

STATE OF CALIFORNIA  
BOARD OF EQUALIZATION

410.0166

APPEALS DIVISION

In the Matter of the Petition )  
for Redetermination Under the ) HEARING  
Sales and Use Tax Law of: ) DECISION AND RECOMMENDATION  
)  
)  
P--- R--- B--- ) No. S- -- XX-XXXXXX-210  
)  
)  
Petitioner )

The above-referenced matter came on regularly for hearing before Hearing Officer Michele F. Hicks on August 23, 1990 in Salinas, California.

Appearing for Petitioner:

Mr. P--- R--- Be---

Ms. K--- B---

Appearing for the  
Department of Business Taxes:

Mr. Frank E. Coryell

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Branch Office Supervisor

Protested Item

The protested tax liability for the period January 1, 1986 through August 18, 1986 is measured by:

<u>Item</u>	<u>State, Local and County</u>
Dual determination issued against former partner.	\$86,414

Petitioner's Contention

Petitioner was not a partner in the business during the period that the tax liability accrued and he had no actual or constructive knowledge that he was a permit holder.

### Summary

This appeal concerns sales taxes due from the operation of the B--- S--- C--- located in [city], California.

On July 24, 1979, G--- H--- filed an application for a seller's permit to operate a restaurant called the B--- S--- C---. The owners were listed as G--- H---, W--- H---, and P--- B---. Permit number S- -- XX-XXXX69 was issued to "G--- J. & W--- N. H---, etal".

On August 1, 1979, G--- H--- and P--- B--- entered into a "General Partnership Agreement for B--- S--- C---". The agreement provided that Mr. H--- would contribute capital to the partnership and Mr. B--- would operate the restaurant.

On December 31, 1984, Mr. H--- and Mr. B--- entered into an "Agreement of Sale and Dissolution of Partnership" whereby Mr. B--- sold to Mr. H--- all of his interest in the partnership.

The tax liability which is the subject of this appeal accrued between January 1, 1986 and August 18, 1986, more than one year after Mr. B--- sold his interest in the B--- S--- C---. On June 26, 1986, the Board of Equalization issued a Notice of Revocation for failure to file a return for first quarter 1986, against permit number S- -- XX-XXXX69 issued to G--- J. & W--- N. H---, et al. On August 18, 1986, G--- H--- advised the [board] office that he was the sole proprietor of the business. On September 12, 1986, the Board issued to G--- H--- seller's permit S- -- XX-XXXX63. Returns for the first and second quarter 1986, which were filed under S- -- XX-XXXX69, were transferred to the new permit account S- --- XX-XXXX63 by Tax Return and/or Account Adjustment Notice dated September 15, 1986.

Mr. H--- become embroiled in increasing financial difficulties and by May 23, 1988, the B--- S--- C--- had ceased doing business. On May 24, 1988, the landlord served Mr. H--- a notice of termination of the lease for the B--- S--- C---.

At the hearing, Mr. B--- stated that after Mr. H--- went out of business, Mr. S---, his former landlord, contacted Mr. B--- and offered Mr. B--- the lease for the property. Negotiations were completed and Mr. B--- was given access to the property on June 1, 1988.

Mr. H--- had not removed all of his equipment after abandoning his business. On June 21, 1988, an estimated value of the equipment was made at \$4,000 by T--- R--- S---. On June 23, 1988, Mr. B--- purchased the equipment from Mr. H--- for \$4,000.

On June 23, 1988, Mr. B--- applied for a seller's permit for his new restaurant "B--- S---". At that time, Board personnel found the outstanding tax liability against "B--- S--- C---". A Notice of Determination was issued against Mr. B--- on August 15, 1988. The amount determined was for \$7,734.20 which was comprised of \$5,616.93 in tax due from January 1, 1986 until August 18, 1986, the date that Mr. H--- informed the Board that he operated B--- S--- C--- as a sole proprietor. The determination included interest of \$2,117.27 which had accrued on the unpaid tax.

The audit staff contends that Mr. B--- is liable for the unpaid tax under Sales and Use Tax Regulation 1699(e) because he failed to notify the Board that he was no longer a partner in B--- S--- C---.

Mr. B--- contends that he is not liable under Regulation 1699(e) because his name was never on the seller's permit and he never filled out any forms, including form BT 403, pertaining to securing the seller's permit.

#### Analysis and Conclusions

Sales and Use Tax Regulation 1699(e) provides:

"INACTIVE PERMITS. A permit shall be held only by persons actively engaging in or conducting business as a seller of tangible personal property. Any person not so engaged shall forthwith surrender his permit to the board for cancellation. The board may revoke the permit of a person found to be not actively engaged in or conducting a business as a seller of tangible personal property.

"Upon discontinuing or transferring a business, a permit holder shall promptly notify the board and deliver his permit to the board for cancellation. To be acceptable, the notice of transfer or discontinuance of a business must be received in one of the following ways:

"(1) Oral or written statement to a board office or authorized representative, accompanied by delivery of the permit, or followed by delivery of the permit upon actual cessation of the business. The permit need not be delivered to the board, if lost, destroyed or is unavailable for some other acceptable reason, but notice of cessation of business must be given.

"(2) Receipt of the transferee or business successor's application for a seller's permit may serve to put the board on notice of the transferor's cessation of business.

"Notice to another state agency of a transfer or cessation of business does not in itself constitute notice to the board.

“Unless the permit holder who transfers the business notifies the board of the transfer, or delivers the permit to the board for cancellation, he will be liable for taxes, interest and penalties (excluding penalties for fraud and intent to evade the tax) incurred by his transferee who with the permit holder’s actual or constructive knowledge uses the permit in any way; e.g., by displaying the permit in transferee’s place of business, issuing resale certificate showing the number of the permit thereon, or filing returns in the name of the permit holder or his business name and under his permit number. The liability shall continue and include all liability incurred up to the time the board receives notice of the transfer.”

Therefore, a permit holder is not liable for tax incurred by his transferee unless his permit is used “with the permit holder’s actual or constructive knowledge”.

Mr. B--- contends that he had no “actual or constructive knowledge” that “his” permit was being used because he did not know that permit S- -- XX-XXXX69 was issued to him. He contends that he never filled out any forms necessary to secure a seller’s permit, including Form BT 403, which is individual information required for all persons named on the application. Further, the application was filled out and signed by G--- H---. Mr. B--- contends that he did not know Mr. H--- listed his name on the application. Mr. B--- points out that G--- H--- also listed W--- H---’s name on the application and W--- H--- never had any interest in the B--- S--- C---.

The audit staff concedes that it does not have a Form BT 403 signed by Mr. B--- and that his name did not appear on the seller’s permit.

We conclude that there is no evidence that Mr. B--- ever had actual or constructive knowledge that he was a permit holder under account S- -- XX-XXXX69. There is no evidence that he completed any forms necessary to obtain the permit. His name is not listed on the permit. There is no evidence that the Board staff was even aware of his former connection to B--- S--- C--- until he came into apply for a permit for his new business in June 1988, two years after the tax liability accrued. Accordingly, we do not believe that Mr. B--- is liable for the tax under Regulation 1699(e).

Recommendation

Cancel the determination.

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MICHELE F. HICKS, HEARING OFFICER

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11/9/90  
Date