

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: DANIEL ILKO,

Debtor,

DANIEL ILKO,

Appellant,

v.

CALIFORNIA STATE BOARD OF
EQUALIZATION,

Appellee.

No. 09-60049

BAP No.
09-1119-JuRMo

ORDER

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Montali, Rimel, and Jury, Bankruptcy Judges, Presiding

Argued and Submitted
June 6, 2011—Pasadena, California

Filed June 27, 2011

Before: Stephen S. Trott and Pamela Ann Rymer,
Circuit Judges, and Ralph R. Beistline, Chief District Judge.*

*The Honorable Ralph R. Beistline, Chief District Judge for the U.S. District Court for Alaska, sitting by designation.

COUNSEL

A. Lavar Taylor, Law Offices of A. Lavar Taylor, Santa Ana, California, for the debtor-appellant.

Leslie Branman Smith, Deputy Attorney General for the State of California, San Diego, California, for the appellee.

ORDER

We affirm the decision of the Bankruptcy Appellate Panel for the reasons stated in its Memorandum dated October 15, 2009, attached to this Order as the Appendix.

AFFIRMED.

APPENDIX

FILED

OCT 15 2009

SUSAN M SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP No.	SC-09-1119-JuRMo
DANIEL ILKO,)	Bk. No.	01-07056
Debtor.)	Adv. No.	08-90324
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CALIFORNIA STATE BOARD OF EQUALIZATION,)		
Appellant,)		
v.)		
DANIEL ILKO,)	M E M O R A N D U M ¹	
Appellee.)		

Argued and Submitted on September 23, 2009
at Pasadena, California

Filed - October 15, 2009

Appeal from the United States Bankruptcy Court
for the Southern District of California

Hon. James W. Meyers, Bankruptcy Judge, Presiding.

Before: JURY, RIMEL,² and MONTALI, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

² Hon. Whitney Rimel, Bankruptcy Judge for the Eastern District of California, sitting by designation.

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1 Appellant California State Board of Equalization (the
2 "Board") appeals the bankruptcy court's order granting summary
3 judgment in favor of debtor Daniel Ilko in a proceeding relating
4 to the discharge of California sales taxes.

5 More than two years after debtor received his chapter 7
6 discharge, the Board assessed debtor \$105,334.49³ as the
7 responsible person for unpaid sales taxes owed by his
8 corporation Executive Auto Sales, Inc. ("EAS"). After
9 exhausting his administrative remedies, debtor reopened his
10 bankruptcy case in June 2008 and filed an adversary complaint
11 seeking a determination that his tax debt was discharged.

12 On cross motions for summary judgment, the bankruptcy court
13 ruled for debtor, finding that the tax debt was discharged,
14 presumably because it did not meet one or more of the
15 requirements for a nondischargeable tax under §§ 523(a)(1) and
16 507(a)(8)(A)(iii).⁴

17 We follow the panel's prior decision in George v. Cal.
18 State Bd. of Equalization (In re George), 95 B.R. 718 (9th Cir.
19 BAP 1989) aff'd 905 F.2d 1540 (9th Cir. 1990) and hold that
20 debtor's responsible person liability to the Board was a "tax"

21
22
23 ³ This amount consisted of \$33,542.25 in tax, \$47,442.23 in
24 interest and \$24,350.01 in penalties. The Board conceded that
the penalty portion of the assessment was discharged.

25 ⁴ Unless otherwise indicated, all chapter, section and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
27 to the Federal Rules of Bankruptcy Procedure, as enacted and
28 promulgated prior to October 17, 2005, the effective date of most
of the provisions of the Bankruptcy Abuse Prevention and Consumer
Protection Act of 2005, Pub. L. 109-8, April 20, 2005, 119 Stat.
23, as debtor's case was filed prior to its effective date.

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1 for purposes of dischargeability under § 523(a)(1). We also
2 follow, as we must, the panel's decision in Raiman v. State Bd.
3 of Equalization (In re Raiman), 172 B.R. 933 (9th Cir. BAP
4 1994), which held that the California sales tax at issue here
5 was a tax "on or measured by gross receipts" under
6 § 507(a)(8)(A). Finally, we determine that debtor's tax
7 liability was not assessed before, but still assessable under
8 California law after the commencement of his case as required
9 under § 507(a)(8)(A)(iii).

10 Accordingly, for the reasons set forth below, we hold that
11 debtor's tax debt was excepted from discharge and REVERSE.

12 I. FACTS

13 On May 1, 1993 debtor obtained a seller's permit in the
14 name of EAS, a wholesale car dealership. Debtor was the
15 president and majority shareholder for the business.

16 EAS was obligated to pay sales taxes to the State of
17 California under Cal. Rev. & Tax Code § 6051⁵, which imposes a
18 tax on all retailers "[f]or the privilege of selling tangible
19 personal property at retail. . . ." The Board audited the sales
20 tax returns of EAS for the period of October 1, 1993 through
21 September 30, 1996. As a result, EAS became indebted to the
22 Board through a final assessment in the amount of \$85,376.58
23 that became due and payable on June 20, 1997. EAS made some
24 payments towards this assessment.

25 On July 3, 2001 debtor filed his chapter 7 bankruptcy
26

27 _____
28 ⁵ All references to the Cal. Rev. & Tax Code are referred
to below as the "Tax Code".

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1 petition. His Schedule F reflected the EAS tax debt to the
2 Board as a contingent liability. The debtor received his
3 discharge on October 3, 2001.

4 On March 31, 2003 EAS ceased operations without paying the
5 full amount of the audit assessment.

6 On November 10, 2005 the Board issued a dual determination
7 for responsible person liability to debtor under Tax Code
8 § 6829⁶ for the unpaid portion of the audit assessment against
9 EAS. Debtor pursued his administrative remedies with the Board
10 asserting, among other things, that the tax debt was discharged
11 in his bankruptcy. On August 7, 2008 the Board determined that
12 the dual determination was timely and debtor's tax debt was not

13

14

15

16 ⁶ Tax Code § 6829(a) provides:

17 Upon the termination, dissolution, or abandonment of
18 the business of a corporation, partnership, limited
19 partnership, limited liability partnership, or limited
20 liability company, any officer, member, manager,
21 partner, or other person having control or supervision
22 of, or who is charged with the responsibility for the
23 filing of returns or the payment of tax, or who is
24 under a duty to act for the corporation, partnership,
25 limited partnership, limited liability partnership, or
26 limited liability company in complying with any
27 requirement of this part, shall, notwithstanding any
28 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.

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1 discharged in his bankruptcy case.⁷

2 The bankruptcy court granted debtor's motion to reopen his
3 bankruptcy case by order entered on June 23, 2008. On July 30,
4 2008 debtor filed an adversary complaint seeking a determination
5 from the bankruptcy court that his responsible person tax
6 liability was discharged. Debtor asserted, by way of motion for
7 summary judgment, that the statute of limitations for assessment
8 of his tax liability had expired prior to his bankruptcy filing.

9 The Board filed its cross motion for summary judgment on
10 February 12, 2009, asserting that the statute of limitations for
11 assessing the tax did not commence until EAS had ceased
12 operations in March 2003, after debtor had filed his bankruptcy
13 case. Thus, the Board argued the tax debt was nondischargeable
14 under § 507(a)(8)(A)(iii) because the tax was not assessed, but
15 remained assessable under California law.

16 The bankruptcy court ruled orally in debtor's favor at the
17 hearing. The order granting summary judgment for debtor and
18 denying the Board's motion was entered on April 27, 2009. The
19 Board timely appealed the bankruptcy court's order.⁸

20

21

22 ⁷ The Board's decision did not preclude the bankruptcy
23 court from exercising its exclusive jurisdiction to determine
24 whether the debtor's tax liability was discharged. Sasson v.
Sokoloff (In re Sasson), 424 F.3d 864, 873 (9th Cir. 2005).

25 ⁸ The Clerk's office for the Bankruptcy Appellate Panel
26 filed an Order Re Waiver of Separate Judgment Requirement which
27 required the Board to file and serve on opposing counsel a
28 written response that a separate judgment had been issued by
Friday, August 21, 2009. No separate judgment has been entered
and, therefore, the separate document requirement is waived.
Bankers Trust Co. v. Mallis, 435 U.S. 381, 388 (1978).

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1 **II. JURISDICTION**

2 The bankruptcy court had jurisdiction over this proceeding
3 under 28 U.S.C. §§ 1334 and 157(b)(2)(I). We have jurisdiction
4 under 28 U.S.C. § 158.

5 **III. ISSUE**

6 Whether the bankruptcy court erred in finding that
7 debtor's tax debt was discharged in his bankruptcy.

8 **IV. STANDARD OF REVIEW**

9 Since this case arises on summary judgment, the standard of
10 review is de novo. Marshack v. Orange Comm'l Credit (In re
11 Nat'l Lumber & Supply, Inc.), 184 B.R. 74, 77 (9th Cir. BAP
12 1995).

13 "[S]ummary judgment is proper 'if the pleadings,
14 depositions, answers to interrogatories and admissions on file,
15 together with the affidavits, if any, show that there is no
16 genuine issue as to any material fact and that the moving party
17 is entitled to a judgment as a matter of law.'" Celotex Corp.
18 v. Catrett, 477 U.S. 317, 322 (1986). In making this
19 determination, conflicts are resolved by viewing all facts and
20 reasonable inferences in the light most favorable to the
21 non-moving party. United States v. Diebold, Inc., 369 U.S. 654,
22 655 (1962).

23 **V. DISCUSSION**

24 The purpose of the discharge is to give the debtor a fresh
25 start. Grogan v. Garner, 498 U.S. 279, 286 (1991). A chapter 7
26 debtor is generally granted a discharge of all debts that arose
27 before the filing of the bankruptcy petition "[e]xcept as
28 provided in section 523 of this title." § 727(b). "Most tax

1 claims are nondischargeable in bankruptcy." State Bd. of
2 Equalization v. Leal (In re Leal), 366 B.R. 377, 380 (9th Cir.
3 BAP 2007).

4 Section 523(a)(1)(A) makes certain tax debts
5 nondischargeable in chapter 7, including those "of the kind" and
6 for the periods specified in § 507(a)(8).⁹ Section 507(a)(8)(A)
7 gives unsecured tax claims priority if they are for a tax "on or
8 measured by . . . gross receipts for a taxable year ending on or
9 before the date of the filing of the petition" and are taxes
10 "not assessed before, but assessable, under applicable law
11 . . . , after, the commencement of the case."¹⁰
12 § 507(a)(8)(A)(iii). Thus, relevant to this appeal, the general
13 discharge under § 727(b) does not discharge a debtor from
14 liability for a tax that was unassessed at the time debtor filed
15 for bankruptcy but still assessable by law.

16
17 _____
18 ⁹ Section 523(a)(1)(A) provides:

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

21 (1) for a tax or a customs duty-

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

24 ¹⁰ An exception to this grant of priority are taxes
25 excepted from discharge under § 523(a)(1)(B) (taxes for which no
26 return was filed) and § 523(a)(1)(C) (taxes for which a false
return was filed).

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1 **A. Debtor's Responsible Person Liability Is A "Tax" Under**
2 **§ 523(a) (1)**

3 We consider the threshold issue whether debtor's
4 responsible person liability under Tax Code § 6829 for the
5 unpaid sales taxes of EAS is a "tax" within the meaning of
6 § 523(a) (1).

7 The Board contends that our prior decision in George, 95
8 B.R. 718 (9th Cir. BAP 1989) aff'd 905 F.2d 1540 (9th Cir. 1990)
9 provides the answer to this question.¹¹ In George, the panel
10 held that the debtor's personal liability under Tax Code § 6829
11 was a "tax" for purposes of nondischargeability under § 523. At
12 oral argument, debtor's counsel conceded that George was
13 controlling authority on this issue. Because we do not find
14 George distinguishable from this case, we adopt its holding
15 since we are bound by principles of stare decisis and follow our
16 own decisions. See State v. Rowley (In re Rowley), 208 B.R.
17 942, 944 (9th Cir. BAP 1997) (stating that we are bound by prior
18 Panel decisions).

19 Very briefly summarized, the panel in George applied the
20 four-part test set forth in County Sanitation Dist. v. Lorber

21 _____
22 ¹¹ The panel's decision in George was affirmed by the Ninth
23 Circuit in an unpublished decision, albeit for a different
24 reason. George, 905 F.2d 1540 (9th Cir. 1990). Under 9th Cir.
25 R. 36-3, citation to unpublished dispositions issued before
26 January 1, 2007 may not be cited to or by the courts of this
27 circuit except in certain circumstances, none of which apply
28 here. The rule further provides that "Unpublished dispositions
and orders of this Court are not binding precedent, except when
relevant under the doctrines of law of the case, res judicata,
and collateral estoppel." None of those doctrines is applicable
to this appeal. Accordingly, we neither discuss the unpublished
decision nor rely upon it.

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1 Indus. of Cal. (In re Lorber Indus. of Cal.), 675 F.2d 1062,
2 1066 (9th Cir. 1982) to determine whether the debtor's personal
3 liability under Tax Code § 6829 was a "tax" for purposes of
4 nondischargeability. George, 95 B.R. at 720. In Lorber, the
5 Ninth Circuit defined a "tax" as: (a) an involuntary pecuniary
6 burden, regardless of name, laid upon individuals or property;
7 (b) imposed by, or under authority of the legislature; (c) for
8 public purposes, including the purposes of defraying expenses of
9 government or undertakings by it; and (d) under the police or
10 tax power of the state. The panel concluded that the debtor's
11 personal liability was a "tax" because it was "an involuntary
12 pecuniary burden imposed by the legislature under the taxing
13 power of the state for public purposes." George, 95 B.R. at
14 720.¹²

15 In addition, we recognize the holding and rationale set
16 forth in United States v. Sotelo, 436 U.S. 268, 275 (1978) as
17 persuasive authority for deciding that debtor's responsible
18 person liability under Tax Code § 6829 is a "tax" for purposes
19 of nondischargeability. In that case, the Internal Revenue
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22

23 ¹² Since our decision in George, 95 B.R. 718, the Ninth
24 Circuit added a fifth element to the Lorber test in George v.
25 Uninsured Employers Fund (In re George), 361 F.3d 1157, 1162-63
26 (9th Cir. 2004). In that case, the court held that a claim
27 asserted by a government entity is not a dischargeable excise tax
28 if granting priority to the claim could disadvantage any private
creditors with like claims under the relevant statute. The
addition of a fifth element has no effect on the disposition in
this appeal.

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1 Service assessed the debtor a penalty under 26 U.S.C. § 6672¹³
2 for failing to pay over withholding taxes he had collected in
3 his capacity as an officer of a corporation. The relevant
4 statute, 26 U.S.C. § 6672, imposed personal liability on those
5 individuals whose control over the financial affairs of a
6 business entity required them to collect and pay over taxes
7 withheld from employees.

8 The Court of Appeals found that the prior Bankruptcy Act's
9 § 17(a)(1)(e), formerly codified at 11 U.S.C. § 35, the
10 predecessor to § 523(a), and § 507(a)(7)(C) [now § 507(a)(8)(C)]
11 was inapplicable to the debtor because he was not obligated by
12 law to collect and withhold the taxes. The Supreme Court
13 reversed, concluding that the debtor's liability under 26 U.S.C.
14 § 6672 necessarily meant that as an officer he was supposed to
15 "'collect, truthfully account for, and pay over' the taxes and
16 that he willfully failed to meet one or more of these
17 obligations." Id. at 274.

18 The court also observed that although the taxes were
19 collected or withheld from the corporation's employees they were
20 not paid over to the Government. Id. at 275. The court noted
21 "[i]t is therefore clear that the [26 U.S.C.] § 6672 liability
22

23 ¹³ 26 U.S.C. § 6672 provides:

24 Any person required to collect, truthfully account for,
25 and pay over any tax imposed by this title who
26 willfully fails to collect such tax, or truthfully
27 account for and pay over such tax, or willfully
28 attempts in any manner to evade or defeat any such tax
or the payment thereof, shall, in addition to other
penalties provided by law, be liable to a penalty equal
to the total amount of the tax evaded, or not
collected, or not accounted for and paid over. . . .

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1 was not imposed for a failure on the part of respondent to
2 collect taxes, but was rather imposed for his failure to pay
3 over taxes that he was required both to collect and to pay over.
4 Under these circumstances, the most natural reading of the
5 statutory language leads to the conclusion that respondent
6 'collected or withheld' the taxes within the meaning of
7 Bankruptcy Act § 17a(1)(e)." Id.

8 Finally, the court opined that the funds at issue were
9 "unquestionably" taxes at the time they were collected and the
10 Government's attempt to later recover them did not change their
11 "essential character" as taxes for purposes of the Bankruptcy
12 Act. Id. The court further found that the liability imposed
13 under 26 U.S.C. § 6672 was not penal in nature, but rather was a
14 means of ensuring that withholding taxes were paid. Id.
15 Therefore, the court held that the fact that the personal
16 liability was conditioned on the corporation's failure to pay
17 [withholding taxes] did not render the tax liability
18 dischargeable under section Bankruptcy Act § 17(a)(1)(e).

19 The court's reasoning in Sotelo is applicable here. Tax
20 Code § 6829 and 26 U.S.C. § 6672 are similar. Debtor's
21 liability for the unpaid sales taxes of EAS was established in
22 the administrative hearing before the Board. The character of
23 the funds as "taxes" did not change simply because the Board
24 sought to recover them from debtor rather than EAS. Moreover,
25 Tax Code § 6829 allows for the aggressive collection of sales
26 taxes from responsible persons to ensure that they are paid over
27 to the State of California. In sum, the fact that debtor's
28 personal liability was conditioned on EAS's failure to pay the

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1 taxes before its termination did not render debtor's tax
2 liability dischargeable.

3 For all these reasons, we hold that debtor's responsible
4 person liability for the unpaid sales taxes of EAS is a debt for
5 a "tax" under § 523.

6 **B. Debtor's "Tax" Debt Under § 523(a) (1) Is "Of the Kind"**
7 **Specified In § 507(a) (8)**

8 Having established that debtor's liability is a tax under
9 § 523(a) (1), we next consider whether it is "of the kind"
10 specified in § 507(a) (8). Section 507(a) (8) lists many types of
11 taxes that are accorded priority including, but not limited to,
12 taxes on or measured by income or gross receipts (subsection A);
13 a tax required to be collected or withheld and for which the
14 debtor is liable in whatever capacity (subsection C); and an
15 excise tax (subsection E).

16 The Board contends that the responsible person tax
17 liability imposed on debtor was "of the kind" specified in
18 § 507(a) (8) (A) because it was a tax "on or measured by gross
19 receipts". The Board maintains we are bound by Raiman, 172 B.R.
20 933, which held that the California sales tax imposed under Tax
21 Code § 6051 was a tax on or measured by gross receipts under
22 § 507(a) (8) (A).

23 Debtor asserts the holding in Raiman was incorrect. He
24 contends that in Raiman the debtor posed the wrong question and
25 that the test for determining whether a tax is a gross receipts
26 tax is not whether there are deductions from the tax, but
27
28

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1 instead what is the base on which the tax is imposed.¹⁴ Debtor
2 contends that the California sales tax does not meet the test
3 laid out in Raiman for a gross receipts tax, i.e., a tax "on the
4 entire earnings of a business."

5 The panel in Raiman was presented with, and decided, the
6 exact question we are faced with here – whether the California
7 sales tax imposed on a debtor under Tax Code § 6051 was a tax
8 "on or measured by gross receipts" under § 507(a)(8)(A).
9 Relying on traditional canons of statutory interpretation, the
10 panel construed the phrase "gross receipts" in § 507(a)(8)(A) as
11 sufficiently broad to encompass the California sales tax under
12 Tax Code § 6051.

13 We agree with the Board that we are bound by Raiman under
14 principles of stare decisis. Although Raiman did not involve
15 responsible person liability under Tax Code § 6829, that
16 distinction is irrelevant. Tax Code § 6829 does not
17 differentiate what types of taxes a responsible person may be
18 liable for, but simply imposes the liability on responsible
19 persons when certain conditions are met. We also observe that
20 it is a question of federal law whether the tax debt falls
21 within the purview of § 507(a)(8). George, 95 B.R. at 720 n. 4.
22 Therefore, we can properly rely on Raiman.

23 Although the issue was raised, the Raiman panel did not
24

25 _____
26 ¹⁴ In Raiman, the debtor argued that to fall within the
27 scope of a tax on "gross receipts" under § 507(a)(7)(A) [now
28 § 507(a)(8)(A)], California's sales tax must be calculated based
on the total receipts of a taxpayer, and that a tax on anything
less than all of those receipts is not a tax on gross receipts
and is therefore dischargeable. 172 B.R. at 939.

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1 decide whether the California sales tax might also be an "excise
2 tax" within the meaning of § 507(a)(8)(E). The bankruptcy court
3 in George decided that the California sales tax was an excise
4 tax, but the panel did not address that issue on appeal since
5 the "obligation arose within three years of the petition filing
6 and thus the 'staleness' exception to nondischargeability under
7 § 523(a)(1)(A) and § 507(a)(7)(E) [now § 507(a)(8)(E)] [was] not
8 at issue." 95 B.R. at 720 n. 4. Whether the California sales
9 tax is an excise tax is an issue left open in this Circuit.

10 Debtor argues that debtor's personal liability for EAS's
11 unpaid sales taxes, if a tax at all, is a dischargeable excise
12 tax under § 507(a)(8)(E) because the look back periods had
13 expired pre-bankruptcy.¹⁵ At oral argument, the Board conceded
14 that its claim against debtor for the unpaid sales taxes of EAS
15 was an excise tax. Although not dispositive, California also
16 describes the sales tax imposed under Tax Code § 6051 as an
17 "excise" tax. Raiman, 172 B.R. at 940 citing Livingston Rock &
18 Gravel Co. v. De Salvo, 136 Cal. App.2d 156, 288 P.2d 317, 319
19

20 ¹⁵ Section 507(a)(8) gives allowed unsecured claims of
21 governmental units eighth priority for an

22 (E) excise tax on--

23 (i) a transaction occurring before the date of the
24 filing of the petition for which a return, if required,
25 is last due, under applicable law or under any
26 extension, after three years before the date of the
27 filing of the petition; or

28 (ii) if a return is not required, a transaction
occurring during the three years immediately preceding
the date of the filing of the petition[.]

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1 (Cal. Ct. App. 1955). Finally, the Ninth Circuit explained that
2 the term "'excise taxes' has traditionally been used in the
3 United States to refer to taxes on 'the sale of a specified
4 commodity' measured by value or quantity, such as alcohol,
5 tobacco, or motor fuel, as opposed to taxes on income." George,
6 361 F.3d at 1163. Taken together, the above discussion
7 persuades us that the California sales tax falls under the
8 umbrella of an excise tax.

9 Consequently, we perceive a potential overlap between the
10 provisions for taxes "on or measured by gross receipts" under
11 § 507(a)(8)(A) and excise taxes under § 507(a)(8)(E) which we
12 must resolve since the two provisions can lead to conflicting
13 consequences for debtor. Under the gross receipts provision,
14 debtor's tax debt is excepted from discharge, but under the
15 excise tax provision it would be discharged as "stale".

16 We simply focus on the language of § 507(a)(8)(A) that
17 refers to a "tax" which is "on or measured by gross receipts".
18 By its plain meaning, the word "tax" can include any type of
19 tax, including an excise tax, so long as it is "on or measured
20 by gross receipts". Accordingly, without any defining
21 characteristic or limitation on the word "tax" other than it be
22 "on or measured by gross receipts", we conclude that the "tax"
23 referred to in § 507(a)(8)(A) could very well be an excise tax
24 or any other type of tax.

25 This interpretation is supported by the holding and public
26 policy considerations espoused in Shank v. State Dep't of
27 Revenue (In re Shank), 792 F.2d 829 (9th Cir. Wash. 1986). In
28 Shank, the Ninth Circuit held that not all sales taxes

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1 automatically fall into § 507(a)(8)(E) – the excise tax
2 provision – even though they may be classified as excise taxes.
3 Rather, even if a sales tax is an excise tax, it may fall within
4 another category of taxes listed in § 507(a)(8) depending upon
5 the specific characteristics of the tax at issue and, as a
6 matter of federal law, on a case-by-case basis. Shank teaches
7 that the categories of taxes under § 507(a)(8) are not mutually
8 exclusive and that a determination whether a tax falls within
9 the scope of a particular category involves more than a
10 mechanical per se application. We explain.

11 In Shank, the debtor-retailer was required by Washington
12 law to collect sales tax on all retail sales and forward the
13 collected funds to the Washington Department of Revenue (the
14 “Department”). The debtor failed to forward the collected
15 funds. When the business was discontinued in 1979, the debtor’s
16 total liability for sales taxes was in excess of \$45,000. The
17 debtor left the state and after filing for bankruptcy in 1984,
18 instituted an adversary proceeding against the Department
19 seeking a determination that the sales tax debt to the State of
20 Washington was dischargeable.

21 The bankruptcy court granted summary judgment in favor of
22 the Department. The bankruptcy court concluded that Congress
23 intended the collected sales tax to be characterized as a trust
24 fund tax and thus excepted from discharge under §§ 507(a)(6)(C)
25 [now § 507(a)(8)(C)] and 523(a)(1)(A). The district court
26 reversed the judgment of the bankruptcy court. The district
27 court concluded that all sales taxes owed by sellers, including
28 those collected by sellers and held in trust, were intended by

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1 Congress to be characterized as excise taxes and dischargeable
2 under § 507(a)(6)(E) [now § 507(a)(8)(E)]. The Ninth Circuit
3 reversed, concluding that the trust fund tax provision under
4 § 507(a)(6)(C) [now § 507(a)(8)(C)] excepted from discharge
5 those excise taxes required to be collected from third parties.

6 The court reasoned:

7 A failing retailer should not be given incentive to
8 default on sales tax obligations. If the obligation to
9 the taxing authority can be discharged by a bankruptcy
10 filing three years after the transaction giving rise
11 to the tax, such an incentive to default will exist.
12 For these reasons, we hold that Congress intended to
13 differentiate between two categories of excise taxes
14 and that the trust fund tax provision excepts from
15 discharge those excise taxes required to be collected
16 from third parties.

17 Thus, Shank demonstrates that sales taxes are excise taxes
18 falling within two categories: those owed personally by a
19 retailer, falling within § 507(a)(8)(E) (the excise tax
20 provision) and those incurred by a retailer's customers which
21 are collected by the retailer under the authority of the state,
22 held in trust, and then remitted by the retailer to the state,
23 falling within § 507(a)(8)(C) (the trust fund tax provision).

24 Applying similar policy considerations, we decide that the
25 "tax" under § 507(a)(8)(A) can be viewed as a further
26 differentiation between categories of excise taxes – here those
27 sales taxes which are excise taxes and owed by a retailer, but
28 which are also the kind of sales tax "on or measured by gross
receipts".

29 In short, our conclusion is consistent with the statutory
30 language in § 507(a)(8)(A) and our holding in Raiman.
31 Accordingly, we hold that § 507(a)(8)(E) does not provide a safe

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1 harbor for debtor when another category of nondischargeable
2 taxes under § 507(a)(8)(A) squarely applies.

3 **C. Debtor's Tax Liability Was Not Assessed, But Remained**
4 **Assessable After the Commencement Of His Case**

5 The Board argues that debtor's tax liability was not
6 discharged because both elements under § 507(a)(8)(A)(iii) – the
7 tax was not assessed, but remained assessable – were met. The
8 Board's premise is simple: because responsible person liability
9 does not arise under Tax Code § 6829 until a corporation
10 dissolves, terminates or abandons its business, the statute of
11 limitations for issuing a notice of dual determination to a
12 responsible person begins to run when the liability arises.
13 Since debtor was not liable for the taxes until EAS ceased
14 operations on March 31, 2003, which was after the July 3, 2001
15 commencement of his bankruptcy case, the Board asserts that the
16 taxes were still assessable by law.

17 The Board further urges us to adopt the reasoning set forth
18 In the Matter of Hosmer McKoon, 2007 WL 1932801, at *2 (Cal.
19 State Bd. of Equalization 2007) in which it decided that the
20 termination of the business which sold the property was the
21 determining factor for when the statute of limitations begins to
22 run for Tax Code § 6829 liability. The Board in McKoon further
23 determined that the return filed by the corporation could not be
24 attributed to a different person because the limitation period
25 for issuing a determination under Tax Code § 6829 could not
26 commence prior to the time that the liability could be lawfully
27 imposed. Id.

28 In conducting our de novo review, we examine the provisions

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1 of the relevant California tax law to determine whether the Board
2 could have assessed debtor for the unpaid sales taxes of EAS
3 after the commencement of debtor's bankruptcy case.

4 Tax Code § 6829 provides that upon termination, dissolution,
5 or abandonment of a corporation or certain other business
6 entities, the person having control or supervision of or
7 responsibility for filing returns and paying taxes shall be
8 personally liable for unpaid taxes, interest, and penalties, if
9 such person willfully failed to pay or cause to be paid any taxes
10 due. Tax Code § 6829(a). The language of this provision is
11 plain and unambiguous. "[P]ersonal liability arises under
12 section 6829 for unpaid sales tax only 'upon termination,
13 dissolution, or abandonment' of the corporation." State Bd. of
14 Equalization v. Wirick, 93 Cal. App. 4th 411, 418, 112 Cal. Rptr.
15 2d 919, 924 (Cal. Ct. App. 2001).

16 The California Court of Appeal in Wirick explained:

17 The Legislature chose, for whatever reason, to limit
18 personal liability to when the corporation ceased.
19 Perhaps because the Board has the ability to require
20 security for sales taxes under section 6701, to levy a
21 retailer's property under section 6703, and to impose a
22 lien for unpaid taxes under section 6757, the
23 Legislature believed the Board had adequate remedies
24 without personal liability of officers, until the
25 corporation ceased to exist. Id.

26 Under Tax Code § 6829(e), as in effect prior to January 1,
27 2009¹⁶, any sum due under Tax Code § 6829 "may be collected by
28

¹⁶ Tax Code § 6829 was amended effective January 1, 2009 to
include subsection (f) which provides:

(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

(continued...)

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1 determination and collection in the manner set forth in Chapter 5
2 (commencing with Tax Code § 6451) and Chapter 6 (commencing with
3 § 6701)." Tax Code § 6829(e). These chapters provide limitation
4 periods for both a notice of deficiency and a suit to collect a
5 tax. Our focus here is only on the limitation period for the
6 notice of deficiency.

7 Tax Code § 6487 provides a statute of limitations of three
8 years, or eight years if no return was filed, for sending a
9 notice of deficiency determination.¹⁷ This section applies to

10

11 ¹⁶(...continued)
12 period in which the board obtains actual knowledge,
13 through its audit or compliance activities, or by
14 written communication by the business or its
15 representative, of the termination, dissolution, or
16 abandonment of the business of the corporation, [. . .]
17 or, within eight years after the last day of the
18 calendar month following the quarterly period in which
19 the corporation [. . .] was terminated, dissolved, or
20 abandoned, whichever period expires earlier. If a
21 business or its representative files a notice of
22 termination, dissolution, or abandonment of its
23 business with a state or local agency other than the
24 board, this filing shall not constitute actual
25 knowledge by the board under this section.

26 ¹⁷ This section provides:

27 For taxpayers filing returns, other than a return filed
28 pursuant to Section 6452.1, on other than an annual
basis, except in the case of fraud, intent to evade
this part or authorized rules and regulations, or
failure to make a return, every notice of a deficiency
determination shall be mailed within three years after
the last day of the calendar month following the
quarterly period for which the amount is proposed to be
determined or within three years after the return is
filed, whichever period expires the later. In the case
(continued...)

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1 persons filing returns. Debtor was not required to file a
2 return.

3 Accordingly, debtor asserts that the plain language of Tax
4 Code § 6487(a) mandates a ruling in his favor. Debtor's theory
5 is that the time periods prescribed in the statute do not begin
6 with the "termination, dissolution, or abandonment" of the
7 underlying business. Rather, the statute of limitations is
8 linked to the filing of, or failure to file, a tax return.
9 According to debtor, the time periods are inapplicable to him
10 because he was not personally required to file a sales tax return
11 as he was neither a retailer nor held himself out to be a
12 retailer. Debtor therefore concludes that the statute of
13 limitations for his responsible person liability began to run at
14 the same time that the statute of limitations began to run for
15 that of his corporation EAS.

16 We are unpersuaded by debtor's plain meaning argument. Not
17 only does debtor fail to cite any case law in support of his
18 argument, but his argument goes against the basic statutory
19 construction principle that courts do not consider statutory
20 language in isolation. Instead, like the California courts, we
21 "examine the entire substance of the statute in order to
22 determine the scope and purpose of the provision, construing its

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24 ¹⁷(...continued)
25 of failure to make a return, every notice of
26 determination shall be mailed within eight years after
27 the last day of the calendar month following the
28 quarterly period for which the amount is proposed to be
determined.

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1 words in context and harmonizing its various parts." San Leandro
2 Teachers Ass'n v. Governing Bd. of San Leandro Unified Sch.
3 Dist., 46 Cal. 4th 822, 831, 209 P.3d 73, 79 (Cal. 2009) (quoting
4 State Farm Mutual Automobile Ins. Co. v. Garamendi 32 Cal.4th
5 1029, 1043, 88 P.3d 71, 78 (Cal. 2004)). Moreover, we read every
6 statute "with reference to the entire scheme of law of which it
7 is part so that the whole may be harmonized and retain
8 effectiveness." Id.

9 Debtor's personal liability for the unpaid sales taxes of
10 EAS under Tax Code § 6829 cannot be imposed until the corporation
11 terminates or abandons its business or dissolves. Tax Code
12 § 6829 makes Tax Code § 6487 applicable to debtor by subdivision
13 (e). The reasonable and practical construction of these
14 statutes, read together, leads us to conclude that the Board has
15 the better argument.

16 To summarize, first, the limitations period for imposing
17 responsible person liability on debtor did not begin to run until
18 EAS ceased operations in 2003. Second, there is no indication in
19 the statutory scheme that debtor can bootstrap himself into a
20 more favorable limitations period by attributing EAS's filed tax
21 returns to himself, especially when EAS and debtor are viewed as
22 separate persons under Tax Code § 6005.¹⁸ Finally, debtor was an

23
24 ¹⁸ Tax Code § 6005 titled "Person" provides:

25 "Person" includes any individual, firm, partnership,
26 joint venture, limited liability company, association,
27 social club, fraternal organization, corporation,
28 estate, trust, business trust, receiver, assignee for
the benefit of creditors, trustee, trustee in
bankruptcy, syndicate, the United States, this state,
any county, city and county, municipality, district, or
(continued...)

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1 officer of EAS and the provisions of Tax Code § 6487 are made
2 applicable to officers by Tax Code § 6829(e).

3 Debtor further argues that cases imposing personal liability
4 under federal tax law bolster his statutory interpretation.
5 Debtor maintains that federal courts have held that the period of
6 limitations for assessing "responsible persons" under 26 U.S.C.
7 § 6672 for unpaid withholding taxes owed by a corporation is
8 three years after the date on which the corporation filed its
9 employment tax returns. See Lauckner v. United States, 68 F.3d
10 69 (3rd Cir. 1995). We do not follow this case law because in
11 California the legislature has chosen, for whatever reason, to
12 limit personal liability to when the corporation terminates, is
13 abandoned or dissolves. Moreover, the legislature had not
14 amended California Tax Code § 6829 to include subsection (f)
15 until well after debtor's liability arose.

16 Debtor makes one final argument. He contends that the
17 Board's decision in McKoon, WL 1932801, at *2, is neither
18 persuasive nor entitled to our deference. Agnew v. Bd. of
19 Equalization, 21 Cal. 4th 310, 322, 87 Cal. Rptr. 423 (Cal. 1999)
20 (courts need not defer to any administrative understanding of the
21 meaning of the Board's interpretation of the statutes and
22 existing regulations). Since our independent determination on
23 the question of law presented is consistent with McKoon regarding
24 when the statute of limitations starts to run for responsible
25

26 _____
27 ¹⁸(...continued)
28 other political subdivision of the state, or any other
group or combination acting as a unit.

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1 person liability, we need not delve any further into the Board's
2 ruling in McKoon.

3 **VI. CONCLUSION**

4 Upon de novo review, and construing the evidence in a light
5 most favorable to debtor, we conclude that the Board was entitled
6 to summary judgment as a matter of law on its claim that the tax
7 debt was excepted from debtor's discharge under §§ 523(a)(1)(A)
8 and 507(a)(8)(A)(iii).

9 Accordingly, for the reasons stated above, we REVERSE.

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