Hilbrick’s online banking account. Both
15 Resk and the Debtor testified that the Debtor had input into which creditors to pay for
16 each given month, and as Resk testified, at least on one occasion the Debtor alone
17 authorized the payment of particular vendors and payroll since the Debtor was an
18 authorized signatory on the company’s bank account.

19 Thus, despite the fact that the Debtor routinely discussed employment matters and
20 bills with Resk and considered Resk to be the final decision maker in that regard, the
21 preponderance of the evidence shows that the Debtor had the requisite control and
22 responsibility to ensure Hilbrick complied with Rev. & T. Code § 6829. Thus, the court
23 finds that the Debtor is a “responsible person” within the meaning of Rev. & T. Code
24 § 6829.

25 **2. The Failure to Pay was “Willful”**

26 Rev. & T. Code § 6829(d) states that the phrase “‘willfully fails to pay or to cause
27 to be paid’ means that the failure was the result of an intentional, conscious, and
28 voluntary course of action.” The California Code of Regulations adds, “A failure to pay or

1 to cause to be paid may be willful even though such failure was not done with a bad
2 purpose or evil motive.” CCR § 1702.5(b)(2).

3 In this case, Hilbrick made payments to its creditors and its employees (including
4 the Debtor) during the Relevant Period. The Debtor was aware that Hilbrick had an
5 outstanding sales and use tax liability with SBE when Hilbrick made these payments.
6 Additionally, as stated above, the Debtor had input into which creditors to pay for each
7 given month, and at least on one occasion the Debtor alone authorized the payment of
8 particular vendors and payroll. The Debtor was well aware of the delinquent taxes owed
9 to SBE as the Debtor personally prepared the sales tax returns. The Debtor also testified
10 that he was aware of Hilbrick’s delinquency, and the Debtor entered into an installment
11 agreement with SBE—which he signed on behalf of Hilbrick.

12 Thus, the court finds that the Debtor’s failure to pay taxes owed to SBE was the
13 result of the Debtor’s intentional, conscious and voluntary course of action. Accordingly,
14 the court finds that that the Debtor’s failure to pay taxes was “willful” within the meaning
15 of Rev. & T. Code § 6829. Because the court finds that the Debtor was a responsible
16 person who willfully failed to pay, or to cause to be paid, sales taxes due from Hilbrick
17 under Rev. & T. Code § 6829, the court determines that he is liable for the taxes.

18 This determination of liability may be a harsh result because the Debtor undertook
19 these actions during his employment at Hilbrick under the supervision of Resk, Hilbrick’s
20 principal, and it appears that Resk actually made the decisions for Hilbrick on which bills
21 to pay and not to pay, including the SBE’s tax liabilities, and signed most, if not all, of the
22 company check. At Resk’s behest, and with the Debtor’s knowledge, the Debtor
23 became a signatory on Hilbrick’s checking account, became Hilbrick’s chief operating
24 officer, prepared, filed and signed Hilbrick’s sales tax returns showing tax due, had
25 knowledge of the company’s sales, payables and cash flow, and participated in decisions
26 to pay employees and creditors other than the SBE for the unpaid sales taxes, knowing
27 that Hilbrick had outstanding sales tax liabilities. While the Debtor’s situation is
28 unfortunate, the court concludes that he may be properly determined to be a responsible

1 person who willfully failed to pay state sales taxes because he had the authority to pay
2 the taxes and knowingly participated in decisions for the company to pay debts other than
3 the taxes. While Resk may be the most responsible person, this does not relieve the
4 Debtor from liability under Rev. & T. Code § 6829 because the test is not who is most
5 responsible, but who is responsible.

6 **CONCLUSION**

7 Based on the evidence presented at trial as discussed above, the court finds that
8 the SBE has shown by a preponderance of the evidence that the tax liability was properly
9 assessed by the SBE against the Debtor under Rev. & T. Code § 6829 because the
10 Debtor was a responsible person and willfully failed to pay Hilbrick's sales taxes for the
11 period of July 1, 2007 through December 31, 2007. The court thus finds that the SBE
12 has met its burden of proving by a preponderance of the evidence that the tax liability
13 assessed against the Debtor with respect to Hilbrick's unpaid sales taxes for the subject
14 calendar quarters pursuant to Rev. & T. Code § 6829 is non-dischargeable pursuant to
15 11 U.S.C. § 523(a)(1)(A).

16 Accordingly, this debt is excepted from discharge pursuant to 11 U.S.C.
17 § 523(a)(1)(A), and the SBE is ordered to submit a proposed judgment in this adversary
18 proceeding consistent with this memorandum decision within 30 days of entry of this
19 memorandum decision.

20 **IT IS SO ORDERED.**

21 ###

22
23 

24 DATED: July 27, 2012

25 United States Bankruptcy Judge
26
27
28

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*) **MEMORANDUM DECISION RE ADVERSARY COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT** was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of **July 27, 2012**, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below:

- Victoria C Baker Victoria.Baker@boe.ca.gov
- Michael W Binning mbinning@binninglaw.com
- Karen S Naylor (TR) acanzone@burd-naylor.com, knaylor@ecf.epiqsystems.com
- United States Trustee (SA) ustpreion16.sa.ecf@usdoj.gov
- Wendy D Vierra wendy.vierra@boe.ca.gov

II. SERVED BY THE COURT VIA U.S. MAIL: A copy of this notice and a true copy of this judgment or order was sent by U.S. Mail, first class, postage prepaid, to the following person(s) and/or entity(ies) at the address(es) indicated below:

III. TO BE SERVED BY THE LODGING PARTY: Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s) and/or email address(es) indicated below: